IN THE MATTER OF

COLLEGE FOOTBALL ASSOCIATION, ET AL.

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

Docket 9242. Complaint, Sept. 5, 1990 -- Final Order, June 16, 1994

This final order dismisses the complaint which alleged that the College Football Association (CFA) and Capital Cities/ABC, Inc. illegally restrained competition through agreements which gave ABC exclusive rights to televise certain college football games. The final order to dismiss was due to the Commission's lack of jurisdiction over CFA, citing its not-for-profit nature. Dismissal was also determined to be in the public interest.

Appearances

For the Commission: *Michael E. Antalics.*

For the respondents: *Michael Sibarinm, Winston & Strawn*, Washington, D.C. *Clyde A. Muchmore, Crowe & Dunlevy*, Oklahoma City, OK. *A. Douglas Melamed, James Carr, Randolph D. Moss* and *David P. Donovan*, Washington, D.C.

COMPLAINT

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

RESPONDENTS

PARAGRAPH 1. Respondent College Football Association ("CFA") is an unincorporated association with its principal place of business at 6668 Gunpark Drive, Boulder, Colorado.

PAR. 2. CFA is an organization whose members include many of the nation's major college-football-playing institutions, and which,

among other things, negotiates and administers the sale of certain college football television rights for its participating members.

PAR. 3. For the year ending December 31, 1989, CFA generated revenue of approximately $33.75 million from the sale of college football telecast rights.

PAR. 4. Respondent Capital Cities/ABC, Inc. ("Capital Cities") is a corporation organized and existing under the laws of the State of New York with its principal executive offices at 77 West 66th Street, New York, New York.

PAR. 5. Capital Cities is principally engaged in television and radio broadcasting. ABC Television Network, one of the three major over-the-air television networks, is wholly owned by Capital Cities, which also owns 80% of ESPN, a cable sports programming service.

PAR. 6. For the year ending December 31, 1989, Capital Cities had net revenue of $4.96 billion.

JURISDICTION

PAR. 7. Each of the respondents maintains, and has maintained, a substantial course of business, including the acts or practices alleged in this complaint, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

ANTICOMPETITIVE ACTS OR PRACTICES

PAR. 8. Respondent College Football Association, through agreement with and among its members pursuant to which its members have agreed not to compete with each other and the association, has entered into telecast rights agreements with telecasters that restrict competition in the marketing of college football telecasts.

PAR. 9. Respondent CFA and respondent Capital Cities (or entities owned or controlled by Capital Cities) have entered agreements which give Capital Cities exclusive telecast rights to certain college football games and which otherwise restrict competition in the marketing of college football telecasts.

ANTICOMPETITIVE EFFECTS

PAR. 10. By engaging in the acts or practices described in paragraphs eight and nine of this complaint, respondents have

unreasonably restrained competition in the following ways, among others:

(a) Competition among schools in the marketing of college football telecast has been hindered, restrained, foreclosed and frustrated;

(b) Competition among telecasters of college football games has been hindered, restrained, foreclosed and frustrated; and

(c) Consumers have been deprived of the selection of college football games that would have otherwise been televised in a competitive environment.

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

Commisioner Azcuenaga dissenting.*

INITIAL DECISION

BY JAMES P. TIMONY, ADMINISTRATIVE LAW JUDGE
JULY 29, 1991

On this date my orders dismissing the respondents were filed. By Rule 3.24(a)(2) and Rule 3.51(a), the opinions supporting those orders shall be the Initial Decision in this case, wherein, as a matter of law,

The complaint must be dismissed, without prejudice. Order re Motions to Dismiss, Coca-Cola Company of the Southwest, et al., Docket 9215, filed October 25, 1988.

ORDER DISMISSING COLLEGE FOOTBALL ASSOCIATION

I. JURISDICTION OVER CFA

A. *Prologue*

* Commissioner Owen concurs in the issuance of the complaint, except to the extent that it alleges that contractual provisions governing the minimum and maximum number of appearances of a particular member school or conference violate Section 5 of the Federal Trade Commission Act.

College Football Association ("CFA") moves for summary decision[1] for lack of jurisdiction, asserting that it is organized as a nonprofit association and is not "organized to carry on business for its own profit or that of its members." 15 U.S.C. 44.

Complaint counsel advance four theories for upholding jurisdiction: (1) CFA carries on business for the profit of its members, (2) the majority of its members are state agencies subject to jurisdiction, (3) CFA operates a business and not a charity, and (4) CFA members seek profits through their telecast activities.

B. *The Statute*

The starting point in determining the scope of the Commission's jurisdiction must be the language of the statute itself. *United States v. Turkette*, 452 U.S. 576, 580 (1981).[2]

Section 5(a)(2) of the Act empowers the Commission "to prevent persons, partnerships, or corporations from using unfair methods of competition in or affecting commerce." 15 U.S.C. 45 (a)(2) (1988). Section 4 of the Act defines the term "corporations" as used in the Act to include an association that is "organized to carry on business for its own profit or that of its members."[3] 15 U.S.C. 44 (1988). Thus, under the Act, the Commission has jurisdiction over the CFA only if it is organized "for its own profit or that of its members."

Traditionally, organizations do not "carry on business for . . . profit" unless they are organized to distribute dividends or other benefits in the nature of dividends to their members or shareholders.[4] Comment, "Piercing the Nonprofit Corporate Veil," 66 Marq. L. Rev. 134, 136 (1982). Moreover, an organization does not operate for

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[1] If the Commission lacks jurisdiction it cannot render a summary decision but must dismiss the action without prejudice. Factual disputes may be resolved in doing so. *Cf., Prakash v. American University*, 727 F.2d 1174, 1182 (D.C.Cir . 1984); *Narios Corp. v. Nat'l Maritime Union of America*, 236 F. Supp. 657, 659 (E.D. Pa. 1964), *aff'd*, 359 F.2d 853 (3rd Cir.), *cert. denied*, 385 U.S. 900 (1966).

[2] "The Federal Trade Commission is a creation of Congress, not a creation of judges, contemporary notions of what is wise policy. . . . The question to be answered is 'not what the [Commission] thinks it should do but what Congress has said it can do.'" *National Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672, 674 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974).

[3] The provision does not exempt nonprofit associations from operation of the antitrust laws; nonprofit associations are subject to suit in federal court under the Sherman and Clayton Acts. The provision, rather, limits the Commission's jurisdiction over nonprofit organizations. Complaint counsel bear the burden of "'affirmatively'" establishing that jurisdiction exists. *Oliver v. Trunkline Gas Co.*, 789 F.2d 341, 343 (5th Cir. 1986).

[4] The author further explained: "That does not mean that [a nonprofit corporation] is prohibited from earning a profit. Rather, it is only the distribution of those earnings as dividends that is prohibited." (Emphasis added.) 66 Marq. L. Rev. at 136.

profit because it distributes benefits to other nonprofit organizations. The test is whether "any excess of revenue over expenses resulting from the operation . . . is distributed to any private person or company as a profit." *Logan Lanes, Inc. v. Brunswick Corp.*, 378 F.2d 212, 216 (9th Cir.), *cert. denied*, 389 U.S. 898 (1967) (interpreting the "not operated for profit" language in Robinson-Patman Act).

A corporation is subject to Commission jurisdiction if it directly[5] or indirectly[6] pursues profits for itself or its members. The issue is not whether CFA and its members are participating in "commercial"[7] rather than "charitable"[8] activities. CFA admits it conducts commercial activities.[9] And complaint counsel have much evidence of the commercial nature of college football as practiced by CFA's members. A nonprofit organization, however, does not jeopardize its status by selling or buying property. A nonprofit organization may obtain revenues in excess of expenses. Receipt of income in excesses of expenses, making an organization capable of self-perpetuation or expansion, is not "profit" within meaning of Section 4. *Community Blood Bank of Kansas City Area, Inc. v. FTC*, 405 F.2d 1011, 1016 (8th Cir. 1969). Nor does an organization's nonprofit status depend upon the source of its revenues. The test instead is whether the organization's funds are properly used for recognized public

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[5] *Ohio Christian College*, 80 FTC 815 (1972), involved an ostensibly nonprofit corporation that directly pursued profits for the individual respondent.

[6] Cases finding jurisdiction over trade associations that indirectly pursued profits for the private persons or for-profit companies that were their members include *American Medical Ass'n*, 94 FTC 701, 926 (1976), enforced as modified, 638 F.2d 443 (2d Cir. 1980), *aff'd by an equally divided Court*, 455 U.S. 676 (1982); *Michigan State Medical Soc'y*, 101 FTC 191 (1983); *National Comm'n on Egg Nutrition*, 517 F.2d 485, 488 (7th Cir. 1975), *cert. denied*, 426 U.S. 919 (1976) ("NCEN was organized for the profit of the egg industry"); *Nat'l Harness Mfgrs' Assn. v. FTC*, 268 F. 705, 706-10 (6th Cir. 1920) ("persons and concerns engaged in selling at wholesale harness and saddlery goods.")

[7] That was the issue in *Hennessey v. NCAA*, 564 F.2d 1136 (5th Cir. 1977) where the NCAA unsuccessfully asserted "that it is outside the ambit of the antitrust laws." *Id.* at 1148. In Hennessey the question was whether the NCAA was engaged in "commercial" activity, since NCAA argued that the Sherman Act was intended for the business world, and not for noncommercial aspects of activities which are educational. *Id.* at 1148. The CFA does not assert an exemption from the antitrust laws.

[8] "Charity" is only one of many recognized nonprofit activities under the federal income tax, 26 U.S.C. 501(c)(3), or under general law of nonprofit organizations, including educational, athletic, political, religious, social, and others. B.R. Hopkins, The Law of Tax Exempt Organizations (5th Ed. 1987) at p. 55; 19 Fletcher Cyc. Corp. Section 2:21 at p. 28.

[9] "Business" can be carried on by nonprofit or for-profit organizations. 1 Fletcher Cyc. Corp. Section 68.05 at p. 920. Section 4 of the FTC Act assumes that an organization beyond the Commission's jurisdiction may conduct business activity; the statute neutrally refers to an association organized to "carry on business." The distinguishing factor is whether it does so "for its own profit or that of its members."

purposes, rather than distributed to private persons or for-profit companies.

C. *Jurisdictional Theories*

1. Commercial activity theory

Complaint counsel argue that a nonprofit corporation is subject to the Commission's jurisdiction if it "is essentially a commercial enterprise." They rely on *American Medical Ass'n v. FTC*, 638 F.2d 443, 448 (2d Cir. 1980), aff'd by an equally divided Court, 455 U.S. 676 (1982) ("AMA"). But that case concerned whether individual, profit-seeking doctors obtained pecuniary benefits through the activities of their professional association.[10]

Complaint counsel also blend the jurisdictional requirement that respondent's activities affect commerce (Section 5) with the separate jurisdictional requirement that respondent must be organized for profit (Section 4). The Commission's enforcement power extends only to organizations engaged in conduct "in or affecting commerce." 15 U.S.C. 45(a)(2) (1988). Similarly, Section 1 of the Sherman Act applies only to contracts, combinations, and conspiracies "in restraint of trade or commerce." 15 U.S.C. 1 (1988). Complaint counsel argue that their test, "whether an organization is a commercial enterprise," is the same as whether an organization is "engaged in commerce" under Section 1 of the Sherman Act. Opposition at 13, n.11.[11] They rely on *Hennessey v. NCAA*, 564 F.2d 1136 (5th Cir. 1977) and *NCAA v. Board of Regents of Oklahoma University.*, 468 U.S. 85 (1984). Both cases considered whether the conduct in question constituted "trade or commerce" under the Sherman Act. Neither case addressed the separate "for profit" requirement of the FTC Act.

All parties agree that the controlling case on this jurisdictional issue is *Community Blood Bank of Kansas City v. FTC*, 405 F.2d 1011 (8th Cir. 1969), where the nonprofit corporation, Community Blood Bank, competed against two for-profit blood banks for the same customers. The Commission found that "Community and the

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[10] The pecuniary benefit went to AMA members who were "engaged in the profit motivated private practice of medicine. . ." 94 FTC at 926.

[11] This would read the "for profit" requirement of Section 4 out of the Act. Yet, Congress undoubtedly intended the Section 4 requirement to have independent meaning. *United States v. Menasche*, 348 U.S. 528, 538 (1955).

hospitals perform their functions in much the same manner as commercial entities[12] such as the commercial blood bank and 'for-profit' hospitals, and receive compensation for goods supplied and services rendered." 70 FTC at 909. The Community Blood Bank employed "method[s] [that] had the practical effect of insuring that hospitals [with two exceptions] would use only blood supplied through Community." *Id.* at 824. Nevertheless, the Eighth Circuit held that the Commission did not have jurisdiction, and it expressly ruled that the fact that Community and the for-profit blood banks functioned in the same manner and competed against each other was irrelevant. 405 F.2d at 1019.

The court held that the fact "'that Community Blood Bank conducts its affairs in a businesslike fashion and makes profits on the sale of blood . . . is certainly of no relevance here.'" 405 F.2d at 1019 (quoting Commissioner Elman's dissenting opinion). The court ruled that the commercial source of the income was immaterial, explaining:

> A religious association might sell cookies at a church bazaar, or receive income from securities it holds, but so long as its income is devoted exclusively to the purposes of the corporation, and not distributed to members or shareholders, it surely does not cease to be a nonprofit corporation merely because it has income, or keeps its books and records . . . in much the same manner as commercial enterprises.

Id. at 1019-1020.[13]

The "commercial activity" test also finds no support in *Iowa State University of Science and Technology v. United States*, 500 F.2d 508 (Ct.Cl. 1974). In that case, the court held that a commercial television station owned by a state university constituted an "unrelated

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[12] In *Community Blood Bank*, "both the Area Hospital Association and Community were organized to carry on business in the broadest sense;" "[t]hey had permanent paid staff [and] a place of business"; they "kept records and files, collected dues, or fees"; and Community "bought supplies for the processing of blood [and] maintained an elaborate laboratory and storage facilities." 70 FTC at 863-864. Community's contracts with the hospitals were "couched in terms of . . . commercial transaction[s]"; "Community paid donors $15 per unit" while charging "the hospital a $25 responsibility fee and a $9 processing fee, or $34"; "Community . . . actually secured a gross profit on several of its operations"; and "the return on its entire operation was sufficiently in excess of total expenses so that it was able to repay some of the loans which were made to it at the time of its organization." *Id.* at 764-765, 836, 864.

[13] After the Community Blood Bank case was decided, the Commission sought to amend Section 4 of the Act. Congress rejected the proposed amendment. H.R. Rep. No. 95-339, 95th Cong., 1st Sess. 120 (1976).

business" within the meaning of Section 511 of the Internal Revenue Code. The court explained:

> Income accruing to an educational institution exempt from taxation under Internal Revenue Code Section 501(c)(3) is taxable if the income is generated by the operation of an unrelated trade or business. To be taxable, the activity in question must be (1) a trade or business, (2) regularly carried on, and (3) not substantially related, other than through the production of income, to the purpose for which the institution was granted exemption under Section 501. Treas. Reg. Section 1.513-1(a)(2).

Id. at 516. Section 511, and the court's holding in Iowa State University, however, bear no relation to the question whether the Commission may assert jurisdiction over the CFA.

College football television revenues are not unrelated business income under Section 511 and the Iowa State University case. Internal Revenue Service rulings hold that the CFA's sale of college football telecast rights does not constitute an "unrelated business."[14]

Complaint counsel argue that the Iowa State University case establishes that it is the "source" of the funds received, and not their "destination," that determines whether the Commission has jurisdiction over an association under Section 4 of the FTC Act.[15] The "source" of the income standard that was applied in the Iowa State University case is tied directly to the language that Congress used in creating the unrelated business tax,[16] and has nothing to do with the

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[14] Revenue rulings relied upon by the CFA stress that "[t]he broadcasting of the organization's . . . regulated athletic events promotes the various amateur sports, fosters widespread public interest in the benefits of its nationwide amateur athletic program, and encourages public participation." Rev. Rul. 89-295, 1980-2 C.B. 194, 195.

[15] Before 1951 the Internal Revenue Code exempted from income tax corporations organized and operated exclusively for charitable purposes, and some courts held that colleges could obtain exempt income by owning for-profit corporations, engaged solely in business, the profit from which went exclusively to the nonprofit college, because it was the use of the income which indicated the nonprofit purpose, *e.g.*, *C.F. Mueller Co. v. Comm. of Internal Revenue*, 190 F.2d 120 (3rd Cir. 1951) (New York University Law School obtained exempt income from a company making and selling spaghetti.) Noticing the loss of tax and the impact on for-profit companies by such tax exempt competitors, Congress then imposed a new tax on the institutions' "unrelated business taxable income." Kaplan, Intercollegiate Athletics and the Unrelated Business Income Tax, 80 Columbia L.R. 1430, 1432-34 (1980). The new statute shifted the focus from the use of the income, *C.F. Mueller Co.*, 190 F.2d at 121, to the method of procuring the funds. *Iowa State University,* 500 F.2d at 518-19. Thereafter, the "source" of the income was the important consideration in determining the exemption. . . ." *Id.*

[16] Some courts used the source of income test to tax such commercial organizations even before the feeder exclusion was added by the Revenue Act of 1950, *e.g.*, *University Hill Foundation v. C.I.R.*, 446 F.2d 701, 703-04 (9th Cir. 1971), *cert. denied*, 405 U.S. 965 (1972). The unrelated business income amendment eliminated any doubt.

FTC Act. The Internal Revenue Code defines "unrelated business taxable income" to mean "the gross income derived by any organization from any unrelated trade or business." 26 U.S.C. 512(a)(1) (1988). (Emphasis Added.) Section 4 of the FTC Act, in contrast, asks whether the association "is organized to carry on business for its own profit or that of its members."[17] 15 U.S.C. 44 (1988). And, as shown above, an association is "organized to carry on business for . . . profit" only if it can distribute the excess of revenue over expenses to shareholders or other private interests. The cases decided under Section 4 hold that the relevant test is "how [the organization] disposed of [its] profits." *Ohio Christian College*, 80 FTC at 848; *Community Blood Bank*, 405 F.2d at 1019.

Commercial activity by CFA or its members does not constitute carrying on business for profit under the statute.

2. State school theory

Complaint counsel argue that the Commission has jurisdiction over the CFA because many of its members are state instrumentalities -- and thus "persons" -- which receive pecuniary benefits from the CFA. They argue that cases like *Massachusetts Board of Registration in Optometry*, 110 FTC 549 (1988), and *City of Minneapolis*, 105 FTC 304 (1985), show that the Commission has jurisdiction over state agencies as 'persons' acting in a proprietary capacity. They do not allege that the state schools distribute any part of the telecast funds to individuals or firms who seek monetary gain. Rather, they concede that the "state schools act in the public interest and do not distribute revenue to shareholders. . ." Opposition at 27.

Complaint counsel argue that action against the CFA is more efficient than action against CFA's members. Opposition at 24-25. Jurisdiction, however, is a question of adjudicative power, not of convenience. *Finley v. United States*, 490 U.S. 545 (1989). Nor does the AMA case support the argument. In AMA a trade association was subject to the Commission's jurisdiction because it operates to generate profits for private, profit seeking members. 94 FTC at 983. Here, the television revenues go, not for the profit of its members, but

[17] A literal reading of the statute would seem to mean that Commission jurisdiction is based solely on a nonprofit association's organizational purpose, and not its operation. It is uncontested that CFA is organized as a nonprofit association.

through CFA to the members to be used for tax exempt public purposes of education and amateur athletics.

Moreover, the Eighth Circuit in Community Blood Bank held that the Commission lacked jurisdiction over the Kansas City Area Hospital Association because the Association -- like the CFA -- was not organized for profit. The court reached that result, even though 12 of the Association's members were "instrumentalities of federal, state, county, or local governments," 70 FTC at 767.[18]

3. Piercing the corporate veil

Complaint counsel argue that "the CFA is not truly a charitable enterprise," and they maintain that they seek "to pierce the nonprofit veil of the enterprise." They also promise to pierce the corporate veil of the state schools and show that their football programs are businesses. Tr. 109.[19]

These arguments are essentially the same as the commercial activity theory. But even if it were alleged that profits are being dispersed to profit seeking entities,[20] respondents have credibly asserted the lack of such evidence (findings 7 and 10, *infra*), and complaint counsel have offered no evidence in support. This action cannot continue based on possibility. In this situation, a party opposing a motion for summary judgment "must come forward with concrete evidence indicating the existence of a genuine issue of material fact," *Kreuzer v. American Academy of Periodontology*, 735 F.2d 1479 1495 (D.C. Dir. 1984), and cannot rest on "conclusory allegations," *De Leon v. St. Joseph Hosp., Inc.*, 871 F.2d 1229, 1236 (4th Cir), *cert. denied*, 110 S. Ct. 87 (1989).

D. *CFA's Nonprofit Purposes*

Federal tax law recognizes several proper nonprofit purposes, including, charitable, educational, scientific, religious, literary, and

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[18] Here, CFA's 66 member colleges include three federal, 14 private and 49 state institutions. Appendix to CFA's Motion for Summary Judgment, March 19, 1991.

[19] Even if they could prove that college football is a commercial enterprise, the jurisdictional test is whether the revenues are going to private individuals directly or as dividends.

[20] Complaint counsel argue that some coaches receive high salaries. In order to show that the CFA schools are operating their football programs "for profit" within the meaning of Section 4 of the FTC Act, complaint counsel would have to show, that their athletic programs are actually run by the coaches in order to generate profits for themselves -- paid out as dividends disguised as phony salaries. Complaint counsel do not allege, however, that any private person or for-profit company is receiving such disguised "profits" from the CFA or the colleges.

promoting amateur sports competition. 26 U.S.C. 501(c)(3). CFA promotes both amateur sports competition and education.

1. Amateur athletic competition

College football and television exposure of college football have nonprofit purposes. In 1976, Congress amended Section 501(c)(3) to include as a proper nonprofit purpose "fostering national or international amateur sports competition." P.L. 94-455, Section 1313, 1976 U.S. Code Cong. & Ad. News (90 Stat.) Vol. 1, p. 1730. Inclusion of amateur sports competition within Section 501(c)(3) rendered pursuit of this purpose -- by itself -- a sufficient basis upon which to confer nonprofit, tax exempt status. 26 CFR 1.501(c)(3)-1(d)(1)(iii).

CFA, through its television contracts and other programs fosters intercollegiate football and that in itself is a proper nonprofit purpose.[21]

2. Educational purpose

CFA promotes educational purposes. Congress and the IRS have already determined that athletics has value to education and that football television has value to athletics.

The Senate and House Committee Reports constituting the legislative history of the "unrelated income" tax laws state:

> Athletic activities of schools are substantially related to their educational functions. For example, a university would not be taxable on income derived from a basketball tournament sponsored by it, even where the teams were composed of students from other schools.

