

IN THE MATTER OF

UNIVERSITY HEALTH, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED
VIOLATION OF SEC. 7 OF THE CLAYTON ACT

Docket 9246. Complaint, April 2, 1991--Decision, Sept. 9, 1992

This consent order prohibits, among other things, a non-profit corporation and two of its subsidiaries, for ten years, from acquiring St. Joseph Hospital or any other hospital in the Augusta, Georgia area -- and from consolidating the operations of respondents' University Hospital with those of St. Joseph or any other local general hospital -- without prior FTC approval.

Appearances

For the Commission: *Mark J. Horoschak* and *Oscar M. Voss*.

For the respondents: *Robert McCann* and *William G. Kopit*,
Epstein, Becker & Green, Washington, D.C.

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that the respondents, University Health, Inc., University Health Services, Inc., and University Health Resources, Inc., corporations subject to the jurisdiction of the Commission, have agreed to acquire St. Joseph Hospital (Augusta, Georgia) and related assets and other interests from Health Care Corp. of the Sisters of St. Joseph of Carondelet; that such acquisition, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18; and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, pursuant to Section 11 of the Clayton Act, 15 U.S.C. 21, stating its charges as follows:

I. THE RESPONDENTS

1. Respondent University Health, Inc. ("UHI") is a non-profit corporation organized, existing and doing business under and by virtue of the laws of the State of Georgia, with its office and principal place of business at 1350 Walton Way, Augusta, Georgia. UHI is governed by a board of trustees. UHI's board of trustees is substantially self-perpetuating, in that the board controls the designation of a majority of all new UHI trustees.

2. Respondent University Health Services, Inc. ("UHS") is a non-profit corporation organized, existing and doing business under and by virtue of the laws of the State of Georgia, with its office and principal place of business at 1350 Walton Way, Augusta, Georgia. UHS is governed by a board of trustees. UHI controls the designation of a majority of all new UHS trustees, and thereby controls UHS.

3. Respondent University Health Resources, Inc. ("UHR") is a for-profit corporation organized, existing and doing business under and by virtue of the laws of the State of Georgia, with its office and principal place of business at 810 13th Street, Augusta, Georgia. UHS is the sole shareholder of UHR.

4. UHI, UHS, and UHR (hereinafter referred to collectively as "respondents") are primarily engaged in the operation and management of health care facilities in the Augusta, Georgia area, including but not limited to 690-bed University Hospital in Augusta ("University Hospital"), which is operated by UHS. In its fiscal year ending December 30, 1990, University Hospital reported approximately \$155 million in sales, and total profits of over \$12 million.

5. Health Care Corp. of the Sisters of St. Joseph of Carondelet ("HCC"), a Missouri non-profit corporation, operates approximately 12 hospitals in various regions of the United States. HCC holds the right to designate a majority of the directors of St. Joseph Center for Life, Inc. ("SJCFL"), which in turn controls St. Joseph Hospital, Augusta, Georgia, Inc., the owner and operator of 236-bed St. Joseph Hospital in Augusta, Georgia ("St. Joseph Hospital"). In its fiscal year ending June 30, 1990, St. Joseph Hospital earned approximately \$4 million on over \$51 million in sales.

II. JURISDICTION

6. At all times relevant herein, respondents, and HCC and St. Joseph Hospital, have been and are now engaging in or affecting commerce as the term "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12.

7. Respondents are persons subject to the jurisdiction of the Commission pursuant to Section 11 of the Clayton Act, as amended, 15 U.S.C. 21.

III. THE PROPOSED ACQUISITION

8. Pursuant to an acquisition agreement signed January 21, 1991, respondents agreed to acquire St. Joseph Hospital and related interests and other assets from HCC and its affiliated corporations. Among these interests are the rights held by HCC and its parent religious order to designate directors of SJCFL, which rights if acquired by respondents would give respondents control of SJCFL and indirect control over the assets of St. Joseph Hospital. Also among the interests subject to the acquisition agreement are a general partnership interest in a medical office building under construction next to St. Joseph Hospital, which UHR has agreed to acquire from an affiliate of HCC. The value of the assets and interests to be acquired by respondents pursuant to the agreement is in excess of \$38 million.

IV. NATURE OF TRADE AND COMMERCE

9. For purposes of this complaint, the relevant line of commerce is the production and sale of general acute care hospital services (excluding services provided by psychiatric hospitals, rehabilitation hospitals, and Federally-owned facilities) and/or any narrower group of services contained therein. General acute care hospital services are services provided by health facilities that provide 24-hour inpatient care in connection with services of physicians for conditions for which nursing, medical or surgical services would be appropriate for care, diagnosis, or treatment, other than services provided by

facilities that are specially intended for treatment of mental illness, emotional disturbance or substance abuse.

10. For purposes of this complaint, the relevant section of the country is the Augusta, Georgia area, including Richmond County, Georgia, Columbia County, Georgia, and Aiken County, South Carolina, and/or any narrower area contained therein.

V. MARKET STRUCTURE

11. The relevant market -- the production and sale of general acute care hospital services in the Augusta, Georgia area -- is highly concentrated whether measured by the Herfindahl-Hirschmann Index ("HHI") or by four-firm concentration ratios.

VI. ENTRY CONDITIONS

12. Entry into the relevant market is difficult due to certificate-of-need regulation of entry by the Georgia and South Carolina state governments, substantial lead times required to establish a new hospital, and other factors.

VII. ACTUAL AND POTENTIAL COMPETITION

13. University Hospital and St. Joseph Hospital are actual and potential competitors in the production and sale of general acute care hospital services in the Augusta, Georgia area.

VIII. EFFECTS

14. The effects of the aforesaid acquisition, if consummated, may be substantially to lessen competition in the relevant market in the following ways, among others:

(a) It would eliminate actual and potential competition between St. Joseph Hospital and University Hospital, and between St. Joseph Hospital and others;

(b) It would significantly increase the already high levels of concentration;

(c) It would create a firm whose market share is so high as to lead to dominant firm status;

(d) It would eliminate St. Joseph Hospital as a substantial independent competitive force;

(e) It may enhance the possibility of collusion or interdependent coordination by the remaining firms; and

(f) It may deny patients, physicians, and purchasers of health care coverage the benefits of free and open competition based on price, quality, and service.

15. All of the above increase the likelihood that firms producing and selling general acute care hospital services in the Augusta area will increase prices and restrict output, both in the near future and in the long term.

IX. VIOLATION CHARGED

16. The proposed acquisition of St. Joseph Hospital and related assets and interests by respondents would, if consummated, violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18.

Commissioner Owen dissenting.

DECISION AND ORDER

The Federal Trade Commission having heretofore issued its complaint charging the respondents named in the caption hereof with violation of Section 7 of the Clayton Act, as amended, and the respondents having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondents, their attorneys, and counsel for the Federal Trade Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all of the jurisdictional facts set forth in the aforesaid 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 would have been violated by their proposed acquisition as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(b) of its Rules; and

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

1. Respondent University Health, Inc. is a non-profit corporation organized, existing and doing business under and by virtue of the laws of the State of Georgia, with its office and principal place of business at 1350 Walton Way, Augusta, Georgia. Respondent University Health Services, Inc. is a non-profit corporation organized, existing and doing business under and by virtue of the laws of the State of Georgia, with its office and principal place of business at 1350 Walton Way, Augusta, Georgia. Respondent University Health Resources, Inc. is a for-profit corporation organized, existing and doing business under and by virtue of the laws of the State of Georgia, with its office and principal place of business at 810 13th Street, Augusta, Georgia.

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

ORDER

I.

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

A. "*University*" means University Health, Inc., University Health Services, Inc., and University Health Resources, Inc., and their directors, trustees, officers, employees, representatives, agents, parents, subsidiaries, affiliates, divisions, successors, and assigns.

B. "*Hospital*" means a health facility, other than a federally owned facility, having a duly organized governing body with overall administrative and professional responsibility, and an organized medical staff, that provides 24-hour inpatient care, as well as outpatient services, and having as a primary function the provision of inpatient services for medical diagnosis, treatment, and care of physically injured or sick persons with short-term or episodic health problems or infirmities. For purposes of this order, retirement communities (*e.g.*, the Brandon Wilde facility operated by Augusta Resource Center on Aging, Inc.), or health facilities whose inpatient services are limited to rehabilitation care (*e.g.*, Walton Rehabilitation Hospital in Augusta, Georgia), mental health care, or substance abuse care, are not "hospitals."

C. To "*acquire a hospital*" means to directly or indirectly acquire the whole or any part of the assets of a hospital; acquire the whole or any part of the stock or share capital of, the right to designate directly or indirectly directors or trustees of, or any equity or other interest in, any person which operates a hospital; or enter into any other arrangement to obtain direct or indirect ownership, management or control of a hospital or any part thereof, including but not limited to a lease of or management contract for a hospital.

D. To "*operate a hospital*" means to own, lease, manage, or otherwise control or direct the operations of a hospital, directly or indirectly.

E. "*Affiliate*" means any entity whose management and policies are controlled or directed in any way, directly or indirectly, by the person with which it is affiliated.

F. "*Person*" means any natural person, partnership, corporation, company, association, trust, joint venture or other business or legal entity, including any governmental agency.

G. The "*Augusta area*" means the area consisting of Richmond and Columbia Counties in Georgia, and Aiken County, South Carolina.

H. The "*Commission*" means the Federal Trade Commission.

II.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, University shall not, without the prior approval of the Commission:

- A. Acquire any hospital in the Augusta area; or
- B. Permit any hospital it operates in the Augusta area to be acquired by any person that operates, or is in the process of acquiring, any other hospital in the Augusta area.

Provided, however, That such prior approval shall not be required for:

- (a) The establishment of a new hospital service or facility (other than as a replacement for a hospital service or facility not operated by University, pursuant to an agreement or understanding between University and the person operating the replaced service or facility),
- (b) Any transaction exempt from the requirements of paragraph III of this order by operation of subpart (b) of the proviso to that paragraph III; or
- (c) Any transaction subject to this paragraph II of this order if the fair market value of (or, in case of a purchase acquisition, the consideration to be paid for) the hospital, part thereof or interest therein to be acquired does not exceed one million dollars (\$1,000,000).

III.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, University shall not, without providing advance notification to the Commission, enter into any joint venture or other arrangement with any other hospital in the Augusta area for the joint establishment or operation of any new hospital, hospital medical or surgical diagnostic or treatment service or facility, or part thereof in the Augusta area. Such advance notification shall be required upon University's issuance of a letter of intent for, or

execution of an agreement to enter into, such a transaction, whichever is earlier.

No notification shall be required by this paragraph III of this order for any transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. 18a, or for which prior approval by the Commission is required, and has been requested, pursuant to paragraph II of this order.

The notification required by this paragraph III of this order shall be made according to the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations, as amended, and shall be prepared and transmitted in accordance with the requirements of that part, except that notification need not be transmitted to the United States Department of Justice. The notification required by this paragraph III of this order shall apply to University and shall not apply to any other party to the transaction. If the transaction for which notification is required by this paragraph III of this order requires state regulatory approval under a health facilities certificate of need law, University may, in lieu of the foregoing notification, submit to the Commission a copy of the application for such state approval.

Provided, however, That no transaction shall be subject to this paragraph III of this order if:

(a) The fair market value of the assets to be contributed to the joint venture or other arrangement by hospitals not operated by University does not exceed one million dollars (\$1,000,000); or

(b) The service, facility or part thereof to be established or operated is to engage in no activities other than the provision of the following services: laundry; data processing; purchasing; materials management; billing and collection; dietary; industrial engineering; maintenance; printing; security; records management; laboratory testing; personnel education, testing, or training; or health care financing (such as through a health maintenance organization or preferred provider organization).

IV.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, University shall not permit all or any substantial part of any hospital it operates in the Augusta area to be acquired by any other person unless the acquiring person files with the Commission, prior to the closing of the acquisition, a written agreement to be bound by the provisions of this order, which agreement University shall require as a condition precedent to the acquisition.

V.

It is further ordered, That University shall, one year after the date this order becomes final and annually for nine (9) years thereafter, file with the Commission a verified written report setting forth in detail the manner and form in which it has complied and intends to comply with this order.

VI.

It is further ordered, That, for the purposes of determining or securing compliance with this order, and subject to any legally recognized privilege, upon written request and on reasonable notice to University made at its principal offices, University shall permit any duly authorized representatives of the Commission:

1. Access, during office hours and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda and all other records and documents in University's possession or control relating to any matter contained in this order; and
2. Upon five days' notice to University and without restraint or interference from University, to interview its officers or employees, who may have counsel present, regarding such matters.

VII.

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

Commissioner Owen dissenting.

IN THE MATTER OF

DIRAN M. SEROPIAN, M.D.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket 9248. Complaint, June 12, 1991--Decision, Sept. 11, 1992*

This consent order prohibits, among other things, a Florida physician from conspiring with the medical staff of Broward General Medical Center to prevent competition from physicians of the Cleveland Clinic Florida, a non-profit provider of health care services, or any other provider of health care services.

Appearances

For the Commission: *Mark J. Horoschak and Paul Nolan.*

For the respondent: *Davis W. Duke, Jr. and J. Cameron Story, III, Gunster, Yoakley & Stewart, Ft. Lauderdale, FL.*

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 Diran M. Seropian, M.D., hereinafter sometimes referred to as "respondent" or "Dr. Seropian," has violated and is violating Section 5 of the Federal Trade Commission Act, 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 stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Diran M. Seropian, M.D., is a plastic surgeon licensed by the State of Florida and practices in Fort Lauderdale, Florida. His office address is 1414 S.E. 3rd Avenue, Fort Lauderdale, FL. Dr. Seropian is engaged in the business of providing health care services to patients for a fee.

PAR. 2. The Medical Staff of Broward General Medical Center ("the Medical Staff") is an unincorporated association, organized and existing under the laws of the State of Florida, with its mailing address at 1600 South Andrews Avenue, Fort Lauderdale, FL. The Medical Staff is composed of physicians and other health care practitioners who have privileges to attend patients at Broward General Medical Center ("Broward General" or "the Hospital"). Appointment to the Medical Staff is a prerequisite for physicians who seek to admit, diagnose, or treat patients at Broward General. Dr. Seropian has been the Chief of the Medical Staff at Broward General since 1986.

PAR. 3. The North Broward Hospital District ("NBHD") is a public hospital district chartered under Florida law to serve the northern two-thirds of Broward County, Florida. The NBHD is licensed by the State of Florida to operate 1567 general acute care beds. NBHD owns and operates four hospitals including Broward General, which is licensed to operate 744 general acute care beds. Broward General offers subspecialty services such as cardiac surgery, and is one of the few tertiary care hospitals in the Northern Broward County area.

PAR. 4. The Cleveland Clinic Florida ("CCF"), which is an affiliate of the Cleveland Clinic Foundation located in Cleveland, Ohio, provides comprehensive health care services to patients. CCF, which is located in Fort Lauderdale, operates a multispecialty group medical practice that provides consumers an alternative to traditional individual and single specialty group forms of practice. Under CCF's multispecialty group practice format, patients can obtain all necessary specialized medical care and ancillary services from CCF employees, including salaried physicians.

PAR. 5. The acts and practices of the respondent, including those herein alleged, are in or affect commerce within the meaning of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

PAR. 6. As early as September 1985, the Medical Staff and respondent Dr. Seropian had formally resolved: (a) to demand that NBHD "immediately cease all negotiations with the Cleveland Clinic"; and (b) that the Medical Staff had "no confidence" in Broward General's administration or the NBHD Board because of

their negotiations with the Clinic. The Medical Staff's resolutions were intended as, and were understood by hospital officials to be, threats that the Medical Staff's members would withhold patient admissions from Broward General if NBHD entered an affiliation with CCF.

PAR. 7. From January 1988 to October 1989, the Medical Staff and respondent Dr. Seropian engaged in, among other things, the following concerted acts and practices:

A. Soliciting physicians on the Medical Staff to join in a combination or conspiracy to threaten to withhold patient admissions from Broward General if the NBHD established a business relationship with CCF or supported CCF's application for a certificate of need to build its own hospital;

B. Threatening to boycott Broward General by representing to the NBHD that doctors would act jointly to withhold patient admissions from Broward General if the NBHD approved the hospital privilege applications of CCF physicians;

C. Threatening Broward General that all Medical Staff officers would refuse to provide their services to the Hospital, and threatening to have the Medical Staff cease to perform its functions, if the NBHD took steps to provide CCF physicians with access to Broward General's facilities; and

D. Refusing to process applications of CCF physicians for hospital privileges, and obstructing the NBHD's attempt to have an independent panel of Medical Staff physicians review the hospital privilege applications of CCF physicians.

