

Set Aside Order

119 F.T.C.

IN THE MATTER OF

NATIONAL COMICS PUBLICATIONS, INC., ET AL.

SET ASIDE ORDER IN REGARD TO ALLEGED VIOLATION OF
SEC. 2 OF THE CLAYTON ACT*Docket 7614. Consent Order, July 6, 1960--Set Aside Order, June 14, 1995*

The Federal Trade Commission has reopened a 1960 consent order (57 FTC 69) -- which required the companies to offer promotional allowances for their publications on proportionally equal terms to all customers -- and has set aside the consent order pursuant to the Commission's Sunset Policy Statement, under which the Commission presumes that the public interest requires terminating competition orders that are more than 20 years old.

ORDER REOPENING PROCEEDING
AND SETTING ASIDE ORDER

On February 16, 1995, DC Comics and Warner Publisher Services, Inc. ("WPS"), as respondents and successors to National Comics Publications, Inc. and Independent News Company, Inc.¹ filed a Petition to Reopen and Set Aside Consent Order ("Petition"), in this matter. DC and WPS request that the Commission set aside the 1960 consent order in this matter pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), Rule 2.51 of the Commission's Rules of Practice, 16 CFR 2.51, and the Statement of Policy With Respect to Duration of Competition Orders and Statement of Intention to Solicit Public Comment With Respect to Duration of Consumer Protection Orders, issued on July 22, 1994, and published at 59 Fed. Reg. 45,286-92 (Sept. 1, 1994) ("Sunset Policy Statement"). In its Petition, DC and WPS affirmatively state that neither has engaged in any conduct violating the terms of the order. The Petition was placed on the public record, and the thirty-day comment period expired on March 27, 1995. No comments were received.

The Commission in its Sunset Policy Statement said, in relevant part, that "effective immediately, the Commission will presume, in

¹ Since the Commission issued the order in this matter, National Comics has become DC Comics, a general partnership between Warner Communications, Inc., and Time Warner Entertainment Co., L.P. Independent has changed its name to Warner Publisher Services, Inc., and is now owned by Warner Communications Inc.

the context of petitions to reopen and modify existing orders, that the public interest requires setting aside orders in effect for more than twenty years."² The Commission's consent order in Docket No. 7614 was issued on July 6, 1960, and has been in effect for more than twenty years. Consistent with the Commission's Sunset Policy Statement, the presumption is that the order should be terminated. Nothing to overcome the presumption having been presented, the Commission has determined to reopen the proceeding and set aside the order in Docket No. 7614.

Accordingly, *It is ordered*, That this matter be, and it hereby is, reopened;

It is further ordered, That the Commission's order in Docket No. 7614 be, and it hereby is, set aside as of the effective date of this order.

² See Sunset Policy Statement, 59 Fed. Reg. at 45,289.

Set Aside Order

119 F.T.C.

IN THE MATTER OF

INDEPENDENT NEWS COMPANY, INC.

SET ASIDE ORDER IN REGARD TO ALLEGED VIOLATION OF
SEC. 2 OF THE CLAYTON ACT*Docket 7611. Consent Order, July 6, 1960--Set Aside Order, June 14, 1995*

The Federal Trade Commission has reopened a 1960 consent order (57 FTC 56) -- which required the company to offer promotional allowances for its publications on proportionally equal terms to all customers -- and has set aside the consent order as to respondent Warner Publisher Services, the successor of Independent News Company, pursuant to the Commission's Sunset Policy Statement, under which the Commission presumes that the public interest requires terminating competition orders that are more than 20 years old.

ORDER REOPENING PROCEEDING
AND SETTING ASIDE ORDER

On February 16, 1995, Warner Publisher Services, Inc. ("WPS"), as respondent and successor of Independent News Company, Inc.,¹ filed a Petition to Reopen and Set Aside Consent Order ("Petition"), in this matter. WPS requests that the Commission set aside the 1960 consent order in this matter pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), Rule 2.51 of the Commission's Rules of Practice, 16 CFR 2.51, and the Statement of Policy With Respect to Duration of Competition Orders and Statement of Intention to Solicit Public Comment With Respect to Duration of Consumer Protection Orders, issued on July 22, 1994, and published at 59 Fed. Reg. 45,286-92 (Sept. 1, 1994) ("Sunset Policy Statement"). In its Petition, WPS affirmatively states that it has not engaged in any conduct violating the terms of the order. The Petition was placed on the public record, and the thirty-day comment period expired on March 27, 1995. No comments were received.

The Commission in its Sunset Policy Statement said, in relevant part, that "effective immediately, the Commission will presume, in the context of petitions to reopen and modify existing orders, that the public interest requires setting aside orders in effect for more than

¹ Since the Commission issued the order in this matter, Independent has changed its name to Warner Publisher Services, Inc. and is now owned by Warner Communications Inc. The other respondent in this matter, The New American Library of World Literature, Inc., did not petition to have the order set aside as to it.

twenty years."² The Commission's consent order in Docket No. 7611 was issued on July 6, 1960, and has been in effect for more than twenty years. Consistent with the Commission's Sunset Policy Statement, the presumption is that the order should be terminated. Nothing to overcome the presumption having been presented, the Commission has determined to reopen the proceeding and set aside the order in Docket No. 7611 as to WPS.

Accordingly, *It is ordered*, That this matter be, and it hereby is, reopened;

It is further ordered, That the Commission's order in Docket No. 7611 be, and it hereby is, set aside as to respondent Warner Publisher Services, Inc., as of the effective date of this order.