S. Rep. No. 2375, 81st Cong., 2nd Sess. (1950) at 29; H. Rep. No. 2319, 8lst Cong., 2nd Sess. (1950) at 37.

Internal Revenue Rulings state that an athletic organization's sale of telecasting rights of an athletic event is not an unrelated trade or business under IRC Section 513 (the unrelated business income statute), and that a university's television contracts, whether through an athletic association or otherwise, are related to its exempt purpose

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[21] CFA's organizational documents show that its purpose fosters national amateur sports competition (App. Tab 4, p.1, Art. II). Complaint counsel apparently concede this point. "([S]tate schools act in the public interest and do not distribute revenue. . . .") Opposition Brief at p. 27.

within the meaning of Section 513. *See* the Revenue Rulings attached as Exhibits "B," "C," and "D" to CFA's Supplemental Brief, Rev. Rul. 80-296, 80-295, and 80-294, respectively. In Private Letter Rulings, the IRS scrutinized whether a large university which was a member of a national athletic association realized unrelated income from the sale, by the athletic association, of the telecasting rights for the university's football games.[22] The IRS explained some of the purposes served by public exposure of a football game:

> For example, an audience for a game may contribute importantly to the education of the student-athlete in the development of his/her physical and inner strength and to the education of the student body and the community-at-large in heightening interests in and knowledge about the participating schools. In regard to the student-athlete, the knowledge that an event is being observed heightens its significance, which raises the levels of both competitive effort and enjoyment. Attending the game enhances student interest in education generally and in the institution because such interest is whetted by exposure to a school's athletic activities. Moreover, the games (and the opportunity to observe them) foster those feelings of identification, loyalty, and participation typical of a well-rounded educational experience.[23]

95 IRS Letter Rulings, CCH Reports 7851002, Dec. 26, 1978.

The CFA's television rights to college football games, with the proceeds going to the schools to help support their athletic programs,[24] have a nonprofit educational purpose.

3. CFA's nonprofit status

In determining whether an organization is carrying on business for "profit," the Commission and the courts defer to an IRS determination that the organization qualifies as tax exempt under Section 501(c)(3). The reason for this respect is in *American Medical Ass'n*,

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[22] IRS Private Letter Rulings 7851002, 7851005, and 7851006, 95 IRS Letter Rulings, CCH Reports, Dec. 26, 1978.

[23] While private letter rulings do not have precedential value, the rationale makes sense, and the Revenue Rulings attached to CFA's Supplemental Brief, which incorporate the same holdings, represent the official position of the Internal Revenue Service. 26 CFR 601, Section 601.601. They are entitled to "great deference." *Amato v. Western Union International, Inc.*, 773 F.2d 1402, 1411-12 (2d Cir. 1985).

[24] Football television revenues on the average comprise one-fifth of one percent of a university's total expenditures, and about 5% of a university athletic department's expenditures Exhibit A to CFA's Reply filed May 17, 1991. CFA does not pay the television revenues directly to any athletic department of its members. It remits the revenues to the college or university, or for some institutions, to the regional athletic conference of which the member is a participant, which then distributes the revenues to the conference's members, CFA Submission of July 25, 1991.

94 FTC 701, 989-990 (1979), where the Commission distinguished Community Blood Bank. The Commission explained that the respondents' inability to quality under Section 501(c)(3) set them apart from the KCAHA. The Commission stated that failure to qualify under Section 501(c)(3) did not lead inexorably to the conclusion that there was jurisdiction:

> Of course, failure to qualify as tax exempt under Section 501(c)(3) does not by itself necessarily mean that a respondent is within the reach of Section 4 of the FTC Act, since, as we have discussed supra, the pecuniary benefit of its activities to its members must constitute a substantial part of its activities under Section 4.

94 FTC at 990 and n.17. Thus, while an IRS determination that an organization does not qualify as tax exempt under Section 501(c)(3) necessitates further inquiry under the Commission's "substantiality" test, an IRS determination "that a respondent is or is not organized and operated exclusively for eleemosynary purposes should not be disregarded." 94 FTC at 990.[25]

4. Distribution of funds to nonprofit members

The money CFA pays to its members does not represent a distribution of profits. A distribution of funds by one nonprofit organization to another nonprofit organization is permitted, *National Foundation v. United States*, 13 Cl.Ct. 486, 492 (Cl.Ct. 1987). Since CFA's members are nonprofit organizations, CFA may distribute revenues to them without losing its own nonprofit status.

II. FINDINGS OF FACT

Complaint counsel have failed to raise disputed issues of fact that could support a finding of jurisdiction. All of the facts placed in issue by complaint counsel concern whether the CFA is involved in

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[25] The importance of tax exempt status in determining whether an organization is nonprofit is also reflected in other cases. In *Ohio Christian College*, 80 FTC 815, 848 (1972), in taking jurisdiction over an educational corporation the Commission relied upon a similar case where the IRS "found that because of the lax financial dealings with the founders of the school, it was not in fact an exempt corporation." 80 FTC at 848. In Community Blood Bank, the court found that the corporations were organized under Missouri's not-for-profit corporation law, that 43 of 45 of the corporate respondents, members were also organized under nonprofit corporation laws or were instrumentalities of federal, state, county or local governments, and that: "All satisfied the requirements of the federal law entitling them to exemption from federal income tax liability." 405 F.2d at 1020, n.16.

"commercial" activity.[26] However, this question bears no relevance to the jurisdictional test set out in the Federal Trade Commission Act. The factual disputes alleged by complaint counsel are, as a matter of law, not material to the jurisdictional issue.

CFA's motion for summary decision is supported by evidence demonstrating that neither it nor its members operate for profit.[27] The facts relating to the lack of subject matter jurisdiction in this case are genuinely undisputed, or are immaterial to the issue. Specifically, there is no genuine dispute that:

(1) CFA is organized and operated as a nonprofit association;[28]

(2) CFA's tax exempt status under Section 501(c)(3) has been recognized by the IRS. Admitted, Opposition Brief filed Apr. 22, 1991 at p. 31, paragraph 2;

(3) CFA's directors and officers are not paid, and CFA's staff, including its executive director, are paid salaries to compensate for services rendered;[29]

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[26] An order on March 28, 1991, directed that complaint counsel set forth "a statement of facts as to which, it is contended, there exists a genuine issue necessary to be litigated." Order re Summary Decision Motions. Complaint counsel replied that the "CFA's organizational objectives include acting in the economic interests of the big-time football programs of its members," that the "CFA . . . is essentially a commercial enterprise," that the "CFA has at least one paid official," that "most of the members with [the] CFA are state instrumentalities," that "[t]elevision football is the major CFA function," that CFA members use revenues received from the CFA "to enhance the athletic programs of [the] CFA members," and that "Mr. Neinas does not explain [in his affidavit) the destination of . . . $2,955,500 that [the] CFA received from its television contracts." Opposition at 31-33. Even if true, these allegations would not support jurisdiction.

[27] CFA provided additional support in a Supplemental Brief, with accompanying exhibits, filed on April 5, 1991. Appendix A to that Brief demonstrates that the CFA does not retain net earnings from year-to-year and does not distribute earnings to any individual or for-profit organization. The appendices to CFA's Motion for Summary Decision show that no member of the CFA is a for-profit organization.

[28] Neinas Tr. (Tab 2) attached to Appendix to CFA's Motion for Summary Decision, at 7-8; Tab 3 paragraphs 2 and 3; Tab 4, p. 1 Art. II.

Money from the sale of television rights is used to sustain college football programs and promote amateur athletic competition, a recognized public purpose for nonprofit status. Complaint counsel rely on the affidavit of a professor at Indiana University who asserts that CFA is a commercial enterprise. The affidavit does not raise a factual dispute. CFA agrees that the sale of its members' television rights is a business activity. That, however, is not relevant to the question of whether the activity is carried on for profit.

[29] Tab 73, Neinas Aff'd., paragraph 2. Complaint counsel asserts that the payment of a salary to CFA's Executive Director, Charles M. Neinas, is the payment of revenues to "officer." Opposition Brief at p. 8, n.7. The officers of the CFA are described in its Articles of Association, Tab. 4. p. 4, Art. V, paragraph 4. They consist of a chairman and a secretary/treasurer, neither of whom is paid a salary. Tab. 73, Neinas Affid., paragraph 2. Mr. Neinas is employed as executive director of the CFA, not as an officer. *Id.*, paragraphs 1 and 2. Moreover, there is no prohibition of a nonprofit organization paying reasonable compensation for services rendered by an officer. *E.g.*, 1 Fletcher Cyc. Corp. Section 68.05 at p.919. CFA's articles accordingly permit such payments. Tab 4, P.6, Art. IX, paragraph 1. What is prohibited is net earnings inuring to private interests.

(4) CFA's audited financial statements show that the proportion of cumulative television revenues used to pay salaries and employee benefits has been a fraction of 1%;[30]

(5) CFA's members all are organized under applicable nonprofit laws or as state or federal instrumentalities;[31]

(6) Television football has become a major function of CFA, enhancing the quality of its members football programs and sustaining viewer interest in such programs; [32]

(7) The television revenues earned by the sale of CFA's members, football telecasting rights are used by the institutions for their proper non-profit purposes, including sustaining their athletic programs;[33]

(8) CFA negotiates and signs the television contracts, receives the revenues, and makes payments to the membership. All CFA members receive "participation pool" payments and those which are actually televised receive appearance or rights fees. (Admitted, Opposition Response Brief, p. 33, paragraph 8.);

(9) CFA is obligated to pay the rights fees within 90 days after a game has been played, and makes the participation payments in June following the football season in which the games are played, investing the funds in the interim in conservative investments. (Admitted, Opposition Response Brief, p. 33, paragraph 9.);

(10) The earnings on investments of television revenues are used to pay CFA's administrative expenses for the television plan; CFA attempts to pay all of the television revenues to its members and is largely successful in doing so; and[34]

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[30] The salaries and benefits are included in the audited financial statements, CFA's Supplemental Brief, Ex. A, within the itemization column for "expenses."

[31] It is undisputed that all of CFA's members are tax exempt. As to whether CFA's members are nonprofit, the dispute is not factual (complaint counsel's Opposition, filed Apr. 22, 1991 at pp. 31-32, paragraph 5). The state institutions are promoting the same public interests as the private ones, and many have obtained Section 501(c)(3) status, solely as a convenience. *See* IRS letters under Tabs 29, 32, 34, 40, 43, 51, 59, 60, 61, 63, 64 and 70. Donations to the state institutions for their public purpose functions are deductible as "charitable contribution" under IRC Section 170(c). *See* IRS letters under Tabs 24, 25, 27, 29, 30, 32, 34, 36, 37, 56, 58, 64, and 65.

[32] Tab 2, Neinas Tr. at 25-29, 32, 175-79, 216-17; Ex. K to complaint counsel's Opposition, at p. 215.

[33] Tab 2, Neinas Tr. at 214-15. Television revenues enhance the educational programs of CFA members as well as their amateur athletic competitors, regardless of their commercial source, *supra*.

[34] Neinas Tr. at 182-83. CFA has distributed 98% of the revenues remaining after production costs for its previous contracts with CBS and ESPN. Tab 73, Neinas Aff'd., paragraph 4. The remaining 2% is held in escrow until CFA's final expenses are determined; none of the net revenues are retained by the CFA. Tab 73, Neinas Aff'd., paragraph 4.

(11) Of the revenues obtained under the television contracts, CFA retains only that portion of gross revenues necessary to pay its administrative expenses relating to administration of the television plan and contracts.[35]

What quarrels exist or are purported to exist with respect to these basic facts are not material to resolution of the jurisdictional issue.

III. CONCLUSIONS OF LAW

1. Section 5(a)(2) of the FTC Act limits the jurisdiction of the Commission to "persons, partnerships, or corporations," 15 U.S.C. 45(a)(2).

2. Section 4 of the FTC Act defines "corporation" for purposes of Section 5(a)(2) to include an association "which is organized to carry on business for its own profit or that of its members." 15 U.S.C. 44.

3. CFA is organized and operated as a nonprofit association under 26 U.S.C. 501(c)(3), Internal Revenue Code ("IRC"). CFA's tax-exempt status under IRC Section 501(c)(3) has been recognized by the Internal Revenue Service ("IRS").

4. A nonprofit organization is exempt under Section 4 and Section 5 of the FTC Act unless the organization is only ostensibly organized not-for-profit, and is actually used as a vehicle to obtain profit. *Community Blood Bank of Kansas City Area, Inc. v. FTC,* 405 F.2d 1011, 1017 (8th Cir. 1969). *Cf. FTC v. National Commission on Egg Nutrition,* 517 F.2d 485, 488 (7th Cir. 1975), *cert. denied,* 426 U.S. 919, 49 L.Ed.2d 372 (1976).

5. "Profit" within the meaning of Section 4 of the FTC Act does not include the use by a nonprofit organization of net revenues for its own self-perpetuation or expansion. *Community Blood Bank*, 405 F.2d at 1016.

6. A determination by the IRS, that a respondent organized and operated for purposes recognized as conferring nonprofitstatus under Section 501(c)(3) should not be disregarded. *American Medical Ass'n, et al.,* 94 FTC 701, 989-990 (1979), *aff'd sub. nom., American Medical Ass'n v. Federal Trade Commission*, 638 F.2d 443 (2d Cir. 1980), *aff'd by an equally divided court*, 455 U.S. 676, 71 L.Ed.2d 546 (1982).

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[35] Tab 73, Neinas Aff'd., paragraphs 3-5; Tab 2, Neinas Tr. at 182-83.

7. The television contracts here promote the purposes for which CPA has been conferred tax-exempt status under IRC Section 501(c)(3), including the fostering of national amateur sports competition. Rev.Rul. 80-296, 1980-2 C.B. 195; Rev.Rul. 80-295, 1980-2 C.B. 194; Rev.Rul. 80-294, 1980-2 C.B. 187. (Exhibits B-D to CFA's Supplemental Brief filed Apr. 5, 1991.)

8. CPA does not carry on business for its own profit within the meaning of Section 4 of the FTC Act.

9. CFA's members are comprised of (a) federal instrumentalities, (b) state public educational institutions, and (c) private nonprofit educational institutions.

10. Federal instrumentalities are nonprofit, tax-exempt organizations. IRC, Section 115(2). State educational institutions are also nonprofit, tax-exempt organizations. IRC Section 115(l).

11. CFA's members which are private organizations are all nonprofit, tax-exempt organizations under Section 501(c)(3).

12. A nonprofit organization may distribute revenues to and for the benefit of other nonprofit organizations while retaining its nonprofit status. Rev.Rul. 67-149, 1967-1 C.B. 133; *National Foundation, Inc. v. United States*, 13 Cl.Ct. 486 (1987).

13. That a nonprofit organization has as members "persons" within the meaning of Section 5 of the FTC Act is insufficient to confer jurisdiction over the organization under Section 4 of the FTC Act. In Community Blood Bank, of the 43 member hospitals of KCAHA, 12 were instrumentalities of federal, state, or local governments and 2 were organized as proprietary corporations. 70 FTC at 767.

14. CFA is not organized and does not carry on business for the profit of its members, and has no members which are organized or operated for-profit.

ORDER

College Football Association is a nonprofit association which does not carry on business for its own profit or that of its members, within the meaning of Section 4 of the FTC Act, 15 U.S.C. 44. The complaint against the CFA must therefore be dismissed for lack of jurisdiction by the Commission over the CFA.

ORDER DISMISSING CAPITAL CITIES/ABC, INC.

This case involves the sale of college football telecast rights by College Football Association to Capital Cities/ABC, Inc. An order has been entered dismissing College Football Association on the grounds that it is not organized for its own profit or that of its members, and therefore is not subject to Commission jurisdiction. Respondent Capital Cities also now seeks dismissal.

Where public rights are involved one party to a contract may be sued without joining the other. *Pepsi Co., Inc. v. FTC*, 472 F.2d 179 (2d Cir. 1972), *cert. denied,* 414 U.S. 876 (1973). Here, however, the restriction on the Commission's power to proceed against CFA should not be circumvented by seeking to enjoin the other party to the arrangement.[1] A jurisdictional limitation should not be attacked collaterally:[2]

> the distinction made in the Act between corporations acting for profit and nonprofit corporations would be erased if all the Commission had to do, in order to obtain jurisdiction, was to name the officers, directors and other personnel of a nonprofit corporation as the respondents.[3]

Complaint counsel argues that "there is a separate and distinct monopolization count against Capital Cities for buying multiple college football telecast packages." Complaint counsel's nonbinding statement filed Oct. 26, 1990, briefly refers to a theory of violation by Capital Cities involving its aggregating exclusive college football telecast "packages" and gaining anticompetitive advantage over competing telecasters.[4] The complaint, however, lacks allegations of monopoly power or purpose, or any reference to a theory of violation by Capital Cities separate from the arrangement with CFA.

The complaint must be dismissed, without prejudice, to allow the Commission to consider whether to proceed against Capital Cities

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[1] *Cf. Community Blood Bank of Kansas City Area, Inc. v. FTC*, 405 F.2d 1011, 1022 (8th Cir. 1969) ("the Commission is not entitled to acquire jurisdiction otherwise lacking over the nonprofit by indirection, that is, by enforcing its order against the pathologists, administrators or key employees of the corporation"); *Ohio Christian College*, 80 FTC 815, 844-45 (1972) ("to circumvent a legislative restriction of the Commission's authority over certain classes of companies by issuing orders against all individual officers, agents, directors or trustees would be contrary to the intent of Congress").

[2] *Champaign-Urbana News Agency, Inc. v. J.L. Cummins News Co., Inc.*, 632 F.2d 680, 692-93 (7th Cir. 1980)

[3] *Community Blood Bank*, 405 F.2d at 1021 (quoting from Commissioner Elman's dissenting opinion).

[4] This theory is on page 27 of the nonbinding statement and is attached as an appendix.

alone. *Capital Records Distributing Corp.*, 58 FTC 1170, 1173 (1961).

APPENDIX

This is page 27 of the nonbinding statement.

telecasters, enlarge its own college football audience, and increase the price of advertising during college football.[37]

The network and time period exclusivity provisions obviously prevent other telecasters from competing with ABC and ESPN for viewers and advertising revenues.[38] Additionally, by purchasing the exclusive CFA package (and adding it to the exclusive Big Ten/Pac-10 package it already held), Capital Cities recognized that it would be able to reduce the number of college football network exposures, thus decreasing the available time for advertising and giving it the ability to charge college football advertisers a significant premium.[39]

OPINION OF THE COMMISSION

BY STEIGER, *Chairman*:

I. INTRODUCTION

On September 5, 1990, the Federal Trade Commission issued an administrative complaint alleging, *inter alia*, that respondents College Football Association ("CFA") and Capital Cities/ABC, Inc. ("Capital Cities") had unreasonably restrained competition in the marketing of college football telecasts and among telecasters of college football games. Administrative litigation ensued. Both CFA and Capital Cities filed motions to dismiss for lack of jurisdiction

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[37] The evidence will show that the benefits that Capital Cities receives from its participation in the exclusive CFA agreements is not unintended: Capital Cities has continually sought college football exclusives for both ABC and ESPN. This conduct -- Capital Cities' seeking (and obtaining) the collective agreement of CFA schools to refuse to deal with other networks and to restrict their dealings with all other networks and to restrict their dealings with all other telecasters -- amounts to the activities of a boycott ringleader. *Klor's, supra* note 36 (one retailer received agreements from multiple suppliers that they would boycott a competing retailer).

[38] Moreover, the restrictions are beneficial to ABC in that, if the network's affiliates wish to show a CFA game at the time ABC is telecasting a CFA game, they must show the ABC game because no competing CFA game may be telecast during that period. Affiliates are thus deterred from preempting the network programming.

[39] Indeed, by aggregating the exclusive CFA package with previously acquired packages, Capital Cities can gain an anticompetitive advantage over competing telecasters. *See Standard Oil Co. v. United States*, 337 U.S. 293 (1949); *Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 676 F.2d 1291, 1302-03 (9th cir. 1982) (a single innocuous contract may belong to a pattern of contractual relations that significantly restrain trade in the relevant market), *cert. denied*, 459 U.S. 1009 (1982).

based on the assertion that CFA is a nonprofit association which does not carry on business for its own profit or that of its members. After oral argument, on November 13, 1990, Administrative Law Judge James P. Timony denied both motions. PC Tr. 110-11.[1] In a subsequent written order, the Administrative Law Judge explained that CFA's motion raised a "close question" that could not be decided "in the absence of a record." Order re CFA's Motion to Dismiss at 1, 3 (December 27, 1990).

Following nine months of discovery,[2] CFA and ABC filed renewed motions for summary decision and/or to dismiss based on CFA's nonprofit status. On July 29, 1991, the Administrative Law Judge issued an Initial Decision finding that the Commission lacked jurisdiction over CFA and ordered that the complaint against CFA be dismissed without prejudice. On that same date, Judge Timony further ordered that the complaint against Capital Cities be dismissed without prejudice, to allow the Commission to consider whether to proceed against Capital Cities alone. Complaint counsel have appealed from these orders. For the reasons set forth below, the complaint as to CFA is dismissed for lack of jurisdiction. Under the circumstances of this litigation, we find it in the public interest to dismiss the complaint against CFA with prejudice, and the complaint as to Capital Cities is dismissed without prejudice.

As discussed more fully *infra* in Section III, respondent CFA is an unincorporated association of 66 colleges and universities. It is formally organized under its articles as a nonprofit association. It is treated as exempt from federal income taxation under Internal Revenue Code Section 501(c)(3), 26 U.S.C. 501(c)(3). All of CFA's members are organized under state nonprofit laws or as state or federal instrumentalities. CFA negotiates and signs contracts for televising college football games involving its members. It distrib-

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[1] The following abbreviations are used in this opinion:

ID	Initial Decision
IDF	Initial Decision finding number
PC Tr.	Transcript of prehearing conference (November 13, 1990)
OA Tr.	Transcript of Commission oral argument (January 30, 1992)
CCAB	Complaint Counsel's Appeal Brief
CFAB	Brief of Appellee College Football Association
CCRB	Complaint Counsel's Reply Brief

[2] Depositions of 41 witnesses were conducted and over 4,000 pages of transcripts--in addition to interrogatory responses and document productions--were generated. Although discovery was substantial, it was not complete at the time of the Initial Decision.

utes the revenues derived from these contracts to its members after deducting a portion to cover its administrative expenses.

Respondent Capital Cities owns the ABC Television Network and 80% of ESPN, a national cable television network. Answer of Capital Cities/ABC, Inc. (October 19, 1990) (admitting allegations in paragraph five of complaint). ABC and ESPN have entered contracts with CFA to telecast certain games of its members during the 1991 through 1995 college football seasons. *Id.* (admitting certain allegations in paragraph nine of complaint); Appendix to CFA's Motion for Summary Decision (March 1991), Tab 73, Neinas Affidavit at paragraph 3.