PAR. 8. The acts and practices described in paragraphs six and seven were undertaken as part of a combination or conspiracy by and among respondent Dr. Seropian, the Medical Staff and others to prevent, delay, and limit competition from CCF in Northern Broward County through the use of boycott threats and other coercive means. The combination was directed at restricting competition in Northern Broward County from (1) CCF, (2) CCF physicians, and (3) any joint venture or affiliation between CCF and Broward General.

PAR. 9. The purpose, effects, tendency, or capacity of the respondent's conduct described in paragraphs six to eight are and

have been to restrain trade unreasonably and hinder competition in the provision of health care services in the Northern Broward County area in the following ways, among others:

A. Depriving consumers of the benefits of competition between CCF's integrated multispecialty group practice and independent fee-for-service practitioners;

B. Depriving consumers of the full array of services that CCF sought to offer consumers in Northern Broward County;

C. Hindering CCF's ability to offer health care services to consumers by raising its costs and reducing its efficiency, and delaying or preventing CCF from offering specialty and subspecialty services; and

D. Limiting competition among physicians in Northern Broward County.

PAR. 10. The combination, conspiracy, acts and practices described above constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act. Such combination, conspiracy, acts and practices, or the effects thereof, are continuing and will continue or recur in the absence of the relief herein requested.

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondent named in the caption hereof with a violation of Section 5 of the Federal Trade Commission Act, as amended, and the respondent having been furnished with a copy of that complaint, together with a notice of contemplated relief; and

The respondent 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 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 Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

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

1. Respondent is a licensed physician and doing business under and by virtue of the laws of the State of Florida, with his office and principal place of business located at the address listed in the complaint attached hereto.

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. "*Medical Staff*" means the Medical Staff of Broward General Medical Center, its successors, assigns, officers, directors, committees, agents, employees, and representatives.

B. "*NBHD*" means the North Broward Hospital District, a tax supported entity with its principal offices located at 1625 Southeast Third Avenue, Fort Lauderdale, FL., the hospitals that are owned by the North Broward Hospital District, and its subsidiaries, affiliates, successors, assigns, officers, administrators, directors, committees, agents, employees, and representatives.

C. "*Broward General*" means the Broward General Medical Center, one of the hospitals of the North Broward Hospital District, located at 1600 South Andrews Avenue, Fort Lauderdale, FL., its

subsidiaries, affiliates, successors, assigns, officers, administrators, directors, committees, agents, employees, and representatives.

D. "CCF" means Cleveland Clinic Florida, a nonprofit corporation organized under Florida law, located at 3000 West Cypress Creek Road, Ft. Lauderdale, FL., its parent foundation (Cleveland Clinic Foundation, which is located at 9500 Euclid Avenue, Cleveland, OH.), any entity located in Florida that is owned, controlled or under the management of Cleveland Clinic Florida or Cleveland Clinic Foundation, and its successors, assigns, officers, directors, committees, agents, employees, and representatives of Cleveland Clinic Florida or Cleveland Clinic Foundation.

E. "*Corrective action*" means action taken pursuant to and in conformance with the Medical Staff's bylaws against any person with hospital privileges at Broward General whose activities or professional conduct is reasonably believed to be detrimental to patient safety or the delivery of quality patient care.

II.

It is ordered, That respondent directly or indirectly, or through any device, in connection with activities in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist from entering into, attempting to enter into, organizing, continuing, or acting in furtherance of any agreement or combination, express or implied, between or among the Medical Staff or its members or with other physicians, providers of health care services, medical societies, hospitals, or medical staffs, for the purpose or with the effect of preventing or restricting the offering or delivery of health care services by the NBHD, Broward General, CCF, any CCF physician, or any other provider of health care services, including any agreement to:

A. Refuse to deal or threaten to refuse to deal with the NBHD, Broward General, CCF, any CCF physician, or any other provider of health care services, including, but not limited to, any agreement or combination to refuse or threaten to refuse to:

1. Participate in any Medical Staff or NBHD committee, admit any patient to any NBHD hospital, fulfill any Medical Staff obligation imposed or recognized under any provision of the Florida statutes, the Code of the NBHD, the By-Laws or Rules and Regulations of the Medical Staff, or fulfill any other function customarily performed by the Medical Staff;

2. Refer patients to, accept patient referrals from, provide back-up for, or consult in the treatment of any patient with, any CCF physician; or

3. Associate with NBHD or CCF as an employee or independent contractor, or otherwise deal with NBHD, CCF or any CCF physician.

B. Deny, impede, or refuse to consider any application for hospital privileges or for changes in hospital privileges by any person solely because of his or her affiliation with CCF.

C. Deny or recommend to deny, limit, or otherwise restrict hospital privileges for any CCF physician without a reasonable basis for concluding that the denial, limitation, or restriction serves the interests of the hospital in providing for the efficient and competent delivery of health care services.

D. Discriminate, or threaten to discriminate, against any CCF physician with hospital privileges at Broward General with respect to the rights accorded to a member of the Medical Staff.

E. Encourage, advise, pressure, induce, or attempt to induce any person to engage in any action prohibited by this order.

III.

A. *It is further ordered*, That this order shall not be construed to prohibit the respondent from engaging, pursuant to the Medical Staff's by-laws, in credentialing, corrective action, utilization review, quality assurance, or peer review at Broward General, where such conduct neither constitutes nor is part of any agreement, combination or conspiracy the purpose, effect or likely effect of which is to impede competition unreasonably.

B. *It is further ordered*, That this order shall not be construed to prohibit respondent from entering into an agreement or combination

with any other physician or health care practitioner with whom he practices in partnership or in a professional corporation, or who is employed by the same person, as respondent.

C. *It is further ordered*, That this order shall not be construed to prohibit respondent from lawfully carrying on his private medical practice and providing patient care at Broward General or otherwise prohibit the respondent from unilaterally exercising his professional judgment in connection with the making or receiving of patient referrals to and from other physicians.

IV.

It is further ordered, That respondent shall:

A. Within thirty (30) days after this order becomes final, mail a copy of this order to the Chairman of the Board of the NBHD and to each member of the Medical Council of the Medical Staff of Broward General Medical Center.

B. Within sixty (60) days after this order becomes final, and at any time the Commission, by written notice, may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which respondent complied with this order and intends to comply with this order.

C. For a period of three (3) years after this order becomes final, respondent shall promptly notify the Commission: (1) of any change in his business address; and (2) whenever he enters into any new business, employment, or hospital affiliation that involves the provision of medical care. Each such notice shall include the respondent's new business address, hospital affiliation, a statement of the nature of the business or employment in which respondent is newly engaged, and a description of respondent's duties and responsibilities in connection with the business or employment. The expiration of the notice provision of this paragraph shall not affect any other obligation arising under this order.

IN THE MATTER OF

JASON PHARMACEUTICAL, INC., ET AL.

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

Docket C-3392. Complaint, Sept. 16, 1992--Decision. Sept. 16, 1992

This consent order prohibits, among other things, the Maryland marketers of the Medifast diet programs, from misrepresenting the efficacy of any very-low-calorie diet program, and from falsely claiming that their physicians are certified in the treatment of obesity. In addition, the order requires the respondents to possess competent and reliable scientific evidence to substantiate any claims about the success of patients on any diet program in achieving or maintaining weight loss, and requires that claims about the safety of the program be accompanied by a clear disclosure that physician monitoring is needed to minimize the potential for health risks.

Appearances

For the Commission: *Richard F. Kelly, Michael C. McCarey and Matthew Daynard.*

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

COMPLAINT

The Federal Trade Commission, having reason to believe that Jason Pharmaceuticals, Inc. ("Jason"), a corporation, and Nutrition Institute of Maryland, Inc. ("NIM"), a corporation (hereinafter "respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. (a) Respondent Jason Pharmaceuticals, Inc., is a Maryland corporation, with its offices and principal place of business at 11435 Cronhill Drive, Owings Mills, MD.

(b) Respondent Nutrition Institute of Maryland, Inc., is a Maryland corporation, with its offices and principal place of business at 11435 Cronhill Drive, Owings Mills, MD.

(c) The aforementioned respondents cooperate and act together in carrying out the acts and practices alleged in this complaint.

PAR. 2. Respondents are engaged, and have been engaged, in advertising and promotion of the physician-supervised Medifast 55 and 70 very-low-calorie diet ("VLCD") programs and related nutritional products for sale to the public by Medifast Associate Physicians. VLCDs are rapid weight-loss, modified fasting diets of 800 calories or less per day requiring medical supervision. Medifast 55 and 70 diet supplements provide between 440 and 480 calories per day. The Medifast diet programs include "food" within the meaning of Section 12 of the Federal Trade Commission Act, 15 U.S.C. 52.

PAR. 3. Respondents have created and placed advertisements, and provided camera-ready advertising copy to their Medifast Associate Physicians for placement, in various professional periodicals and consumer publications to promote the Medifast programs to prospective patients. Typical of respondents' advertising, but not necessarily inclusive thereof, are the advertisements entitled "Obesity Is A Serious Disease That Deserves A Serious Medical Treatment" ("Obesity advertisement"), and "The Burden Of Being Overweight Isn't Something You Have To Face Alone" ("Burden advertisement"), attached hereto as Exhibits A-1 and A-2. Respondents further advertise the Medifast programs to the public by means of brochures, pamphlets, and booklets that they provide to Medifast Associate Physicians to give to patients and prospective patients. Typical of respondents' brochures, pamphlets, and booklets, but not necessarily inclusive thereof, are the brochures, pamphlets and booklets entitled "Medifast - Your Physician's Answer to Weight Control" ("Physicians brochure") "Questions Patients Ask" ("Questions pamphlet"), "Medifast, Out-Patient Supplemented Fast, Weight Reduction Phase" ("Weight Reduction pamphlet"), and "Medifast Patient Information Booklet" ("Patient Information booklet"), attached hereto as Exhibits B-1 through B-4.

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

PAR. 5. Respondents' advertising contains the following statements:

(a) "...more than 300,000 formerly obese patients had already been helped by Medifast without one instance of serious side effect associated with their treatment." (Patient Information booklet, p. 8)

(b) "...we have experienced no deaths or serious side effects in patients on the Medifast program." (Questions pamphlet, p. 3)

PAR. 6. By and through the use of the statements referred to in paragraph five, and others not specifically set forth herein of similar import and meaning, respondents represent, and have represented, directly or by implication, that the Medifast diet programs are unqualifiedly free of serious health risks. Respondents have failed to disclose that physician supervision is required to minimize the potential risk to patients of the development of health complications on very-low-calorie diets. In view of respondents' representation that the Medifast programs are free of serious health risks, the disclosure as to the requirement for medical supervision is necessary. Therefore, in light of respondents' failure to disclose, said representation was and is misleading.

PAR. 7. Respondents' advertising contains the following statements:

(a) "...obesity is serious. But like many diseases, it can now be controlled through a program of medical treatment... the effectiveness of Medifast has been proven by over 200,000 patients..." (Obesity advertisement)

(b) "...you will not experience a rebound phenomenon [regain lost weight] after you attain your goal." (Weight Reduction pamphlet, p. 1)

(c) "Through the right combination of physician supervision, supplemented fasting, and behavior modification, your ideal weight will be easily achieved and maintained." (Burden advertisement)

(d) "...more than 300,000 formerly obese patients had already been helped by Medifast..." (Patient Information booklet)

PAR. 8. By and through the use of the statements referred to in paragraph seven, and others not specifically set forth herein of similar import and meaning, respondents represent, and have represented, directly or by implication, that:

(a) The Medifast programs are successful long-term or permanent treatments for obesity; and

(b) The typical Medifast patient is successful in maintaining achieved weight loss.

PAR. 9. By and through the statements and representations referred to in paragraphs seven and eight, respondents represent, and have represented, directly or by implication, that at the time respondents made those representations, respondents possessed and relied upon a reasonable basis for those representations.

PAR. 10. In truth and in fact, at the time respondents made the statements and representations referred to in paragraphs seven and eight, 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. Respondents' advertising contains the following statements:

(a) "Obesity is a serious disease that deserves a serious medical treatment...We're certified, experienced and dedicated to the highest professional standards." (Obesity advertisement)

(b) "...obesity is serious. But like many diseases, it can now be controlled through a program of medical treatment...We're certified, experienced and dedicated to the highest professional standards." (Physicians brochure)

PAR. 12. By and through the use of the statements referred to in paragraph eleven, and others not specifically set forth herein of similar import and meaning, respondents have represented, directly or by implication, that all of respondents Medifast Associate Physicians are certified, through an objective evaluation process, in the treatment of obesity.

PAR. 13. In truth and in fact, many of respondents' Medifast Associate Physicians are not certified, through an objective

evaluation process, in the treatment of obesity. Therefore, the representation set forth in paragraph twelve was and is false and misleading.

PAR. 14. The acts and practices of respondents alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Sections 5(a) and 12 of the FTC Act, 15 U.S.C. 45(a) and 52.

Complaint

115 F.T.C.

EXHIBIT A-1

A-1

C-3392
902337
B129002

Notes to advertiser:
All ads are "Camera Ready"
fine art and may be sized up
or down to accommodate the
publication of your choice.

**(Caution: Take extra care
with your ad type size.
Reducing an ad that already
has small type could result in
a type size too small to read.)**

Obesity Is A Serious Disease That Deserves A Serious Medical Treatment.

Obesity is more than just a problem. The National Institutes of Health considers obesity a disease with serious medical consequences.

Eventually, it can lead to the development of high blood pressure, diabetes, elevated cholesterol, coronary heart disease, and even some forms of cancer.

But obesity may exert its worst effect on your sense of self-esteem. The National Institutes of Health states: "Obesity creates an enormous psychological burden. In fact, in terms of suffering, this burden may even be the greatest adverse effect of obesity."

Indeed, obesity is serious. But like many diseases, it can now be controlled through a program of medical treatment.

If you're more than 20 pounds overweight, you owe it to yourself to do something about it.

The MEDIFAST® Program treats obesity as the serious, chronic disease that it is.

MEDIFAST® starts with a complete medical evaluation: physical examination, EKG, medical history, laboratory testing, nutrition assessment, and other tests when indicated.

Next comes the easy part: losing the weight. A diet couldn't be easier to follow. During your Weight Reduction Phase, every nutritional

requirement is provided by medically formulated MEDIFAST® supplements.

No calorie counting and no complicated meal planning. Just the MEDIFAST® supplements. A refreshing, satisfying beverage — 5 times a day.

Best of all is the result: rapid and continuous weight reduction. You can expect to lose an average of 3 to 5 pounds of excess fat stores every week.

Safe, yes. And convenient, too.

You'll have all the energy you need to continue your usual recreational and employment activities without disruption. Meanwhile, you'll receive regular check-ups under a doctor's supervision, to manage your program and insure your success.

Soon, you'll sense the "healing" relief of weight reduction. You'll feel better physically. You'll also experience renewed emotional strength and self-confidence. In most cases, associated medical conditions will improve dramatically or even clear up entirely as weight reduction continues.

Finally, you'll learn to control your weight. For good.

MEDIFAST® counselors will give you the guidance and encouragement you'll need in the beginning to persevere in your weight reduction program.

Then, as you approach your Desired Weight, the focus will shift

toward maintaining your goals in the future.

In the MEDIFAST® Life-Style® Program of Patient Support, you'll discover a positive and caring approach to Self-esteem, Relationships, Nutrition, Fitness and Healthful Living — all vitally important to your continued success.

Call or visit our MEDIFAST® Center today.

For almost a decade, the safety and effectiveness of MEDIFAST® has been proven by over 200,000 patients in private practice and outpatient clinics across the nation.

The program is available only through designated MEDIFAST® Associate Physicians who have completed the required course of training.

We're certified, experienced and dedicated to the highest professional standards.

In a word, we're committed to providing you with the finest medical care available.

Obesity is truly a serious disease that deserves a serious medical treatment. We'll be happy to show you how to start. Give us a call.



Your Physician's Answer To Weight Control!

NAME, ADDRESS & PHONE NUMBER
OF YOUR OFFICE HERE

EXHIBIT A-2

The Burden Of Being Overweight Isn't Something You Have To Face Alone.