CONCURRING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

I concur in the decision to grant the request of Warner Publisher Services, Inc., the successor of Independent News Company, Inc., to set aside the 1960 order in this case. I dissent from the decision to limit the setting aside of the order to Warner, instead of setting aside the order in its entirety.

The decision to limit relief to Warner, one of the two respondents under the order, appears to be inconsistent with the Commission's announced policy to presume "that the public interest requires reopening and setting aside the order in its entirety" (emphasis added) "when a petition to reopen and modify a competition order is filed" and the order is more than twenty years old.¹ The Commission's recognition of the limitations of the findings underlying an order² further suggests that the presumption that an order will be terminated after twenty years should apply to the order in its entirety and not be limited to the petitioner.³

I previously have expressed my concern that the adoption of a presumption instead of an across-the-board rule in favor of sunset

² See Sunset Policy Statement, 59 Fed. Reg. at 45,289.

¹ FTC, Statement of Policy with Respect to Duration of Competition Orders and Statement of Intention To Solicit Public Comment with Respect to Duration of Consumer Protection Orders (July 22, 1994), at 8 (hereafter "Sunset Policy Statement").

² "[F]indings upon which [orders] are based should not be presumed to continue" for longer than twenty years. Sunset Policy Statement at 4.

³ The presumption of termination after 20 years applies automatically for new orders in competition cases and is not limited to individual respondents, further supporting the view that the twenty-year presumption in favor of sunset for existing orders should apply to the order, not to particular respondents.

"will impose costs by requiring respondents to file individual petitions and the Commission to assess in the context of each such petition whether the presumption has been overcome for that order."⁴ Now the Commission would further increase the burden on both public and private resources by applying the presumption in favor of sunset not only on a case-by-case basis but on a respondent-by-respondent basis.

The petition filed by Warner invoked the twenty-year presumption that the order should be set aside. No evidence of recidivist conduct by any respondent, including The New American Library of World Literature, Inc., having been presented to overcome the presumption,⁵ the order should be set aside in its entirety.

⁴ Separate Statement of Commissioner Mary L. Azcuenaga on Sunset Policy (July 22, 1994), at 7 (footnote omitted).

⁵ See Sunset Policy Statement at 8 n.19

IN THE MATTER OF

TALEIGH CORPORATION, ET AL.

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

Docket C-3587. Complaint, June 16, 1995--Decision, June 16, 1995

This consent order prohibits, among other things, two marketing corporations and the owner from misrepresenting that any product is new or unique, the existence or conclusions of any test or study, or that an endorsement for any product represents the typical experience of people who use it. The consent order requires the respondents to have scientific evidence to substantiate any representation regarding the performance, benefits, efficacy or safety of any weight-loss or smoking cessation product, or for any food, dietary supplement, drug, or device. In addition, the consent order requires the owner to post a \$300,000 performance bond before marketing any weight-loss product or smoking deterrent or cessation product in the future.

Appearances

For the Commission: *Richard L. Cleland* and *Joel Winston*.
For the respondents: *Sheldon Lustigman*, New York, N.Y.

COMPLAINT

The Federal Trade Commission, having reason to believe that Taleigh Corporation and Choice Diet Products, Inc., corporations; and William J. Santamaria, individually and as an officer and director of said corporations ("respondents"), have violated 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 Taleigh Corporation ("Taleigh"), formerly known as Taleigh, Inc., is a Florida corporation doing business under the names "Choice Diet Products," "Choice Products," and other trade names. Its principal place of business is located at 4742 N.W. Boca Raton Boulevard, Boca Raton, FL.

Respondent Choice Diet Products, Inc. ("Choice") is a New York

corporation. Its principal place of business is located at 4800 N.W. Boca Raton Boulevard, Boca Raton, FL.

Respondent William J. Santamaria is or was at relevant times herein the sole owner, director, and officer of the corporate respondents. Individually or in concert with others, he participated in and/or formulated, directed, and controlled the acts and practices of the corporate respondents, including the acts and practices alleged in this complaint. His address is 20640 Baybrooke Court, Boca Raton, FL.

PAR. 2. Respondents have advertised, offered for sale, sold, and distributed weight-loss pills and a smoking cessation product to the public. Respondents have marketed the weight-loss pills under various names, including "MegaLoss," "FormulaTrim," and "MiracleTrim." These products are "foods" and/or "drugs" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act. Respondents have marketed the smoking cessation product under the name "Nicotain Stop Smoking Patch."

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

DIET PILLS
FormulaTrim 3000

PAR. 4. Respondents have disseminated or have caused to be disseminated advertisements for FormulaTrim 3000, including, but not necessarily limited to the attached Exhibits A and B. These advertisements contain the following statements and depictions:

A. Exhibit A:

"Debbie Hoya lost 25 pounds fast.

Tamara Cowens lost 35 pounds fast." [*Video*: 'before' and 'after' photographs of consumer endorsers displayed with amounts of weight lost.]

"Now you too can lose weight fast, with the help of this new powerful FormulaTrim 3000 diet pill." [*Video*: "LOSE WEIGHT FAST!" displayed with product and, in the next screen, the words "NEW," "FormulaTrim 3000," and "POWERFUL!" displayed in full screen with small print at the bottom of the screen stating, "Use only as directed with diet plan."]