The Initial Decision concludes that CFA is not subject to the Commission's jurisdiction because it is not organized and does not carry on business either for its own profit or for the profit of its members. Complaint counsel challenge both of these conclusions. They argue that CFA is essentially a commercial entity and that the Administrative Law Judge erroneously assessed CFA's status by formulating a faulty legal standard, according undue deference to the determinations of the Internal Revenue Service, and failing to resolve factual disputes in favor of complaint counsel, as required by summary decision law. They also argue that under governing precedents CFA is organized for the profit of its members regardless of whether those members are within the Commission's jurisdiction. Moreover, complaint counsel contend that the Commission's jurisdiction over approximately three-fourths of CFA's members (the state colleges and universities) as "persons" under the Federal Trade Commission Act provides a further basis for the Commission's jurisdiction over CFA. We address these contentions below.[3]

The parties below moved for summary decision, and the case was presented, briefed, and argued on that basis. Federal courts have held that the standard for summary judgment may be appropriately used in deciding a jurisdictional issue, once there has been some discov-

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[3] The Administrative Law Judge also determined that the complaint against Capital Cities should be dismissed without prejudice "to allow the Commission to consider whether to proceed against Capital Cities alone." Order Dismissing Capital Cities/ABC, Inc. at 2 (July 29, 1991). Capital Cities argues that the Administrative Law Judge's order should be affirmed but concedes that the Commission is "free to initiate a case solely against Capital Cities on the basis of an investigation that is focused upon Capital Cities and addresses the necessary elements in such a case, and after Capital Cities has had an opportunity to address the issues that would be raised by such a case." Answering Brief of Capital Cities/ABC, Inc. at 53-54. In view of its disposition of the jurisdictional arguments raised with respect to CFA, the Commission has determined to dismiss the complaint against Capital Cities without prejudice.

ery. *Ball v. Metallurgie Hoboken-Overpelt. S.A.*, 902 F.2d 194, 196-98 (2d Cir.), *cert. denied*, 498 U.S. 854 (1990). Thus, the Commission's analogous rules for summary decision will be used in deciding this appeal.

II. THE LEGAL STANDARD

The jurisdictional inquiry is governed by two sections of the Federal Trade Commission Act. Section 5 of that Act, as amended, 15 U.S.C. 45, provides:

> The Commission is empowered and directed to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

The term "*corporation*" is defined in Section 4, as amended, 15 U.S.C. 44:

> "Corporation" shall be deemed to include any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, which is organized to carry on business for its own profit or that of its members, and has shares of capital or capital stock or certificates of interest, and any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, without shares of capital or capital stock or certificates of interest, except partnerships, which is organized to carry on business for its own profit or that of its members.

The statute does not define the phrase "organized to carry on business for . . . profit." The legislative history provides no direct guidance.

The Initial Decision defines this phrase with a single-pronged test based on the destination of the income. It finds that CFA's income is never distributed to private individuals or for-profit corporations and treats this as determinative. Thus, the Initial Decision states:

> Nor does an organization's nonprofit status depend upon the source of its revenues. The test instead is whether the organization's funds are properly used for recognized public purposes, rather than distributed to private persons or for-profit companies.

ID at 4. It elaborates:

> an association is "organized to carry on business for . . . profit" only if it can distribute the excess of revenue over expenses to shareholders or other private interests.

Id. at 7 (emphasis in original).

We find the Initial Decision's definition too narrow. While we agree that the distribution of funds to private persons or for-profit companies as opposed to their use for "recognized public purposes" is one basis for finding an entity to be "organized to carry on business for . . . profit," we conclude that the source of the income provides another basis for such a finding. At least when a corporation has entered the mainstream of commercial activity,[4] an adequate nexus is required between its activities and its alleged public purposes if the corporation is to qualify for Section 4's not-for-profit exemption.[5]

This broader, two-pronged definition looks to the totality of the circumstances. A corporation both engages in operations and reaps the fruits of those activities. The Initial Decision focuses solely on the distribution of the latter, disregarding the corporation's activities themselves. Such a limited focus surely is unjustified from the perspective of antitrust enforcement: the role of a corporation in the competitive process appears as closely linked to the character of its activities as to the nature of the recipients of its revenues. Nor does such limited focus appear justified from the perspective of the allegedly not-for-profit corporation: as discussed below in connection with the Internal Revenue Code, when Congress has clearly delimited the circumstances for according advantages to not-for-profit entities, it has mandated attention to the relationship between their activities and their professed public purposes.

The two-pronged test is suggested first by the case law. The primary judicial analysis of Section 4's for-profit standard is presented in the opinion of the United States Court of Appeals for the Eighth Circuit in *Community Blood Bank of the Kansas City Area, Inc. v. FTC*, 405 F.2d 1011 (8th Cir. 1969). That court rejected a Commission ruling that a corporation lacking capital stock or shares of capital is organized to carry on business for its own profit when it receives fees, prices or dues and is not prohibited by its charter from

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[4] We do not deal here with the situation where an organization engages in occasional or isolated ventures outside the scope of its public purposes. Rather, the inquiry before us involves evaluation of CFA's systematic and pervasive operations in marketing college football telecast rights.

[5] Although the definition of "corporation" in Section 4 literally focuses on how a corporation is "organized," the standard has been interpreted consistently to encompass considerations involving an entity's operation as well as its formal organizational status. *See, e.g., Community Blood Bank of the Kansas City Area, Inc. v. FTC*, 405 F.2d 1011, 1018-19 (8th Cir. 1969) ("we do not mean to hold or even suggest that the charter of a corporation and its statutory source are alone controlling the reality of their being in law and in fact charitable organizations places them beyond the reach of the Act"). CFA concedes that "the test of FTC jurisdiction is whether the defendant is organized and operated as a not-for-profit corporation as that term is commonly understood." CFAB at 10 (emphasis added).

devoting any excess of its income over expenditures to its own use, *i.e.*, for its own self-perpetuation or expansion. The court concluded that the test to be applied in determining whether a non-stock corporation, no less than a corporation having capital stock, is exempt "is whether it engages in business for profit within the traditional and generally accepted meaning of that word." *Id.* at 1017 (emphasis in original). The court then expressly held:

> [U]nder Section 4 the Commission lacks jurisdiction over nonprofit corporations without shares of capital which are organized for and actually engaged in business for only charitable purposes, and do not derive any "profit" for themselves or their members within the meaning of the word "profit" as attributed to corporations having shares of capital.

Id. at 1022 (emphasis added). The court thus established a two-pronged test looking both to the source of the income, *i.e.*, to whether the corporation is "organized for and actually engaged in business for only charitable purposes," and to the destination of the income, *i.e.*, to whether either the corporation or its members derive a profit.

A similar two-pronged standard is clearly articulated in the analogous body of federal law which governs treatment of not-for-profit organizations under the Internal Revenue Code. The Commission has long recognized that "[w]hile the terms employed in other statutes and the interpretation adopted by other agencies are not controlling, the treatment of exemptions for nonprofit corporations by other branches of the Federal Government is helpful." *Ohio Christian College*, 80 FTC 815, 848 (1972). *See American Medical Ass'n*, 94 FTC 701, 990 (1979) (finding an entity's tax-exempt status "certainly one factor to be considered" and observing that "a determination by another Federal agency that a respondent is or is not organized and operated exclusively for eleemosynary purposes should not be disregarded"), enforced as modified, 638 F.2d 443 (2nd Cir. 1980), aff'd by an equally divided court, 455 U.S. 676 (1982) ("AMA"). The Internal Revenue Code delineates the circumstances under which Congress, at least in one context, has been willing to exempt not-for-profit organizations from the burdens of federal laws.

Section 501(c)(3) of the Internal Revenue Code provides an exemption from income taxation for;

> [c]orporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety,

literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual. . . .

26 U.S.C. 501(c)(3). The two-pronged test is clear: an entity qualifies for tax-exempt status if (1) it is "organized and operated exclusively" for one of the enumerated exempt purposes and (2) no part of its net earnings "inures to the benefit of any private shareholder or individual." The first standard focuses on the source of the income, examining the organization for an adequate nexus between its activities and exempt purposes.[6] The second standard focuses on the destination of the income, ensuring that no earnings are distributed for private gain.[7]

The courts struggled in applying the not-for-profit exemption to entities operated like CFA, which engage in commercial activities but "feed" their net earnings to exempt institutions. Initially, the courts split on the taxability of such entities.[8] Appellate courts in some circuits applied a destination-of-income test, exempting a "feeder organization" from taxation if its income was distributed exclusively for charitable purposes even though the organization's primary or sole activity consisted of purely commercial operations. *See, e.g., C.F. Mueller Co. v. Commissioner,* 190 F.2d 120 (3d Cir. 1951); *Roche's Beach, Inc. v. Commissioner*, 96 F.2d 776 (2d Cir. 1938). Appellate courts in other circuits looked to the source of the income, finding that when the activities in which the feeder organization itself engaged were of a non-exempt nature, the feeder organization was subject to taxation. *See, e.g., Ralph H. Eaton Found. v. Commissioner,* 219 F.2d 527 (9th Cir. 1955); *United States v. Community*

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[6] "An organization will be regarded as operated exclusively for one or more exempt purposes only if it engages primarily in activities which accomplish one or more of such exempt purposes specified in section 501(c)(3)." 26 CFR 1.501(c)(3)-l(c)(1) (emphasis in original).

[7] This bifurcation was already a feature of federal tax law in 1913, when the income tax was imposed by the same Congress which the following year enacted the Federal Trade Commission Act. *See* Tariff Act of October 3, 1913, Section II.G. (a) (exempting from income taxation corporations and associations "organized and operated exclusively for religious, charitable, scientific, or educational purposes, no part of the net income of which inures to the benefit of any private stockholder or individual").

[8] Reviewing the precedents, the United States Court of Appeals for the Fourth Circuit concluded that "both the decisions reached on the facts and the views expressed in the opinions are so varied and so divergent, that they cannot readily be reconciled." *United States v. Community Services, Inc.,* 189 F.2d 421, 428 (4th Cir. 1951), *cert. denied*, 342 U.S. 932 (1952).

Services, Inc., 189 F.2d 421 (4th Cir. 1951), *cert. denied*, 342 U.S. 932 (1952); *cf. Squire v. Students Book Corp.* 191 F.2d. 1018, 1020 (9th Cir. 1951) (observing that "resolution of the case before us does not depend wholly on the ultimate destination of the taxpayer's profits," finding that the business of a campus book store "bears a close and intimate relationship to the functioning of the College itself," and holding that the enterprise was tax-exempt without expressly choosing between source-of-income and destination-of-income tests).

The debate was finally settled, not by the courts, but by Congress. The Revenue Act of 1950 amended the Internal Revenue Code to make it clear that both the source of income and the destination of income were relevant. The feeder organization amendment, as currently codified in Section 502(a) of the Internal Revenue Code, provides:

> An organization operated for the primary purpose of carrying on a trade or business for profit shall not be exempt from taxation under section 501 on the ground that all of its profits are payable to one or more organizations exempt from taxation under section 501.

26 U.S.C. 502 (a).[9] Pursuant to the feeder organization amendment, the mere fact that an organization distributes all of ts profits to exempt organizations does not confer an exemption. If the feeder organization itself operates "for the primary purpose of carrying on a trade or business for profit," it is subject to taxation. As observed by the United States Court of Appeals for the Ninth Circuit:

> Without exception, [the courts of appeals which have considered the feeder organization amendment] concluded that in [adopting that amendment] the Congress intended to require courts to adopt the source-of-income test previously followed by this circuit, rather than the destination-of-income test that had been followed in other circuits.

University Hill Found. v. Commissioner, 446 F.2d 701, 706 (9th Cir. 1971), *cert. denied*, 405 U.S. 965 (1972).

In the same Revenue Act of 1950, Congress further amended the Code by imposing a tax on the unrelated business income of exempt

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[9] Section 502(b) of the Code, as amended in 1969, provides exceptions for businesses deriving certain rents; businesses in which substantially all the work is performed without compensation; and businesses which sell merchandise received as gifts or contributions.

organizations.[10] As currently codified, the unrelated business income rule taxes organizations otherwise exempt under Section 501(c), as well as state colleges and universities, to the extent of their unrelated business taxable income. 26 U.S.C. 511.[11] "Unrelated business taxable income" refers to gross income from "any trade or business the conduct of which is not substantially related (aside from the need of such organization for income or funds or the use it makes of the profits derived) to the exercise or performance by such organization of its charitable, educational, or other purpose or function constituting the basis for its exemption . . . ." 26 U.S.C. 512-13.[12] "The effect of the 1950 legislation was to abandon the preexisting doctrine that the destination of income (*i.e.* for the exempt Iowa State) was more important than its source (*i.e.* a commercial enterprise such as WOI-TV)." *Iowa State Univ. of Science & Technology v. United States,* 500 F.2d 508, 518-19 (Ct. Cl. 1974) (holding Iowa State University taxable under the unrelated business income rule on the income earned by its wholly-owned commercial television station).

The guidance from federal tax law is clear. Congress has sought to protect and support specific categories of not-for-profit organizations by freeing them from tax liabilities but only so long as (1) no part of their net earnings inures to the benefit of any private shareholder or individual and (2) the activities which generate the income--whether conducted by a feeder organization or by the exempt entity itself--are in furtherance of exempt purposes. The test is two-pronged and requires an adequate nexus between the entity's operations and recognized public purposes.

Indeed, CFA repeatedly acknowledged at oral argument that a two-pronged test, looking to both the destination and the source of income, was appropriate. Discussing a hypothetical situation where a collection of schools purchased the stock of General Motors, counsel for CFA argued:

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[10] Whereas the feeder organization amendment deals with separate organizations which feed profits to exempt entities, the unrelated business income rule deals with certain income earned by the exempt entities themselves. The separate, feeder organizations are declared non-exempt. In contrast, the unrelated business income rule maintains the entities' tax-exempt status, but subjects their unrelated business income to taxation. *See University Hill*, 446 F.2d at 707 n.4.

[11] 26 U.S.C. 512 confines the tax to income derived from unrelated trade or business "regularly carried on."

[12] As explained by Internal Revenue Service regulations: The presence of [the unrelated business income rule's "substantial relationship"] requirement necessitates an examination of the relationship between the business activities which generate the particular income in question--the activities, that is, of producing or distributing the goods or performing the services involved--and the accomplishment of the organization's exempt purposes. 26 CFR 1.513-1(d)(1).

Well the point there would be that General Motors, the corporation, does not act in a public purpose, it manufactures cars. And therefore you don't get to the question of what happens to its profits. And so the argument there would be that the Commission could reach General Motors because it doesn't operate -- because that distinct corporation doesn't operate in a public purpose.
. . . the question is are you a nonprofit organization or not. General Motors is not because manufacturing cars is not a public purpose.

OA Tr. at 39-40. Emphasizing the two-pronged nature of the test, CFA counsel explained:

Well, you have to show that first you operate -- that you're organized to carry out a public purpose, such as education or amateur athletics. Then we also have to show -- or they have to disprove, since it's their burden -- that the money doesn't come into private pockets.

And that's what these hypotheticals keep illustrating. The General Motors hypothetical shows not a public purpose. Therefore, even if the money doesn't get to private pockets, it's still not non-profit.

Id. at 53 (emphasis added).

We agree with CFA counsel on this point. The not-for profit jurisdictional exemption under Section 4 requires both that there be an adequate nexus between an organization's activities and its alleged public purposes and that its net proceeds be properly devoted to recognized public, rather than private, interests.

III. IS CFA ORGANIZED TO CARRY ON BUSINESS FOR ITS OWN PROFIT?

CFA is formally organized as a nonprofit association. Its basic operation involves funneling its revenues, apart from administrative expenses and salaries, to its members. Thus the Initial Decision found:[13]

1. CFA is formally organized as a nonprofit association. IDF 1.

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[13] The Initial Decision makes reference to "findings of fact," and Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), requires "findings as to the facts." Of course, in a case resolved through summary decision, findings of fact are appropriate only to the extent that the facts are not subject to genuine dispute. We understand the Administrative Law Judge to have used the term in this fashion. If, instead, it had been necessary to resolve disputed factual issues concerning the jurisdictional questions at hand, relevant discovery, at a minimum, should have been completed.

2. CFA has been recognized by the Internal Revenue Service as tax-exempt under Section 501(c)(3). IDF 2.[14]

3. CFA's officers and directors are not paid. Its staff, including its executive director, is compensated for services rendered. Audited financial statements show that CFA's salaries and employee benefits have amounted to less than 1% of its cumulative television revenues. IDF 3-4.

4. CFA negotiates and signs television contracts, receives the revenues, and makes payments to its members. All of CPA's members receive "participation pool" payments, and those whose football games are actually televised receive rights fees. CFA is obligated to pay the rights fees within 90 days after a game is played. CFA makes the participation pool payments in June following the football season, investing the funds in the interim in conservative investments. The earnings on investments are used to pay CFA's administrative expenses for the television plan. None of the net revenues is retained by CFA. IDF 8-10.

5. CFA's members are all organized under applicable nonprofit laws or as state or federal instrumentalities. IDF 5. CFA's private university members are all tax-exempt organizations under Section 501(c)(3). ID at 17.

6. Revenues earned by the sale of football telecasting rights are used by the CFA members for sustaining their athletic programs and/or for educational purposes. *See* IDF 7.[15]

Complaint counsel have not challenged any of these findings on appeal.[16] From these facts -- and assuming for present purposes no

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[14] Although complaint counsel do not challenge the accuracy of this finding, they do question its continued reliability. Thus, they note that the last of the exemption review letters issued to CFA is dated August 8, 1984, and they observe that the first of CFA's television contracts was not implemented until the 1984 football season. However, CFA had entered a television contract as early as August 8, 1981. Appendix to CFA's Motion for Summary Decision (March 1991), Tab 2, Neinas Tr. at 39. Although that contract was never implemented, *id.* at 40, it is undisputed that a subsequent contract, which was implemented, was entered before the last exemption review letter was issued -- the football season had simply not begun. CFAB at 11 n.10. Perhaps more important, complaint counsel concede that CFA's television revenues have remained tax-exempt since 1984. OA Tr. 70.

[15] The Initial Decision's specific finding was that CFA's revenues "are used by the institutions for-their proper nonprofit purposes, including sustaining their athletic programs . . . ." IDF 7. Complaint counsel deny the accuracy of this finding, insofar as it suggests that the revenues devoted to sustaining university athletic programs are used for proper non-profit purposes. Issues pertaining to the university members' use of the revenues received from CFA are discussed *infra* at Section IV.B.

[16] In opposing summary disposition by the Administrative Law Judge, complaint counsel denied CFA's assertion that it retains only that portion of its gross television revenue necessary to pay its administrative expenses. However, complaint counsel concede on appeal that 95-98% of CFA's revenue in excess of expenses is distributed to its members. CCRB at 18 n.15.

misapplication of the funds by the colleges and universities -- it would appear that CFA satisfies a destination-of-income test in that no part of its revenues inures to the benefit of private individuals or for-profit business entities.

Rather than challenging the facts relied upon in the Initial Decision, complaint counsel have proffered legal arguments directed primarily toward demonstrating that CFA has not satisfied the second standard, focusing on the source of income. In addition, complaint counsel cite Commission Rule 3.24(a)(2), 16 CFR 3.24(a)(2), for the proposition that summary decision is appropriate only where "there is no genuine issue as to any material fact and . . . the moving party is entitled to such decision as a matter of law," and argue that unresolved factual disputes material to their theories render this case inappropriate for summary disposition.

Complaint Counsel argue first that CFA's predominant activity--selling telecast rights--is purely commercial activity and that this renders CFA subject to Commission jurisdiction. They contend that the Initial Decision failed to consider the evidence showing the business nature of CFA's telecast activities and to resolve conflicts in the evidence in their favor, as is required under the summary decision standard.

However, concerning whether CFA engages in commercial activity, there does not appear to be any genuine issue as to a material fact: CFA concedes that it engages in large-scale commercial activity from which it generates substantial revenue. *See* CFA's Motion for Summary Decision at 34 (March 1991). ("CFA does not dispute, and stipulates for purposes of this motion, that it is engaged in selling college football telecast rights, that those telecast sales activities are a substantial part of CFA's overall activities, and that the sales activities generate millions of dollars of pecuniary revenue to CFA's members") (emphasis in original); CFA's Reply to Complaint Counsel's Response to CFA's Jurisdictional Motion at 21 n.26 (May 17, 1991) ("CFA agrees that the sale of its members' television rights is a business activity"). Both the commercial nature of CFA's activities and the business source of its revenues are admitted; only the legal implications deriving from the commercial nature of its activities are in dispute.

A properly defined source-of-income test does not equate commercial activity, even when large-scale and systematic, with the

statutory requirement of organization to carry on business for profit. Community Blood Bank made it clear that commercial activity by itself does not subject an entity to the Commission's jurisdiction. There the court rejected the Commission's claim of jurisdiction over a blood bank, notwithstanding the Commission's finding that the blood bank "perform[ed its] functions in much the same manner as... the commercial blood bank and ... receive[d] compensation for goods supplied and services rendered." *Community Blood Bank of the Kansas City Area, Inc.*,70 FTC 728, 909 (1966).[17] The court quoted with approval the dissenting remarks of Commissioner Elman:

> The majority opinion points out that Community Blood Bank conducts its affairs in a businesslike fashion and makes profits on the sale of blood, but that is certainly of no relevance here.

Community Blood Bank, 405 F.2d at 1019, quoting 70 FTC at 950.[18] Similarly, the Internal Revenue Code subjects an exempt entity to taxation not on all business income, but only on unrelated business income, *viz.*, income from business activities "not substantially related" to the purpose or function constituting the basis for the entity's exemption. 26 U.S.C. 511-13. In like fashion, something more than mere commercial activity is needed to subject CFA to Commission jurisdiction under the source-of-income test. As explained *supra* in Section II, the appropriate evaluation depends on the presence or absence of an adequate nexus between CFA's activities and its recognized public purposes.

Complaint counsel argue next that there is in fact no nexus between CFA's television contracting activities and recognized public purposes or that, at a minimum, there are material facts in dispute concerning this question, making summary decision improper. CFA responds that it serves two public purposes--promotion of education and fostering of amateur sports competition. It argues

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[17] Community acquired its blood for $15 and charged hospitals a replacement fee of $25 plus a processing fee of $9. 70 FTC at 763-64 (Initial Decision).

[18] Complaint counsel argue that the judicial decisions in *Board of Regents of the University of Oklahoma v. National Collegiate Athletic Ass'n*, 546 F. Supp. 1276 (W.D. Okla. 1982), *aff'd in part, remanded in part*, 707 F.2d 1147 (10th Cir. 1983), *aff'd*, 468 U.S. 85 (1984), as well as representations by CFA members in that litigation, establish the for-profit nature of television rights marketing activities similar to those engaged in by CFA. However, the issues underlying the cited materials--whether the NCAA's television restrictions could escape *per se* condemnation or could be justified under the rule of reason as ancillary to legitimate purposes or as generating procompetitive efficiencies--are inapposite to whether CFA is organized to carry on business for profit for purposes of jurisdiction under the Federal Trade Commission Act.

that (i) athletics are part of education; (ii) direct viewing of athletics contributes to the athletic/educational experience; and (iii) televised viewing is analytically indistinguishable from direct viewing of athletics, as is the income derived from the two sources.