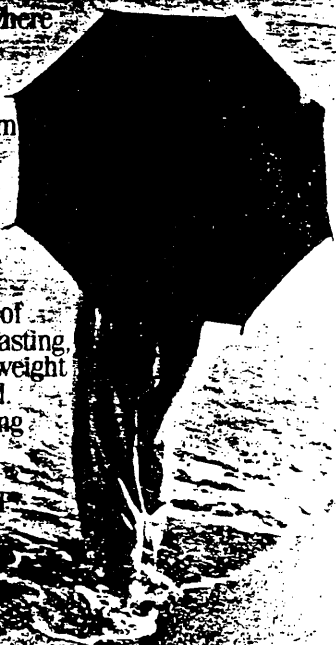
If you have a health problem, where do you turn for help?

Thousands of specially trained doctors nationwide have been offering the MEDIFAST® Weight Control Program for nearly a decade.

Their professional supervision means you will lose weight quickly and safely. The benefits are immediate improvements in your health and appearance.

Through the right combination of physician supervision, supplemented fasting, and behavior modification, your ideal weight will be easily achieved and maintained.

You already know how frustrating it is to lose weight on your own. Don't do it alone — THERE IS A MEDIFAST PHYSICIAN NEARBY WANTING TO HELP.



CALL 1-800-368-3683 OR ASK YOUR PHYSICIAN



Complaint

115 F.T.C.

EXHIBIT B-1

C-3392, 9023337, B129002

B-1

No caloric counting and no complicated meal planning. Just the Medifast supplements. A refreshing and satisfying beverage — 5 times a day. A diet couldn't be easier to follow.

Best of all is the result: rapid and continuous weight reduction. You can expect to lose an average of 3 to 5 pounds of excess fat stores every week.

Safe, yes. And convenient, too.

Under your doctor's supervision, you'll be given check-ups at regular intervals to manage your program and insure your progress.

Meanwhile, you'll have all the energy you need to continue your usual recreational and employment activities without disruption.

Soon, you'll begin to sense the "healing" relief of weight reduction. Without a doubt, you'll feel better physically. You'll also experience a renewal of emotional strength and self-confidence.

In most cases, associated medical conditions will improve dramatically or even clear up entirely as weight reduction continues.

Finally, you'll learn to control your weight. For good.

At first, your counselor's guidance and encouragement will enable you to comply with your weight reduction program.

Then, as you approach your Desired Weight, the focus will shift toward maintaining your goals in the future.

In the Medifast *LifeStyles*™ Program of Patient Support, you'll discover the key elements to vibrant health and weight control. *LifeStyles* provides a positive and lasting approach to: Self-esteem, Relationships, Nutrition, Fitness, and Healthful Living — all of which are vitally important to your continued success.

Please don't worry about cost.

The Medifast Program may sound expensive at first.

Actually, the cost is quite reasonable in

Obesity — A serious disease that deserves a serious medical treatment.

According to the National Institutes of Health, obesity is more than just a problem. It is, in fact, a disease with serious medical consequences.

Eventually, it can lead to the development of high blood pressure, diabetes, elevated cholesterol, coronary heart disease, and even some forms of cancer.

Obesity may even exert its worst effect on your sense of self-esteem. The National Institutes of Health says: "Obesity creates a enormous psychological burden. In fact, in terms of suffering, this burden may even be the greatest adverse effect of obesity."

Indeed, obesity is serious. But like many diseases, it can now be controlled through a program of medical treatment.

How do you know if you're obese?

Obese isn't a word people like to apply to themselves. And you needn't use the word if you don't like it.

But it is important to realize that if you're more than 20 percent over your Ideal Weight, you owe it to yourself to do something about it.

The Medifast® Program starts with a physical, not a diet sheet.

There was a time when overweight patients were handed a diet sheet, a prescription for appetite suppressants, and a pep talk.

But times change. Today, the treatment for obesity is much like treatment for any other chronic disease.

Medifast starts with a complete medical evaluation: nutrition assessment, medical history, laboratory testing, EKG, physical examination, and other tests when indicated.

Next comes the easy part: losing the weight.

During your Weight Reduction Phase, every nutritional requirement is provided by medically formulated Medifast supplements.

the long run because of the rapid and continuous weight reduction.

Remember, also, the money you will be saving on food, snacks and restaurant bills will cover much of the cost of restoring your health.

In many cases, fees for professional services will be paid by your health insurance. And, you may also be able to deduct part of the cost on your tax return as a medical expense.

The point is, you're a patient with a medical problem who deserves medical treatment. We'll be glad to sit down with you and work out the best possible way to handle the cost of your Medifast Program.

Visit our Medifast Center today.

The safety and effectiveness of Medifast has been proven by over 340,000 patients in private practice and outpatient clinics across the nation.

The program is available only through designated Medifast Associate Physicians who have completed the required course of training. We're certified, experienced and dedicated to the highest professional standards.

In a word, we're committed to providing you with the finest medical care available.

Obesity is truly a serious disease that deserves a serious medical treatment. We'll be happy to show you how to get started. Give us a call.



YOUR PHYSICIAN'S ASSISTANT TO YOUR CHAIR

EXHIBIT B-2

B-2
 Questions Patients Ask

C-3392
 9023337
 B129002

Halitosis. Bad breath has been noted occasionally while patients are on the fast. It is the result of using up body fat. Sugarless gum and mouthwash will get rid of the taste, and increasing fluid intake will help eliminate the problem.

MAY I TAKE HOLY COMMUNION?

Yes.

IS THE SUPPLEMENT KOSHER?

Yes. Medifast® is certified as a Kosher dairy product by the Union of Orthodox Jewish Congregations of America.

WILL MY INSURANCE COMPANY PAY FOR THE PROGRAM?

This depends on your insurance company, your policy, and whether or not you have any medical problems that may be helped by a loss of weight. Insurance will often pay for part or all of your medical costs. Our physicians and clinic will be sure to list every diagnosis that could increase your chances of receiving insurance reimbursement.

IS OBESITY HEREDITARY?

The primary cause of obesity is a pattern of behaviors. Children often learn these behavior patterns from obese parents, and then say "fat runs in my family." There are some very rare cases in which slow metabolisms can be inherited, but for greater than 98% of the population it is only behavior that is "inherited," and behavior can be changed.

WHY CAN MY HUSBAND EAT LIKE A HORSE AND NEVER GAIN AN OUNCE, WHILE I SMELL FOOD AND IT ENDS UP ON MY HIPS?

There is some variation in metabolic rates. A stocky person may need fewer calories than a lean person, or the other way around, but when careful records are kept it usually turns out that thin people eat fewer calories and exercise more than overweight people.

HAVE YOU HAD ANY SERIOUS SIDE EFFECTS OR DEATHS?

We are pleased to report that we have experienced no deaths or serious side effects in patients on the Medifast® program.

WHAT ABOUT THE SET POINT THEORY?

The set point theory suggests that your body "wants" to be a certain weight, and will tend to stay at that weight whether you diet or gorge. This theory ignores most of what we know about nutrition, and is not accepted by experts in the field.

I HAVE PROBLEMS EXERCISING. WHAT CAN I DO?

The Medical Director and Group Leader will work with you to develop a series of physical activities which you can do instead of conventional exercise.

Complaint

115 F.T.C.

EXHIBIT B-3

B-3

C-3392
9023337
B129002**MEDIFAST
OUT-PATIENT SUPPLEMENTED FAST
WEIGHT REDUCTION PHASE**

All that you have done so far has been in preparation for this phase. You will remain in this phase until you have reached your IDEAL BODY WEIGHT.

If you are to be successful, you cannot play games with the program. You may not "test the edges". We provide the technique and the education which you must strictly adhere to. We will do our part to monitor and guide you through the program in a safe and effective manner.

As you will see, a modified fasting program is quite spartan. However, you will mobilize and lose FAT STORES at a predictable and steady rate; you will have virtually no sensation of hunger; you will conserve LEAN BODY MASS and you will feel very well with a sense of energy and vitality.

As you probably know, most patients who have lost weight in the past have regained the lost pounds (and more). The reason for this REBOUND PHENOMENON is quite clear and simple. The weight that they lost was largely (40-50%) LEAN BODY MASS and there was a natural, inner drive to replenish this LBM. In the OPSF, there is virtually NO LOSS OF LBM and you will not experience a rebound phenomenon after you have attained your goal. However, all excess fat tissue must be lost - not just part of it.

Again:

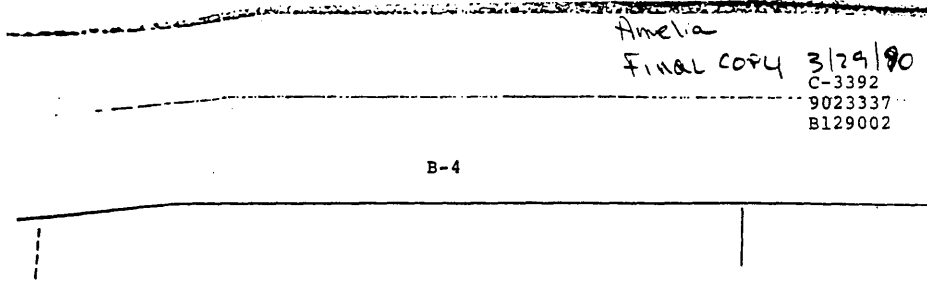
1. Weight loss is RAPID. (3.6-5.2 pounds of FAT STORES per week.)
2. There is NO HUNGER.
3. It is EASY TO FOLLOW - No complicated diet necessary. No exotic foods to purchase or prepare.
4. It is SAFE UNDER MEDICAL SUPERVISION on an outpatient basis in your home and job environment.
5. It is RELATIVELY INEXPENSIVE considering the length of time it would take to lose all excess fat and to achieve normal weight by any other program available today.

You must, of course, regard your previous overweight condition as a chronic problem associated with many years of improper dietary patterns. As you approach your IDEAL BODY WEIGHT, you will be gradually introduced to a nutritionally sound maintenance diet and behavioral modification by our nutritional counselor and by printed materials.

The MEDIFAST PROGRAM is a CHEMICALLY DEFINED DIET consisting of a natural protein formula, carefully calculated nutritional supplements (vitamins, minerals, micronutrients, electrolytes, trace elements, fiber) and fluids. The MEDIFAST protein formula should be considered to be medication rather than a food substance.

In spite of all the advantages, we DO NOT recommend this program without physician supervision, careful metabolic monitoring and the provision of nutritional supplementation (some will be taken orally and some will be given by injection).

EXHIBIT B-4



The Medifast Program Benefits 300,000 Patients

Having developed the programs and protocols which became known as the Medifast Program, the Nutrition Institute of Maryland began providing specialized training for physicians.

By 1989, NIM had trained over 12,000 Medifast Associate Physicians in private practice and outpatient clinics across the U.S. More than 300,000 formerly obese patients had already been helped by Medifast without one instance of serious side effect associated with their treatment.

*What You Can
Expect*

BENEFITS OF THE MEDIFAST PROGRAM

After medical evaluation, you will begin the Protein-Sparing Modified Fast. During the Weight Reduction Phase of your Medifast Program, every nutritional requirement will be provided by modified fasting supplements.

Medifast Supplements are specially formulated to include the precise balance of natural protein, vitamins, minerals, trace elements, electrolytes, fiber and other micronutrients essential to good health. (Additional medications may be prescribed at your physician's discretion.)

We urge you not to begin the Weight Reduction Phase until you fully understand the instructions and intend to follow them to the letter.

Good News...

You may be somewhat anxious at the prospect of going on a Protein-Sparing Modified Fast. But, rest assured that any apprehensions you might have will soon be allayed.

*...specially
formulated to
include the precise
balance of nutrients
essential to good
health....*

DECISION AND ORDER

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

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, 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 Jason Pharmaceuticals, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland, with its offices and principal place of business located at 11435 Cronhill Drive, Owings Mills, Maryland.

2. Respondent Nutrition Institute of Maryland, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland, with its offices and

principal place of business located at 11435 Cronhill Drive, Owings Mills, Maryland.

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

I.

It is ordered, That respondents Jason Pharmaceuticals, Inc., and Nutrition Institute of Maryland, Inc., corporations, their successors and assigns, and their officers, representatives, agents, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, promotion, offering for sale, or sale of any weight loss or weight control product, program or service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Making any representation, directly or by implication, regarding the safety of any very-low-calorie diet ("VLCD") program (providing 800 calories or less per day), unless respondents clearly and prominently disclose in close proximity to any such representation that physician monitoring is required to minimize the potential for health risks, or otherwise misrepresenting any health risk of the program.

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

C. Making any representation, directly or by implication, about the success of patients on any diet program in achieving or maintaining weight loss or weight control, unless, at the time of making any such representation, respondents possess and rely upon a reasonable basis consisting of competent and reliable scientific evidence substantiating the representation; *provided, however*, that for any representation that:

(1) Any weight loss achieved or maintained through any diet program is typical or representative of all or any subset of patients using the program, said evidence shall, at a minimum, be based on a representative sample of: (a) all patients who have entered the program, where the representation relates to such persons; or (b) all patients who have completed a particular phase of the program or the entire program, where the representation only relates to such persons;

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

(3) Any weight loss is maintained permanently, said evidence shall, at a minimum, be based upon the experience of patients who were followed for a period of time after completing the program that is either: (a) generally recognized by experts in the field of treating obesity as being of sufficient length to constitute a reasonable basis for predicting that weight loss will be permanent or (b) demonstrated by competent and reliable survey evidence as being of sufficient duration to permit such a prediction.

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

(1) The following information:

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

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

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

(2) The statement:

"For many dieters, weight loss is only temporary," *provided, however*, that respondents shall not represent, directly or by implication, that the above-quoted statement does not apply to dieters in respondents' diet programs.

E. Representing, directly or by implication, that any physician associated with a diet program is certified in the treatment of obesity unless that is the case.

II.

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 respondents such as dissolution, assignment, or sale resulting in the emergence of a successor corporation(s), the creation or dissolution of subsidiaries, the filing of a bankruptcy petition, or any other change in the corporation(s) that may affect compliance obligations arising out of this order.

III.

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

IV.

It is further ordered, That respondents and their successors or assigns, shall forthwith distribute a copy of this order to each of their officers, agents, representatives, independent contractors and employees who are engaged in the preparation and placement of advertisements or promotional materials, or who have any responsibilities with respect to the subject matter of this order; and, for a period of ten (10) years from the date of entry of this order, distribute same to all of respondents' future officers, agents, representatives, independent contractors and employees having said responsibilities.

V.

It is further ordered, That respondents and their successors or assigns shall, within thirty (30) days after service of this order, advise Medifast Associate Physicians that advertising previously furnished by respondents for use by physicians, and brochures, pamphlets and booklets previously provided by respondents to physicians for dissemination to patients and prospective patients, shall not be further used by those physicians where that advertising or other materials would violate this order; and respondents further shall attempt to insure that such advertising or other materials shall not be further used by Medifast Associate Physicians.

VI.

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

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

CONCURRING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

I have voted to accept the consent agreements in these matters. In addition to the injunctive provisions, the advertising disclosures that the orders require are appropriate given the allegations in the complaints that the firms failed to have a basis for previous advertising claims about weight loss maintenance. This does not mean that similar disclosures are necessarily required for other firms in the diet industry. Indeed, if their advertising claims have a valid basis, such a requirement might be unduly burdensome, for firms who routinely use broadcast advertising, and without clear, countervailing benefits for consumers.

STATEMENT OF COMMISSIONER DEBORAH K. OWEN
CONCURRING IN PART AND DISSENTING IN PART

The consent orders with these three marketers of very low calorie diet programs go a long way toward protecting consumers against misrepresentations about the safety and efficacy of these programs. However, legitimate concerns have been raised as to whether the mandated, company-specific maintenance disclosures in television and radio ads are effective in communicating useful information to consumers, unduly cumbersome, and consistent with the Commission's position in other situations. Based on comments received and other information, I believe that consumers would be better served by a different approach to company-specific disclosures when weight-loss maintenance claims are made in certain television and radio advertisements. Accordingly, I have voted in favor of issuing the

consent agreements in final form, except as to those provisions, with respect to which I dissent.