"FormulaTrim's new fat-burning plan is so powerful, you can burn more body fat relaxing all day than running 10 miles nonstop." [*Video*: "Based on 180 pound person" displayed in small print below full screen display of two young persons in pool with caption in large print "BURN AWAY FAT!"]

"Laurette Morello burned away 17 pounds."

LAURETTE MORELLO: "I went from a size 13 to a size 5."

"Adam Locas lost 36 pounds carving 7 inches from his waist....lost 52 pounds trimming from a size 14 to a size 6."

"This powerful, doctor-approved diet pill formula is medically proven to work." [Video: "Use only as directed with diet plan" displayed in small print at bottom of full screen displaying "DOCTOR APPROVED FormulaTrim 3000."]

"The new FormulaTrim fat burning plan is so powerful you can burn more body fat relaxing all day than sweating through five exhausting hours of aerobics . . ." [Video: "BURN AWAY FAT!" superimposed over two young persons in a pool with "Based on 180 pound person" displayed in small white letters against light background at bottom of screen.]

"Terri Nigelson burned away 15 pounds; Joanne Benora lost 32 pounds and Annette Garton lost an incredible and amazing 59 pounds! Now you can burn away fat and lose weight fast by calling . . . for your powerful new FormulaTrim 3000"

"Your satisfaction is 100% guaranteed."

* * *

[Video: during ordering instructions, while telephone number and cost information is presented in audio and video, the following text is presented at the bottom of various screens in small print: "Use only as directed with diet plan," "Testimonials compensated," and "Following diet plan is essential for loss of weight (average 1½ - 2 pounds per week) for results cannot be achieved solely through the use of pill."]

B. Exhibit B:

"Debbie Hoya lost 25 pounds, fast. Tamara Koons lost 35 pounds, fast."

"Now you too can lose weight fast with the help of this new powerful medically-proven FormulaTrim 3000 No Hunger Diet Pill." [Video: "Use only as directed with diet plan" displayed in small print below depiction of pill with the words "NEW," "FormulaTrim 3000," and "POWERFUL!" presented in large full-screen display.]

"Following this new powerful FormulaTrim fat burning diet plan, you can burn more body fat relaxing all day than running 10 miles nonstop or even sweating through 5 exhausting hours of aerobics." [Video: "Based on 180 pound person" displayed in small print below full screen display of two young persons in pool with caption in large print "BURN AWAY FAT!"]

"Terry Nigelson burned away 15 pounds.

Lorette Morello burned away 17 pounds." [Video: 'before' and 'after' photographs with "BURN AWAY FAT!" displayed on screen.]

LORETTE MORELLO: "I went from a size 13 to a size 5."

"Adam Locas burned away 36 pounds."

"Claire Contobi burned away 52 pounds [Video: 'before' and 'after' photographs with "BURNED AWAY 52 LBS" displayed on screen] and Annette Barton burned away an incredible and amazing 59 pounds!"

"Now you can end biting hunger pain, burn away fat and lose weight fast by calling . . . for your powerful FormulaTrim 3000"

[*Video*: during ordering instructions, while telephone number and cost information is presented in audio and video, the following text is presented at the bottom of various screens in small print: "Use only as directed with diet plan," "Testimonials compensated," and "Following diet plan is essential for loss of weight (average 1½ - 2 pounds per week) for results cannot be achieved solely through the use of pill."]

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

- A. FormulaTrim 3000 causes substantial weight loss rapidly;
 - B. FormulaTrim 3000 causes substantial weight loss without the need to exercise or reduce caloric intake;
 - C. FormulaTrim 3000 causes the burning of more body fat daily, thereby resulting in the same or greater weight-loss benefit to users, than five hours of aerobic exercise or running ten miles nonstop;
 - D. FormulaTrim 3000's active ingredient is new and/or unique;
- and
- E. Scientific studies prove that FormulaTrim 3000 causes substantial weight loss rapidly.

PAR. 6. In truth and in fact:

- A. FormulaTrim 3000 does not cause substantial weight loss rapidly;
- B. FormulaTrim 3000 does not cause substantial weight loss without the need to exercise or reduce caloric intake;
- C. FormulaTrim 3000 does not cause the burning of more body fat daily, thereby resulting in the same or greater weight-loss benefit to users, than five hours of aerobic exercise or running ten miles nonstop;
- D. FormulaTrim 3000's active ingredient is not new and/or unique; and
- E. Scientific studies do not prove that FormulaTrim 3000 causes substantial weight loss rapidly.

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

PAR. 7. Through the use of the statements and depictions contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits A and B, respondents have represented, directly or by implication, that FormulaTrim 3000 burns body fat.

PAR. 8. Through the use of the statements and depictions contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits A and B, respondents have represented, directly or by implication, that at the time they made the representations set forth in paragraphs five A-C and seven, they possessed and relied upon a reasonable basis that substantiated such representations.

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

PAR. 10. Through the use of the statements and depictions contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits A and B, respondents have represented, directly or by implication, that testimonials from consumers appearing in advertisements for FormulaTrim 3000 reflect the typical or ordinary experience of members of the public who have used the product.

PAR. 11. In truth and in fact, testimonials from consumers appearing in advertisements for FormulaTrim 3000 do not reflect the typical or ordinary experience of members of the public who have used the product. Therefore, the representation set forth in paragraph ten was, and is, false and misleading.

MegaLoss 1000

PAR. 12. Respondents have disseminated or have caused to be disseminated advertisements for MegaLoss 1000, including but not necessarily limited to the attached Exhibits C and D. These advertisements contain the following statements and depictions:

A. Exhibit C:

"You can start losing up to 10, 20, 50 even 100 pounds with the powerful, doctor approved, MegaLoss 1000 Miracle Diet Pill Program for only \$9.95."