Both legislative and administrative pronouncements support CFA's position. Congress spoke on the issue in 1950, when it enacted the taxes on feeder organizations and unrelated business income. The committee reports of both the Senate and the House of Representatives found a clear nexus between athletic activities and education: "Athletic activities of schools are substantially related to their educational functions.,"[19] The committees of both houses also found a direct link between exhibiting athletic contests and education:

> Of course, income of an educational organization from charges for admission to football games would not be deemed to be income from an unrelated business, since its athletic activities are substantially related to its educational programs.[20]

No meaningful distinction between the sale of admission tickets and the sale of television rights has been advanced.

The Internal Revenue Service has extended the Congressional findings directly to "the sale of . . . broadcasting rights." A 1980 Revenue Ruling explains:

> The Service has traditionally taken the position that income from paid admissions to college and university athletic events, regardless of the number of persons in attendance or the amount of paid admissions, is not taxable as income from unrelated trade or business because the events themselves are related to the educational purposes of the colleges and universities.
> . . . . Also, the educational purposes served by exhibiting a game before an audience that is physically present[21] and exhibiting the game on television or radio

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[19] S. Rep. No. 2375, 81st,Cong., 2d Sess. 29 (1950); H.R. Rep. No 2319, 81st Cong., 2d Sess. 37 (1950); *accord* Staff of the Joint Comm. on Internal Revenue Taxation, 81st Cong., 2d Sess., Summary of H.R. 8920, "The Revenue Act of 1950," as Agreed to by the Conferees 24, *reprinted* in 1950 U.S. Code Cong. & Admin. News 3219, 3240.

[20] S. Rep. No. 2375, 81st Cong., 2d Sess. 107, *reprinted in* 1950 U.S. Code Cong. & Admin. News 3053, 3165; H.R. Rep. No. 2319, 81st Cong., 2d Sess. 109 (1950). (Emphasis added.)

[21] The IRS had previously explained, in private letter rulings: [A]n audience for a game may contribute importantly to the education of the student-athlete in the development of his/her physical and inner strength and to the education of the student body and the community-at-large in heightening interests in and knowledge about the participating schools . . . Attending the game enhances student interest in education generally and in the institution because such interest is whetted by exposure to a school's athletic activities. Moreover, the games (and the opportunity to observe them) foster those feelings of identification, loyalty, and participation typical of a well-rounded educational experience.

before a much larger audience are substantially similar. Therefore, the sale of the broadcasting rights and the resultant broadcasting of the game contributes importantly to the accomplishment of the organization's exempt purposes.

Rev. Rul. 80-296, 1980-2 C.B. 195 (footnote added). This Revenue Ruling links the sale of college sports broadcasting rights to the promotion of education. A second Revenue Ruling from the same year links the sale of broadcasting rights to promoting amateur sports:

The broadcasting of [a national amateur athletics governing body's] sponsored, supervised, and regulated athletic events promotes the various amateur sports, fosters widespread public interest in the benefits of its nationwide amateur athletic program, and encourages public participation. Therefore, the organization's sale of broadcasting rights and the resultant broadcasting of its athletic events contributes importantly to the accomplishment of its exempt purposes . . . .

The sale of exclusive broadcasting rights, under the circumstances described above, is substantially related to the purpose constituting the basis for the organization's exemption and, therefore, is not unrelated trade or business within the meaning of section 513 of the Code.

Rev. Rul. 80-295, 1980-2 C.B. 194.[22]

To the extent that the Initial Decision suggests that the Commission necessarily defers to related IRS determinations in deciding whether an entity is organized to carry on business for profit, the Initial Decision would be in error. As the Commission explained in AMA:

We recognize that a respondent's status as either a Section 501(c)(3) or (6) tax-exempt organization does not obviate the relevance of further inquiry into a

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IRS Private Letter Rulings 7851002, 7851005, and 7851006. The private letter rulings lack precedential value, and they are cited here only to suggest the considerations which apparently underlie the quoted Revenue Ruling's reference to "educational purposes served by exhibiting a game before an audience that is physically present."

[22] Complaint counsel claim that the IRS determinations have no precedential value even for tax purposes. CCAB at A-9, n.18. That is incorrect. "A 'Revenue Ruling' is an official interpretation by the Service that has been published in the Internal Revenue Bulletin." 26 CFR 601.601(d)(2)(i)(a). "Revenue Rulings published in the Bulletin do not have the force and effect of Treasury Department Regulations (including Treasury decisions), but are published to provide precedents to be used in the disposition of other cases, and may be cited and relied upon for that purpose." 26 CFR 601.601(d)(2)(v)(d). While the Revenue Rulings lack the force of statutes and regulations, they express "the studied view of the agency whose duty it is to carry out the statute," and are entitled to some weight. *Brook, Inc. v. Commissioner,* 799 F.2d 833, 836 n.4 (2d Cir. 1986), *quoting Anselmo v. Commissioner,* 757 F.2d 1208, 1213 n.5 (11th Cir. 1985).

respondent's operations and goals . . . . Rulings of the Internal Revenue Service are not binding upon the Commission . . . .

94 FTC at 990. Although IRS rulings are not binding on the Commission, such determinations nevertheless offer significant guidance. *See id.* (finding an entity's tax-exempt status a factor "to be considered" and cautioning that IRS determinations "should not be disregarded"); *Ohio Christian College*, 80 FTC at 848. Here, the IRS rulings do not stand alone, and the fact that they reflect legislative intent, as expressed by both houses of Congress, adds weight to their authority.

On the other hand, complaint counsel seek to distinguish the Revenue Rulings on grounds that they dealt with entities that were themselves directly involved in making the televised athletic contests possible. CCAB at A-9 n.18. Moreover, complaint counsel contend that because the alleged effect of CFA's contracts has been to reduce output, CFA has acted to diminish the televised viewing of college football and thus to impede rather than to foster education and amateur athletics. CCRB at 22 n.24. While, under the circumstances present, we do not find these arguments determinative,[23] these contentions do underscore why the Section 4 inquiry should not rely completely on IRS rulings.

Consequently, it remains fully appropriate for the Commission to conduct an independent factual inquiry into the nexus between CFA's activities and its alleged public purposes, and not simply to rely on the IRS rulings. However, because the Revenue Rulings suggest that the promotion of televised viewing of amateur sports itself serves a public purpose and because of the closeness of CFA's activities to the promotion of televised viewing, the factual inquiry here is somewhat more complicated than would be the usual case. Specifically, complaint counsel must show that CFA's activities are not aiding either of the recognized public purposes--(i) furthering education and (ii) fostering amateur athletics--by breaking the linkage between televised college sports and these purposes; by demonstrating CFA's failure to promote televised viewing of college football; or by some other technique.

In this regard, complaint counsel deny that CFA is organized and operated for purposes of education and fostering national amateur

[23] Complaint counsel fail to explain why the claimed distinction makes a material difference to the analysis expressed in the Revenue Rulings. The contention that CFA has reduced output is discussed *infra* at note 27 and accompanying text.

sports competition. Although they accept that there may be educational value in intercollegiate sports, they assert that "big-time" college football programs are entertainment businesses with purposes often inconsistent with education and amateur sports competition. They argue that CFA's telecast operations have no purpose or value other than making money and offer evidence intended to show that CFA is a commercial enterprise focused on making money through the sale of telecast rights. These arguments, however, largely go to whether CFA's activities can be characterized as commercial, and Community Blood Bank teaches that commercial activity alone is an insufficient basis upon which to find jurisdiction. Moreover, evidence of CFA's business nature and revenue-generating efforts misses entirely the point that the benefits to public purposes have been understood to flow from the presence of the telecasts themselves.[24]

Concerning the relevant question--whether there is an adequate nexus between CFA's activities and its alleged public purposes--complaint counsel have provided little factual information. With regard to the promotion of education, complaint counsel offer assertions rather than specific facts.[25] In challenge to the nexus to amateur sports, complaint counsel offer virtually no facts whatsoever.[26] With regard to whether CFA is promoting televised viewing, complaint counsel offer allegations of output restriction and assertions that such restrictions impede rather than foster education

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[24] *See generally* 26 CFR 1.513-1(d)(2) (emphasizing that the test for unrelated business income is whether the conduct of the business activities has substantial "causal relationship to the achievement of exempt purposes (other than through the production of income)") (emphasis added).

[25] *See, e.g.*, Complaint Counsel's Opposition to Respondents' Motions for Summary Decision at Ex. A (Affidavit of Murray Sperber) (asserting in conclusory fashion that "CFA's television-related activities . . . do not, in any way, advance the fundamental goals of higher education"). While complaint counsel argue that enhancing the athletic programs of CFA members does not necessarily serve an educational function, their evidence--such as various selections from the testimony presented to the Knight Foundation Commission on Intercollegiate Athletics--is directed toward demonstrating the commercial nature of "big-time" college football, rather than toward rebutting the linkage to education articulated by Congress and the IRS.

[26] In addition to their observations concerning the central role of television contracting activities in CFA's operations, complaint counsel's single pertinent factual assertion is that the revenues generated are not used by CFA to promote amateur sports but rather are distributed to its members." CCRB at 21 n.22. This contention, however, overlooks the fact that the members may devote the revenues to support their amateur athletic programs, *see infra* Section IV.B., and it ignores the direct fostering of amateur sports that has been found to flow from their broadcasting. *See* Rev. Rul. 80-295, *supra.*

and amateur athletics, but no evidence that CFA is in fact not promoting televised viewing.[27]

More is needed to defeat a motion for summary decision. The Supreme Court has emphasized that the party opposing summary judgment is required to raise more than "some metaphysical doubt." *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). *See* 6 Moore's Federal Practice paragraph 56.15[3] at 56-274-76 ("the opposing party's facts inust be material, and of a substantial nature, not . . . conjectural, speculative, nor merely suspicions") (footnotes omitted). Even if all inferences are drawn in favor of the nonmoving party, complaint counsel have failed to raise a genuine issue of material fact casting doubt upon the nexus between CFA and its asserted public purposes. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).[28]

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[27] One arguable suggestion of output restriction--a reference in a 1981 American Council on Education letter (Complaint Counsel's Opposition to Respondents' Motions for Summary Decision at Ex. E)--indicating that CFA planned to televise fewer games than the National Collegiate Athletic Association would televise, but thought that this would increase viewing of those games presented--is clouded by the fact that CFA represented only a subset of the NCAA colleges. The reference is not cited by complaint counsel as evidence of the claimed output restriction.

Complaint counsel mut do more in this jurisdictional inquiry than merely positing that a full-blown trial will in fact show that CFA is restricting the televising of college football. Complaint counsel's assertions equate the jurisdictional inquiry with the substantive liability determination for anticompetitive output restrictions. We cannot accept an interpretation of our jurisdictional reach that in effect would (i) require trial on the merits before reaching the jursdictional issue and (ii) find freedom from jurisdiction only in the absence of substantive liability. Such an interpretation effectively is no jurisdictional limitation at all.

[28] Complaint counsel argue that the Administrative Law Judge improperly ruled on the parties' summary decision motions before discovery could be completed. Given the fact-based nature of the jurisdictional inquiry under Section 4, *see, e.g., FTC v. Ernstthal,* 607 F.2d 488 (D.C. Cir. 1979), relevant discovery, as a general rule, should be completed before the jurisdictional question can be answered adequately. Complaint counsel, however, were afforded substantial discovery before the parties' motions were made. *See supra* note 2 and accompanying text. Indeed, the Administrative Law Judge, early in the litigation, denied motions for dismissal so that relevant discovery could proceed. Moreover, Commission rules permitted complaint counsel to seek further discovery in response to a motion for summary decision. Commission Rule 3.24(a) (4), 16 CFR 3.24(a) (4), permits a party opposing a motion for summary decision to submit a document, usually in the form of an affidavit, explaining with specificity why it cannot present facts essential to justify its opposition and how further discovery will defeat the summary decision motion. In this case, complaint counsel did not specify exactly how discovery--in addition to that already conducted--would defeat the summary decision motion, that is, would establish the presence of a genuine dispute as to a material fact. *See SEC v. Spence & Green Chemical Co.*, 612 F.2d 896, 901 (5th Cir. 1980) (nonmoving party "may not simply rely on vague assertions that additional discovery will produce needed, but unspecified, facts"), *cert. denied*, 449 U.S. 1082 (1981); *Contemporary Mission, Inc. v. New York Times Co.*, 665; F. Supp. 248, 269 (S.D.N.Y. 1987) ("Plaintiffs have not met their burden of showing how the deposition . . . would produce material evidence which would be potentially favorable to them"), *aff'd*, 842 F.2d 612 (2d Cir.), *cert. denied*, 488 U.S. 856 (1988). Without such a showing, the Administrative Law Judge had no reason to prolong the litigation on the question of jurisdiction.

IV. IS CPA ORGANIZED TO CARRY ON BUSINESS FOR THE PROFIT OF ITS MEMBERS?

Complaint counsel argue first that CFA is organized to carry on business for the profit of its members, irrespective of considerations pertinent to their nature. Even assuming that this were not the case, complaint counsel further contend that CFA is nonetheless subject to the Commission's jurisdiction because the majority of its members are subject to FTC jurisdiction and because CFA's member universities are acting in the pursuit of profit.

A. *Jurisdiction Irrespective of the-Nature of CFA's Members*

Complaint counsel contend that by distributing the revenues from the sale of telecast rights, CFA is operating for the profit of its members. Both the statute and the case law, it is claimed, attach jurisdiction from the act of distribution.

Thus, complaint counsel argue that the Administrative Law Judge effectively adds language to the statute by reading it as if it were worded to limit jurisdiction to entities that "carry on business for their own profit or that of members who are private persons or for-profit companies." CCAB at 13 (emphasis in original). However, the for-profit limitation is not an unwarranted gloss, but rather part of the statute itself: Section 4 confers jurisdiction over an entity organized to carry on business "for profit . . . of its members" (emphasis added).

The same point emerges from the case law. No case cited suggests that Section 4 jurisdiction may be predicated on distributions or pecuniary benefits to members not operated for private gain.

Community Blood Bank does not so hold. Although complaint counsel suggest that the Eighth Circuit rejected jurisdiction on the limited ground that the respondent blood bank's and hospital association's funds were never distributed to their members, non-distribution was merely one of the factors cited by the court. The sentence immediately following the court's observation that the respondents did not distribute funds to members reads: "Any profit realized in their operations is devoted exclusively to the charitable purposes of the corporation." 405 F.2d at 1019. The opinion as a whole in no sense establishes that distribution to not-for-profit

members for use in advancing public purposes renders the distributing association subject to Commission jurisdiction.

Similarly, the Commission's AMA opinion affords complaint counsel no support. Complaint counsel observe that AMA states a two-part test looking to (i) whether an association's activities "engender a pecuniary benefit to its members" and (ii) whether the activities that engender the pecuniary benefit are "a substantial part of the total activities of the organization, rather than merely incidental to some non-commercial activity." 94 FTC at 983. Complaint counsel argue that AMA failed to state a third standard requiring that the members themselves be within the Commission's jurisdiction. CCA.B at 12. However, AMA's members were profit-seeking physicians. There was simply no need to articulate a third standard.[29] Stated differently, a finding that a substantial part of an association's activities engender pecuniary benefits for profit-seeking members is sufficient to establish that the association is organized to carry on business "for the profit" of its members; a finding that such activities engender pecuniary benefits for entities that are not for-profit is not.

In contrast to complaint counsel's position, *National Foundation, Inc. v. United States*, 13 Cl. Ct. 486 (1987), holds that distribution by one nonprofit entity to other nonprofit entities does not deprive the former of its Section 501 (c) (3) tax exemption. Rather, such distributions were understood to promote exempt purposes, and the defendant was viewed as similar in function to the United Way. *Id.* at 492. The IRS is in accord. *See* Rev. Rul. 67-149, 1967-1 C.B. 133 (distributions of income to organizations that are exempt under Section 501(c)(3) do not deprive the distributing organization of an exemption under that section). In effect, the exempt purposes of the receiving entities are imputed to the distributing entity.

These teachings have application to the present context. There is no basis in Section 4 for distinguishing a not-for-profit organization which directly applies its funds to public purposes from one which passes funds through to another not-for-profit entity for accomplish-

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[29] AMA does not predicate its finding of jurisdiction directly on the fact that the members were profit-seeking physicians. However, the Commission expressly recognized that "[r]espondents' membership serves to distinguish them from the hospital association involved in Community Blood Bank, providing further evidence that they exist in substantial part for the profit of their members." 94 FTC at 989 (observing that only two of the Community Blood Bank hospital association's 43 members were proprietary corporations). As indicated in the Initial Decision in *Community Blood Bank*, 70 FTC at 755-57, 767, 41 of the 43 hospital association members were religious or charitable associations, not-for-profit corporations, or governmental instrumentalities.

ment of those same purposes. In the case of CFA, its distribution of revenues is nothing more than the mechanism for applying funds--through its college and university members--to the recognized public purposes of promoting education and amateur sports competition. That distribution--in and of itself--does not transform CFA into an entity "organized to carry on business for profit," and it confers no jurisdiction.

B. *Jurisdiction Based on the Nature of CFA's Members*

Complaint counsel also argue that jurisdiction attaches because of the nature of CFA's members. Noting that approximately three-quarters of CFA's members are state colleges and universities, complaint counsel contend that (i) these members are subject to Commission jurisdiction as "persons" within the meaning of Section 5 and (ii) jurisdiction over these members creates jurisdiction over CFA. In addition, complaint counsel assert that, even under Section 4's for-profit test, unresolved factual issues concerning the use of CFA's revenues by its members preclude summary disposition in CFA's favor.

Section 5 of the Federal Trade Commission Act empowers the Commission to prevent "persons, partnerships, or corporations" from using unfair methods of competition and unfair or deceptive acts or practices. 15 U.S.C. 45. Complaint counsel argue that state colleges and universities are "persons" within the meaning of Section 5 and therefore fall within the Commission's jurisdiction without regard to the definition of "corporation" in Section 4. In *Massachusetts Board of Registration in Optometry*, 110 FTC 549 (1988), we found that a state licensing board was a "person" within the meaning of Section 5 and thus subject to our jurisdiction. We were not, however, presented with the precise question raised here: namely, whether state colleges and universities, entities which bear at least a facially similar likeness to not-for-profit private entities, are subject to our jurisdiction as "persons" under Section 5 or whether those entities must still meet as well Section 4's for-profit test. We need not decide this question because, even assuming, *arguendo*,that such state colleges and universities are "persons" subject to the Commission's jurisdiction without inquiry under Section 4's for-profit test, it would nonetheless be improper, under the circumstances of this litigation, to find that the Commission has jurisdiction over CFA.

Complaint counsel contend that, because many of CFA's members are arguably "persons," the Commission automatically has jurisdiction over CFA. Complaint counsel do not argue that the "persons" jurisdiction of Section 5 applies directly to CFA. Rather, the claim is that Section 5 creates jurisdiction over CFA's members as "persons" and that, by some undefined mechanism, the jurisdiction over the members automatically creates jurisdiction over the association itself. The argument suffers from a primary theoretical defect: it blurs the distinction between an association and its members. The issue before us is jurisdiction over CFA, the association, not jurisdiction over its members, which are not named in the complaint.

Complaint counsel derive no support from the case law. *Massachusetts Furniture & Piano Movers Ass'n*, 102 FTC 1176 (1983), *rev'd in part on other grounds*, 773 F.2d 391 (lst Cir. 1985), cited by complaint counsel, in fact demonstrates that the Commission has recognized the distinction between an association and its members. In that case the respondent association disputed the Commission's jurisdiction on the basis that some of the association's members were exempt under Section 5 as common carriers. Although the opinion observes that to the extent that the jurisdictional status of the members mattered, at least 50% were non-immune, the Commission's initial and primary point was that the association and its members were distinct, so that the jurisdictional status of the members appeared to be irrelevant. Thus, the Commission reasoned:

> It is questionable whether the status of the Association's membership is relevant to this case: the carrier members are not named in the complaint and the challenged conduct is that of the Association.

102 FTC at 1213. Here, CFA, not the members, is named in the complaint, the challenged conduct is that of CFA, and the appropriate test of CFA's amenability to jurisdiction is that provided in Section 4.[30]

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[30] The Commission's decision in Ohio Christian College is not to the contrary. That case involved two nonprofit corporations which were "in reality" identical to an individual respondent. 80 FTC at 847. The Commission's complaint named as respondents both the corporations and the individual who controlled them. The corporations were "completely dominated" by that individual, who had "complete operational control of everything," and "sole control of the purse strings." *Id.* There was "cavalier treatment of the corporate assets and finances," and the corporations were "mere shells without substance." *Id.* at 847-48. Under these circumstances, the Commission was willing to "pierce the veil."

Complaint counsel assert that the Commission's decision in AMA supports their argument. They argue that "[j]ust as the Commission asserted jurisdiction over the American Medical Association, an association of persons, so too here the Commission can assert jurisdiction over CFA, an association of persons." CCAB at 17. The Commission's AMA decision, however, cannot be so simplified. The Commission in AMA engaged in a close, factual inquiry into both the activities of AMA and the nature of its members. It did not rest on a theoretical point that the AMA's members were "persons" under Section 5. Of course, the profit-seeking nature of AMA's membership obviously had a significant impact on the Commission's final decision to assert jurisdiction over AMA. That does not mean, however, that AMA can be read to suggest that the mere *a priori* labelling of some members of an association as "persons" pretermite; the close, factual inquiry required into both the association itself and the nature of its members.

Nor is there statutory language or legislative history in support of complaint counsel's argument that jurisdiction over an association's members automatically confers jurisdiction over the association. Indeed, what little exists suggests that in drafting Section 4, Congress fully appreciated the difference between an association and its members. On August 8, 1914, after passage of differing House and Senate bills to create a Federal Trade Commission, Joseph E. Davies, Commissioner of the Bureau of Corporations, conveyed his suggestions regarding the legislation to Senator Francis G. Newlands, Chairman of the Committee on Interstate Commerce.[31] The very first concern articulated involved the definition of "corporation."[32]

Id. at 849. Complaint counsel do not argue that CFA is a shell rather than a *bona fide* association of colleges and universities or that there has been a cavalier treatment of assets and finances such as to justify disregard of CFA's separate identity.

[31] Senate Comm. on Interstate Commerce, 63d Cong., 2d Sess., Letter from the Commissioner of Corporations to the Chairman of the Committee on Interstate Commerce, transmitting certain suggestions relative to the Bill (H.R. 15613) to Create a Federal Trade Commission (1914).