I support requiring in all maintenance advertising by these respondents general disclaimers which alert consumers to the fact that weight loss is temporary for many dieters. This counterbalances any unrealistically rosy scenario that a diet program might try to present in this regard. However, the orders compel additional disclosures, including a string of statistics, which may well be among the more informationally complex disclosures that have been required in Commission orders. While these numerically intricate disclosures may ultimately prove helpful to consumers in the context of print ads, which afford the opportunity for absorption, reflection, and comparison, I am concerned that the orders may fail to appreciate that consumers' ability to assimilate such complicated messages is likely to be much poorer for TV and radio ads of 30 seconds or less. One study of FTC orders with disclosure requirements noted that generally, broadcast media would not appear especially effective in providing detailed or complex disclosures.¹ A more recent study suggests that consumers are less likely to become well informed when certain disclosures are displayed in a video, as compared to a print, format.²

In the past, the Commission itself has recognized that less detailed disclosure requirements are sometimes appropriate for broadcast claims, and has entered orders which tailored the disclosure requirements to particular media. For instance, in *Sorga, Inc.*, 97 FTC 205 (1981), the Commission charged an advertising agency with having made deceptive and unsubstantiated representations about the efficacy and safety of a contraceptive, where the potential adverse impact of the misrepresentations was highly serious. Lengthy disclosures were required in print ads, whereas the television and radio ad disclosures were greatly abbreviated. Similarly, in *Southwest Sunsites, Inc.*, 105 FTC 7 (1985), a brief, simple disclosure concerning the riskiness of land purchases was required for radio, television, and short print advertisements, with a lengthy, more

¹ W. Wilkie, *Affirmative Disclosure at the FTC: Communication Decisions*, 6 J. Pub. Pol'y & Marketing 33, 35 (1987).

² See A. Best, *The Talismanic Use of Incomprehensible Writings: An Empirical and Legal Study of Words Displayed in TV Advertisements*, 33 St. Louis U. L. J. 285 (1989).

complex disclosure mandated for larger print ads, promotional materials, and oral sales presentations. In addition, a detailed disclosure about cancellation rights was required in each land sale contract.

More recently, the Commission has recognized the differences between disclosures in print on labels, and in broadcast media. In Congressional testimony presented in November of last year, the Commission noted that:

we feel it is important that the Commission have the ability to take account of the practicalities of regulating advertising. For example, regulations enacted pursuant to the [Nutrition Labeling and Education Act] might require more extensive explanations of a health claim in food labeling than would be necessary for a television or radio advertisement.³

Finally, the length and detailed nature of the disclosures mandated by the Commission for radio and television ads in these orders appear to resemble proposed Food and Drug Administration labeling disclosure requirements that Commission staff from the Bureaus of Consumer Protection and Economics have recently criticized, in the print context of labels. With respect to the length of the numerical disclosures required in connection with relative nutrient content claims, the staff argued:

The length of the required disclosure is a concern primarily because it could reduce the information available to consumers by reducing producers' incentives to make valid relative claims.... Lengthy disclosures contribute to label clutter, which may discourage consumers from reading the information on the label.

The staff proposed, instead, a more concise disclosure similar in length to the general maintenance disclaimer that would be required under these consent orders.⁴

³ Prepared Statement of the Federal Trade Commission before the Transportation and Hazardous Materials Subcommittee, Energy and Commerce Committee, U.S. House of Representatives (Nov. 21, 1991) at 12.

⁴ The staff cited as an example of a problematic mandated disclosure: "Less fat -- 38 percent less fat than our regular popcorn. This popcorn has 5 grams of fat compared to 8 grams in our regular popcorn." They proposed as an alternative: "Less fat -- 3 grams less than our regular popcorn." Federal Trade Commission Staff Comments Before the Dept. of Health and Human Services, Food and Drug Administration, In the Matters of Nutrition Labeling; Nutrient Content Claims;

I strongly suspect that many consumers will have great difficulty in absorbing or recalling the relatively complex disclosures of these orders if made during broadcast ads. Although these particular respondents have to date not made great use of broadcast media in marketing their programs, some such undesirable effects from the present orders will still obtain in the broadcast advertising that they do. Moreover, I am very concerned that the approach in these orders may be viewed as precedent in any future matter that involves firms whose use of broadcast media is much more extensive.

In my view, the orders would have been more effective had they required for broadcast ads only the general disclaimer on weight-loss maintenance. But I am also convinced that the other disclosures on percent of weight loss maintained, duration of that maintenance, and the representativeness of the triggering claim would be important in helping consumers decide whether they will get their money's worth when they sign up for a particular program. Consequently, based on available information, I would have supplemented the more concise general disclosure for broadcast ads with requirements that respondents provide at point-of-sale, and prior to the execution of any contract, a clearly written statement of all the disclosures otherwise required,⁵ and that the broadcast ads alert consumers to the availability of that additional information. This approach, in my view would provide the relevant information to consumers at a time when they most need it, and in a format more likely to be useful in evaluating and comparing diet programs.

Health Claims; Ingredient Labeling, Prop. Rules, Dkt. Nos. 91N-0384, 84N-0153, 85N-0061, 91N-0098, 91N-0099, 91N-0094, 91N-0096, 91N-0095, 91N-0219 (Feb. 25, 1992) at 39-40.

⁵ See, e.g., *Arthur Murray, Inc.*, 95 FTC 347 (1980) (disclosures required of firm and its franchisees in contracts with consumers); see also, Letter from the Honorable Janet D. Steiger (by direction of the Commission) to Senator Slade Gorton (Sept. 25, 1991) at 7 n.11 ("The principle that detailed information of the kind usually found on labels is most useful when available at the point when comparisons can be made or decisions can be affected has been supported by many consumer information processing studies.").

IN THE MATTER OF

TARRA HALL CLOTHES, INC., ET AL.

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

Docket C-2797. Consent Order, Feb. 24, 1976--Modifying Order, Oct. 27, 1992

This order reopens the proceeding and modifies the Commission's cease and desist order issued on Feb. 24, 1976 (87 FTC 294), by narrowing the conditions under which Abraham Cohen, former president of Tarra Hall Clothes, Inc., must post a bond before importing wool products. The Commission concluded that the petition to modify the order should be granted to require bonding only for importation of recycled wool products.

ORDER REOPENING THE PROCEEDING AND
MODIFYING CEASE AND DESIST ORDER

On May 1, 1992, Abraham Cohen ("Petitioner") filed a Petition to Reopen Proceeding and Modify Consent Order ("Petition") in Docket No. C-2797, pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Sections 2.51 and 3.72 of the Commission's Rules of Practice and Procedure, 16 CFR 2.51 and 3.72, to reopen and modify the consent order entered by the Commission on February 24, 1976 ("consent order"), as it applies to him individually.

The final order in this matter was the product of a consent agreement Tarra Hall Clothes, Inc. ("Tarra Hall") and its president and owner, Petitioner, entered into with the Commission to resolve charges that they had imported mislabeled fabrics containing wool in violation of the Wool Products Labeling Act of 1939 ("Wool Act"). Tarra Hall is an importer of wool blend fabrics and a manufacturer of

men's clothing.¹ The consent order was one of several other orders involving the misbranded importation of wool products² from a major textile center in Italy, the City of Prato.³ The consent order prohibits Tarra Hall and Petitioner from falsely and deceptively stamping, tagging, labeling, or otherwise identifying wool products, and from failing to securely affix to each product a stamp, tag, label or other means of identification showing each element of information required to be disclosed by Section 4(a)(2) of the Wool Act. The consent order further prohibits the respondents from importing wool products except upon filing a bond with the Secretary of the Treasury.⁴ Petitioner requests that the Commission reopen and modify the consent order to remove the Petitioner from the coverage of the bond

¹ Shortly after the consent order became effective, Petitioner notified the Commission that he had sold his interest in Tarra Hall and had purchased an interest in another importer and manufacturer of men's clothing, Hartz & Co., Inc. ("Hartz"). Petitioner is president of Hartz, and he owns two thirds of the Class A common stock (the voting stock) and two thirds of the Class B common stock. As a result of the terms of the consent order, it applies to Hartz through the Petitioner.

² The term "wool product" is defined by the Wool Products Labeling Act of 1939 ("Wool Act") as any product containing wool or represented to contain wool. The Wool Act was amended in 1980 to substitute the word "recycled" for the words "reprocessed" and "reused." Recycled wool is wool that has been made into one product and then recycled into a second product. Accordingly, the order is modified by substituting the word "recycled" for "reprocessed" where appropriate.

³ See, e.g., *Norlic Import Co.*, 84 FTC 1173 (1974); *C. Itoh & Co. (America)*, 84 FTC 1187 (1974); *Bagatelle Int'l Ltd.*, 85 FTC 270 (1975); *Allora, Ltd.*, 86 FTC 283 (1975); *Texora Int'l Corp.*, 87 FTC 273 (1976); *Silton Brothers, Inc.*, 87 FTC 1335 (1976); and *Verrazzano Trading Corp.*, 91 FTC 888 (1978). The Prato mills produced recycled wool products made from shredding of miscellaneous cloth scraps, rags and textile byproducts and then weaving or felting new wool blend products from the fibers.

⁴ Section 8 of the Wool Act, 15 U.S.C. 68f, empowers the Commission to order importers of wool products to cease and desist from importing such products "except upon filing bond with the Secretary of the Treasury in a sum double the value of said wool products and any duty thereon, conditioned upon compliance with the provisions of this Act." The bond is administered by the United States Customs Service, and it is subject to forfeiture if imported wool products are not labeled or otherwise identified in accordance with the Wool Act and the rules and regulations promulgated by the Commission under that Act.

requirement, or, alternatively, to require Petitioner to file a bond only with respect to the importation of recycled wool products.

The request to reopen and modify the consent order was placed on the public record on May 13, 1992, and a press release regarding the request was issued on the same day. The public comment period ended on June 12, 1992, and nine comments were filed, all in support of the Petition.⁵ For the reasons stated below, the Commission has determined to grant the Petition and limit the bond requirement to the importation of recycled wool products.

I. BACKGROUND

This is Petitioner's second petition to reopen and modify the consent order. On April 2, 1987, Petitioner filed a petition to reopen and modify the consent order to eliminate the bond requirement as it applied to him as an individual ("the 1987 Petition"). He did not alternatively petition the Commission to limit the scope of the bond requirement. Petitioner recited only two changes in circumstances of fact or law to support the 1987 Petition:

(1) Petitioner sold his interest in Tarra Hall in late 1976, and purchased a controlling interest in Hartz. He then instituted procedures at Hartz, including occasional testing of imported wool products, to ensure compliance with the consent order; and

(2) Petitioner contended that Commission policy on the imposition of bonds in Wool Act enforcement had changed, and after entry of the consent order, the Commission only required a bond in one other order, which involved more egregious circumstances.⁶

Petitioner further argued that public considerations warranted elimination of the bond requirement because it imposed an economic burden on Hartz and placed Hartz at a disadvantage to its competitors who did not have to pay for a bond. He also argued that the bond

⁵ Petitioner agreed to an extension of time to permit the Commission to consider his petition.

⁶ See *Verrazzano Trading Corp.*, 91 FTC 888 (1978).

requirement had served its purpose because he had absolutely complied with the order since it was issued.

The Commission denied the 1987 Petition on the ground that Petitioner had not demonstrated changed conditions of fact or law warranting the elimination of the bond requirement. The Commission also determined that Petitioner had not shown that the bond requirement imposed any specific injury or resulted in harm that reasonably could not have been anticipated when the consent order was entered.⁷

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

Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), provides that the Commission shall reopen an order to consider whether it should be altered, modified or set aside if a respondent files a petition that makes a satisfactory showing that changed conditions of law or fact require the order to be altered, modified or set aside in whole or in part.⁸ A satisfactory showing sufficient to require reopening is made when a petition to reopen identifies significant changes in circumstances and shows that the changes

⁷ *Tarra Hall Clothes, Inc.*, Docket No. C-2797, Letter to Lawrence M. Garten, Esq. (November 25, 1987).

⁸ Section 5(b) provides, in part, that the Commission may modify a final order. Whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require . . . [T]he Commission shall reopen any such order to consider whether such order (including any affirmative relief provision contained in such order) should be altered, modified, or set aside, in whole or in part, if the person, partnership, or corporation involved files a request with the Commission which makes a satisfactory showing that changed conditions of law or fact require such order to be altered, modified, or set aside, in whole or in part.

The 1980 amendment to Section 5(b) did not change the standard for order reopening and modification, but "codifie[d] existing Commission procedures by requiring the Commission to reopen an order if the specified showing is made," S. Rep. 96-500, 96th Cong., 1st Sess. 9-10 (1979), and added the requirement that the Commission act on petitions to reopen within 120 days of filing.

eliminate the need for the order, or make continued application of the order inequitable or harmful to competition.⁹

In instances in which changed circumstances would not require reopening an order, under Section 5(b) the Commission may nevertheless modify an order when the Commission determines that the public interest requires it. Accordingly, Section 2.51 of the Commission's Rules of Practice invites a petitioner to demonstrate in the petition how the public interest warrants the requested reopening and modification.

Regardless of whether the modification is sought because of changed circumstances or because the public interest warrants it, under Section 5(b), the burden is on the petitioner to make a satisfactory showing for the Commission to reopen the order.¹⁰ The language of Section 5(b) plainly anticipates that the petition must make a satisfactory showing 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.¹¹ 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. This burden is a heavy one in view of the public interest in repose and finality of Commission orders.¹²

⁹ *Louisiana Pacific Corp.*, Docket No. C-2956, Letter to John C. Hart (June 5, 1986) at 4. See S. Rep. No. 96-500, 96th Cong., 1st Sess. 9 (1979) (significant changes or changes causing unfair disadvantage); *United States v. Swift & Co.*, 286 U.S. 106, 119 (1932) ("clear showing" of changes that eliminate reasons for order or such that order causes unanticipated hardship).

¹⁰ See S. Rep. No. 96-500, 96th Cong., 1st Sess. 9-10 (1979).

¹¹ This legislative history to the amended Section 5(b) states: [U]nmeritorious, time consuming and dilatory requests are not to be condoned. A mere facial demonstration of changed facts or circumstances is not sufficient. . . The Commission, to reemphasize, may properly decline to reopen an order if a request is merely conclusory or otherwise fails to set forth specific facts demonstrating in detail the nature of the changed conditions and the reasons why these changed conditions require the requested modification of the order.

¹² See *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394 (1981) (strong public interest considerations support repose and finality).

III. PETITIONER'S ARGUMENTS

The Petitioner raises two main arguments in support of his current Petition. First, the Petitioner argues that circumstances and facts have changed, making the bond requirement of the consent order no longer necessary to ensure compliance with the Wool Act. Petitioner states that his new company, Hartz, is larger and manufactures higher quality and higher priced clothing than Tarra Hall had produced.¹³ According to Petitioner, ninety percent of the piece goods Hartz imports constitute pure virgin wool, while the remaining ten percent are wool blends of the highest quality -- wool blended with silk, linen, or cashmere. Petitioner contends that Hartz no longer imports recycled wool products, nor does it obtain any wool products from the mill in Prato, Italy that supplied the wool products that were the subject of the original Commission complaint.

Petitioner also argues that Hartz carefully tests the fiber content of all imported wool products for which Hartz is the importer of record, including 100% of the wool products from Prato, Italy.¹⁴ Petitioner explains that because Tarra Hall was a smaller company, it did not have the resources Hartz has to conduct such testing. In addition, Petitioner points out that he has maintained a perfect record of compliance with the consent order.

Petitioner's second argument is that the public interest warrants modification of the consent order because the bond requirement places an unfair burden on him. He states that he currently must spend \$10,000 each year to secure a surety bond for compliance with the consent order. He further claims that since 1978, Hartz has spent approximately \$100,000 in compliance with the bond requirement,

¹³ Petitioner states that Hartz employs nearly 700 people in its factories in Maryland and Virginia, and has annual sales of about \$45 million. Petitioner also states that Hartz sells its products under such well-known trade names as GIVENCHY, TALLIA, OLIVER, and CHARLES JOURDAN, and the clothes are sold nationally by such retailers as Macy's, Raleigh's, and Neiman Marcus.

¹⁴ Petitioner's letter of June 18, 1992, describes the testing program as follows: The tests are conducted on the fabric in a random fashion, with about 25% of the fabrics ultimately being tested. However, with regard to the very limited quantity of fabric imported from the Prato region of Italy, 100% of those fabrics are tested for the reasons set forth in the Petition.

which outlay did not include administrative costs to Hartz resulting from compliance procedures. Petitioner maintains that this places the company at an unfair disadvantage with respect to his competitors, who do not have similar requirements, and is a stigma under which he and Hartz must continue to operate.