[*Video*: "Use Only As Directed With Diet/Exercise Plan" displayed in small print at bottom of screen below full screen depiction of pill on a finger and the words "MIRACLE DIET PILL" in large print, followed by the words "PROGRAM" and "Doctor Approved" in smaller print.]

"With this doctor-approved MegaLoss 1000 Program, you can burn more body fat relaxing in the sun than swimming 2½ miles or exercising 6 hours nonstop."

[*Video*: young slender woman lying by a pool with statement "Based On 180 Pound Person" in small print displayed at bottom of screen.]

"Ohio's Faye Diamond lost a dramatic 15 pounds, rapidly dropping from a size 8 to a size 4."

FAYE DIAMOND: "I'm not embarrassed to wear a bikini anymore."

"Toronto's Debbie Holloway lost 53 pounds trimming from a size 16 to a size 7."

Wisconsin's A.J. Jr. rapidly lost 75 pounds, carving 10 bulging inches from his waist.

Tennessee's Sherry Capick lost 38 pounds with her doctor-approved Miracle Diet Pill Program.

And New York's Jeff Waldo rapidly lost an awesome 92 pounds!" [*Video*: photos of each consumer endorser displayed with amounts of weight lost; two consumer endorsements contain small video displays in the same color as background stating "Results Vary."]

"While under her Doctor's care, Mrs. McKinson quickly lost 32 pounds.

Lorraine Liberatti rapidly lost 46 pounds.

Lynn Clarey lost an astonishing 65 pounds, and E.J. Elkar lost an incredible 100 pounds! Now you can shed excess fat by calling . . . for your doctor approved MegaLoss 1000 Miracle Diet Pill Program. . . ."

"Your satisfaction is 100% guaranteed." [*Video*: "30-day Money-back Guarantee" displayed with ordering information; during ordering instructions, while telephone number and cost information is presented in audio and video, the following text is presented at the bottom of various screens in small print: "Use Only As Directed With Diet/Exercise Plan," "Testimonials Compensated," and "Following diet/exercise plan is essential for loss of weight for results cannot be achieved solely through the use of pill."]

B. Exhibit D:

"MIRACLE DIET PILL" [headline that appears in approximately 1-inch bold letters]

"Megaloss 1000 Diet Plan GETS THE FAT OFF FAST!" [smaller headline followed by word "Program"]

"Your Ultimate Anti-Fat Weapon!" [headline in ½ inch bold letters]

"SHRINK MILLIONS OF FAT CELLS IN JUST 24 To 48 HOURS!" [smaller headline]

"MEGALOSS GETS THE FAT OFF FAST!"

MegaLoss 1000 really works wonders ... FAST! Debbie Holloway lost an amazing 53 pounds. Harold Albright rapidly burned away 75 pounds and Erma Alkire lost 100 pounds so fast her friends could barely recognize her."

"RAPIDLY LOSE POUNDS & INCHES

Just imagine yourself beginning to burn away years of unsightly fat as the MegaLoss 1000 diet plan helps you rapidly shrink millions of fat cells almost

overnight. Now you, like Debbie, Erma and Faye have the opportunity to rapidly lose weight and regain your figure thanks to the MegaLoss 1000 fat-burning diet and its powerful, clinically tested, medically proven and doctor-recommended diet pill formula."

"MEDICALLY PROVEN - DOCTOR APPROVED!

The MegaLoss 1000 diet plan was designed to trigger super fast weight loss. Results are simply fantastic! Your self-confidence and self esteem will grow each day as you regain your youthful figure with the help of this doctor approved diet program's special diet pill ingredient. Formerly available only through doctors, this powerful ingredient is now available to help you lose weight with the doctor-approved MegaLoss 1000 diet since being recommended for its safety to the United States Government"

"Watch as you:

- LOSE up to 23 INCHES off your WAIST
- LOSE up to 20 INCHES off your HIPS
- LOSE up to 10 INCHES off your THIGHS"

"Naturally, individual weight may vary depending largely on how much you need to lose. But you'll simply be amazed as your calorie intake reduces and gnawing hunger pains are shut off as your high-speed fat burn-off turns on full flame to trim away years of built-up fat. The results are fantastic!"

"ULTIMATE ANTI-FAT WEAPON

You'll no longer be a slave to your appetite. MegaLoss 1000's medically proven formula has been praised by leading doctors, featured in thousands of studies, medical books and national magazines. You now have the ultimate anti-fat weapon you need to lose weight fast. As you quickly drop pounds and inches, experience the more vibrant, desirable and exciting new you emerge."

"NO DANGEROUS SIDE EFFECTS

You'll simply be amazed at how fast the weight comes off. And best of all - you don't have to worry about those nervous jitters, insomnia, laxative effects or dangerous side effects. But you can lose weight so fast your friends may not even recognize you.... As if by magic on the MegaLoss diet plan, down go the calories, down go the inches and down go the pounds!"

"NOW IT'S YOUR TURN

Now it's your turn to rapidly lose weight . . .