[32] The House bill, passed on June 5, 1914, provided: "'Corporation' means a body incorporated under law, and also joint-stock associations and all other associations having shares of capital or capital stock or organized to carry on business with a view to profit." H.R. Rep. No. 1142, 63d Cong., 2d Sess. 11 (1914). The Senate bill, passed on August 5, 1914, provided: "The term 'corporation' or 'corporations' shall include joint-stock associations and all other associations having shares of capital or capital stock, organized to carry on business for profit." *Id.* at 14.

A separate section in the Senate bill, but not in the House bill, provided, "The powers and jurisdiction herein conferred upon the commission shall extend over all trade associations, corporate combinations, and corporations as hereinbefore defined engaged in or affecting commerce, except banks and common carriers." *Id.* at 15. This section, though noted, was not discussed by Commissioner Davies. It was deleted from the final legislation.

Commissioner Davies observed that the House and Senate definitions would preclude the new Commission from inquiring into transactions by not-for-profit associations of manufacturers and dealers despite the potential that these associations furnished for reaching anticompetitive understandings. Commissioner Davies' suggestion--to eliminate the not-for-profit jurisdictional exclusion--was not accepted, but the bill which emerged dealt with his concern by extending the definition of corporation to encompass any company or association without shares of capital or capital stock (other than a partnership), that is "organized to carry on business for its own profit or that of its members." 38 Stat. 719 (1914).[33] While this legislative history is not extensive, it clearly underscores that Congress understood the distinction between an association and its members and that jurisdiction over members might not automatically confer jurisdiction over the association itself.

Finally, to preserve their alternative position that, apart from any "persons" jurisdiction under Section 5, CFA is organized to carry on business for the profit of its members, within the meaning of Section 4, complaint counsel would need to demonstrate genuine issues of material fact casting doubt upon the not-for-profit nature of CFA's members. Although complaint counsel argued to the Administrative Law Judge that CFA's members made profits--in the sense of revenues in excess of expenditures--from their college football programs, complaint counsel's own evidence shows that the members devoted those excess revenues to supporting the lesser, "non-revenue" sports in their athletic programs. complaint counsel's Opposition to Respondents' Motions for Summary Decision (April 22, 1991), Ex. J at 27 and Ex. K at 214-15. Apart from the barest of suggestions that CFA football coaches reap excessive financial benefits, *id.* at 18 n.17, complaint counsel have not intimated that CFA members have utilized football telecast revenues other than for their athletic and, much less frequently, their academic *(id.* Ex. S at 214 and Ex. V at 152) programs. However, it has been clear since the Eighth Circuit's decision in Community Blood Bank that the mere fact that revenues in excess of expenses are applied to perpetuate an entity's own operations is insufficient to subject that entity to

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[33] The Wheeler-Lea Act of 1938, 52 Stat. 111 (1938), further amended the Section 4 definition of "corporation" by applying the phrase "organized to carry on business for its own profit or that of its members" to companies and associations with shares of capital or capital stock as well.

the Commission's jurisdiction. Indeed, without entirely abandoning the rhetorical assertion that CFA's members are "profit-seekers," CCAB at 8, complaint counsel concede on appeal that "it is presumed that states and state entities put revenues from their proprietary activities to some public use . . . ." CCRB at 10. In any case, complaint counsel's minimal assertions regarding the use of funds by member colleges and universities and their conclusory efforts to label the members' activities "for-profit" are insufficient to avert summary disposition.

V. CONCLUSION

We conclude that complaint counsel have not demonstrated the existence of any genuine issue of material fact concerning whether CFA is organized to carry on business for its own profit or that of its members and thus, concerning whether CFA constitutes a "corporation" within the meaning of Sections 4 and 5 of the Federal Trade Commission Act. Summary disposition in CFA's favor is appropriate, based on the existing record, and we dismiss the complaint as to CFA for lack of jurisdiction. Under the circumstances of this litigation, we find it in the public interest to dismiss the complaint against CPA with prejudice. As discussed *supra* at note 3, the complaint against Capital Cities is dismissed without prejudice.

FINAL ORDER

This matter having been heard by the Commission upon the appeal from the Initial Decision of counsel supporting the complaint and upon briefs and oral argument in support of and in opposition to the appeal, for the reasons stated in the accompanying opinion, the Commission has determined to deny the appeal. Accordingly,

It is ordered, That:

1. The complaint as to the College Football Association is dismissed with prejudice; and
2. The complaint as to Capital Cities/ABC, Inc. is dismissed without prejudice.

CONCURRING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

On September 5, 1990, the Commission issued a complaint against the College Football Association and Capital Cities/ABC, Inc., and I dissented from that action. Today, the Commission dismisses the complaint, and I concur in the result, except that with respect to the College Football Association, I would dismiss for lack of jurisdiction instead of dismissing "with prejudice." I reach this conclusion without the extensive analysis in the opinion of the majority, and I do not join that opinion.

At the time the Commission initiated this litigation, I refrained from issuing a statement to explain my dissenting vote in order to avoid any prejudice to the case during the administrative adjudication, to avoid any suggestion of prejudgment of the outcome of the adjudication, and, for the duration of the adjudicative process, in deference to the decision of the majority. My vote against the issuance of the complaint stemmed from my reservations about the Commission's jurisdiction over the College Football Association and, based primarily on those reservations, my belief that a complaint was not in the public interest. Since the complaint issued, nothing new has been presented in fact or in law to persuade me that the Commission has jurisdiction to proceed against the College Football Association.

The parties do not contest the findings of fact below.

Section 5 of the Federal Trade Commission Act authorizes the Commission to issue complaints against persons, partnerships and corporations. Under Section 4, a "corporation" is defined to include only an "association . . . which is organized to carry on business for its own profit or that of its members." The College Football Association is organized as a nonprofit association, and its revenues from the sale of television rights are distributed to member schools for use in athletics or education. No credible allegation has been made that the nonprofit status of the association is a sham, that its revenues are from anything other than the sale of television rights, or that its funds are not used by member schools for the nonprofit purposes claimed. A plain reading of the statute suggests that the College Football Association is outside the scope of Sections 4 and 5 of the Federal Trade Commission Act.

Complaint counsel argue that even if the association is itself nonprofit, it includes among its members some schools that are

subject to the Commission's jurisdiction. The College Football Association is made up of private nonprofit universities, state colleges and universities, and federal instrumentalities. Whether or not the commission may have jurisdiction over any of those schools, no showing was made that the association conducted business for the profit of any member, as required by Section 4. No persuasive argument in favor of jurisdiction over the College Football Association having been advanced either before the complaint issued or since, I concur in the dismissal of the complaint.

IN THE MATTER OF

EL PORTAL LUGGAGE, INC.

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

Docket C-3499. Complaint, June 20, 1994--Decision, June 20, 1994

This consent order prohibits, among other things, a Nevada-based retailer of luggage and other leather goods from misrepresenting the identity of the country of origin of any product it sells, and from removing, altering, obliterating, or concealing any country of origin designation attached to a product that it receives or offers for sale.

Appearances

For the Commission: *Sylvia Kundig* and *Barry L. Costilo.*
For the respondent: *Pro se.*

COMPLAINT

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

PARAGRAPH 1. Respondent El Portal Luggage, Inc., is a Nevada corporation, with its principal office or place of business at 4432 Aldebaran Avenue, Las Vegas, Nevada.

PAR. 2. Respondent owns and operates 18 retail luggage stores located in the western United States. It sells luggage and small leather goods, including planners, portfolios, shoulder bags, carry-on luggage, and standard size suitcases. The luggage lines sold by El Portal include Ralph Lauren Polo, Tumi, and Yamani.

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

PAR. 4. Some of the goods that respondent has offered for sale, and sold, are foreign-made. These goods have been delivered to respondent with labels affixed thereto that state the country-of-origin.

PAR. 5. From at least as early as 1990, respondent has on various occasions deliberately removed labels that state the foreign country-of-origin from such goods before they were offered for sale.

PAR. 6. During much of this period, window and in-store signs in certain of respondent's stores that offered the goods identified in paragraph five have emphasized that many of the products respondent sells are made in the United States.

PAR. 7. Through the acts and practices referred to in paragraphs five and six, respondent has represented, directly or by implication, that the goods without the labels referred to in paragraph five were manufactured in the United States.

PAR. 8. In truth and in fact, the goods referred to in paragraph seven were not manufactured in the United States. Therefore, the representation as set forth in paragraph seven was, and is, false and misleading.

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

DECISION AND ORDER

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

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

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

1. Respondent El Portal Luggage, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Nevada, with its office and principal place of business located at 4432 Aldebaran Avenue, Las Vegas, Nevada.

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

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

ORDER

I.

It is ordered, That respondent, El Portal Luggage, Inc., a corporation, its successors and assigns, and its officers, and respondent's agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the labeling, advertising, promotion, offering for sale, sale or distribution of any product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting, in any manner, directly or by implication, the identity of the country-of-origin of any product.

II.

It is further ordered, That respondent, El Portal Luggage, Inc., a corporation, its successors and assigns, and its officers, and respondent's agents, representatives and employees, directly or through any

corporation, subsidiary, division or other device, in connection with the offering for sale, sale or distribution of any product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from removing, altering, obliterating, or concealing any country-of-origin designation that is on or attached to any product that respondent receives and offers for sale.

III.

It is further ordered, That for five (5) years after the last date of dissemination of any representation covered by this order, respondent, or its successors and assigns, shall maintain and upon request make available to the Federal Trade Commission for inspection and copying all materials that were relied on in disseminating such representations.

IV.

It is further ordered, That the respondent shall:

A. Within thirty (30) days after the date of service of this order, provide a copy of this order to each of its current directors and officers, and to each employee, agent, and representative having any sales, advertising, or policy responsibility with respect to the subject matter of this order, and obtain from each such person a signed statement acknowledging receipt of this order; and

B. For ten (10) years from the date of issuance of this order, provide a copy of this order to each of its directors and officers, and to each employee, agent, and representative having any sales, advertising, or policy responsibility with respect to the subject matter of this order, within fifteen (15) days after such person commences his or her duties, and obtain from each such person a signed statement acknowledging receipt of this order.

V.

It is further ordered, That respondent shall notify the Commission, at least thirty (30) days prior to any proposed change in the respondent such as dissolution, assignment, or sale resulting in the

emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation that may affect compliance obligations arising out of the order.

VI.

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

IN THE MATTER OF

SONIC TECHNOLOGY PRODUCTS, INC., ET AL.

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

Docket 9252. Complaint, Feb. 25, 1992--Decision, June 21, 1994

This consent order prohibits, among other things, a California company and its officers from representing that any ultrasonic pest control device can eliminate rodent or flea infestations, and from misrepresenting the results of any scientific studies regarding their ultrasonic pest control products.

Appearances

For the Commission: *Matthew D. Gold, David M. Newman* and *Sylvia J. Kundig*.

For the respondents: *Caswell O. Hobbs, Peter E. Halle* and *Patrick J. Pascarella, Morgan, Lewis & Bockius*, Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that Sonic Technology Products, Inc., a corporation ("Sonic" or "respondent"), and W. Lowell Robertson and Brian Phillip Jobe, individually and as officers of said corporation (also each a "respondent"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent Sonic is a California corporation, with its office and principal place of business located at 120 Richardson Street, Suite C, Grass Valley, California.

PAR. 2. Respondent W. Lowell Robertson resides in Nevada City, California. Respondent Robertson is and was at all times pertinent to this complaint an officer and director of Sonic. Individually or in concert with others, Robertson formulates, directs, controls, or participates in Sonic's business practices, including the acts and practices set forth herein.

PAR. 3. Respondent Brian Phillip Jobe resides in San Jose, California. Jobe is and was at all times pertinent to this complaint an officer and director of Sonic. Individually or in concert with others, Jobe formulates, directs, controls, or participates in Sonic's business practices, including the acts and practices set forth herein.

PAR. 4. Sonic has manufactured, advertised, promoted, offered for sale, sold, and distributed ultrasonic pest control devices, including those called the "PestChaser" and the "Pestrepeller."

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

PAR. 6. Respondents have disseminated or have caused to be disseminated advertisements and promotional materials for its ultrasonic pest control devices, including, but not necessarily limited to, the attached Exhibits "A" through "G."

PAR. 7. The advertisements and promotional materials referred to in paragraph six contain the following illustrations or statements:

(a) "... A high quality, well designed ultrasound generator like the PestChaser can quickly repel rodents from a sound protected area and can provide an ongoing repellant protection." (Exhibits A and D)

(b) "Get Rid of Unwanted Guests. PestChaser ultrasonic repeller can drive out disease bearing vermin that are making your home their home. Safe, economical and effective high frequency ultrasound can keep your premises free of rats, mice and other pests." (Exhibit B)

(c) A depiction of a rat inside of the universal null symbol (red circle with a red diameter line drawn). (Exhibit C)

(d) "In . . . tests we proved the PestChaser could repel rodents in actual user situations . . . and could keep them away." (Exhibit D)

PAR. 8. Through the use of the illustrations and statements referred to in paragraph seven, and others in advertisements and promotional materials not specifically set forth herein, respondents have represented, directly or by implication, that use of respondents' ultrasonic pest control devices eliminates rodent infestations.

PAR. 9. In truth and in fact, use of respondents' ultrasonic pest control devices does not eliminate rodent infestations. Therefore, the representation set forth in paragraph eight was and is false and misleading.

PAR. 10. The advertisements and promotional materials referred to in paragraph six contain the following illustrations or statements:

(a) "Our PestChaser ultrasonic repeller can seriously reduce, if not eliminate a flea infestation problem in pet owners' homes." (Exhibit F)

(b) "Backed by Field Test Studies, the PestChaser will dramatically reduce the dreaded flea infestations that will occur in the months ahead." (Exhibit G)

(c) A depiction of a flea inside of the universal null symbol (red circle with a red diameter line drawn). (Exhibit C)

PAR. 11. Through the use of the illustrations and statements referred to in paragraph ten, and others in advertisements and promotional materials not specifically set forth herein, respondents have represented, directly or by implication, that use of respondents' ultrasonic pest control devices eliminates or reduces flea infestations, or repels fleas.

PAR. 12. In truth and in fact, use of respondents' ultrasonic pest control devices does not eliminate or reduce flea infestations; nor does it repel fleas. Therefore, the representation set forth in paragraph eleven was and is false and misleading.

PAR. 13. The advertisements and promotional materials referred to in paragraph six contain the following statements:

(a) "Documented Testing..... Sonic Technology conducted extensive field tests ... to measure repellency [sic] effectiveness. In these tests we proved the PestChaser could repel rodents in actual user situations and could keep them away." (Exhibit D)

(b) "We've got something that no one else has. . . A scientific Field Test Study that proves that our PestChaser ultrasonic repeller can seriously reduce, if not eliminate, a flea infestation problem in pet owners' homes." (Exhibit F)

(c) "Backed by Field Test Studies, the PestChaser . . . will dramatically reduce the dreaded flea infestations that will occur in the months ahead." (Exhibit G)

PAR. 14. Through the use of the statements referred to in paragraph thirteen, and others in advertisements and promotional materials not specifically set forth herein, respondents have represented, directly or by implication, that competent and reliable scientific tests have established that the representations set forth in paragraph eight and paragraph eleven are true.

PAR. 15. In truth and in fact, no competent and reliable scientific tests have established that the representations set forth in paragraph eight and paragraph eleven are true. Therefore, the representation set forth in paragraph fourteen was and is false and misleading.

PAR. 16. The advertisements and promotional materials referred to in paragraph six contain the following statements:

(a) "Ultrasonic sound is most effective when combined with other pest control methods. This tool can increase the overall effectiveness of your efforts to eliminate pest problems." (Exhibit C)

(b) "The repellency [sic] effect of ultrasound can be used to drive pests toward safely placed traps and/or poisons; this use may increase the effectiveness of efforts to eliminate a pest problem." (Exhibit D)

(c) "RODENTS. Ultrasound can cause pain due to the high intensity sound pressure and will definitely create stress on the animals which causes them to avoid the sound protected area. The environmental stress effect can reduce their normal caution around placed traps and baits and increase the effectiveness of your eradication efforts." (Exhibit E)

PAR. 17. Through the use of the statements referred to in paragraph sixteen, and others in advertisements and promotional materials not specifically set forth herein, respondents have represented, directly or by implication, that use of respondents' ultrasonic pest control devices in conjunction with other pest control methods, such as traps and poisons, will increase the effectiveness of the user's efforts to eliminate or reduce infestations of rodents or other pests.

PAR. 18. Through the use of the statements set forth in paragraphs seven, ten and sixteen, and other statements contained in advertisements and promotional materials not specifically set forth herein, respondents have represented, directly or by implication, that, at the time they made the representations set forth in paragraphs eight, eleven and seventeen, they possessed and relied upon a reasonable basis for those representations.

PAR. 19. In truth and in fact, at the time respondents made the representations set forth in paragraphs eight, eleven and seventeen, respondents did not possess and rely upon a reasonable basis for those representations. Therefore, the representation set forth in paragraph eighteen was and is false and misleading.

PAR. 20. In providing the advertisements and promotional materials referred to in paragraph six to their dealers for the purpose of inducing consumers to purchase respondents' ultrasonic pest control devices, respondents have furnished the means and instrumentalities to those dealers to engage in the acts and practices alleged in paragraphs six through nineteen.

PAR. 21. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

EXHIBIT A

A SOUND APPROACH TO RODENT CONTROL

PESTCHASER® RODENT REPELLER MODEL PC110S

The PestChaser® Ultrasonic Repeller generates high frequency sound which cannot be heard by human beings, farm animals or common pets.

This inexpensive non-toxic approach creates an acoustically uncomfortable environment which, given a choice, rodents and other affected pests will avoid. A high quality, well designed ultrasound generator like the PestChaser® can quickly repel rodents from a sound protected area and can provide an ongoing repellant protection.

PestChaser® is the only product of this type Registered for sale by the Canadian Agriculture Dept. for use against rats and mice. PCP Reg. No. 19674. Three year warranty. U.L. Listed. List $34.95.

MANUFACTURED AND DISTRIBUTED BY:
SONIC TECHNOLOGY PRODUCTS, INC.
120 RICHARDSON ST.
GRASS VALLEY, CA 95945
1-800-247-5518
(916) 272-4607 in California
CONTACT: W.L. ROBERTSON

EXHIBIT B

EXHIBIT B

© Sonic Technology Products Inc. 19

EXHIBIT C

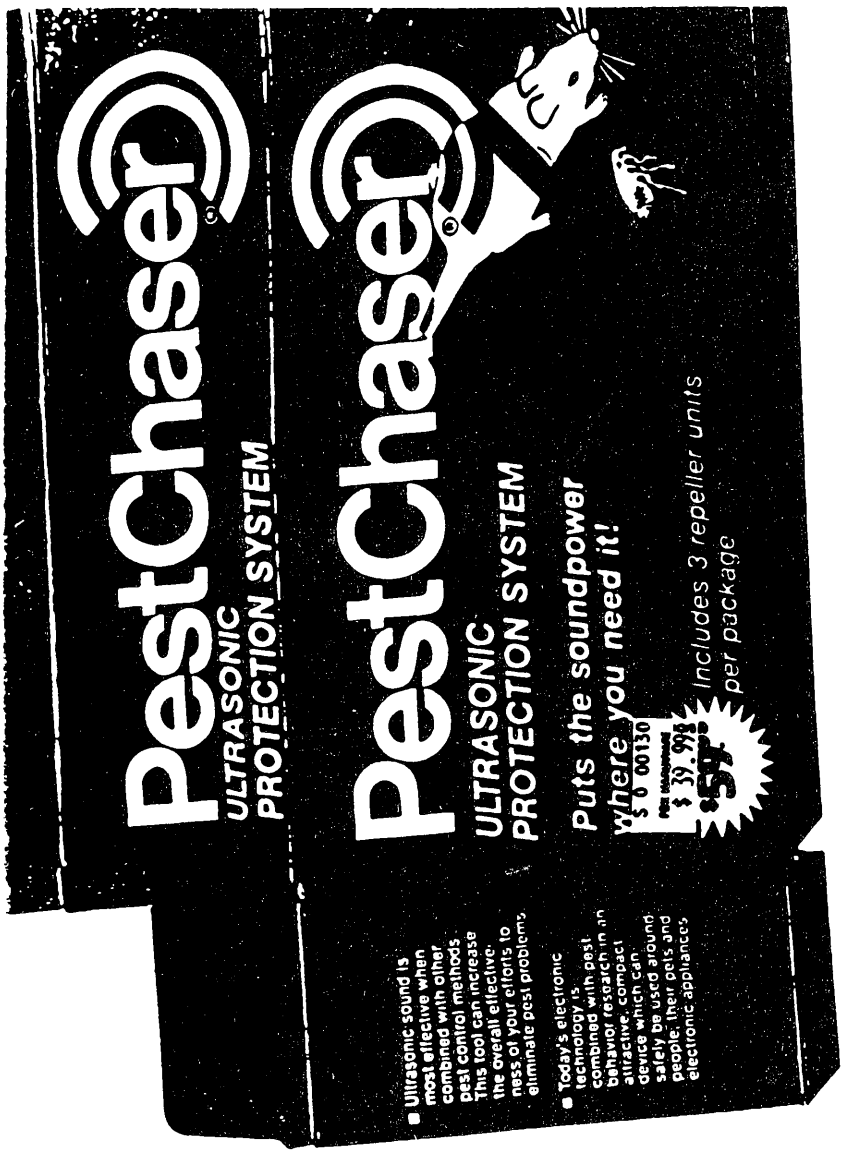

PestChaser
ULTRASONIC
PROTECTION SYSTEM
PestChaser
ULTRASONIC
PROTECTION SYSTEM
Puts the soundpower where you need it!
Includes 3 repeller units per package
Ultrasonic sound is most effective when combined with other pest control methods. This tool can increase the overall effective-ness of your efforts to eliminate pest problems.
Today's electronic technology is combined with pest behavior research in an attractive, compact device which can safely be used around people, their pets and electronic appliances.