Finally, Petitioner argues that it is unfair for the Commission to continue to require the bond as to all wool products because the Commission has previously eliminated or modified the bond requirements that the Commission had imposed on three other fabric importers, Norlic Import Company,¹⁵ C. Itoh & Co., (America), Inc.,¹⁶ and Texora International Corporation.¹⁷ Petitioner argues that the Commission modified the orders in Norlic and Itoh because those companies no longer imported recycled wool products, and that the Commission modified the order in Texora because the company had set up a program for testing the fibers of its imported wool products.¹⁸ Consequently, Petitioner contends that fairness and the public interest mandate that the Commission should treat him similarly because he, too, no longer imports recycled wool products and now tests all wool products from Prato and about 25% of all other wool products on a randomly selected basis for which Hartz is the importer of record.

IV. PETITIONER HAS DEMONSTRATED THAT MODIFICATION OF THE ORDER IS IN THE PUBLIC INTEREST

As stated previously, Section 5(b) of the FTC Act requires Petitioner to make "a satisfactory showing that changed conditions of law or fact" require the order to be modified. Where changed circumstances would not require reopening an order, the Commission nevertheless may modify an order when the Commission determines that the public interest requires it.

¹⁵ *Norlic Import Co.*, 84 FTC 1173 (1974), modified, 91 FTC 112 (1978).

¹⁶ *C. Itoh & Co., (America)*, 84 FTC 1187 (1974), modified, 96 FTC 40 (1980).

¹⁷ *Texora Int'l Corp.*, 87 FTC 273 (1976), modified, 97 FTC 351 (1981).

¹⁸ In *Texora*, the Commission reopened and modified the order to substitute the wool product testing procedures for the bond requirement.

In the 1987 petition, Mr. Cohen had requested that the bonding requirement be entirely eliminated. As changed conditions of fact, Petitioner claimed that his company had instituted testing procedures and that the bond requirement imposed economic and competitive hardship. Petitioner also claimed that Commission policy on bonding requirements had changed. The Commission concluded that the above contentions did not establish sufficient changes of fact to warrant the requested order modification.

However, Petitioner now offers a number of new changed conditions of fact not presented in the 1987 petition. Petitioner observes that the subject of the Commission's complaint had been the mislabeling of recycled wool products purchased from the Prato, Italy region. Petitioner states that he now is president and an owner of a different company, Hartz, that does not purchase wool products from Tarra Hall's supplier in Italy and, in fact, does not import any of the recycled wool products and other types of fabrics that gave rise to the complaint. Petitioner claims that such facts, in conjunction with the company's testing program and other facts cited in the Petition, warrant modification of the bonding requirement.

The legal test regarding changed conditions of fact is whether such facts eliminate the need for the order, or make continued application of the order inequitable or harmful to competition. The changes in fact that Petitioner cites, standing alone, do not meet this test. At the time the order was entered, it was foreseeable that Petitioner might sell his interest in Tarra Hall and start or purchase an interest in another business such as Hartz. It also was foreseeable that Petitioner might institute procedures, such as the testing of imported wool products, to ensure compliance with the order. The Commission expects respondents to modify their practices so as to comply with an order.¹⁹ And finally, it was foreseeable that Petitioner might stop importing wool products from the troublesome supplier in Prato, Italy, or might cease importing recycled wool

¹⁹ Petitioner also offers as a changed condition of fact that the company has a perfect record of compliance with the order. The Commission disagrees that compliance with orders represents a change of fact. It is the responsibility of all respondents to comply with orders. However, a good record of compliance creates a favorable climate for the Commission's consideration of order modification petitions.

products altogether. The Commission nevertheless determined at the time the order was entered that the bond requirement was a prudent safeguard. Moreover, there is no guarantee that Hartz will continue its present testing safeguards or that it will never import lesser grades of wool products that might cause labeling problems.

Despite this absence of sufficient changes of fact, the Commission may still grant the petition on public interest grounds. Petitioner argues that economic and competitive hardship warrant reopening and modifying the order on public interest grounds.²⁰ The Commission is not persuaded by this claim. It is evident that the bond requirement has not prevented Hartz from successfully competing in the marketplace. Petitioner states that Hartz has annual sales of about \$45,000,000 and is one of the very few domestic clothing manufacturers making a profit at this time. It is doubtful that the \$10,000 in annual premiums that Petitioner pays for the bond is an economic or competitive hardship. Consequently, the Commission declines to modify the order on the basis that the order is against the public interest due to economic burden.

Economic and competitive hardship are not the only criteria the Commission may consider.²¹ The Commission also may examine the

²⁰ Although Petitioner also claims that the bond imposes a stigma upon him and his company, which is against the public interest, he offers no substantiation for his claim. To the contrary, the materials submitted with the petition indicate that Petitioner and Hartz enjoy a good reputation within the garment industry. Consequently, the Commission considers any stigma associated with the bonding requirement to have been negligible.

²¹ See, e.g., *American Home Products Corporation*, 103 FTC 528 (1984) (order reopened and modified on public interest grounds to bring petitioner's order into general parity with other similar Commission orders); *Redman Industries, Inc.*, 110 FTC 636, 640 (1988) (four orders reopened and vacated on public interest grounds because they contained remedies contemplated and rejected as not beneficial to consumers in connection with proposed rulemaking); *Liquid Air Corporation of North America* 111 FTC 135, 137 (1988) (order reopened and modified on public interest grounds because order's requirement of prior Commission approval of petitioner's acquisitions imposed substantial compliance costs and required prior approval for potential wholly internal activities); *Lenox, Incorporated*, 111 FTC 612, 620 (1989) (order reopened and modified in part on public interest grounds because order prohibited conduct that itself may not be unlawful and provision no longer necessary to ensure compliance).

entirety of the circumstances in each case to determine whether intrinsic fairness dictates that an order be modified.²² The new petition presents a significantly stronger case for order modification on fairness grounds than the 1987 Petition. With the addition of the facts that Petitioner does not sell recycled wool products, does not purchase such products from the mill that supplied the offending fabrics, and now requests in the alternative that the bond requirement merely be limited rather than eliminated, the Petition presents circumstances similar to those in *Norlic* and *C. Itoh*. In those cases, the petitioners similarly had ceased buying wool products from the offending mills in Prato, Italy and had ceased buying recycled wool products altogether. The Commission modified the orders in each case to apply the bonding requirement only to the importation of recycled wool products.²³

In sum, Petitioner, while not presenting changed facts that by themselves warrant an order modification, has demonstrated that a modification is in the public interest. This fairness consideration, when coupled with the changed facts noted above, justifies granting the limited modification requested.²⁴

²² See, e.g., *National Tea Company*, 111 FTC 109, 110 (1988)(order reopened and modified on public interest grounds because company had exited the geographic market and order requirements imposed substantial costs and put petitioner at disadvantage to competitors who were not under similar restraints); see also *American Home Products Corporation*, 103 FTC at 528.

²³ The Commission finds Petitioner's analogy to *Texora* less persuasive. The petition was similar to this case in that *Texora* claimed strict testing procedures as a changed condition of fact. Petitioner also points to his company's testing program. However, in *Texora* the Commission, while eliminating the bond requirement, also modified the order to make testing mandatory. Petitioner does not seek this substitution of a testing requirement for the current bond requirement. Consequently, testing by Hartz would remain voluntary and there is no guarantee that the company would continue this practice.

²⁴ This is not to suggest that an order modification is always warranted whenever the petitioner's order contains provisions that differ from those in orders covering its competitors. Nevertheless, maintaining a level playing field among competitors, to the extent practicable and justified by the facts, is of concern to the Commission. This concern is heightened where, as here, the order imposes affirmative obligations that go beyond prohibiting violative practices (in this case, a bond requirement) on only one of several members of an industry. The order provision at issue is not a core provision

Accordingly, the Commission grants Petitioner's alternative request that the order be modified to require bonding only with respect to the importation of recycled wool products. The Petitioner will continue to be bound by the order's general prohibitions against falsely labeling any wool products. In the event Petitioner again imports recycled wool products, he must obtain a bond to ensure those wool products are properly labeled.

V. CONCLUSION

The Commission concludes, in the public interest, that the Petition should be granted to require bonding only for importations of recycled wool products.

It is therefore ordered, That the proceeding is hereby reopened and the Decision and Order issued on February 24, 1976, is hereby modified to read as follows:

ORDER

It is ordered, That respondents Tarra Hall Clothes, Inc., a corporation, its successors and assigns, and its officers, and Abraham Cohen, individually and as an officer of said corporation, and respondents' representatives, agents, and employees, directly or through any corporation, subsidiary, division or any other device, in connection with the introduction, or manufacture for introduction, into commerce, or the offering for sale, sale, transportation, distribution, delivery for shipment or shipment, in commerce, of wool products as "commerce" and "wool product" are defined in the Wool Products Labeling Act of 1939, do forthwith cease and desist from misbranding such products by:

1. Falsely and deceptively stamping, tagging, labeling or otherwise identifying such products.
2. Failing to securely affix to, or place on, each such product a stamp, tag, label or other means of identification showing in a clear

that directly prohibits deceptive practices or violations of a statute. Instead, the provision at issue is a perpetual bonding requirement in a non-fraud case.

and conspicuous manner each element of information required to be disclosed by Section 4(a)(2) of the Wool Products Labeling Act of 1939.

It is further ordered, That respondent Tarra Hall Clothes, Inc., a corporation, its successors and assigns, and its officers, representatives, agents, and employees directly or through any corporation, subsidiary, division, or other device, do forthwith cease and desist from:

Importing or participating in the importation of wool products into the United States except upon filing bond with the Secretary of the Treasury in a sum double the value of said wool products and any duty thereon, conditioned upon compliance with the provisions of the Wool Products Labeling Act of 1939.

It is further ordered, That respondent Abraham Cohen, his representatives, agents, and employees, directly or through any corporation, subsidiary or division, or other device, do forthwith cease and desist from:

Importing or participating in the importation of recycled wool products into the United States except upon filing a bond with the Secretary of the Treasury in a sum double the value of said wool products and any duty thereon conditioned upon compliance with the provisions of the Wool Products Labeling Act of 1939.

It is further ordered, That respondents notify, by registered mail, each of their customers that purchased the wool products which gave rise to this complaint of the fact that such products were misbranded.

It is further ordered, That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and his affiliation with a new business or employment. Such notice shall include respondent's current business address and a statement as to the nature of the business or employment in which he is engaged, as well as a description of his duties and responsibilities.

It is further ordered, That the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions.

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

Commissioner Azcuenaga concurring in the result only.

IN THE MATTER OF

POMPEIAN, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3402. Complaint, October 27, 1992--Decision, October 27, 1992*

This consent order prohibits, among other things, the Maryland manufacturer of Pompeian Olive Oil from representing that eating olive oil lowers cholesterol more than eating vegetable oil, and is more heart healthy than eating vegetable oil, or that any edible oil has the relative or absolute ability to cause or contribute to any health benefit, or has a favorable impact on any physiologic function or risk factor for disease, unless the respondent has a reasonable basis consisting of competent and reliable scientific evidence that substantiates such representations.

Appearances

For the Commission: *Nancy S. Warder and Joel Winston.*

For the respondent: *Lloyd S. Mailman, Blum, Yumkas, Mailman, Gutman & Denick. P.A., Arlington, VA.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Pompeian, Inc. ("Pompeian" or "respondent"), a corporation, 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. Pompeian is a Maryland corporation with its offices and principal place of business at 4201 Pulaski Highway, Baltimore, Maryland.

PAR. 2. Pompeian has advertised, offered for sale, sold, and distributed Pompeian Olive Oil, a "food" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

PAR. 3. Pompeian has disseminated or caused to be disseminated advertisements for Pompeian Olive Oil. These advertisements have been disseminated by various means in or affecting commerce, including television broadcasts and magazines distributed across state lines, for the purpose of inducing the purchase of Pompeian Olive Oil by members of the public.

PAR. 4. The acts and practices of Pompeian alleged in this complaint have been in or affecting commerce.

PAR. 5. Respondent has disseminated or caused to be disseminated advertisements for Pompeian Olive Oil, including but not necessarily limited to, the broadcast advertisements attached hereto as Exhibits A and B. These advertisements contain the following statements:

a. I just changed my husband's oil. Yeah, I switched from cooking with vegetable oil to Pompeian Olive Oil....Because medical studies show that olive oil can help reduce your body's level of cholesterol. Oh sure, my vegetable oil was cholesterol-free, but the Pompeian actually helped reduce harmful cholesterol in your body. (Exhibit A)

b. I just changed my husband's oil! Yeah, I switched from cooking with vegetable oil to Pompeian Olive Oil....Because studies show olive oil can reduce your body's level of cholesterol. Sure, my vegetable oil was cholesterol-free. But Pompeian actually reduces harmful cholesterol already in your body...If you're using a cholesterol-free vegetable oil, you're not getting the benefits of Pompeian Olive Oil. Because studies show Pompeian isn't just cholesterol-free. All three varieties can actually reduce your body's level of harmful cholesterol. (Exhibit B)

PAR. 6. Respondent has also disseminated or caused to be disseminated advertisements for Pompeian Olive Oil, including but not necessarily limited to, the print advertisements attached hereto as Exhibits C and D. These advertisements contain the following statements:

a. If you're fed up with giving up good taste to enjoy good health, take heart. Just change your cooking oil to Pompeian Olive Oil. You'll love the unique flavor Pompeian brings to all your favorite recipes, while you receive health benefits no vegetable oil can ever give you. You see, Pompeian's not just cholesterol free -- studies have shown olive oil can actually reduce your body's harmful cholesterol. (Exhibit C)

b. If you're fed up with giving up good taste to enjoy good health, take heart. Just change your cooking oil to Pompeian Olive Oil. You'll love the unique flavor

Pompeian brings to your food, while you receive health benefits no vegetable oil can ever give you. You see, Pompeian's not just cholesterol free -- studies have shown olive oil can actually reduce the level of harmful cholesterol already in your body, and may help lower systolic blood pressure when included as part of a balanced diet. So changing to Pompeian will help your heart. (Exhibit D)

PAR. 7. Through the use of the statements contained in the advertisements referred to in paragraphs five and six, including but not necessarily limited to the advertisements attached as Exhibits A through D, respondent has represented, directly or by implication, that:

- a. Eating vegetable oil does not lower cholesterol; and
- b. Eating olive oil lowers cholesterol more than vegetable oil.

PAR. 8. Through the use of the statements contained in the advertisements referred to in paragraphs five and six, including but not necessarily limited to the advertisements attached as Exhibits A through D, respondent has represented, directly or by implication, that at the time it made the representations set forth in paragraph seven respondent possessed and relied upon a reasonable basis for such representations.

PAR. 9. In truth and in fact, respondent did not possess and rely upon a reasonable basis for the representations set forth in paragraph seven at the time the representations were made. Therefore, the representation set forth in paragraph eight was and is false and misleading.

PAR. 10. Through the use of the statements contained in the advertisement referred to in paragraph six (b), including but not necessarily limited to the advertisement attached as Exhibit D, respondent has represented, directly or by implication, that olive oil is more heart healthy than all vegetable oils.

PAR. 11. Through the use of the statements contained in the advertisement referred to in paragraph six (b), including but not necessarily limited to the advertisement attached as Exhibit D, respondent has represented, directly or by implication, that at the time it made the representation set forth in paragraph ten respondent possessed and relied upon a reasonable basis for such representation.

PAR. 12. In truth and in fact, respondent did not possess and rely upon a reasonable basis for the representation set forth in paragraph ten at the time the representation was made. Therefore, the representation set forth in paragraph eleven was and is false and misleading.

PAR. 13. The dissemination by respondent of the aforesaid false and misleading representations as alleged in this complaint constitutes 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

**RADIO
TVREPORTS**

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

PRODUCT:	POMPEIAN OLIVE OIL	M90-49378
PROGRAM:	HOTEL 6/12/90	30 SEC.
LIFETIME	(MILWAUKEE)	9:56AM



1. (MUSIC) WOMAN: I just changed my husband's oil.



2. Yeah, I switched from cooking with vegetable oil to Pompeian Olive Oil.



3. MAN: Why?



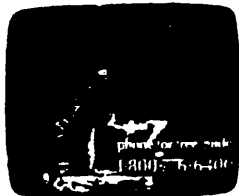
4. WOMAN: Because medical studies show that olive oil can help reduce your body's level of cholesterol.