Now you can:

- Shrink Millions of Fat Cells The Very First Day
- Trigger Awesome Fat-burning in 24 to 48 Hours
- Slim Stubborn Bulges in Record Time
- Dramatically Reshape Your Body"

"SATISFACTION 100% GUARANTEED OR YOUR MONEY BACK

Now is the proper time... the turning point of your life. Now you can shed your excess fat and have a firm, youthful-looking body faster than you ever dreamed possible. No matter how many years you have been overweight, this amazing anti-fat weapon not only can... but must work wonders for you... or it doesn't cost a single cent! You risk absolutely nothing when you call in your order."

"ORDER NOW WITHOUT RISK

You must be 100 percent satisfied with your rapid weight loss and the results you see in you waist, hips and thighs. If you are not completely satisfied in any way, simply return the unused portion in 30 days and receive a full refund of your purchase price. No questions asked. So act now. Call in your order today."

[Ad contains the following footnote in fine print: "If you read nothing else, read this . . . Following the High Speed diet plan is an extremely fast and effective means to conquer obesity. It causes you to lower caloric intake, which is essential to the rapid reduction of fat and body weight. Naturally, the incredible results described above may not be achieved solely though the use of the diet pills. You must follow the entire Hi-Speed diet plan, which includes behavior modification and walking to achieve the fastest results. Results vary. Average weight loss is 1-2 pounds per week. . . . This product should not be used by the elderly or children. Pregnant women, nursing mothers, individuals being treated for high blood pressure or depression or who have heart disease, diabetes, or thyroid disease should only use as directed by their physician."]

PAR. 13. Through the use of the statements and depictions contained in the advertisements referred to in paragraph twelve, including but not necessarily limited to the advertisements attached as Exhibits C and D, respondents have represented, directly or by implication, that:

- A. MegaLoss 1000 causes substantial weight loss rapidly;
- B. MegaLoss 1000 causes substantial weight loss without the need to exercise or reduce caloric intake;
- C. MegaLoss 1000 causes the burning of more body fat daily, thereby resulting in the same or greater weightloss benefit to users, than swimming two and a half miles or exercising six hours nonstop;
- D. Prior to the sale of MegaLoss 1000, the active ingredient in MegaLoss 1000 was available only through doctors; and
- E. Scientific studies prove that MegaLoss 1000 causes substantial weight loss rapidly.

PAR. 14. In truth and in fact:

- A. MegaLoss 1000 does not cause substantial weight loss rapidly;
- B. MegaLoss 1000 does not cause substantial weight loss without the need to exercise or reduce caloric intake;
- C. MegaLoss 1000 does not cause the burning of more body fat daily, thereby resulting in the same or greater weight-loss benefit to

users, than swimming two and a half miles or exercising six hours nonstop;

D. The active ingredient in MegaLoss 1000 was available to the public without a doctor's prescription for a substantial period of time prior to the sale of MegaLoss 1000; and

E. Scientific studies do not prove that MegaLoss 1000 causes substantial weight loss rapidly.

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

PAR. 15. Through the use of the statements and depictions contained in the advertisements referred to in paragraph twelve, including but not necessarily limited to the advertisements attached as Exhibits C and D, respondents have represented, directly or by implication, that:

A. MegaLoss 1000 does not cause nervous jitters or insomnia or have any dangerous side effects;

B. MegaLoss 1000 burns body fat; and

C. MegaLoss 1000 significantly shrinks millions of fat cells within the first twenty-four to forty-eight hours of use.

PAR. 16. Through the use of the statements and depictions contained in the advertisements referred to in paragraph twelve, including but not necessarily limited to the advertisements attached as Exhibits C and D, respondents have represented, directly or by implication, that at the time they made the representations set forth in paragraphs thirteen A-C and fifteen, they possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 17. In truth and in fact, at the time they made the representations set forth in paragraphs thirteen A-C and fifteen, respondents did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation set forth in paragraph sixteen was, and is, false and misleading.

PAR. 18. Through the use of the statements and depictions contained in the advertisements referred to in paragraph twelve, including but not necessarily limited to the advertisements attached as Exhibits C and D, respondents have represented, directly or by implication, that testimonials from consumers appearing in

advertisements for MegaLoss 1000 reflect the typical or ordinary experience of members of the public who have used the product.

PAR. 19. In truth and in fact, testimonials from consumers appearing in advertisements for MegaLoss 1000 do not reflect the typical or ordinary experience of members of the public who have used the product. Therefore, the representation set forth in paragraph eighteen was, and is, false and misleading.

MiracleTrim

PAR. 20. Respondents have disseminated or have caused to be disseminated advertisements for MiracleTrim, including but not necessarily limited to the attached Exhibit E. This advertisement contains the following statements and depictions:

"Now you can start shrinking millions of fat cells and begin regaining your youthful figure in 24 to 48 hours." [*Video*: heavy woman depicted putting on a pair of jeans and becoming a slim woman within three frames of the ad.]

"The very first day your powerful new MiracleTrim Diet Pill System attacks years of built up fat. You can start losing up to 10, 20, 50, even an atypical 100 pounds for only \$9.95." [*Video*: "100 lbs." and "RECEIVE A FULL 21-DAY SUPPLY," and "NEW!" superimposed over a package containing two bottles of MiracleTrim pills.]

"This new MiracleTrim Diet Pill System is doctor approved to help you quickly shrink millions of fat cells so you can easily regain your youthful figure." [*Video*: "Use Only As Directed With Diet Plan" in small print at bottom of screen below full screen depiction of pill on a finger and the words "NEW!" "DOCTOR APPROVED," and "EASILY REGAIN YOUR FIGURE!" in large print.]