EXHIBIT C

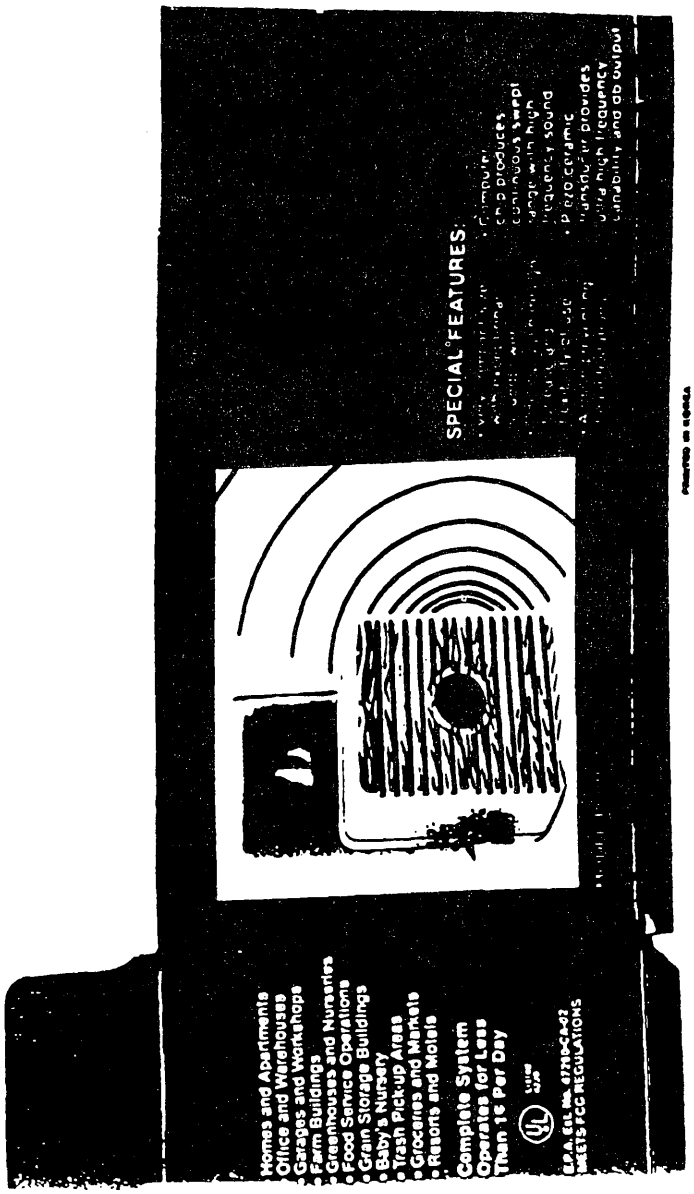
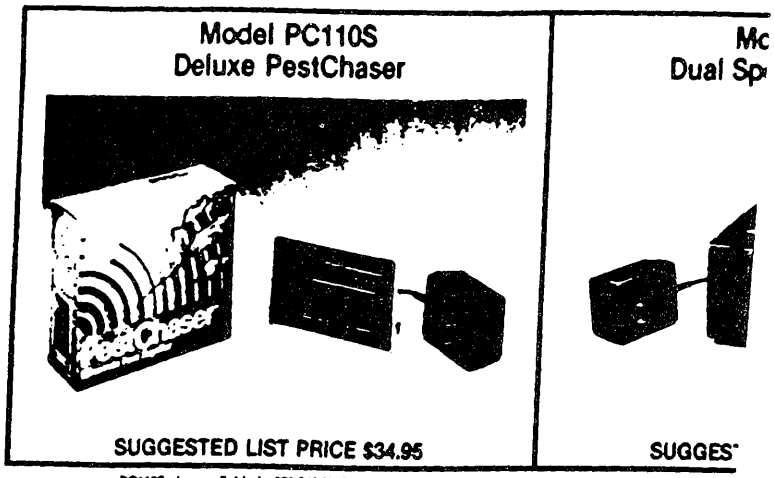

SPECIAL FEATURES
Homes and Apartments
Office and Warehouses
Garages and Workshops
Farm Buildings
Greenhouses and Nurseries
Food Service Operations
Grain Storage Buildings
Baby's Nursery
Trash Pick-up Areas
Groceries and Markets
Resorts and Motels
Complete System
Operates for Less
Than 1¢ Per Day

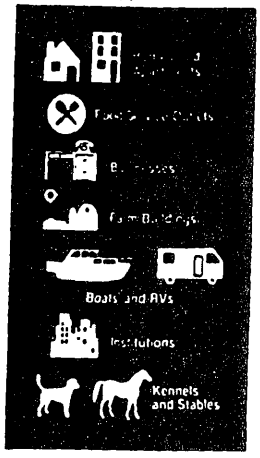
EXHIBIT D



PC110S also available in 220-240 VAC for export

Simple, Safe and Effective

The Right Technology for Many Applications



The PestChaser® Ultrasonic Repeller generates high frequency sound which cannot be heard by human beings or common pets.

PestChaser® is simply plugged into a wall outlet in the room to be protected. Its operation costs less than one cent a day. It makes no irritating audible sound, and it will not interfere with the operation of radio, television sets or other electronic equipment.

This inexpensive non-toxic approach creates an acoustically uncomfortable environment which, given a choice, rodents and other affected pests will avoid. A high quality, well designed ultrasound generator like the PestChaser® can quickly repel rodents from a sound protected area and can provide an ongoing repellant protection. Ultrasound is most effective when used in conjunction with other pest control methods

Please Note:
Since ultrasound does not pests, it is most effectiv used in conjunction w other pest control metho The repellancy effect of ul sound can be used to d pests toward safety pla traps and/or poisons; this may increase the effec ness of efforts to elimina pest problem.

Specification

SOUNDPOWER: 130db + at source 1 meter
FREQUENCY: Pulsed swept range to 62 kHz
POWER: 110 or 220VAC input down to 12VAC ope
CASE: Custom high impact eng grade ABS
U.L. LISTING: 42J9
E.P.A. ESTABLISHMENT NO. 47260
MEETS FCC REGULATIONS

EXHIBIT D

TO FIT EVERY NEED

PC200X
r PestChaser

ST PRICE $54.95

Model PC3000
Deluxe set of 3 Direct Plug-In
Multiroom Protection PestChaser

SUGGESTED LIST PRICE $59.95 set

Quality and Integrity

Sonic Technology pioneered ultrasonic pest repellers in the retail marketplace. We brought our product market only after doing extensive biological and acoustical research. PestChaser is a high quality, U.S.A. ma ultrasonic sound generator. It is designed to produce intense sound in specific frequency ranges heard by rode and some other pest species. Every PestChaser goes through three separate function tests to insure qua control.

We've seen over 50 competitors fail due to lack of quality and integrity!

Satisfied Owners

Every PestChaser sold has earned a 90 day moneyback guarantee. With over 2,000,000 units sold, only by reputable retailers, returns for any reason average less than 8% of sales. PestChaser stays sold because it does what we say it will do.

Guarantees & Warranties

Sonic Technology backs the best product in the industry with the best warranties in the industry.

90 DAY UNCONDITIONAL GUARANTEE

ONE YEAR LIMITED WARRANTY

TWO YEAR EXTENDED WARRANTY

A great warranty and a company that will be around to back it!

Documented Testing

RODENTS

Sonic Technology conducted extensive field tests using a procedure designed by the Agricultural Department of Canada to measure repellancy effectiveness. In these tests we proved the PestChaser could repel rodents in actual user situations and could keep them away. The Canadian protocol is the only published test procedure existant

Reg. No. [illegible] in Canada PCP [illegible]

FLEAS

A scientific field test completed in 1988 by an pendent testing facility s that the PestChaser's hig sity ultrasound reduce number of fleas on th tested and in the carpet to 70% and more. No oth pany has done this t testing or achieved results.

The PestChaser® Ultrasonic Repeller has been sucessfully so by hundreds of quality retail merchandisers, pet stores, and mail order catalogs in the U.S.A., Canada, and abroad.

EXHIBIT E

ABOUT THE PESTCHASER®

Use of ultrasonic sound technology in the control of pests is relatively new in the pest control industry, and there is some understandable confusion about which pests are affected, and how these effects vary from one pest to another. The following information is supplied in response to the most frequently asked questions about the PestChaser®:

Ultrasonic sound waves are sounds that are above the range of human hearing; that is, above 20,000 cycles per second (or 20 kilohertz). The frequencies used in the PestChaser® are considerably higher than that - they sweep from 32 kilohertz to 62 kilohertz, many times a second.

These frequencies, in the intensity generated by the PestChaser®, are completely safe for use around humans, dogs, cats, and domestic animals, except rodents.

AREA COVERAGE

A PestChaser® is adequate for one large room, 300-500 square feet. The more hard reflective surfaces there are, the larger the area of effective coverage will be.

AUDIBLE NOISE

There is a slight hum built into the PestChaser®. This is normal, and should be soft enough in volume so as not to be bothersome.

PRODUCT LIFE

The PestChaser® is designed to be operated continuously. Made of high quality components with a Motorola high output transducer, it should have a useful service life of five to seven years.

EFFECTS OF ULTRASONICS ON ANIMAL LIFE

RODENTS

Ultrasound can cause pain due to the high intensity sound pressure and will definitely create stress on the animals which causes them to avoid the sound protected area. The environmental stress effect can reduce their normal caution around placed traps and baits and increase the effectiveness of your eradication efforts.

FLEAS

Sonic Technology conducted extensive Field Test Studies which showed that the presence of high intensity ultrasound in a home environment could dramatically reduce the number of fleas found on household pets and in carpets. PestChaser® can be an excellent weapon to add to your arsenal for combatting flea problems.

INSECTS

There are many thousands of insect species on this planet. Some of these species are capable of making and receiving sounds in the ultrasonic range - most are not. Other species may react to stress caused by either pressure or vibration in the air created by high frequency sound.

The use of ultrasound in pest control is relatively new and there are many questions to be answered and discoveries to be made.

Sonic Technology Products, Inc. has spent over $100,000 on research, reviewed hundreds of scientific articles on ultrasonic sound and its effects on plant and animal life, and has conducted numerous field test studies.

PestChaser® owners continue to be one of our best sources of information. We have on file over 30,000 surveys completed by PestChaser® owners. Some people had single pest problems and other multiple pests. The following is what PestChaser® users said the product worked on for them: Rats and/or mice 84%, fleas 44%, cockroaches 37%, spiders 10%, flies 9%, crickets 8%, bats 6% and miscellaneous others 22%. This data reflects the experience of actual end-users with the product in their homes and businesses.

SONIC TECHNOLOGY PRODUCTS, INC.
Marketing and Sales, 120 Richardson St., Grass Valley, CA 95945 (916) 272-4607 1-800-247-5548

EXHIBIT F

Dear Pet Supplies Buyer,

WE'VE GOT SOMETHING THAT NO ONE ELSE HAS

What is it?

A Scientific Field Study that proves that our PestChaser® ultrasonic repeller can seriously reduce, if not eliminate a flea infestation problem in pet owners' homes. I'm sure you are aware of the success of ultrasonic flea collars. The fact is that no flea collar can prevent pets from picking up new fleas when they're outside and depositing them in their owners' homes. That's a problem. Treating the rooms inside the house with high intensity ultrasound can help prevent the "flea explosion" that plagues people.

The PestChaser® at 133 dB output is more than 100 times more powerful than the best ultrasonic flea collars.

PLUS, the PestChaser® sells better. In every catalog that we're in where ultrasonic flea collars are also carried, the PestChaser® outsells flea collars on a unit sales basis.

We forecast that flea season 1989 will be one of the worst ever. Isn't it time you added this top rated and proven product to your mix?

SPECIAL CATALOG MERCHANDISER QUOTE

MODEL PC110S	Deluxe PestChaser	$12.00 ea.	List $34.95
MODEL PC200X	Deluxe Dual Speaker Pest Chaser	$19.50 ea.	List $54.95
MODEL PC3000	Set of 3 Direct Plug-in Minirepeller	$19.00 set	List $59.95

Enclosed is a raft of information and a copy of a Press Release just sent to over 300 Consumer and Trade Magazines.
Upon request we will provide a copy of the Field Test Study and samples for evaluation.

Sincerely yours,

W. Lowell Robertson
President

SONIC TECHNOLOGY PRODUCTS, INC.

EXHIBIT G

Sonic
Technology
Products Inc.

Dear CUSTOMER,

"GET IN STOCK FOR FLEA SEASON"

Backed by Field test Studies, the PestChaser® Deluxe Dual Speaker Model PC2020 will dramatically reduce the dreaded flea infestations that will occur in the months ahead.

PC2020...Deluxe Dual Speaker Model is...
50 times more powerful than our other models...
has a sweeping frequency range of 32 to 62
kilohertz while pulsing many times a second...
and...has an output of 148 dB (decibels) of sound.

Why not choose the VERY BEST for your customers this flea season?
"GET IN STOCK"...CALL 800-247-5548, NOW!

Sincerely yours,

Susan Walsh
Director of Sales

CONCURRING STATEMENT OF COMMISSIONER DENNIS A. YAO

I agree that there is reason to believe that Sonic Technology Products, Inc. and its principals violated Section 5 of the FTC Act in the manner alleged in the complaint. Accordingly, I voted in favor of issuance of the complaint. At the same time, I also find reason to believe that the respondents lacked adequate substantiation to support

claims that Sonic's ultrasonic pest control devices would effectively repel or control rodents under real life conditions. Thus, I would have preferred a broader complaint that also expressly includes such an allegation. In my view, this broader complaint would better achieve adequate relief to prevent future deceptive conduct in the event that the Commission upholds the complaint allegations after litigation. Of course, my final decisions in this matter will be made at the conclusion of this proceeding and based on the full record evidence.

DECISION AND ORDER

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

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

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

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

1. Respondent Sonic Technology Products, Inc., is a corporation organized, existing, and doing business under and by virtue of the

laws of the State of Nevada, with its principal place of business located at 120 Richardson Street, Suite C, Grass Valley, California.

Respondents W. Lowell Robertson and Brian Phillip Jobe are officers of said corporation. Individually or in concert with others, they formulate, direct, and control the policies, acts, and practices of said corporation. Their office and place of business is the same as that of said corporation.

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

ORDER

I.

It is ordered, That Sonic Technology Products, Inc., ("Sonic") a corporation, and W. Lowell Robertson and Brian Phillip Jobe, individually and as officers of said corporation, and their successors and assigns, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, marketing, offering for sale, sale, or distribution of the "PestChaser," the "Pestrepeller," or any other ultrasonic pest control device, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication:

A. That the device can or will eliminate infestations of rodents;

B. That the device can or will eliminate or reduce infestations of fleas; or

C. That the device can or will repel fleas.

II.

It is further ordered, That respondents, their successors and assigns, and the corporate respondent's officers, and respondents' representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, promotion, offering for sale, sale or distribution of any ultrasonic pest control device, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do

forthwith cease and desist from misrepresenting, in any manner, directly or by implication, the existence, contents, validity, results, conclusions, interpretations or purpose of any test, study or other scientific data.

III.

It is further ordered, That respondents, their successors and assigns, and the corporate respondent's officers, and respondents' representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, promotion, offering for sale, sale or distribution of any ultrasonic pest control device, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Representing, directly or by implication, that the "PestChaser," the "Pestrepeller," or any other ultrasonic pest control device will increase or assist the effectiveness of a user's efforts to eliminate or reduce infestations of rodents or other pests when the device is used in conjunction with other pest control methods, such as traps or poisons; or

B. Making, directly or by implication, any representation referring or relating to the performance or efficacy of any such device;

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

Provided, that nothing in Section III of this order shall prevent respondents from truthfully representing, by use of the words "Registered in Canada," that the Canadian Department of Agriculture has registered the PestChaser, Pestrepeller or any other ultrasonic pest control device, and permitted the sale of such device in Canada.

IV.

It is further ordered, That respondents shall, within thirty (30) days after the date of service of this order, send to each catalog company with whom respondents have done business since January 1, 1992, a copy of this order and a notice that the catalog company shall immediately cease using or relying upon any of respondents, advertising or promotional materials containing representations prohibited by this order.

V.

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

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

B. All test reports, studies, or other materials in their possession or control that contradict, qualify or call into question such representation or the basis upon which respondents relied for such representation, including complaints from consumers.

VI.

It is further ordered, That for three (3) years from the date of issuance of this order, respondents shall maintain and upon request make available to the Federal Trade Commission for inspection and copying all documents demonstrating or relating to compliance with the terms of this order, including but not limited to:

A. All advertisements, promotional materials, documents, or other materials relating to the offer of sale or sale of any ultrasonic pest control device; and

B. All consumer complaints and requests for refunds.

VII.

It is further ordered, That, for three (3) years from the date of issuance of this order, the corporate respondent, its successors and

assigns, and the individual respondents, shall cause a copy of this order to be distributed to each purchaser of respondents, ultrasonic pest control devices for resale, to each present and future managerial employee of respondents, and to each present and future salesperson of respondents' products, whether they are independent sales agents or employees of respondents.

VIII.

It is further ordered, That, for five (5) years from the date of issuance of this order, respondents shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution or subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of this order.

IX.

It is further ordered, That, for five (5) years from the date of issuance of this order, each individual respondent shall notify the Commission, by submitting a report, in writing, of any change in his residence or business address, occupation, place of business, or place of employment.

X.

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

IN THE MATTER OF

MARTIN MARIETTA CORPORATION

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

Docket C-3500. Complaint, June 22, 1994--Decision, June 22, 1994

This consent order prohibits, among other things, the respondent's Expendable Launch Vehicle (ELV) division from disclosing to its satellite division any non-public information that its ELV division receives from a satellite manufacturer, and requires the respondent to give a copy of the consent order to U.S. satellite owners or manufacturers before obtaining any non-public information from them.

Appearances

For the Commission: *Ann B. Malester* and *Casey Triggs.*

For the respondent: *Raymond A. Jacobsen* and *Scott McGregin, Howrey & Simon*, Washington, D.C.

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that respondent, Martin Marietta Corporation ("Martin Marietta"), a corporation subject to the jurisdiction of the Federal Trade Commission, agreed to acquire certain assets of General Dynamics Corporation, a corporation subject to the jurisdiction of the Federal Trade Commission, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. 45; and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. DEFINITIONS

For the purposes of this complaint the following definitions apply:

1. "*Atlas-class Expendable Launch Vehicle*" means a vehicle that launches Satellites of 4,000 to 8,000 pounds from the Earth's surface to geotransfer orbit and that is consumed during the process of launching a Satellite and therefore cannot be launched more than one time.

2. "*Satellite*" means an unmanned machine that is launched from the Earth's surface for the purpose of transmitting data back to Earth and which is designed either to orbit the Earth or travel away from the Earth.

II. MARTIN MARIETTA CORPORATION

3. Respondent Martin Marietta 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 located at 6801 Rockledge Drive, Bethesda, Maryland.

4. Respondent, through its Astronautics Company and Astro Space Company, is engaged in the research, development, manufacture and sale of Satellites.

5. Respondent, through its Astronautics Company and the proposed acquisition of substantially all of the assets relating to General Dynamics Corporation's Space Systems Division, would be engaged in the research, development, manufacture and sale of Atlas-class Expendable Launch Vehicles, which deliver Satellites into orbit.

III. GENERAL DYNAMICS CORPORATION

6. General Dynamics Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Delaware, with its principal place of business at 3190 Fairview Park Drive, Falls Church, Virginia.

7. General Dynamics Corporation, through its Space Systems Division, is engaged in the research, development, manufacture and sale of Atlas-class Expendable Launch Vehicles, which deliver Satellites into orbit.

IV. JURISDICTION

8. For purposes of this proceeding, respondent Martin Marietta is, and at all times relevant herein has been, engaged in commerce as

"commerce," is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business or practices are in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

V. THE ACQUISITION

9. On December 22, 1993, Martin Marietta agreed to acquire substantially all of the assets, and assume certain liabilities, relating to General Dynamics Corporation's Space Systems Division for consideration totaling approximately $208.5 million.

VI. TRADE AND COMMERCE

10. The relevant lines of commerce are the research, development, manufacture and sale of Satellites and the research, development, manufacture and sale of Atlas-class Expendable Launch Vehicles.

11. The relevant section of the country in which to evaluate the effects of the acquisition is the United States.

12. The relevant line of commerce consisting of the research, development, manufacture and sale of Atlas-class Expendable Launch Vehicles is highly concentrated, whether measured by Herfindahl-Hirschmann Indices ("HHI") or two-firm and four-firm concentration ratios.

13. Entry into the research, development, manufacture and sale of Atlas-class Expendable Launch Vehicles is difficult and unlikely.

VII. EFFECTS OF THE ACQUISITION

14. The effect of the acquisition may be substantially to lessen competition and to tend to create a monopoly in the market for the research, development, manufacture and sale of Satellites in violation of Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. The acquisition may increase and enhance the position and ability of Martin Marietta to gain access to competitively significant and non-public information concerning other Satellite manufacturers.

15. The effect identified in paragraph fourteen may increase the likelihood that, in the market for the research, development, manufacture and sale of Satellites:

a. Direct actual competition between Martin Marietta and Satellite manufacturers will be reduced; and

b. Advancements in Satellite research, innovation, and quality will be reduced.

VIII. VIOLATIONS CHARGED

16. The acquisition agreement described in paragraph nine constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

17. The acquisition described in paragraph nine, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of respondent's proposed acquisition of certain assets of the Space Systems Division of General Dynamics Corporation, 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 violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; 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 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 Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Acts, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with

the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Martin Marietta is a corporation, organized, existing, and doing business under and by virtue of the laws of the State of Maryland, with its office and principal place of business located at 6801 Rockledge Drive, Bethesda, 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, as used in this order, the following definitions shall apply:

A. "*Martin Marietta*" or "*respondent*" means Martin Marietta Corporation, its predecessors, subsidiaries, divisions, groups and affiliates controlled by Martin Marietta, and their respective directors, officers, employees, agents and representatives, and their respective successors and assigns.

B. "*Astronautics*" means Martin Marietta's Astronautics Company, an entity with its principal place of business at P.O. Box 179, Denver, Colorado, which is engaged in, among other things, the research, development, manufacture and sale of Expendable Launch Vehicles and Satellites, as well as its officers, employees, agents, divisions, subsidiaries, successors, and assigns, and the officers, employees or agents of Astronautics's divisions, subsidiaries, successors and assigns.

C. "*Astro Space*" means Martin Marietta's Astro Space Company, an entity with its principal place of business at P.O. Box 800, Princeton, New Jersey, which is principally engaged in the research, development, manufacture and sale of Satellites, its officers, employees, agents, divisions, subsidiaries, successors and assigns, and the officers, employees or agents of Astro Space's divisions, subsidiaries, successors and assigns.

D. "*General Dynamics*" means General Dynamics Corporation, a corporation organized, existing and doing business under the laws of Delaware with its principal place of business at 3190 Fairview Park Drive, Falls Church, Virginia.

E. "*Person*" means any natural person, corporate entity, partnership, association, joint venture, government entity, trust or other business or legal entity.

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

G. "*Expendable Launch Vehicle*" means a vehicle that launches satellites from the Earth's surface that is consumed during the process of launching a Satellite and therefore cannot be launched more than one time.

H. "*Satellite*" means an unmanned machine that is launched from the Earth's surface for the purpose of transmitting data back to Earth and which is designed either to orbit the Earth or travel away from the Earth.

I. "*Acquisition*" means the acquisition by Martin Marietta of substantially all of the assets relating to General Dynamics Corporation's Space Systems Division.

J. "*Non-Public Information*" means any information not in the public domain furnished by a Satellite owner or manufacturer to Astronautics or General Dynamics in their capacity as providers of Expendable Launch Vehicles and (a) if written information, designated in writing by the Satellite owner or manufacturer as proprietary information by an appropriate legend, marking, stamp, or positive written identification on the face thereof, or (b) if oral, visual or other information, identified as proprietary information in writing by the Satellite owner or manufacturer prior to the disclosure or within thirty (30) days after such disclosure. Non-Public Information shall not include (i) information already known to Martin Marietta, (ii) information which subsequently falls within the public domain through no violation of this order by Martin Marietta, (iii) information which subsequently becomes known to Martin Marietta from a third party not in breach of a confidential disclosure agreement with such Satellite owner or manufacturer, or (iv) information after six (6) years from the date of disclosure of such Non-Public information to Martin Marietta or such other period as agreed to in writing by Martin Marietta and the Satellite owner or manufacturer.