5. Oh-sure, my vegetable oil was cholesterol-free, but the Pompeian actually helped reduce harmful cholesterol in your body.



6. And if that isn't enough, tastes great.



7. I called Pompeian for a free guide on how to change his oil.



8. You think they've got something for spare tires?



9. (MUSIC OUT)

Complaint

115 F.T.C.

EXHIBIT B

JORDAN AZZAM, INC.
500 California Street, Baltimore, Maryland 21201-1000 301-857-1100

CONTACT REPORT

CLIENT
PRODUCT
DATE
TOPIC

Woman: I just changed my husband's oil! Yeah, I switched from cooking with vegetable oil to Pompeian Olive Oil.

Man: Why?

Woman: Because studies show olive oil can reduce your body's level of cholesterol. Sure, my vegetable oil was cholesterol-free. But Pompeian actually reduces harmful cholesterol already in your body. And if that wasn't enough, it also tastes great. I called Pompeian for this free guide to changing his oil. Think they've got something for spare tires?

TAG 2: If you're using a cholesterol-free vegetable oil, you're not getting the benefits of Pompeian Olive Oil. Because studies show Pompeian isn't just cholesterol-free. All three varieties can actually reduce your body's level of harmful cholesterol. Good for you, Pompeian!

EXHIBIT B

Complaint

EXHIBIT C

FINALLY
SOMETHING
GOOD FOR YOU



THAT
TASTES GOOD

If you're fed up with giving up good taste to enjoy good health, take heart. Just change your cooking oil to Pompeian Olive Oil. You'll love the unique flavor Pompeian brings to your food, while you receive health benefits no vegetable oil can ever give you. You see, Pompeian's not just cholesterol free — studies have shown olive oil can actually reduce your body's harmful cholesterol. Learn more by calling 1-800-453-7000 for a free guide to adapting all your favorite recipes to one of Pompeian's three varieties. This is one oil change that can't wait.

good for you



Complaint

115 F.T.C.

EXHIBIT D

FINALLY
SOMETHING
GOOD FOR YOU



THAT
TASTES GOOD

If you're fed up with giving up good taste to enjoy good health, take heart. Just change your cooking oil to Pompeian Olive Oil. You'll love the unique flavor Pompeian brings to your food, while you receive health benefits no vegetable oil can ever give you. You see, Pompeian's not just cholesterol free — studies have shown olive oil can actually reduce the level of harmful cholesterol already in your body, and may help lower systolic blood pressure when included as part of a balanced diet. So changing to Pompeian will help your heart. And add a flavor to your food that's good for your soul.

good for you



 EXHIBIT D

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of respondent Pompeian, Inc., a corporation, and the respondent having been furnished 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 and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft complaint, a statement that the signing of 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 respondents have violated the said Act, and that the complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, 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 makes the following jurisdictional findings and enters the following order:

1. Respondent Pompeian, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland, with its principal place of business at 4201 Pulaski Highway, Baltimore, 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.

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

- A. Eating vegetable oil does not lower cholesterol;
- B. Eating olive oil lowers cholesterol more than eating vegetable oil;
- C. Eating olive oil is more heart healthy than vegetable oil;
- D. Any edible oil has the relative or absolute ability to cause or contribute to any health attribute or benefit; or
- E. Any edible oil has a favorable or unfavorable impact on any physiologic function or risk factor for a disease, or provides any other health benefit;

unless at the time of making such representation respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation; *provided, however*, that any such representation that is specifically permitted in labeling for any such food product by the Food and Drug Administration pursuant to the Nutrition Labeling and Education Act of 1990 will be deemed to have a reasonable basis as required by this paragraph. For any test, analysis, research, study, or other evidence to be "competent and reliable" for purposes of this order, such test, analysis, research, study, or other evidence must be conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted by others in the profession or science to yield accurate and reliable results.

II.

It is further ordered, That respondent Pompeian, Inc., its successors and assigns, shall, for three (3) years after the date of the last dissemination of the representation to which they pertain, 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; and

B. All test reports, studies, surveys, or other material in its possession or control that contradict, qualify, or call into question such representation or the basis upon which respondent relied for such representation.

III.

It is further ordered, That respondent Pompeian, Inc., shall 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 and shall secure from each such person a signed statement acknowledging receipt of this order.

IV.

It is further ordered, That respondent Pompeian, Inc., shall notify the Commission at least thirty (30) days prior to any proposed change such as the 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.

V.

It is further ordered, That respondent Pompeian, Inc., 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.

IN THE MATTER OF

QUALITY TRAILER PRODUCTS CORPORATION

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

Docket C-3403. Complaint, Nov. 5, 1992--Decision, Nov. 5, 1992

This consent order prohibits, among other things, a Texas manufacturer, seller, and distributor of axle products from requesting, suggesting, urging, or advocating that its competitors raise, fix or stabilize prices or price levels, or cease providing discounts. It also prohibits the respondent from entering into agreements that fix, raise, or stabilize prices. In addition, the order requires the respondent to provide a copy of the order to all of its directors, officers, and management employees.

Appearances

For the Commission: *Michael E. Antalics.*

For the respondent: *Paul B. Hewitt. Akin, Gump, Hauer & Feld,*
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 Quality Trailer Products Corporation, a corporation, hereinafter sometimes referred to as respondent or "Quality Trailer Products," has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Quality Trailer Products Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas with its office and principal place of business located at 633 Northwest Parkway, Azle,

Texas and its headquarters mailing address at P.O. Box 1349, Azle, Texas.

PAR. 2. Respondent is now, and for some time has been, engaged in the manufacture, advertising, offering for sale, sale and distribution of axle products. Axle products means axles of any size, hubs, spindles, brakes, and any other products used in making axles.

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

PAR. 4. In the fall of 1990, two representatives of Quality Trailer Products visited the headquarters of a competitor and met with an officer of the firm. During the course of the meeting, they invited the competitor to fix prices. They told the competitor that its price for certain axle products was too low, that there was plenty of room in the industry for both firms, and that there was no need for the two companies to compete on price. They also provided assurances to the competitor that Quality Trailer Products would not sell certain axle products below a specified price. The invitation, if accepted, would have constituted an agreement in restraint of trade.

PAR. 5. The aforesaid acts and practices constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act. The acts and practices herein alleged are continuing and will continue in the absence of the relief herein requested.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order,

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said 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 Quality Trailer Products Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas with its office and principal place of business located at 633 Northwest Parkway, Azle, Texas and its headquarters mailing address at P.O. Box 1349, Azle, Texas.

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

ORDER

I.

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

A. "*Respondent*" means Quality Trailer Products Corporation, its predecessors, subsidiaries, divisions, groups, and affiliates controlled by Quality Trailer Products Corporation, and all their respective directors, officers, employees, agents and representatives, and all their respective successors and assigns.

B. "*Axle products*" means axles of any size, hubs, spindles, brakes, and any other products used in making axles.

II.

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

A. Requesting, suggesting, urging, or advocating that any other producer or seller of axle products raise, fix or stabilize prices or price levels, cease providing discounts, or engage in any other pricing action; and

B. Entering into, threatening or attempting to enter into, adhering to, maintaining, or carrying out any combination, conspiracy, agreement, understanding, plan or program with any other producer or seller of axle products to fix, raise, establish, control, maintain or stabilize prices or price levels.

Provided, That nothing in this order shall prohibit respondent from: (1) agreeing to purchase or distribute any competitor's axle products, and (2) negotiating or agreeing upon the price under which any competitor's axle product will be purchased by respondent.

III.

It is further ordered, That respondent shall:

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

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

C. Require each person to whom a copy of this order is furnished pursuant to subparagraphs III. A. and B. of this order to sign and submit to Quality Trailer Products Corporation within thirty (30)

days of the receipt thereof a statement that: (1) acknowledges receipt of the order; (2) represents that the undersigned has read and understands the order; and (3) acknowledges that the undersigned has been advised and understands that non-compliance with the order may subject respondent to penalties for violation of the order.

IV.

It is further ordered, That respondent shall:

A. 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 within sixty (60) days from the date on which this order becomes final, annually thereafter for five (5) years on the anniversary date of this order, and at such other times as the Commission may by written notice to the respondent require; and

B. 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, or any other change in the corporation, including the creation or dissolution of subsidiaries, that may affect compliance obligations arising out of this order.

CONCURRING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

The available evidence shows that officers of Quality Trailer Products Corporation made an uninvited visit to the headquarters of a competitor and, in a face-to-face meeting with an officer of that competitor, made an unambiguous offer to fix the prices of certain products. No justification or excuse has been advanced for this conduct. In these limited circumstances, and based on evidence independent of any testimony or material within the control of the competitor who received the offer, I have voted to accept this consent agreement.

CONCURRING STATEMENT OF COMMISSIONER DEBORAH K. OWEN

The complaint in this matter alleges that two of respondent's representatives invited an officer of a competitor to fix prices.

Specifically, they told the competitor that certain of its prices were too low and that there was "no need" for the companies to compete on price, and provided assurances that respondent would not sell below a specified price. The invitation was not accepted. The conduct did not relate to any proposed, bona fide integration between the parties.

If the alleged invitation had been accepted, it clearly would have constituted a restraint of trade. However, in this case, the invitation to collude itself -- the attempt to engage in a naked price restraint -- is alleged to be an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act. No allegation is made in the complaint as to respondent's market power.

The order in this case prohibits the respondent from: (1) suggesting or advocating that any other producer or seller fix prices or engage in any other pricing action; and (2) entering, or attempting to enter, into any agreement with another producer or seller to fix prices. Purchasing, or negotiating the purchase of, a competitor's product is expressly not prohibited.

Enforcement actions with respect to invitations to collude on price are no longer novel. See *United States v. American Airlines*, 743 F.2d 1114 (5th Cir. 1984). However, the conduct in *American Airlines* was challenged as an illegal attempt to monopolize in violation of Section 2 of the Sherman Act. Under Section 2, proof of market power was required. Here, the complaint does not allege market power or dangerous probability of monopolization. The issue is whether Commission action is appropriate with respect to unaccepted invitations to collude on price in oligopolistic or unconcentrated markets.

Invitations to collude on price in such markets fall outside the parameters of the Sherman Act, and require invocation of Section 5 of the FTC Act. Although the reach of Section 5 has been argued vigorously, legislative history and case law support its extension beyond the strict purview of the Sherman and Clayton Acts, and preventing monopolization in its incipiency enjoys special recog-

dition.¹ Nonetheless, invoking the penumbra of the antitrust laws through the use of Section 5 warrants cautious analysis.²

With respect to oligopolistic markets, Professors Areeda and Turner have argued that "a solicitation to raise prices in concert may reduce [firms'] uncertainty, either by setting a target price or by raising confidence that rivals will follow."³ The invitation to collude may, by its very existence, and whether or not it is accepted, facilitate pricing coordination among rivals. Areeda and Turner suggest Section 5 of the FTC Act as one avenue for attacking such solicitations,⁴ and the Ethyl case makes clear that under circumstances of "oppressive" behavior Section 5 covers certain unilateral conduct in an oligopolistic setting.⁵

Another possibility, in a market with relatively few competitors, is that the invitation to collude comes from a representative of a broader group of competitors, who are now colluding, or who wish to collude in the future. If the group is sufficiently broad, acceptance of the offer will clearly injure consumers. However, having to allege and prove some broader conspiracy or other alternative to market power can be difficult. There may be no clear, observable manifestation of such conduct, and those engaged in it will usually take precautions to avoid leaving a paper trail to any agreement.

¹ For a general discussion of the scope of the statute, see Averitt, The Meaning of "Unfair Methods of Competition" in Section 5 of the Federal Trade Commission Act, 21 B.C.L.Rev. 227 (1980).

² As noted in the 1989 Report of the American Bar Association Section of Antitrust Law Special Committee to Study the Role of the Federal Trade Commission (at 20 n.11), "[although it is well established that Section 5's ban on 'unfair methods of competition' permits the FTC to proscribe conduct not reached by prevailing interpretations of the Sherman and Clayton Acts, there is a debate about how far Section 5 reaches beyond those Acts." The Report generally cautions that the "Commission should file a case only when it can anticipate relief that is practical, likely to remedy the perceived harm, and not unduly burdensome." *Id.* at 17, thus implying that some sort of demonstration of injury is appropriate.

³ P. Areeda & D. Turner, 6 Antitrust Law 117 (1986).

⁴ *Id.* at 118.

⁵ *E.I. DuPont de Nemours & Co. v. FTC*, 729 F.2d 128, 139 (2d Cir. 1984).

Apparently unconcentrated markets present the most difficult cases to analyze. Nonetheless, various theories of harm from solicitations to collude in such markets have been posited. First, invitations to collude on price may cause injury even in an unconcentrated market. For instance, as the recently issued Department of Justice and Federal Trade Commission Horizontal Merger Guidelines make clear, a firm may have the ability to price discriminate as to certain customers, or within certain smaller geographic regions.⁶ Under those circumstances, injury from acceptance of the invitation may be foreseeable since an apparently unconcentrated market may actually be narrower than would first seem. Furthermore, parties to the invitation may have differentiated products that are the first and second choices of certain buyers in the market, or they may share relative advantages in serving some buyers.⁷ Similarly, in a given bidding situation, the potential for harm to an individual customer may exist.⁸

The question then becomes: is it reasonable to assume from the solicitation to collude, in and of itself, that acceptance would injure consumers? Economists frequently tell us that firms do not usually engage in irrational acts. This could suggest that a party who solicits price collusion harbors some expectation that its acceptance will actually produce anticompetitive gains: why would anyone risk going to jail for price-fixing if he would not even benefit if the invitation were accepted? It may therefore be appropriate to begin with a rebuttable inference that acceptance of the solicitation would have harmed consumers. Requiring a showing of market power, or equivalent alternative, may shield attempts to reach such collusive

⁶ Sections 1.12 & 1.22. 5 (CCH) Trade Reg. Rep. ¶ 13,104 (Apr. 2, 1992) ("Merger Guidelines").

⁷ Merger Guidelines, Section 2.21.

⁸ The theory behind the cases brought by the Justice Department, in which market power has not been alleged, is that the solicitation is an attempted fraud on the customer because it is "an attempt to inflate prices [that] customers would be deceived into believing ... were governed by market forces, not the secret agreement of competitors." See, "Report from Official Washington," Remarks of James F. Rill, Assistant Attorney General, Antitrust Division, before the 39th Annual Antitrust Spring Meeting of the Section of Antitrust Law, American Bar Association (Apr. 12, 1991), at 9 (quoting *U.S. v. Critical Industries Co.*).

agreements from antitrust penalties. In a sense, the offender may be given a free bite at the apple -- if its solicitation is spurned, it is not subject to antitrust penalties, and if the invitation is accepted, an agreement may be consummated that presumptively harms consumers, but might never be detected.

While I find these arguments in favor of deterring invitations to collude on price compelling, it is not without a reservation. If it is objectively unlikely that the firms in question would succeed in exercising market power, or if some other theory of harm cannot be proffered, one might question whether the participants indeed anticipated any anticompetitive gains. This raises the concern that the solicitation that is being characterized as a solicitation to price-fix may in fact be something else, perhaps a solicitation to embark on a broader joint venture or some other efficient agreement. Some procompetitive joint ventures necessarily involve ancillary agreements that affect prices. Accordingly, we do not want to prohibit attempts to implement procompetitive joint activities simply because one of the terms the joint venturers must agree on is price, such as in the BMI situation.⁹ Otherwise, we could deprive consumers of efficient new forms of marketing or new products. This consideration imposes on us a duty to ensure that the conduct involved is indeed an invitation to join in a naked price restraint, and not an efficient agreement. Thus, while an iron-clad demonstration of harm is not, in my view, a prerequisite to prosecuting a Section 5 case against attempted price-fixing, the absence of potential injury compels us to check our facts on the issue of whether a pure naked restraint alone is involved.¹⁰ It is from this perspective that I believe we should also view the remedies in this case. Where the Commission finds reason to believe that the law has been violated, it will frequently "fence-in" the challenged conduct, prohibiting conduct that would otherwise be legal. This can ensure against future violations, facilitate enforcement of its order, and remedy any

⁹ *Broadcast Music Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1 (1979). See also *National Bancard Corp. v. Visa, U.S.A., Inc.*, 779 F.2d 592 (11th Cir. 1986).