"You can rapidly shrink up to 10 inches off your thighs. You can easily shrink as much as 20 inches from your hips and you can quickly shrink up to an amazing 23 inches from your waist."

* * *

"Pam rapidly went from a large size 15 to a slim 7. After 15 years of diets, Treva finally found one that really worked." [*Video*: 'before' and 'after' photos displayed with amounts of weight lost.]

A man is pictured as he says: "I quickly lost 55 pounds."

"Jo's incredible 59 pound loss gave her a knockout shape. Carol lost an astonishing 40 pounds. And Edie lost a mind boggling 110 pounds." [*Video*: 'before' and 'after' photos of consumer endorsers displayed with amounts of weight lost.]

"Now it's your turn to dramatically reshape your figure by calling . . . for your new MiracleTrim Diet Pill System for only \$9.95." [*Video*: during ordering instructions, while telephone number and cost information is presented in audio and video, the following text is presented at the bottom of various screens in small print: "Following Diet Plan Is Essential For Weight Loss (Average 1½ - 2 Pounds Per

835

Complaint

Week) For Results Cannot Be Achieved Solely Through Use Of Pill," "testimonials compensated," and "use only as directed with diet plan."]

* * *

DR. PESHKIN [*shown in video*]: "Order today, you'll receive your own personal weight loss consultation, absolutely free. . . ."

PAR. 21. Through the use of the statements and depictions contained in the advertisements referred to in paragraph twenty, including but not necessarily limited to the advertisement attached as Exhibit E, respondents have represented, directly or by implication, that:

- A. MiracleTrim causes substantial weight loss rapidly;
- B. MiracleTrim causes substantial weight loss without the need to exercise or reduce caloric intake;
- C. MiracleTrim's active ingredient is new and/or unique; and
- D. Consumers who order MiracleTrim will receive a personal weight-loss consultation from a doctor or medically trained, professional weight-loss counselor.

PAR. 22. In truth and in fact:

- A. MiracleTrim does not cause substantial weight loss rapidly;
- B. MiracleTrim does not cause substantial weight loss without the need to exercise or reduce caloric intake;
- C. MiracleTrim's active ingredient is not new and/or unique; and
- D. Consumers who order MiracleTrim will not receive a personal weight-loss consultation from a doctor or medically trained, professional weight-loss counselor.

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

PAR. 23. Through the use of the statements and depictions contained in the advertisements referred to in paragraph twenty, including but not necessarily limited to the advertisement attached as Exhibit E, respondents have represented, directly or by implication, that MiracleTrim significantly shrinks millions of fat cells within the first twenty-four to forty-eight hours of use.

PAR. 24. Through the use of the statements and depictions contained in the advertisements referred to in paragraph twenty, including but not necessarily limited to the advertisement attached as

Exhibit E, respondents have represented, directly or by implication, that at the time they made the representations set forth in paragraphs twenty-one A-B and twenty-three, they possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 25. In truth and in fact, at the time they made the representations set forth in paragraphs twenty-one A-D and twenty-three, respondents did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation set forth in paragraph twenty-four was, and is, false and misleading.

PAR. 26. Through the use of the statements and depictions contained in the advertisements referred to in paragraph twenty, including but not necessarily limited to the advertisement attached as Exhibit E, respondents have represented, directly or by implication, that testimonials from consumers appearing in advertisements for MiracleTrim reflect the typical or ordinary experience of members of the public who have used the product.

PAR. 27. In truth and in fact, testimonials from consumers appearing in advertisements for MiracleTrim do not reflect the typical or ordinary experience of members of the public who have used the product. Therefore, the representation set forth in paragraph twenty-six was, and is, false and misleading.

FAILURE TO ADEQUATELY DISCLOSE MATERIAL CONNECTION

PAR. 28. In their advertising and sale of weight-loss pills, including but not necessarily limited to MegaLoss 1000, FormulaTrim 3000, and MiracleTrim, respondents have represented that consumers appearing in respondents' advertisements are endorsers of the weight-loss pills. Respondents have failed to disclose adequately that certain consumers appearing in respondents' advertisements have a material connection with respondents in that such consumers have been compensated, or offered significant compensation, for endorsing the weight-loss pills. This fact would be material to consumers in their purchase or use decisions regarding the products. The failure to disclose adequately this fact, in light of the representation made, was, and is, a deceptive practice.

TRADE PRACTICE VIOLATIONS

PAR. 29. In their advertisements for their weight-loss pills, respondents have directed consumers to call a toll-free telephone number to place an order. Typically, when consumers called this telephone number, they were given a choice of paying by check or by credit card. If consumers indicated that they preferred to pay by check, they were asked to read the numbers across the bottom of one of their checks. Respondents then magnetically encoded this information on a bank draft, which was submitted to the consumer's bank for payment. If consumers indicated that they preferred to pay by credit card, they were asked for their credit card number and respondents billed a charge directly to the consumer's credit card account.

UNAUTHORIZED DEBITS AND CHARGES

PAR. 30. In numerous instances, respondents have debited consumers' bank accounts or billed consumers' credit card accounts without the consumers' authorization or for amounts greater than those authorized by the consumers. Respondents' practices as set forth herein have caused substantial injury to consumers that is not outweighed by any countervailing benefits to consumers or competition and is not reasonably avoidable by consumers, and constitute unfair and deceptive acts or practices.

FAILURE TO HONOR MONEY-BACK GUARANTEE

PAR. 31. In their advertisements and promotional materials for their weight-loss pills, respondents have represented that the weight-loss pills carry a "money-back guarantee," and that consumers can return the product within a specified time period after receipt of the product and receive a full refund within a reasonable period of time.