II.

It is further ordered, That:

A. Martin Marietta shall not, absent the prior written consent of the proprietor of Non-Public Information, provide, disclose, or otherwise make available to Astro Space any Non-Public Information; and

B. Martin Marietta shall use any Non-Public Information obtained by Astronautics only in Astronautics' capacity as a provider of Expendable Launch Vehicles, absent the prior written consent of the proprietor of Non-Public Information.

III.

It is further ordered, That Martin Marietta shall deliver a copy of this order to any United States Satellite owner or manufacturer prior to first obtaining any information relating to the owner's or manufacturer's Satellites outside the public domain either from the Satellite owner or manufacturer or through the acquisition.

IV.

It is further ordered, That one (1) year from the date this order becomes final, annually for the next nine (9) years on the anniversary of the date this order becomes final, and at such other times as the Commission may require, respondent shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and is complying with this order. To the extent not prohibited by United States Government national security requirements, respondent shall include in its reports information sufficient to identify all United States Satellite owners or manufacturers with whom respondent has entered an agreement for the research, development, manufacture or sale of Expendable Launch Vehicles.

V.

It is further ordered, That respondent shall notify the Commission at least thirty days prior to any proposed change in respondent, such

as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in respondent, that may affect compliance obligations arising out of this order.

VI.

It is further ordered, That, for the purpose of determining or securing compliance with this order, and subject to any legally recognized privilege and applicable United States Government security requirements, upon written request, and on reasonable notice, respondent shall permit any duly authorized representative of the Commission:

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

B. Upon five (5) days' notice to respondent and without restraint or interference from it, to interview officers, directors, or employees of respondent, who may have counsel present, regarding such matters.

DISSENTING STATEMENT OF COMMISSIONER DEBORAH K. OWEN

Respondent Martin Marietta Corporation manufactures satellites, which are launched into orbit by expendable launch vehicles, some of which it also manufactures. It proposed to acquire the Space Systems Division of General Dynamics Corporation, which manufactures Atlas-class expendable launch vehicles. The theory of the complaint is that if this acquisition were consummated, Martin Marietta's launch vehicle division would gain access to trade secrets concerning the products of other satellite manufacturers, and would transfer such information to Martin Marietta's satellite division, which will use such information to injure its competitors. The Commission's order enjoins Martin Marietta from misusing its rival's confidential information in this manner.

Vertical integration, and combinations designed to achieve the efficiencies of such integration, are common phenomena, particularly

in the aerospace industry. Accordingly, it would seem that there are already ample opportunities for the sort of abusive information-sharing which concerns the Commission. However, equally common are contractual obligations between vertically integrated companies, and firms that do business with one of their divisions, to prevent the sharing of those firms' confidential business information with other parts of the conglomerate with which they compete. The question then is whether such contracts are sufficient to avoid any competitive problem, or whether government-imposed requirements are necessary; if there exist a significant number of substantiated incidents of such activity, then private agreements would not seem adequate. However, the opposite appears to be the case.

While various Commission personnel have, in recent years, exhorted the business community to be sensitive to antitrust concerns stemming from the sharing of business information, Commission enforcement actions in this area have been rare, and no case has involved the strategic misuse of proprietary information so as to injure a competitor. Furthermore, Martin Marietta currently manufactures both satellites and launch vehicles, and is already privy to competitively significant information from other satellite manufacturers, yet I am unaware of any instance where it has been alleged that proprietary information has been used for exclusionary purposes by Martin Marietta, or indeed by any other aerospace manufacturer. As a result, it seems fair to conclude that contractual obligations prohibiting such behavior, coupled with the threat of business tort and treble-damage antitrust suits, are sufficient deterrents. Moreover, as the amount of available business in the aerospace industry continues to dwindle, it is hard to imagine that developing a reputation for abusing confidential information would enhance any company's profitability.

The Commission's consent is somewhat puzzling in its coverage. If the theory of the complaint is correct -- that Martin Marietta's dominant power in the launch vehicle market would facilitate anticompetitive information-sharing in the satellite market -- why would the company stop there? The theory would seem to support as well allegations of other exclusionary and tying practices, yet these are not included. The Commission, correctly I believe, concluded that there was no evidence to support such charges; I therefore find

it strange that it chose to go forward on the equally speculative information-sharing allegations.

In short, I do not believe that the evidence supports the theory behind the Commission's complaint, nor that a Commission order would be superior to privately negotiated confidentiality agreements for protecting the trade secrets of satellite manufacturers. I dissent.

IN THE MATTER OF

VEIN CLINICS OF AMERICA, INC., ET AL.

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

Docket C-3501. Complaint, June 24, 1994--Decision, June 24, 1994

This consent order prohibits, among other things, an Illinois-based corporation and its officer from misrepresenting the rate of likely recurrence for any venous disease following treatment, or misrepresenting the newness, past availability, safety, risks or potential side-effects of any cosmetic or plastic surgery procedure. In addition, the consent order requires the respondents to have scientific evidence to substantiate any representations it makes about any cosmetic or plastic surgery procedure it markets or sells in the future.

Appearances

For the Commission: *Richard F. Kelly, Sondra Mills* and *Melissa Feinberg.*

For the respondents: *Robert E. Kehoe* and *Daniel S. Kaplan, Wildman, Harrold, Allen & Dixon,* Chicago, IL.

COMPLAINT

The Federal Trade Commission, having reason to believe that Vein Clinics of America, Inc., a corporation, and D. Brian McDonagh, M.D., individually and as an officer of said 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. Respondent Vein Clinics of America ("VCA") is a Delaware corporation, with its corporate headquarters at 1101 Perimeter Drive, Suite 615, Schaumburg, Illinois. Respondent has offices in fifteen cities located in the states of California, Georgia, Illinois, Maryland, Kansas, and Michigan.

Respondent D. Brian McDonagh, M.D., is the Chairman of the Board and National Medical Director of Vein Clinics of America. His address is 1535 Lake Cook Road, Northbrook, IL.

PAR. 2. Respondents are engaged, and have been engaged, in the sale and offering for sale of sclerotherapy treatments for venous disease, including varicose veins and spider veins. Sclerotherapy involves the injection of a solution with a fine needle directly into the vein. The solution irritates the lining of the vein, causing it to swell and stick together and the blood to clot. The vein turns into scar tissue that fades from view. A variety of solutions, called sclerosing agents, may be used for this procedure. These include, but are not limited to, hypertonic saline, Sotradecol (sodium tetradecyl sulfate), Polidocanol (Aethoxysklerol), and sodium morrhuate. In addition to sclerotherapy, other methods are used to treat varicose and spider veins. These include, but are not limited to, surgical procedures, laser treatments and electro-cautery treatments.

Respondents use the terms "MicroCure Process" or "refined compression sclerotherapy" to refer to the procedure used at their clinics. Doctors at respondents' clinics limit their practice to the treatment of varicose and spider veins. Respondents' procedure involves the injection of solutions of Sotradecol into the blood vessel using an empty vein technique, followed by compression of the area with bandages and wraps and post-procedure ambulation by the patient. This procedure is generally referred to by the medical profession as "compression sclerotherapy."

PAR. 3. In the course and conduct of VCA's business, respondents have disseminated or caused to be disseminated advertisements and promotional material for the purpose of promoting the sale of sclerotherapy services which include the use of the drug Sotradecol. Sotradecol is a "drug" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act. Respondents have placed, or caused to be placed advertisements in various periodicals that are in general circulation to the public to promote their treatments of varicose and spider veins to prospective patients. Respondents further advertise and promote their sclerotherapy services through the use of brochures, videos, and pamphlets which are provided to patients and prospective patients.

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 Section 4 of the Federal Trade Commission Act.

PAR. 5. Respondents' advertisements and promotional materials include, but are not necessarily limited to, the advertisements and promotional materials attached hereto as Exhibits A through H.

PAR. 6. Respondents' advertising contains the following statements:

(a) The recurrence rate for surgical treatment of varicose veins is "approximately 65% in 5 years" (Exhibit A); and

(b) "With surgery.... the recurrence rate is about 85% in five years. Quite unsatisfactory." (Exhibit B).

PAR. 7. Through the use of the statements contained in the advertisements referred to in paragraph six, including but not necessarily limited to the advertisements attached as Exhibits A and B, respondents represent, and have represented, directly or by implication, that the rate at which venous disease recurs following surgical treatment is approximately 65% to 85% in 5 years.

PAR. 8. In truth and in fact, the rate at which venous disease recurs following surgical treatment is not approximately 65% to 85% in five years but is substantially lower than 65 percent.

Therefore, the representation set forth in paragraph seven was, and is, false and misleading.

PAR. 9. Respondents' advertising contains the following statements and depictions:

(a) In a chart captioned "A Comparison of the Available Options for Treatment of Venous Disease," contained in the brochure "New Solutions to an Age Old Problem" attached hereto as Exhibit A, in the column identifying the "Recurrence rate" of venous disease following "Surgery-(Ligation and Stripping)," "Hypertonic Saline Injections" and "VCA-MicroCure Process":

(1) The rate at which venous disease recurs following treatment by surgery (ligation and stripping) is "approximately 65% in five years;"

(2) The rate at which venous disease recurs following treatment by hypertonic saline injections is "high;" and

(3) The rate at which venous disease recurs following treatment by VCA's MicroCure Process is "less than 3% in five years;"

(b) "This procedure [the MicroCure Process] . . . produc[es] results not presently available with other treatment methods.

The MicroCure Process, performed only at Vein Clinics of America, produces more cosmetically appealing results with a higher success rate [and] lower recurrence rate . . . .

. . . [T]he treatment [of spider veins by the MicroCure Process] produces more cosmetically appealing (and symptom relieving) results, with a lower recurrence rate than any other method of treatment." (Exhibit D); and

(c) "The MicroCure Process has been used to successfully treat these patients [those who have had previous surgery or other modes of treatment] with virtually no recurrences." (Exhibit E).

PAR. 10. Through the use of the statements contained in the advertisements referred to in paragraphs six and nine, including but not necessarily limited to the advertisements attached as Exhibits A, D and E, respondents represent, and have represented, directly or by implication, that:

(a) The rate at which venous disease recurs within five years following treatment by VCA is less than 3%;

(b) The rate at which venous disease recurs following treatment by hypertonic saline injections is high;

(c) There is virtually no recurrence of venous disease among patients who have undergone treatment by VCA after having previously undergone surgery or other modes of treatment; and

(d) The rate at which venous disease, including spider veins, recurs following treatment by VCA is lower than that following any other method of treatment.

PAR. 11. Through the use of the statements contained in the advertisements referred to in paragraphs six and nine, including but not necessarily limited to the advertisements attached as Exhibits A, B, D and E, respondents represent, and have represented, directly or by implication, that at the time they made the representations set forth in paragraphs seven and ten, respondents possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 12. In truth and in fact, at the time respondents made the representations referred to in paragraphs seven and ten, respondents did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation contained in paragraph eleven was, and is, false and misleading.

PAR. 13. Respondents' advertising contains the following statements:

(a) "The Vein Clinics of America uses an exclusive injection treatment called MicroCure."(Exhibit B);

(b) "With the development of the MicroCure Process, Vein Clinics of America (VCA) has achieved a major breakthrough in the treatment of spider veins." (Exhibit D);

(c) "This procedure [MicroCure] . . . produc[es] results not presently available with other treatment methods." (Exhibit D);

(d) "Until recently, satisfactory treatment of spider veins and other small vessel disease was not possible because of an inability to successfully eradicate a majority of the veins, a high recurrence [sic] rate, side effects and complications such as cramping, ulcerations, and staining of the skin. However, now with the MicroCure Process, unlike saline injections, tiny spider veins on the legs or face can disappear." (Exhibit D);

(e) "The MicroCure Process, performed only at Vein Clinics of America, produces more cosmetically appealing results with a higher success rate, lower recurrence rate, and virtually no side-effects or complications." (Exhibit D);

(f) "The development of the MicroCure Process by Vein Clinics of America (VCA) has resulted in a major breakthrough in the treatment of varicose veins and small vessel disease." (Exhibit E);

(g) "Until the success of Vein Clinics of America, surgery was the only treatment for large varicose veins." (Exhibit E); and

(h) "Painful procedures that leave surgical scars are no longer your only options. Vein Clinics of America offers a safe, non-surgical injection treatment administered by licensed M.D.'s." (Exhibit F).

PAR. 14. Through the use of the statements contained in the advertisements referred to in paragraph thirteen, including but not necessarily limited to the advertisements attached as Exhibits B, D, E and F, respondents represent, and have represented, directly or by implication, that:

(a) The procedure respondents employ for treating varicose and spider veins, which they sometimes refer to as the "MicroCure Process," is a unique mode of treatment that is exclusively available from VCA and that differs materially from the procedures generally used by other physicians to treat varicose and spider veins;

(b) The procedure respondents employ for treating varicose and spider veins, which they sometimes refer to as the "MicroCure Process," is a newly discovered and previously unavailable method of treating varicose and spider veins; and

(c) Prior to the opening of Vein Clinics of America, surgery was the only available treatment for large varicose veins.

PAR. 15. In truth and in fact:

(a) The procedure respondents employ for treating varicose and spider veins, which they sometimes refer to as the "MicroCure Process," is not a unique mode of treatment, is not exclusively available from VCA and does not differ materially from the procedures used by physicians to treat varicose and spider veins. The procedure used by respondents, known within the medical community as compression sclerotherapy, can be, has been, and is regularly performed by other physicians;

(b) The procedure respondents employ for treating varicose and spider veins, which they sometimes refer to as the "MicroCure Process," is not a newly discovered or previously unavailable method of treating varicose and spider veins; and

(c) Prior to Vein Clinics of America, surgery was not the only available treatment for large varicose veins.

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

PAR. 16. Respondents' advertising contains the following statements and depictions:

(a) In a chart captioned "A Comparison of the Available Options for Treatment of Venous Disease," contained in the brochure "New Solutions to an Age Old Problem" attached hereto as Exhibit A, in the column identifying the "Risks/Complications" of "Surgery-(Ligation and Stripping)," "Hypertonic Saline Injections" and "VCA-MicroCure Process":

(1) "Surgery (ligation and stripping)" presents the "[a]ssociated risks of anesthesia, post-op complications with infections and multiple scars;"

(2) "Hypertonic saline injections" present the "[p]ossibility of burns on the skin - unsuitable for extensive disease;" and

(3) "VCA-MicroCure Process" presents the risk of a "[m]ild allergic reaction in approximately 1 in 1000 patients."

(b) "There are other options besides surgery. These include electrocautery, laser and various saline based injections. Problem is, these methods can burn the skin and leave marks. There is a better way." (Exhibit B);

PAR. 17. Through the use of the statements contained in the advertisements referred to in paragraph sixteen, including but not necessarily limited to the advertisements attached as Exhibits A and

B, respondents represent, and have represented, directly or by implication, that:

(a) Respondents' method of sclerotherapy does not result in burning, marking or scarring the skin;

(b) The only significant risk to health presented by respondents' method of sclerotherapy is that of a mild allergic reaction in 1 in 1,000 patients; and

(c) The only significant risk of allergic reaction presented by respondents' method of sclerotherapy is that of a mild allergic reaction in 1 in 1,000 patients.

PAR. 18. In truth and in fact:

(a) Respondents' method of sclerotherapy can result in burning, marking and scarring the skin. As described in paragraph eighteen (b), injections of Sotradecol may cause ulcers to form, leaving scars on the skin. Moreover, potentially permanent post-sclerosis pigmentation may occur following injections of Sotradecol;

(b) The risk of a mild allergic reaction in 1 in 1,000 patients is not the only significant risk to health posed by respondents' method of sclerotherapy. In addition to the possibility of severe allergic reactions described below in paragraph eighteen (c), Sotradecol may cause ulcers, or open sores, to form if it extrudes onto the surface of the skin when it is injected; and

(c) The risk of a mild allergic reaction in 1 in 1,000 patients is not the only significant risk of allergic reaction presented by respondents, method of sclerotherapy. Sotradecol, the drug respondents inject, can cause severe allergic reactions, including anaphylactic shock.

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

PAR. 19. Respondents' advertising contains the following statements and depictions:

(a) In a chart captioned "A Comparison of the Available Options for Treatment of Venous Disease," contained in the brochure "New Solutions to an Age Old Problem" attached hereto as Exhibit A, in

the column identifying the "Risks/Complications" of "Hypertonic Saline Injections" and "VCA-MicroCure Process":

(1) Hypertonic saline injections present the "[p]ossibility of burns on the skin - unsuitable for extensive disease;" and

(2) VCA-MicroCure Process presents the risk of a "[m]ild allergic reaction in approximately 1 in 1000 patients."

(b) "There are other options besides surgery. These include electrocautery, laser and various saline based injections. Problem is, these methods can burn the skin and leave marks. There is a better way." (Exhibit B); and

(c) "The MicroCure Process produces the most complete symptomatic relief of pain and discomfort and superior cosmetic results compared to other modes of treatment such as saline injections, laser, electrocautery or surgery." (Exhibit C);

(d) "The MicroCure Process, performed only at Veins Clinics of America, produces more cosmetically appealing results with a higher success rate, lower recurrence rate, and virtually no side-effects or complications." (Exhibit D).

PAR. 20. Through the use of the statements contained in the advertisements referred to in paragraph nineteen, including but not necessarily limited to the advertisements attached as Exhibits A, B, C and D, respondents represent, and have represented, directly or by implication, that:

(a) Respondents' method of sclerotherapy presents fewer significant risks to health than other non-surgical methods of treating venous disease;

(b) Respondents' method of sclerotherapy produces fewer risks of adverse cosmetic side-effects than other methods of treating venous disease.

PAR. 21. Through the use of the statements contained in the advertisements referred to in paragraphs sixteen and nineteen, including but not necessarily limited to the advertisements attached as Exhibits A, B, C and D, respondents represent, and have represented, directly or by implication, that at the time they made the representations set forth in paragraphs seventeen and twenty, respondents possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 22. In truth and in fact, at the time respondents made the representations referred to in paragraphs seventeen and twenty,

respondents did not possess and rely upon a reasonable basis that substantiated such representations.

Therefore, the representation contained in paragraph twenty-one was, and is, false and misleading.

PAR. 23. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices and the making of "false advertisements" in or affecting commerce in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

EXHIBIT A

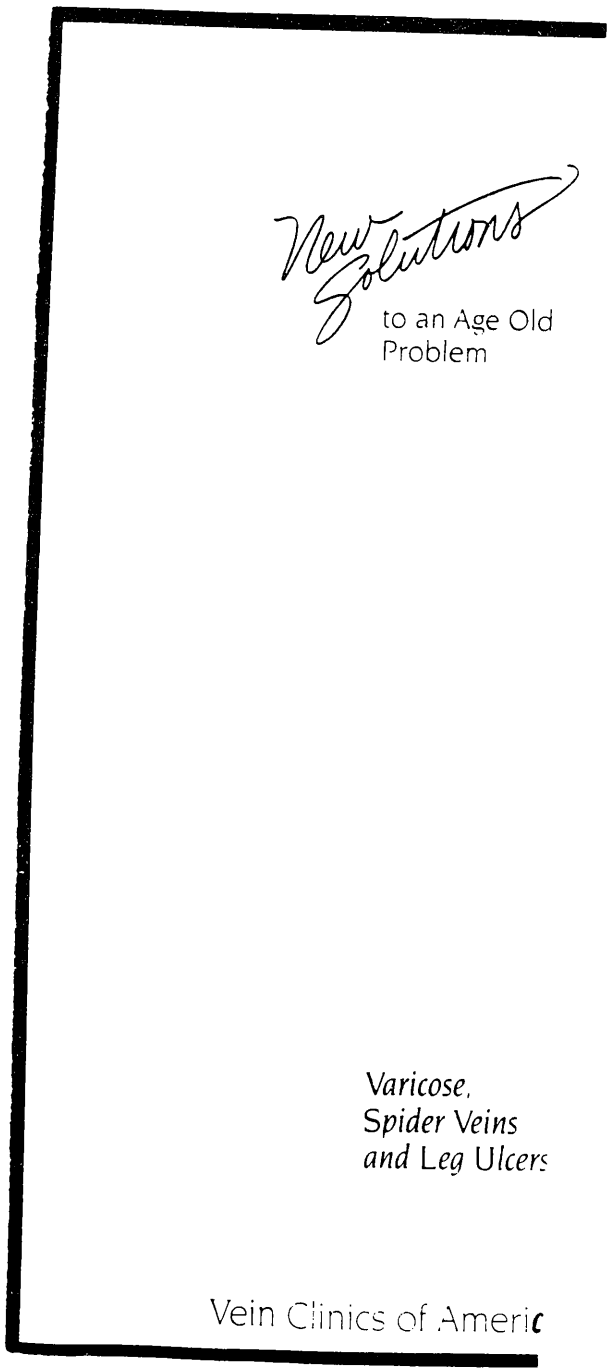

New Solutions
to an Age Old
Problem
Varicose,
Spider Veins
and Leg Ulcers
Vein Clinics of Americ

EXHIBIT A

What are varicose veins?

Varicose veins are abnormally enlarged veins containing stagnant blood caused by the breakdown and leakage of valves and or the dilation or loss of elasticity of the vein walls. They may appear as bulging, bluish and ropy looking

What are spider veins?

These are blush-red threadlike veins which can occur in a cluster or may be isolated and may develop in the legs or face

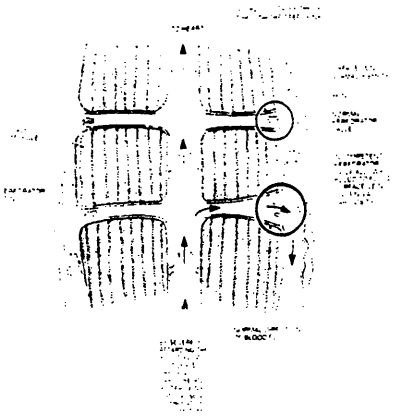
Who suffers from venous disease?

At least 17% of Americans suffer from varicose veins. Women are afflicted much more frequently than men at a ratio of 7 to 1. Causes include hereditary factors, the naturally occurring female hormone estrogen, pregnancy, and trauma. Standing occupations and weight gain can aggravate the disease.

What are the symptoms associated with this disease?

Most people with varicose veins complain of aching swollen, heavy and tired legs. They often complain of cramping, especially at night. Other patients complain of skins dermatitis from the varicose veins which consists of itching or burning with pigmentation and darkening of the skin. This can lead to ucceration, an open sore or breakdown of the skin caused by the intense pressure resulting from venous disease.