¹⁰ In this case, I believe that at least one of the theories of harm applies and no *bona fide*, proposed integration was involved.

lingering effect of the violation. The order in this case, by imposing a blanket prohibition on urging any price action by a competitor, or attempting to enter into an agreement to fix prices, could be interpreted to prohibit, in addition to naked price-fixing invitations, a solicitation to enter into a procompetitive joint venture that incidentally involved the setting of prices. While such a prohibition might be acceptable in this case for fencing-in and enforcement purposes, I do not interpret this action to mean that the Commission intends to discourage solicitations to joint venture, or any other legitimate activity that may involve price discussions. Indeed, the Analysis of Proposed Consent Order to Aid Public Comment expressly notes that the facts in this case did not involve any *bona fide* integration, and the proviso expressly permits the discussion of prices with respect to certain sales between competitors.¹¹

In sum, I voted in favor of this consent agreement because the facts of the case compel a conclusion that an attempt was made to engage in hard-core, price-fixing. On that basis, and because of the Commission's unique enforcement needs here, I do not interpret our action to stifle legitimate efforts to joint venture. Finally, I believe that the conduct of the respondent was not harmless.

¹¹In light of the respondent's consent to these broad prohibitions, it is fair to assume that this particular company does not anticipate any future joint venture, or joint bid activity, that would be prohibited under this order. This would not necessarily be true of other companies, and more tailored relief might be appropriate under different facts. Furthermore, in the event that the respondent's plans change, they could petition the Commission for an order modification pursuant to 16 CFR 2.5.

IN THE MATTER OF

NIKKI FASHIONS, LTD., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE
TEXTILE FIBER PRODUCTS IDENTIFICATION ACT,
THE WOOL PRODUCTS LABELING ACT OF 1939 AND
THE FEDERAL TRADE COMMISSION ACT

Docket C-3404. Complaint, Nov. 13, 1992--Decision, Nov. 13, 1992

This consent order prohibits, among other things, a Massachusetts-based retailer of designer clothing and its owner from selling misbranded textile fiber and wool products, and from selling wearing apparel from which the required labels have been removed or mutilated.

Appearances

For the Commission: *Kristie A. Wood and Phoebe D. Morse.*

For the respondents: *Donald M. Bloch, Lane & Altman, Boston, MA.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, 15 U.S.C. 41 *et seq.* (hereinafter "FTC Act"), the Textile Fiber Products Identification Act, 15 U.S.C. 70 *et seq.* (hereinafter "TFPI Act"), and the Rules and Regulations promulgated thereunder 16 CFR Part 303, and the Wool Products Labeling Act of 1939, as amended, 15 U.S.C. 68 *et seq.* (hereinafter "Wool Act"), and the Rules and Regulations promulgated thereunder, 16 CFR Part 300, and by virtue of the authority vested in it "by said Acts, the Federal Trade Commission (hereinafter "Commission"), having reason to believe that Nikki Fashions Ltd., a corporation, and Nicolina P. Varrichione, individually and as an officer of said corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Acts, and it appearing to the Commission that a proceeding by

it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Nikki Fashions Ltd. is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Massachusetts, with its office and principal place of business located at 328 Worcester Road, Framingham, Massachusetts.

Respondent Nicolina P. Varrichione is sole shareholder and president of the corporate respondent, Nikki Fashions Ltd. She formulates, directs and controls the acts and practices of said corporate respondent, including the acts and practices hereinafter set forth. Her office and principal place of business are the same as that of said corporate respondent.

PAR. 2. Respondents are engaged in, among other things, the retail sale of women's clothing and accessories that were imported into, or manufactured in, the United States.

PAR. 3. Respondents, now and for some time last past, have sold, offered for sale, advertised, delivered, transported or caused to be transported, after their shipment in commerce, as "commerce" is defined in the TFPI Act, 15 U.S.C. 70 (k), women's dresses, suits, evening gowns, and other clothing that are textile fiber products as "textile fiber product" is defined in the TFPI Act, 15 U.S.C. 70(h)(1)-(h)(3).

PAR. 4. Certain of such textile fiber products, when offered for sale and sold by respondents, were misbranded, as "misbranded" is defined in Sections 4(b)(1), (2), (4), (5) and (j) of the TFPI Act, 15 U.S.C. 70b (b)(1),(b)(2),(b)(4), (b)(5) and (j), and the Rules and Regulations promulgated thereunder, 16 CFR Part 303, in that they did not have on, or affixed to, the inside center of the neck or elsewhere if the product did not contain a neck, a stamp, tag, label, or other means of identification showing the constituent fibers and percentages thereof and/or the name of the country where such products were processed or manufactured. The offering for sale and sale by respondents of misbranded textile fiber products violates Section 3(c) of the TFPI Act, 15 U.S.C. 70a(c).

PAR. 5. Prior to the time certain textile fiber products were sold and delivered to consumers, but after their shipment in commerce,

respondents caused or participated in the removal or mutilation of stamps, tags, labels, or other means of identifying the constituent fiber and percentages of such products and/or the country where such products were processed or manufactured. The removal or mutilation by respondents of stamps, tags, labels, or other means of identification violates Section 5(a) of the TFPI Act, 15 U.S.C. 70c(a).

PAR. 6. The acts and practices of respondents as set forth in paragraphs four and five were, and are, in violation of the TFPI Act and the Rules and Regulations promulgated thereunder and constituted, and now constitute, unfair methods of competition and unfair and deceptive acts or practices in or affecting commerce in violation of the Federal Trade Commission Act, 15 U.S.C. 41 *et seq.*

PAR. 7. Respondents, now and for some time last past, have introduced into commerce, transported, distributed, delivered for shipment, shipped, offered for sale, or sold in commerce, as "commerce" is defined in the Wool Act, 15 U.S.C. 68(g), women's dresses, suits, evening gowns, and other clothing that are wool products as "wool product" is defined in the Wool Act, 15 U.S.C. 68(d).

PAR. 8. Certain of such wool products, when offered for sale and sold by respondents, were misbranded, as "misbranded" is defined in Sections 4(a)(2)(A), (B), (D) and (f) of the Wool Act, 15 U.S.C. 68b (a)(2)(A), (B), (D) and (f), and the Rules and Regulations promulgated thereunder, 16 CFR Part 300, in that they did not have on, or affixed to, the inside center of the neck or elsewhere if the product did not contain a neck, a stamp, tag, label, or other means of identification showing the constituent fibers and percentages thereof and/or the name of the country where such products were processed or manufactured. The offering for sale and sale by respondents of misbranded wool products violates Section 3 of the Wool Act, 15 U.S.C. 68a.

PAR. 9. Prior to the time certain wool products were sold and delivered to consumers, respondents caused or participated in the removal or mutilation of stamps, tags, labels, or other means of identifying the constituent fibers and percentages of such products and/or the country where such products were processed or manufactured with intent to violate the provisions of the Wool Act. The removal or mutilation by respondents of stamps, tags, labels, or

other means of identification violates Section 5(b) of the Wool Act, 15 U.S.C. 68c(b).

PAR. 10. The acts and practices of respondents as set forth in paragraphs eight and nine were, and are, in violation of the Wool Act and the Rules and Regulations promulgated thereunder, and constituted, and now constitute, unfair methods of competition, and unfair and deceptive acts or practices, in or affecting commerce, within the meaning of the Federal Trade Commission Act, 15 U.S.C. 41 *et seq.*

PAR. 11. The clothing offered for sale and sold by respondents, as described in paragraph two, is "textile wearing apparel" as that term is defined in the Commission's Trade Regulation Rule relating to the Care Labeling of Textile Wearing Apparel, 16 CFR Part 423.1(g) (hereinafter "Care Labeling Rule"). When purchased by respondents from manufacturers, importers or other parties, these articles of wearing apparel, in most if not all instances, had attached thereto care labels as required by the Care Labeling Rule.

PAR. 12. Respondents caused or participated in the removal of the care labels attached to certain of these articles of wearing apparel, but failed to reattach the labels or substitute other care labels. Respondents then offered for sale and sold these articles of wearing apparel to consumers.

PAR. 13. As a result of the acts or practices of respondents as set forth in paragraph twelve, consumers were and are likely to be misled, to their detriment, into using improper care procedures that are harmful to the articles purchased from respondents.

PAR. 14. The acts or practices of respondents as set forth in paragraph twelve, constituted, and now constitute, deceptive acts or practices in or affecting commerce in violation of Section 5(a)(1) of the Federal Trade Commission Act.

PAR. 15. As a result of the acts or practices of respondents as set forth in paragraph twelve, consumers were and are likely to use improper care procedures that are harmful to the articles purchased from respondents and to experience substantial economic loss from using these procedures. Respondents conduct is not outweighed by any countervailing benefits to consumers or competition and consumers cannot reasonably avoid the economic loss caused by respondents' conduct.

PAR. 16. The acts or practices of respondents as set forth in paragraph twelve, constituted, and now constitute, unfair acts or practices in or affecting commerce in violation of Section 5(a)(1) of the Federal Trade Commission Act.

PAR. 17. In the course and conduct of their business, and at all times mentioned herein, respondents have been, and now are, in substantial competition in or affecting commerce with corporations, firms and individuals engaged in the sale of merchandise of the same general kind and nature as merchandise sold by respondents.

PAR. 18. The acts and practices of respondents, as herein alleged, were and are to the prejudice and injury of the public and respondents' competitors. The acts and practices of respondents, as herein alleged, may recur in the absence of the relief herein requested.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and respondents having been furnished thereafter with a copy of a draft of complaint which the Boston 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, the Textile Fiber Products Identification Act, and the Wool Products Labeling Act of 1939; and

The respondents, their attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by 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 purpose only and does not constitute an admission by respondents 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.

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

record for a period of sixty (60) days, and having duly considered the comment filed thereafter by an interested person pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Nikki Fashions Ltd. is a corporation organized, existing, and doing business under the laws of the Commonwealth of Massachusetts. Its office and principal place of business is located at 328 Worcester Road, Framingham, Massachusetts.

Nicolina P. Varrichione is sole shareholder and president of the corporate proposed respondent named herein. Ms. Varrichione formulates, directs and controls the acts or practices of proposed respondent Nikki Fashions Ltd. Her office and principal place of business are the same as that of said corporate proposed respondent.

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

ORDER

I.

It is ordered, That respondents Nikki Fashions Ltd., a corporation, its successors and assigns, and its officers, and Nicolina P. Varrichione, individually and as an officer of said corporation, and respondents' representatives, agents and employees, directly or through any corporation, subsidiary, division or any other device, in connection with any textile fiber product as "textile fiber product" is defined in the Textile Fiber Products Identification Act, as amended (hereinafter "TFPI Act"), do forthwith cease and desist from offering for sale, selling, advertising, delivering, transporting or causing to be transported, after shipment in commerce, as "commerce" is defined in the TFPI Act, textile fiber products that are misbranded in that they do not have securely affixed to, or placed on, each such product in the location, manner, and form required by the TFPI Act, a stamp, tag, label or other means of identification

correctly showing, in a clear and conspicuous manner, each element of information required to be disclosed by Section 4(b) of the TFPI Act.

II.

It is further ordered, That respondents Nikki Fashions Ltd., a corporation, its successors and assigns, and its officers, and Nicolina P. Varrichione, individually and as an officer of said corporation, and respondents' representatives, agents and employees, directly or through any corporation, subsidiary, division or any other device, in connection with any wool product as "wool product" is defined in the Wool Products Labeling Act of 1939, as amended (hereinafter "Wool Act"), do forthwith cease and desist from offering for sale, selling, advertising, delivering, transporting or causing to be transported, after shipment in commerce, as "commerce" is defined in the Wool Act, wool products that are misbranded in that they do not have securely affixed to, or placed on, each such product in the location, manner, and form required by the Wool Act, a stamp, tag, label or other means of identification correctly showing, in a clear and conspicuous manner, each element of information required to be disclosed by Section 4(a)(2) of the Wool Act.

III.

It is further ordered, That respondents Nikki Fashions Ltd., a corporation, its successors and assigns and its officers, and Nicolina P. Varrichione, individually and as an officer of said corporation, and respondents' representatives, agents and employees, directly or through any corporation, subsidiary, division or any other device, in connection with the offering for sale and sale of any textile fiber product, as "textile fiber product" is defined in the TFPI Act, do forthwith cease and desist from removing or mutilating, or causing or participating in the removal or mutilation of, any stamp, tag, label or other identification required by the TFPI Act to be affixed to textile fiber products, prior to the time any such product is sold and delivered to the ultimate consumer, without substituting therefor labels conforming to Section 4(b) of the TFPI Act.

IV.

It is further ordered, That respondents Nikki Fashions Ltd., a corporation, its successors and assigns and its officers, and Nicolina P. Varrichione, individually and as an officer of said corporation, and respondents' representatives, agents and employees, directly or through any corporation, subsidiary, division or any other device, in connection with the offering for sale and sale of any wool product, as "wool product" is defined in the Wool Act, do forthwith cease and desist from removing or mutilating, or causing or participating in the removal or mutilation of, any stamp, tag, label or other identification required by the Wool Act to be affixed to wool products, prior to the time any such product is sold and delivered to the ultimate consumer, without substituting therefor labels conforming to Section 4(a)(2) of the Wool Act.

V.

It is further ordered, That respondents Nikki Fashions Ltd., a corporation, its successors and assigns and its officers, and Nicolina P. Varrichione, individually and as an officer of said corporation, and respondents' representatives, agents and employees, directly or through any corporation, subsidiary, division or any other device, in connection with the offering for sale and sale of any textile wearing apparel, as "textile wearing apparel" is defined in the Commission's Trade Regulation Rule relating to the Care Labeling of Textile Wearing Apparel (hereinafter "Care Labeling Rule"), 16 CFR Part 423, do forthwith cease and desist from removing, or causing or participating in the removal of any label or tag required by the Care Labeling Rule to be affixed to textile wearing apparel, unless respondents reattach such label or tag to the article of wearing apparel, prior to the time any such product is sold and delivered to the ultimate consumer.

VI.

It is further ordered, That respondents shall distribute a copy of this order to all present and future personnel, agents or representatives having sales, advertising, or policy responsibilities with respect to the subject matter of this order and that respondents secure from each such person a signed statement acknowledging receipt of said order.

VII.

It is further ordered, That, whenever a stamp, tag, label or other form of identification which shows information required by the TFPI Act or Wool Act is substituted or otherwise removed respondents shall keep records for a period of five (5) years sufficient to show the information set forth on the removed stamp, tag, label, or other form of identification, as well as the name or names of the person or persons from whom such product was received.

VIII.

It is further ordered, That respondents shall, for a period of five (5) years after this order becomes final, maintain and upon request, make available to the Federal Trade Commission for inspection and copying, all documents that relate to the manner and form in which respondents have complied with this order.

IX.

It is further ordered, That the corporate respondent shall, for a period of ten (10) years from the date of this order, notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in Nikki Fashions Ltd., such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation that may affect compliance obligations arising out of this order.

X.

It is further ordered, That the individual respondent shall, for a period of ten (10) years from the date of this order promptly notify the Commission of the discontinuance of her present business or employment and of each affiliation with a new business or employment whose activities include the sale or offer for sale of any type of "textile fiber product," "wool product" or "textile wearing apparel," as those terms are defined in the TFPI Act, the Wool Act and the Care Labeling Rule, respectively, or of her affiliation with a new business or employment in which her own duties and responsibilities involve the sale or offer for sale of any such product. Each such notice shall include the respondent's new business address and a statement of the nature of the business or employment in which the respondent is newly engaged as well as a description of respondent's duties and responsibilities in connection with the business or employment.

XI.

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

IN THE MATTER OF

HAROLD HONICKMAN, ET AL.

Docket 9233. Show Cause Order, Nov. 16, 1992

ORDER TO SHOW CAUSE

The Commission's final order in this matter requires respondents Harold Honickman and the entities he controls (hereafter collectively "Mr. Honickman"), for a ten year period, to obtain the Commission's prior approval before acquiring certain assets of or rights related to bottling operations in the New York metropolitan area. The order defines "bottling operation" to mean, *inter alia*, an entity that distributes and sells carbonated soft drinks ("CSDs"). Mr. Honickman filed, on October 24, 1991, a Request for a Declaration or in the Alternative for Approval to Obtain Certain Assets of New York Seven-Up ("Application") to acquire, among other things, the Hawaiian Punch and Perrier franchises owned by New York Seven-Up. That Application raises issues concerning whether the Commission's order applies to the acquisition of franchise rights for Hawaiian Punch, Perrier, and other non-CSD products. For the reasons set out below, the Commission is issuing this Order to Show Cause why the final order should not be modified to exclude from the coverage of Paragraph II. the acquisition of the right to distribute or sell non-CSD products.