PAR. 32. In truth and in fact, in numerous instances, consumers have returned the weight-loss pills to respondents within the specified time period in order to obtain a refund, and respondents have failed to provide refunds of money paid by such consumers or failed to provide them within a reasonable period of time. The practices of respondents as set forth herein have caused substantial injury to consumers that is not outweighed by any countervailing benefits to

consumers or competition and is not reasonably avoidable by consumers, and constitute unfair and deceptive acts or practices.

TRUTH IN LENDING ACT VIOLATIONS

PAR. 33. Respondents are creditors as "creditor" is defined in Section 103(f) of the Truth In Lending Act ("TILA"), 15 U.S.C. 1602(f), and in Section 226.2(a)(17) of Regulation Z, 12 CFR 226.2(a)(17), and are, therefore, required to comply with the applicable provisions of that Act and Regulation.

PAR. 34. Section 226.12(e) of Regulation Z, 12 CFR 226.12(e), which implements Section 166 of the TILA, 15 U.S.C. 1666e, provides that:

When a creditor other than a card issuer accepts the return of property or forgives a debt for services that is to be reflected as a credit to the consumer's credit card account, that creditor shall, within seven business days from accepting the return or forgiving the debt, transmit a credit statement to the card issuer through the card issuer's normal channels for credit statements.

PAR. 35. In numerous instances, respondents have failed to transmit credit statements to the card issuer through the card issuer's normal channels for credit statements within seven business days from accepting the return of property or forgiving the debt for services in violation of the TILA and Section 226.12(e) of Regulation Z.

NONDELIVERY

PAR. 36. In connection with the sale of weight-loss pills to consumers, respondents have represented, directly or by implication, that the weight-loss pills would be delivered to purchasers within a reasonable period of time.

PAR. 37. In truth and in fact, in numerous instances, the weight-loss pills referred to in paragraph thirty-six that were sold to purchasers have not been delivered to such purchasers or have not been delivered to them within a reasonable period of time. Further, in numerous instances, respondents have failed to provide refunds of money paid by such purchasers or have failed to provide such refunds within a reasonable period of time. The practices of respondents as set forth herein have caused substantial injury to consumers that is

not outweighed by any countervailing benefits to consumers or competition and is not reasonably avoidable by consumers, and constitute unfair and deceptive acts or practices.

SMOKING CESSATION PRODUCT -- NICOTAIN

PAR. 38. Respondents have disseminated or have caused to be disseminated advertisements for the Nicotain Stop Smoking Patch, including but not necessarily limited to the attached Exhibit F. This advertisement contains the following statements and depictions:

[Video: "EASILY STOP SMOKING" displayed in large print.]

"You can easily stop smoking with the new nonmedicated, nicotine-free, doctor-approved Nicotain Stop Smoking Patch."

[Video: product box displayed with label reading: "nicotain STOP SMOKING PATCH."]

[Video: "DOCTOR APPROVED!" displayed in large print above depiction of person wearing patch on wrist.]

[Video: "NEW! NON-PRESCRIPTION" displayed in large print and "nicotain STOP SMOKING PATCH" displayed in smaller print over depiction of patch on wrist.]

"This revolutionary new behavior modification, nonprescription Nicotain Stop Smoking Patch Program is so effective, you can easily quit, whether you smoke one, two, even three packs a day." [Video: "Use nonmedicated patch only as directed with plan" in small print displayed at bottom of screen.]

"Roxanna Seles smoked for 12 years."

[Video: "SMOKED FOR 12 YEARS" displayed in large print.]

ROXANNA: "And I quit in just one week." [Video: "QUIT IN JUST ONE WEEK!" displayed in large print video over person identified as Roxanna Seles followed by other consumer endorsements.]

MAN: "Nicotain made it easy. And I didn't have to go to a doctor for it."

1st WOMAN: "Twenty years, twenty cigarettes a day--and I quit in just two weeks with Nicotain."

[Video: "QUIT IN JUST TWO WEEKS!" displayed in large print.]

* * *

2nd WOMAN: "I called, I quit, and it only cost \$9.95."

* * *

MAN: "Every cigarette brings you seven minutes closer to death."

[Video: during ordering instructions, while telephone number and cost information is presented in audio and video, the following text is presented at the bottom of various screens in small print: "use nonmedicated patch only as directed with plan," "testimonials compensated/one-week starter program," "product effectiveness is directly related to user's motivation to stop."]

PAR. 39. Through the use of the statements and depictions contained in the advertisements referred to in paragraph thirty-eight,

including but not necessarily limited to the advertisement attached as Exhibit F, respondents have represented, directly or by implication, that:

A. The Nicotain Stop Smoking Patch enables users to stop smoking easily, regardless of the number of cigarettes they currently smoke or the number of years they have smoked; and

B. The Nicotain Stop Smoking Patch works through a mechanism substantially similar or equivalent to a prescription smoking deterrent patch.

PAR. 40. In truth and in fact:

A. The Nicotain Stop Smoking Patch does not enable users to stop smoking easily, regardless of the number of cigarettes they currently smoke or the number of years they have smoked; and

B. The Nicotain Stop Smoking Patch does not work through a mechanism substantially similar or equivalent to a prescription smoking deterrent patch.