How Venous Disease Occurs



Symptoms

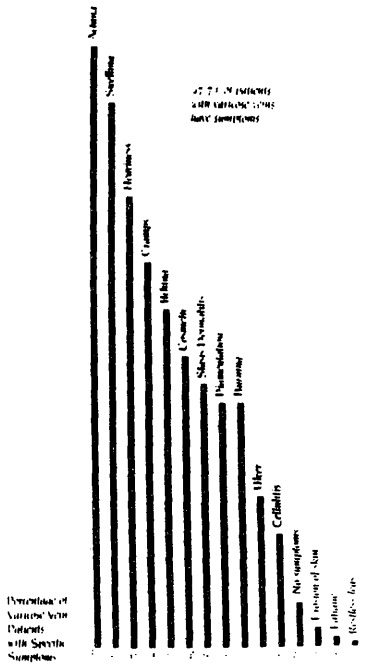


EXHIBIT A

A Comparison of the Available Options for Treatment of Venous Disease

Venous Disease	Surgery–(Ligation and Stripping)	Hypertonic Saline Injections	VCA–MicroCure Process
Who treats this?	General or Vascular Surgeons	Primarily Dermatologists & Plastic Surgeons	Licensed M.D.'s–Practice is limited to Venous Disease by the MicroCure Process
Able to treat the following?			
■ [illegible]	Yes	[illegible]	Yes
■ [illegible] (Spider Veins)	No	Yes	Yes
■ Facial Veins	No	No	Yes
■ Leg Ulcers	Surgical skin grafting–Low success rate	No	Yes
Pain Discomfort?	Yes	Prolonged Burning/Muscle Cramping	Slight Stinging on occasion during treatment
Disruption of Daily Activities?	Yes–May require 4–6 wks. recuperation	No	No
Recurrence rate:	Approximately 65% recurrence in 5 years	High	Less than 3% in 5 years
Cost:	Approximately $8000 and up for in-hospital surgery	Wide range of fees	Approximately 25% of surgery
Risks Complications	Associated risks of anesthesia post-op complications, with infections and multiple scars.	Possibility of burns on the skin–unsuitable for extensive disease	Mild allergic reaction in approximately 1 in 1000 patients

How VCA *treats Venous disease*?

VCA has developed an advanced and refined sclerotherapy technique called the MicroCure Process. It consists of an injection of an FDA approved medication into "points of control" followed by compression and prescribed walking.

***What can I expect to experience during the MicroCure treatment*?**

An individualized plan of treatment in specific steps are followed for each patient. An appropriate history and physical is performed. The doctor indentifies the veins to be treated. From the total evaluation of diseased veins, a series of micro-injections are given proportioned to the size of the vessel. Compression strips or dressings are applied to the leg. The patient is then encouraged to take a short walk immediately after each treatment session. Treatment sessions are short and you can return to work immediately. The number of sessions required depends on the severity of the problem. Our needles are very tiny and generally feel like pulling a hair. Most patients who are afraid of injections, gladly have the treatment when they see their varicose spider veins disappear.

EXHIBIT A

What are the advantages of the MicroCure Process?

The MicroCure Process offers many benefits from both health and economic perspectives.

- The Procedure is performed by well-trained, licensed physicians at Vein Clinics of America who specialize and whose full-time practices are devoted exclusively to phlebology (the treatment of vein disease).
- Although a newer technology than surgery, the MicroCure Process of the Vein Clinics of America already has a proven track record of over 100,000 successful treatment sessions. The most important advantages of the MicroCure technique are that it is safe, effective and economical.
- With the MicroCure Process, all sizes of varicose veins and spider veins can be treated. The need for traditional vein surgery (ligation and stripping) is eliminated.
- The MicroCure Process avoids surgery and general anesthesia with its associated complications and risks which include pain, scars and the loss of time (and income) from work.
- Treatment occurs in our comfortable offices on an out-patient basis, with little or no interruption to the patient's work or activity schedule.
- Where your vein disorder permits, we have an accelerated treatment program. This is especially valuable for our out-of-town patients.
- Only the diseased veins are treated so your normal veins are preserved for possible future by-pass surgery.

Facial Veins

Varicose Veins

Spider Veins

Who Recommends the MicroCure Process?

Many doctors from diverse medical and surgical specialties, including cardiovascular surgeons, routinely refer not only their patients, but, also, their own family members to Vein Clinics of America for treatment of varicose veins. VCA physicians speak to medical groups about the unique and effective MicroCure treatment program. Vein Clinics of America physicians are often interviewed on radio and television and quoted in both newspaper and magazine articles as among the authorities in the treatment of varicose veins.

Does Health Insurance cover the cost of the Treatment?

Medical attention is necessary to alleviate both the pain and potential deprivation caused by untreated varicose veins. Vein disease is a pathological disorder and needs to be treated. For these reasons, most health insurance policies cover the cost of treatment. However, individual policies may vary in their exact coverage.

Vein Clinics of America invites you to see examples of our treatment results so you can compare them with other vein clinics.

Vein Clinics of America

Schaumburg, IL (708) 619-5500
Chicago, IL Michigan Avenue (312) 642-8346
Oak Brook, IL (708) 571-0055
Northbrook, IL (708) 205-9900

Kansas City, KS (913) 345-2622

Detroit/Birmingham, MI (313) 642-0210

Arcadia, CA (818) 445-8688
Beverly Hills, CA (213) 852-0601
Irvine, CA (714) 553-0264
Encino, CA (818) 784-1818
San Bernardino, CA (714) 889-0503
Walnut Creek, CA (415) 945-8656

Atlanta, GA (404) 435-4443

Chevy Chase, MD/Washington, D.C. (301) 654-0033
Baltimore, MD (301) 356-1133

EXHIBIT A

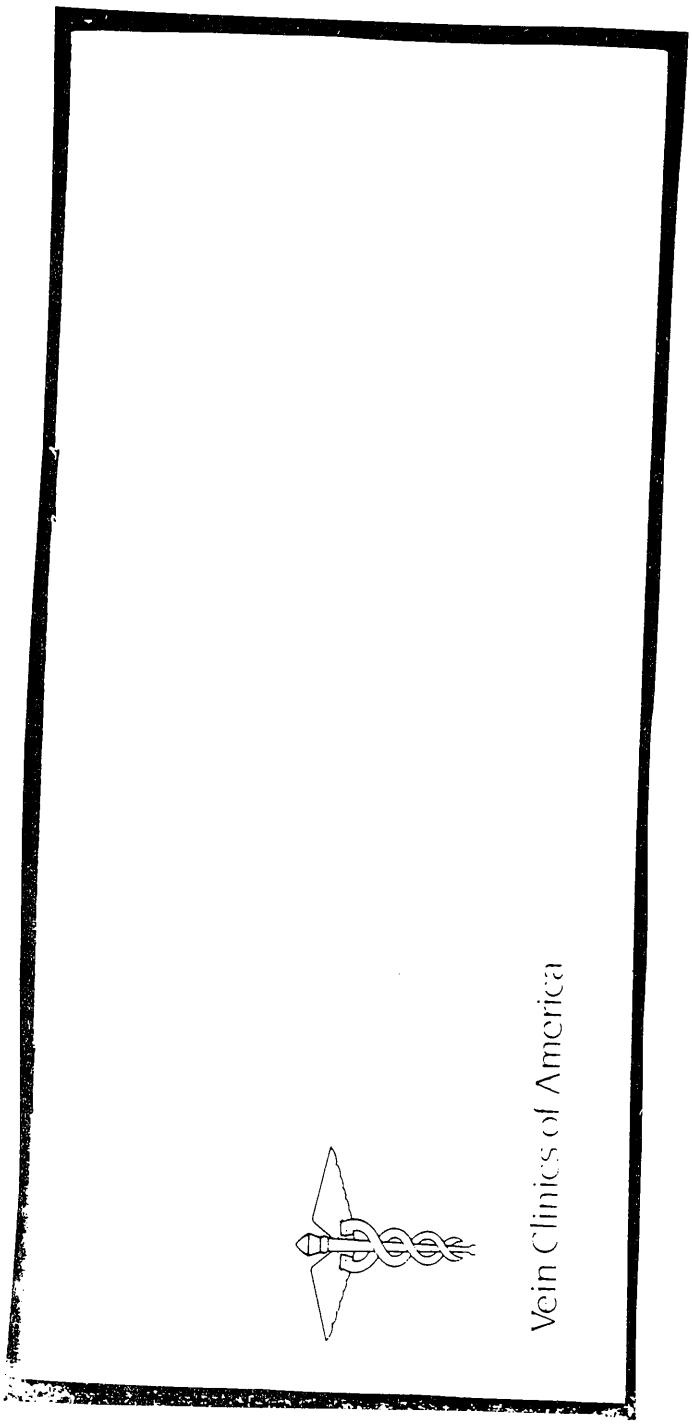


EXHIBIT B

BEFORE YOU HAVE YOUR VARICOSE VEINS TREATED, KNOW THESE IMPORTANT FACTS

1. POTENTIAL DANGERS

Varicose veins are not just unsightly, they're unhealthy. Without treatment they will continue to grow, causing aches, pains, cramping and reduced circulation . . . and can even develop into leg ulcers.

2. SURGERY OBSOLETE

With surgery, damaged veins are pulled out of the leg altogether. This is a painful, rather mutilating procedure always leaving scars. It's also very costly, involving hospitalization and time off from work. And the recurrence rate is about 85% in five years. Quite unsatisfactory.

3. HOW SURGICAL METHODS DIFFER

There are other options besides surgery. These include electrocautery, laser and various saline based injections. Problem is, these methods can burn the skin and leave marks. There is a better way.

4. MICROCURE IS THE MOST EFFECTIVE TREATMENT

The Vein Clinics of America uses an exclusive injection treatment called MicroCure. The treatment safely eliminates vein disorders of all sizes without the scars associated with surgical techniques. It is administered only by licensed M.D.'s who specialize in vein disease. It's also covered by most insurance plans. Find out more.

Call for a physician consultation

(301) 654-6633

IT'S TIME TO DO SOMETHING ABOUT YOUR VARICOSE VEINS.

Vein Clinics of America

EXHIBIT C

The MicroCure Process

The development and introduction of the **MicroCure Process** by Vein Clinics of America in the early 1980's marked a major breakthrough in the treatment of vein disorders.

The MicroCure Process involves a series of micro-injections which are administered over several treatment sessions. There are three important steps in the treatment program: injection, compression, and ambulation. After injection of the varicose veins, individualized therapeutic compression is applied with dressings custom made in Europe. Walking for a prescribed period of time concludes the treatment session.

The MicroCure Process produces the most complete symptomatic relief of pain and discomfort and superior cosmetic results compared to other modes of treatment such as saline injections, laser, electrocautery or surgery. Even among patients who have undergone previous alternative methods of treatment, the MicroCure Process has an extraordinary level of patient acceptance and preference. In addition, VCA accomplishes these results without disruption of daily activities or time lost from work.

The MicroCure Process produces cosmetically appealing results in the treatment of spider veins. Dramatic changes are noticed on even the largest rope-like varicose veins within a few days. Both spider and varicose vein treatments are administered on an out-patient basis, allowing patients to return immediately to their normal activities. The significant advantages over surgery include no incisions or scars, no pain, no risk of infection, no immobilization, and no recuperation time or lost income from work. The MicroCure Process is safe, effective and less expensive than surgery. One of the major advantages of the MicroCure Process over alternative treatments is the attention to detail. Successful concentration on even the smallest abnormal veins is the key to obtaining the lowest recurrence rate, the most normal or psychologic return of circulation, the most symptomatic relief and the best looking finish.

Varicose veins require treatment. Successful treatment relieves associated painful symptoms by improving the circulation in the legs. Even patients who have had previous surgery or other treatment methods for varicose veins greatly benefit from the MicroCure Process, which is available only at Vein Clinics of America.

EXHIBIT D

Treatment of Spider Veins by the Microcure Process

With the development of the **MicroCure Process**, Vein Clinics of America (VCA) has achieved a major breakthrough in the treatment of spider veins. This procedure, a series of micro-injections, focuses careful attention to the details of the diseased veins, thereby producing results not presently available with other treatment methods.

Before

After

What are Spider Veins?

- Spider veins or telangiectasia are either clustered or isolated, threadlike red-to-purplish veins that stem from a network of small veins just below the skin's surface. They develop predominantly on the legs and face. More commonly found in women, most find that they have at least a few of these spider veins which are usually caused by the female hormone estrogen. Other causes of these unsightly and often uncomfortable veins may include hereditary factors, and injury or trauma to the area.

- Even though many people consider spider veins to be only a cosmetic nuisance, in actuality, many patients with spider veins suffer from symptoms including night cramps, dry skin, aching, tired legs, and a "heaviness" of their legs.

Until recently, satisfactory treatment of spider veins and other small vessel disease was not possible because of an inability to successfully eradicate a majority of the veins, a high recurrance rate, side-effects and complications such as cramping, ulcerations, and staining of the skin. However, now with the MicroCure Process, unlike saline injections, tiny spider veins on the legs or face can disappear. The MicroCure Process, performed only at Vein Clinics of America, produces more cosmetically appealing results with a higher success rate, lower recurrence rate, and virtually no side-effects or complications. Vein Clinics of America's success in treating spider veins is partially due to the fact that the MicroCure Process is suitable for the entire leg or face and can treat extensive, diffuse small vessel disease. Furthermore, by treating both the spider veins and the venules from which the spider veins originate, the treatment produces more cosmetically appealing (and symptom relieving) results, with a lower recurrence rate than any other method of treatment.

Treatment of spider veins is conducted under the direction of highly qualified, professionally trained and licensed physicians in a pleasant, comfortable out-patient setting. Since the procedure is non-surgical in nature, patients can return to normal activities immediately following treatment. A brief walk following each treatment session is recommended to improve circulation and to promote healing.

EXHIBIT E

Treatment of Varicose Veins by the Microcure Process

Before

After

The development of the **MicroCure Process** by Vein Clinics of America (VCA) has resulted in a major breakthrough in the treatment of varicose veins and small vessel disease.

What are Varicose Veins?

- When discussing varicose veins, it is best to break these abnormal veins into two categories: spider veins (telangiectasia) and varicose veins. They vary in size from very small to very large, tortuous, ropelike varicose veins.

- Varicose veins are abnormally enlarged veins, engorged with blood due to the breakdown and leakage of some of the valves in the communicating veins. Varicose veins are usually recognized as the large often unsightly and symptomatic component of vein disease. As you know, oxygenated blood is carried throughout the body from the lungs and heart by arteries. Veins transport the deoxygenated blood back to the heart and lungs. The venous system of the legs works against gravity when it carries blood from the legs back up to the heart. The veins are successful in this task due to the interaction between muscular contractions of the leg and a system of one-way valves in the veins. The valves when operating properly, provide uni-directional blood flow by allowing the blood to flow only toward the heart. If the valves of the veins malfunction, the force of gravity predominates and the blood will pool and collect in the superficial veins, causing them to widen, bulge, elongate and become tortuous. Valvular failure is usually located in one or more of the approximately two hundred communicating veins.

- Varicose veins can cause painful, swollen, heavy, aching legs by severely retarding the flow of blood as it leaves the legs. An estimated 17 percent of Americans suffer from large varicose veins. More women are afflicted than men, probably due to the interaction of factors caused by pregnancy.

Until the success of Vein Clinics of America, surgery was the only treatment for large varicose veins. Now with the MicroCure Process, there is no need to consider conventional surgery. In comparison with the MicroCure Process, surgery is less effective, more painful, more expensive, requires a lengthy recovery period, and leaves permanent scars. Treatment at Vein Clinics of America, on the other hand, is performed on an out-patient basis. There are no surgical incisions or scars. Furthermore, patients can return to most normal activities immediately following treatment. A brief walk is recommended to improve circulation and to promote more rapid healing.

Ten to twenty percent of the patients who come to Vein Clinics of America have had previous surgery or other modes of treatment as an attempt to treat their varicose veins. The MicroCure Process has been used to successfully treat these patients with virtually no recurrences. These patients, as well as all of our patients, have been delighted with the symptomatic relief among other advantages of our micro-injection treatment.

EXHIBIT F

HAVEN'T YOU SUFFERED LONG ENOUGH WITH VARICOSE VEINS?

Proven, non-surgical treatment has worked for thousands.

Make the decision today to finally get rid of your uncomfortable varicose veins. Painful procedures that leave surgical scars are no longer your only options. Vein Clinics of America offers a safe, non-surgical injection treatment administered by licensed M.D.'s. It eliminates varicose veins of all sizes as well as the smallest spider veins without hospitalization. Normal treatment takes four to six weeks and will not interfere with your busy schedule. Covered by most insurance plans.

Limited time offer: Free physician consultation

(213) 852-0605 BEVERLY HILLS

(818) 784-1818 ENCINO

(714) 553-0204 IRVINE

(818) 445-8688 ARCADIA

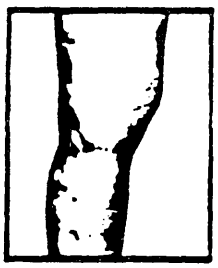
(714) 889-0502 SAN BERNARDINO

IT'S TIME TO DO SOMETHING ABOUT YOUR VARICOSE VEINS.

Vein Clinics of America

Chicago • Los Angeles • Atlanta • Detroit • Washington D.C. • Baltimore

EXHIBIT G



BEFORE

AFTER

GET RID OF VARICOSE VEINS WITHOUT SURGERY OR HOSPITALIZATION.

No matter how bad you think your varicose veins are, Vein Clinics of America has successfully treated thousands of cases that may have been much worse. We offer a proven, safe and effective injection method that eliminates varicose veins of all sizes including the smallest spider veins—without hospitalization and without the limitations of saline. And we offer the latest ultrasound techniques.

The nation's largest group of licensed M.D.s specializing in vein disease. Covered by most insurance plans.

Call for a comprehensive physician consultation.

Owings Mills
(301) 356-1133

Vein Clinics Of America

Los Angeles • San Francisco • Chicago
Washington D.C. • Atlanta • Detroit

EXHIBIT H


THERE IS STILL TIME TO PUT YOUR LEGS HERE THIS SUMMER.
IMMEDIATE APPOINTMENTS AVAILABLE
Have varicose veins been making you hide your legs? Our safe, proven MicroCure injection treatment is fast, easy and won't interfere with your busy summer schedule. In fact, the more active you are, the better. We'll eliminate varicose veins and spider veins—both large and small—without the ugly scars associated with surgery. Normal treatment is 4-6 weeks, so if you call today your legs can still feel better and look better this summer.
Limited time offer:
Free physician consultation
IT'S TIME TO DO SOMETHING ABOUT YOUR VARICOSE VEINS.
Vein Clinics of America

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, or that the facts as alleged in such complaint, other than jurisdictional facts, are true and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such an agreement on the public record for a period of sixty (60) days, 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 Vein Clinics of America, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 1101 Perimeter Drive, (#615), Schaumburg, Illinois.

Respondent D. Brian McDonagh, M.D. is the Chairman of the Board and National Medical Director of Vein Clinics of America, Inc. He formulates, directs and controls the policies, acts and practices of said corporation. His address is 1535 Lake Cook Road, Northbrook, Illinois.

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

ORDER

DEFINITIONS

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

1. "*Sclerotherapy*" means the treatment of venous disease by injecting a solution into a vein with a needle.
2. "*Compression sclerotherapy*" means the treatment of venous disease by injecting a solution, including but not limited to Sotradecol (sodium tetradecyl sulfate), into a vein with a needle, followed by compression of the injected area with bandages or wraps and post-procedure ambulation by the patient.
3. "*Any substantially similar service*" means compression sclerotherapy in which a solution of Sotradecol (sodium tetradecyl sulfate) is injected into a vein.
4. "*Venous disease treatment procedure*" includes, but is not limited to, sclerotherapy, compression sclerotherapy, laser treatments, electrocautery and surgery.
5. "*Competent and reliable scientific evidence*" means tests, analyses, research, studies or other evidence based on the expertise of professionals in the relevant area, that have been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

I.

It is ordered, That respondents Vein Clinics of America, Inc., a corporation, its successors and assigns, and its officers, and D. Brian McDonagh, M.D., individually and as an officer and medical director of said corporation, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, promotion, offering for sale or sale of any venous disease treatment procedure or any other cosmetic or plastic surgery procedure in or affecting

commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from, in any manner, directly or by implication:

A. Representing that the rate at which varicose veins recur following surgery is approximately 65% to 85% in five years, or otherwise misrepresenting the rate at which venous disease is likely to recur or return following treatment by any venous disease treatment procedure;

B. Representing that prior to the opening of Vein Clinics of America, surgery was the only available treatment for large varicose veins;

C. Representing that the sclerotherapy practiced at respondents' clinics as of the date respondents sign this order, sometimes referred to as the "MicroCure Process," or any substantially similar service, is a newly discovered and/or previously unavailable method of treating varicose and spider veins;

D. Misrepresenting that the sclerotherapy practiced at respondents' clinics as of the date respondents sign this order, sometimes referred to as the "MicroCure Process," or any substantially similar service, is exclusively available at respondents clinics;

E. Misrepresenting the newness of, or the past or present availability of, any cosmetic or plastic surgery procedure, including any venous disease treatment procedure;

F. Representing that the sclerotherapy practiced at respondents' clinics as of the date respondents sign this order, sometimes referred to as the "MicroCure Process," or any substantially similar service:

1) Does not present the risk of burning, marking, or scarring the skin; or

2) Presents no possibility of significant risks to health;

G. Misrepresenting the safety, risks, or potential side-effects of any cosmetic or plastic surgery procedure, including any venous disease treatment procedure.

II.

It is further ordered, That respondents Vein Clinics of America, Inc., a corporation, its successors and assigns, and its officers, and D.

Brian McDonagh, M.D., individually and as an officer and medical director of said corporation, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, promotion, offering for sale or sale of any venous disease treatment procedure or any other cosmetic or plastic surgery procedure, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from making any representation, in any manner, directly or by implication, regarding:

A. The success rate or the rate at which a condition is likely to recur or return following treatment by any cosmetic or plastic surgery procedure, including any venous disease treatment procedure; or

B. The rate or nature of risks to health or of adverse cosmetic side-effects presented by any cosmetic or plastic surgery procedure, including any venous disease treatment procedure;

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

III.

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

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

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

IV.

It is further ordered, That respondents shall distribute a copy of this order to each of their operating divisions, to each of their

managerial employees, and to each of their officers, agents, representatives, or employees engaged in the preparation or placement of advertising or other material covered by this order and shall secure from such person a signed statement acknowledging receipt of this order.

V.

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

VI.

It is further ordered, That, for a period of ten (10) years from the date of entry of this order, the individual respondent named herein shall promptly notify the Commission of the discontinuance of his present business or employment, with each such notice to include the respondent's new business address and a statement of the nature of the business or employment in which the respondent is newly engaged as well as a description of respondent's duties and responsibilities in connection with the business or employment.

VII.

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