The Commission's November 2, 1989, complaint charged that Mr. Honickman's acquisition of Seven-Up Brooklyn Bottling Company, Inc., violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, and Section 7 of the Clayton Act, 15 U.S.C. 18, by eliminating competition in the CSD market in certain New York City area counties.¹ After the complaint was issued, but before trial, Mr. Honickman agreed to settle the matter. The consent order was issued

¹ The product markets alleged in the complaint are "branded soft drinks" and "all soft drinks." Complaint ¶ 17. "Soft drink" is defined as "a carbonated soft drink or 'CSD.'" Complaint ¶ 1.n.

on July 25, 1991, and became final on August 5, 1991, the date the order was served.

Paragraph II. of the order prohibits Mr. Honickman, for ten years, from acquiring interests in, assets of, or rights related to bottling operations without the Commission's prior approval, unless he satisfies certain hold separate and divestiture requirements of Paragraph III. Specifically, Paragraph II. provides that, for a period of ten (10) years after the date this order becomes final, respondents shall not, without the prior approval of the Commission, acquire directly or indirectly all or any part of the stock of, share capital of, equity interest in, assets of or rights related to any Bottling Operation in any county in the New York Metropolitan Area where at the time of such acquisition any Existing Honickman Bottling Operation distributes CSDs directly using company-owned or equity distributors to supermarkets; ...

Paragraph I. F. of the order defines "Bottling Operation" as, any business, person, or other entity that distributes and sells CSDs directly using company-owned or equity distribution to supermarkets pursuant to a franchise, license, distribution contract, or other similar agreement; *provided, however*, a Bottling Operation shall not include any business, person or other entity that distributes and sells CSDs only by warehouse delivery or through a beer distributor that does not hold a CSD franchise, license or similar distribution agreement.

Finally, Paragraph I.E. of the order defines "CSDs" as, carbonated soft drinks that are produced by adding carbonated water to a syrup consisting of a concentrate flavoring and a sweetener and are classified under the four-digit Standard Industrial Classification industry code 2086.

For purposes of this order, CSDs shall not include non-carbonated products, carbonated or still water, iced tea, lemonade, products containing in finished form more than ten (10) percent fruit juice, or isotonic or sport drinks.

In his Application, and other materials, Mr. Honickman asserts that Paragraph II. of the order does not cover certain of the proposed acquisitions, and in the alternative requests that any required approval be granted. Mr. Honickman asserts that it was not his

understanding that the order would apply to non-CSD acquisitions,² and he urges that understanding as a reason either to interpret the order not to apply, or, if the order does apply, to grant approval to the acquisitions of several non-CSD franchises. The Commission's letter responding to the Application explains why the respondent's understandings or purposes are not controlling for purposes of order interpretation. The Commission has concluded that the order covers these acquisitions of Hawaiian Punch and Perrier. However, given other circumstances, the Commission has considered whether the order should be modified to exclude such coverage.

Mr. Honickman also asserts that the Commission's staff likewise believed, when it negotiated the consent agreement, that the resulting order would not cover such acquisitions. He has included some of the materials supporting that assertion in his June 24, 1992, submission, and has argued the point in the litigation relating to the Commission's previous denial of his request for approval to acquire the assets of the Seven-Up Brooklyn system.

The staff's memoranda to the Commission recommending acceptance of the consent agreement did not set out a detailed explanation of the order's coverage, but there are statements in some of those memoranda indicating that some of the staff shared Mr. Honickman's view of the order's coverage. Although the record does not show how the Commission itself interpreted the language when it accepted the consent agreement, the record does show that both the staff that considered the question and respondent believed at the time that these acquisitions would not be covered.³

² In a June 24, 1992, submission, Mr. Honickman cites to contemporaneous statements by his counsel showing that at the time the consent agreement was being considered by the Commission Mr. Honickman believed that non-CSD franchise acquisitions would not be covered by the order.

³ This is not a case in which the staff or Commission simply did not consider an issue regarding order coverage. Rather, staff considered the issue but reached an incorrect conclusion, and communicated that conclusion to the Commission.

Also, most important, this is not a case in which respondent alone misinterpreted the order when accepting a settlement. Respondents remain responsible for understanding their obligations under orders, and cannot avoid those obligations by later asserting that they did not intend to undertake them.

In this case, considerations of fairness and the public interest warrant modifying the order to eliminate possibly unintended coverage. The Commission notes that it will retain its general statutory authority to review horizontal acquisitions by Mr. Honickman, without specific coverage in the order.⁴

Accordingly, the Commission hereby issues this Order to Show Cause why the proceeding in Docket No. 9233 should not be reopened to modify the order to add the following language to the end of Paragraph II:

Provided, further, however, that Paragraph II. of this order shall not apply to the acquisition of the right to distribute or sell solely any product that is not a CSD.

In accordance with Section 3.72 of the Commission's Rules of Practice and Procedure, 16 CFR 3.72, respondent has 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.

Commissioner Azcuenaga and Commissioner Starek recused.

⁴ The Commission reserves the right to decline to modify an order, notwithstanding the interpretations by counsel for respondent and the Commission's staff, if the competitive protections afforded by the order serve the public interest.

IN THE MATTER OF

REALTY COMPUTER ASSOCIATES, INC.

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

Docket C-3405. Complaint, Nov. 23, 1992--Decision, Nov. 23, 1992

This consent order prohibits, among other things, Realty Computer Associates, Inc., d/b/a Computer Listing Service, a Missouri-based real-estate multiple listing service (MLS), from refusing to publish exclusive-agency listings, or restricting its members from offering such listings. In addition, the respondent is prohibited from requiring, as a condition of membership or use of its MLS, that any applicant or member engage in real-estate brokerage full time, or that any applicant or member maintain an office located on commercially zoned property or within the respondent's service area.

Appearances

For the Commission: *Michael T. Miller* and *C. Steven Baker*.

For the respondent: *Michael P. Keleher, Keleher & Eastman*, Gladstone, MO.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that respondent Realty Computer Associates d/b/a Computer Listing Service ("CLS"), a corporation, has violated and is violating Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint stating its charges as follows:

PARAGRAPH 1. As used in this complaint:

(1) "*Multiple listing service*" means a clearinghouse through which member real estate brokerage firms regularly exchange information on listings of real estate properties and share commissions with other members.

(2) "*Listing agreement*" means any agreement between a real estate broker and a property owner for the provision of real estate brokerage services.

(3) "*Listing broker*" means any broker who lists a real estate property with a multiple listing service pursuant to a listing agreement with the property owner.

(4) "*Selling broker*" means any broker, other than the listing broker, who locates the purchaser for a listed property.

(5) "*Exclusive agency listing*" means any listing under which a property owner appoints a broker as exclusive agent for the sale of the property, at an agreed commission, but reserves the right to sell the property personally to a direct buyer (one not procured in any way through the efforts of any broker) at an agreed reduction in the commission or with no commission owed to the agent broker.

(6) "*Exclusive right to sell listing*" means any listing under which a property owner appoints a broker as exclusive agent for the sale of the property, and agrees to pay the broker an agreed commission if the property is sold, whether the purchaser is located by the broker or any other person, including the owner.

PAR. 2. Realty Computer Associates, Inc., is a Missouri corporation d/b/a Computer Listing Service with its office and principal place of business located at 6651 N. Oak Trafficway, No. 1, Gladstone, Missouri.

PAR. 3. CLS is and has been at all times relevant to this complaint a corporation organized for the profit of its members within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

PAR. 4. In the course and conduct of their businesses, and through the policies, acts, and practices described below, CLS and its members are in or affect commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. CLS is, and for some time has been, providing a multiple listing service for member real estate brokerage firms. CLS

maintains a computerized database of residential real estate available for sale in Clay and Platte counties, Missouri area and its surroundings (CLS's "service area"). It distributes the information to its members through online terminals and frequent publication of books containing property listings.

PAR. 6. CLS's member firms are owned and operated by real estate brokers who, for a commission, provide the service of bringing together buyers and sellers of residential real estate as well as other services designed to facilitate sales of these properties. Each CLS member agrees to submit all of its exclusive right to sell listings for residential real estate located within CLS's service area for publication to the entire membership of the multiple listing service, and to share commissions with those member firms that successfully locate purchasers for properties it has listed. Only members may participate in the multiple listing service.

PAR. 7. Membership in CLS's multiple listing service provides valuable competitive advantages in the brokering of residential real estate sales in CLS's service area. Membership significantly increases the opportunities for brokerage firms to enter into listing agreements with residential property owners, and significantly reduces the costs of obtaining current and comprehensive information on listings and sales.

PAR. 8. Publication of listings through CLS's multiple listing service generally is considered by sellers and their brokers to be the fastest and most effective means of obtaining the broadest market exposure for residential property in CLS's service area.

PAR. 9. CLS is the predominate multiple listing service in the Clay and Platte County area. The vast majority of brokers that deal in residential real estate in this area are members of CLS. The vast majority of broker-assisted sales of residential real estate in this area go through CLS. Sales of residential real estate listings published by CLS totaled about \$284 million in 1990.

PAR. 10. Except to the extent that competition has been restrained as described herein, CLS members are and have been in competition among themselves in the provision of residential real estate brokerage services within CLS's service area.

PAR. 11. In adopting the policies and engaging in the practices described in paragraphs twelve through fourteen below, CLS has

been and is acting as a combination of its members, or in conspiracy with some of its members, to restrain trade in the provision of residential real estate brokerage services within CLS's service area.

PAR. 12. CLS has been and is now refusing to publish any exclusive agency listing through its multiple listing service.

PAR. 13. CLS has been and is now requiring that each member broker or applicant for membership maintain a real estate office in a commercially zoned property located within the confines of CLS's service area.

PAR. 14. CLS has been and is now requiring that each member broker's or applicant for membership's primary business concern must be that of listing or selling real estate.

PAR. 15. The purpose, capacity, tendency, or effect of the combination or conspiracy described in paragraphs twelve through fourteen above has been, and continues to be, to restrain competition among brokers and to injure consumers by, *inter alia*:

(1) Discouraging or inhibiting brokers from accepting exclusive agency listings or similar contractual terms, such as terms that allow the property owner to pay a reduced commission or no commission if the owner sells the property other than through the broker, thereby restraining competition among brokers based on their willingness to offer or accept different contract terms that may be attractive and beneficial to consumers;

(2) Substantially reducing the ability of residential property owners to compete with real estate brokers in locating purchasers;

(3) Restraining competition from brokerage firms located outside of CLS's service area;

(4) Impeding new membership in CLS by part time or less than full time real estate brokers and impeding entry into the residential real estate business in CLS's service area.

PAR. 16. The policies, acts, practices, and combination or conspiracies described above constitute unfair methods of competition or unfair acts or practices in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. The alleged conduct, or the effects thereof, are continuing and will continue or recur in the absence of the relief requested.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of Realty Computer Associates, Inc., a corporation, d/b/a Computer Listing Service ("CLS") and CLS having been furnished with 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 CLS with violation of the Federal Trade Commission Act; and

CLS, its attorney, and counsel for the Commission having executed an agreement containing a consent order, an admission by CLS of all the jurisdictional facts set forth in the draft of complaint, a statement that the signing of the agreement is for settlement purposes only and does not constitute an admission by CLS that the law has been violated as alleged in the 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 CLS has violated the Federal Trade Commission Act, and that a complaint should issue stating its charges in that respect, and having accepted the executed consent agreement and placed that 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 issues its complaint, makes the following jurisdictional findings, and enters the following order:

(1) Respondent CLS is a Missouri corporation with its principal office and place of business at 6651 N. Oak Trafficway, No. 1, Gladstone, Missouri.

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

ORDER

DEFINITIONS

The following definitions shall apply to this order:

(1) "*Multiple listing service*" means a clearinghouse through which member real estate brokerage firms regularly exchange information on listings of real estate properties and share commissions with other members.

(2) "*Listing agreement*" means any agreement between a real estate broker and a property owner for the provision of real estate brokerage services.

(3) "*Listing broker*" means any broker who lists a real estate property with a multiple listing service pursuant to a listing agreement with the property owner.

(4) "*Selling broker*" means any broker, other than the listing broker, who locates the purchaser for a listed property.

(5) "*Exclusive agency listing*" means any listing under which a property owner appoints a broker as exclusive agent for the sale of the property, at an agreed commission, but reserves the right to sell the property personally to a direct buyer (one not procured in any way through the efforts of any broker) at an agreed reduction in the commission or with no commission owed to the agent broker.

(6) "*CLS*" means Realty Computer Associates, Inc., d/b/a Computer Listing Service and its successors, assigns, directors, officers, committees, agents, representatives, members, and employees.

I.

It is ordered, That respondent CLS, directly or indirectly, or through any corporation, subsidiary, division, or other device, in connection with the operation of a multiple listing service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall cease and desist from:

A. Restricting or interfering with:

- (1) The publication on CLS's multiple listing service of any exclusive agency listing of a member; or
- (2) Any member's offering or accepting any exclusive agency listing;

Provided, however, That nothing contained in this subpart shall prohibit respondent from: (a) including a simple designation, such as a code or symbol, that a published listing is an exclusive agency listing; or (b) applying reasonable terms and conditions equally applicable to the publication of any listing by CLS.

B. Adopting, maintaining or enforcing any bylaw, rule, regulation, policy, agreement or understanding, or taking any other action that has the purpose or effect of:

- (1) Requiring as a condition of CLS membership or use of its multiple listing service that any applicant or member engage in real estate brokerage full time;
- (2) Conditioning membership in CLS or use of its multiple listing service on any applicant or member maintaining a real estate office in a commercially zoned property; or
- (3) Conditioning membership in CLS or use of its multiple listing service on any applicant or member maintaining a real estate office located within the confines of CLS's service area;

Provided, however, That nothing in this subpart shall prohibit respondent from adopting, maintaining, or enforcing any reasonable and nondiscriminatory policy to assure that its members are actively engaged in real estate brokerage and that listings published on respondent's multiple listing service are adequately serviced.

II.

It is further ordered, That CLS shall:

A. Within thirty (30) days after the date this order becomes final, furnish an announcement in the form shown in Appendix A to each member of CLS.

B. Within sixty (60) days after the date this order becomes final, amend its bylaws, rules and regulations, and all other of its materials to conform to the provisions of this order, and provide each member with a copy of the amended bylaws, rules and regulations, and other amended materials.

C. For a period of three (3) years after the date this order becomes final, furnish an announcement in the form shown in Appendix A to each new member of CLS within thirty (30) days of the new member's admission.

III.

It is further ordered, That CLS shall:

A. Within ninety (90) days after the date this order becomes final, submit a verified written report to the Federal Trade Commission setting forth in detail the manner and form in which CLS has complied and is complying with this order.

B. In addition to the report required by Paragraph III (A), annually for a period of three (3) years on or before the anniversary date on which this order becomes final, and at such other times as the Federal Trade Commission or its staff may by written notice to CLS require, file a verified Written report with the Federal Trade Commission setting forth in detail the manner and form in which CLS has complied and is complying with this order.

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

D. Notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in CLS, 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 CLS that may affect compliance obligations arising out of this order.

APPENDIX A

[CLS's Regular Letterhead]

As you may be aware, the Federal Trade Commission has entered into consent decrees with several multiple listing services in order to halt certain multiple listing service practices that have been alleged to be unlawful restraints of trade. To avoid litigation, Realty Computer Associates, Inc., d/b/a Computer Listing Service ("CLS") has entered into such a consent agreement. The agreement is not an admission that CLS or any of its members has violated any law. For your information, CLS is prohibited from the following practices:

A. Restricting or interfering with:

- (1) the publication on CLS's multiple listing service of any exclusive agency listing of a member; or
- (2) any member's offering or accepting any exclusive agency listing.

B. Adopting, maintaining or enforcing any bylaw, rule, regulation, policy, agreement or understanding, or taking any other action that has the purpose or effect of:

- (1) requiring as a condition of CLS membership or use of its multiple listing service that any applicant or member engage in real estate brokerage full time; or
- (2) conditioning membership in CLS or use of its multiple listing service on any applicant or member maintaining a real estate office in a commercially zoned property located within the confines of CLS's area map.