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

PAR. 41. Through the use of the statements and depictions contained in the advertisements referred to in paragraph thirty-eight, including but not necessarily limited to the advertisement attached as Exhibit F, respondents have represented, directly or by implication, that at the time they made the representation set forth in paragraph thirty-nine A, they possessed and relied upon a reasonable basis that substantiated such representation.

PAR. 42. In truth and in fact, at the time they made the representation set forth in paragraph thirty-nine A, respondents did not possess and rely upon a reasonable basis that substantiated such representation. Therefore, the representation set forth in paragraph forty-one was, and is, false and misleading.

PAR. 43. Through the use of the statements and depictions contained in the advertisements referred to in paragraph thirty-eight, including but not necessarily limited to the advertisement attached as Exhibit F, respondents have represented, directly or by implication, that testimonials from consumers appearing in advertisements for The

Nicotain Stop Smoking Patch reflect the typical or ordinary experience of members of the public who have used the product.

PAR. 44. In truth and in fact, testimonials from consumers appearing in advertisements for Nicotain Stop Smoking Patch do not reflect the typical or ordinary experience of members of the public who have used the product. Therefore, the representation set forth in paragraph forty-three was, and is, false and misleading.

PAR. 45. 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.

Chairman Pitofsky not participating.

Complaint

119 F.T.C.

EXHIBIT A

**RADIO
TV REPORTS**

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

PRODUCT FORMULA TRIM 3000 DIET PILLS
TITLE "BEFORE & AFTER"
PROGRAM NEWS
STATION WUAB
PAGE 1 OF 2

OH92-51134
07/06/92 90
(CLEVELAND) 10.58PM

EXHIBIT A (p. 1)



(MUSIC) MALE ANNCR: Debbie Hoya lost 25 pounds fast.



Tamara Cowens lost 35 pounds fast.



Now you too can lose weight fast.



with the help of this new powerful FormulaTrim 3000 diet pill.



FormulaTrim's new fat-burning plan is



so powerful.



you can burn more body fat relaxing all day than running 10 miles non-stop



Laurette Morello burned away 17 pounds.



LAURETTE MORELLO: I went from a size 13 to a size 5.



MALE ANNCR: Adam Locas lost 36 pounds carving 7 inches from his waist.



... lost 52 pounds



trimming from a size 14 to a size 6.



This powerful



doctor-approved diet pill formula is medically proven to work.



The new FormulaTrim fat burning plan is so powerful.



you can burn more body fat relaxing all day

ALSO AVAILABLE IN COLOR VIDEO-TAPE CASSETTE

When Radio-TV Reports is prepared for the public, it is prepared for the public. It is not intended to be a legal document.

EXHIBIT A

RADIO TV REPORTS

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

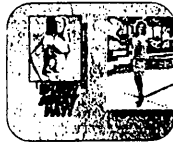
PRODUCT FORMULA TRIM 3000 DIET PILLS
TITLE "BEFORE & AFTER"
PROGRAM NEWS
STATION WJAB
PAGE 2 OF 2

OH92-51134
07/06/92 90
(CLEVELAND) 10:58PM

EXHIBIT A (p. 2)



then sweating through five exhausting hours of aerobics.



Terri Nigelson



burned away 15 pounds;



Joanne Benora lost 32 pounds



and Annette Garton lost an incredible and amazing 59 pounds!



Now you can



burn away fat and lose weight fast by calling 1-800-547-9500



for your powerful new FormulaTrim 3000



for only \$9.95. We accept personal check and credit card orders by phone.



Call 1-800-547-9500 now to order your three week supply.



For only \$9.95. Call right now



and receive your Swedish Cellulite Creme absolutely free.



Your satisfaction is 100% guaranteed.



Remember, have your check book



or credit card ready when calling.



that's 1-800-547-9500. Call now!

ALSO AVAILABLE IN COLOR VIDEO-TAPE CASSETTE

Complaint

119 F.T.C.

EXHIBIT B

**RADIO
TV REPORTS**

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

PRODUCT: FORMULA TRIM 3000 NO HUNGER DIET PILL 92-10715
 TITLE: "END HUNGER PAIN"
 PROGRAM: VICKI 9/15/92 :60
 STATION: WPIX (NEW YORK) 10.30AM

EXHIBIT B



(MUSIC) ANNCR: Debbie Hoya lost 25 pounds, fast.



Tamara Koons lost 35 pounds, fast. Now you too can lose weight fast



with the help of this new powerful medically-proven FormulaTrim 3000 No Hunger Diet Pill.



Following this new powerful FormulaTrim fat burning diet plan.



you can burn more body fat relaxing all day



than running 10 miles non-stop



or even sweating through 5 exhausting hours of aerobics.



Terry Nigelson burned away 15 pounds.



Loretta Morello burned away 17 pounds.



LORETT MORELLO: I went from a size 13 to a size 5.



ANNCR: Adam Logus burned away 36 pounds.



Claire Contobi burned away 52 pounds



and Annette Barton burned away an incredible and amazing 59 pounds! (MUSIC OUT)



ANNCR: Now you can end biting hunger pain, burn away fat and lose weight fast by calling 1-800-542-9696



for your powerful FormulaTrim 3000 for only \$9.95. We accept personal check and credit card orders by phone.



Call 1-800-542-9696 and receive your Swedish Cellulite Cream absolutely free.

ALSO AVAILABLE IN COLOR VIDEO-TAPE CASSETTE

EXHIBIT C

**RADIO
TV
REPORTS**

41 East 42nd Street New York, NY 10017 (212) 307-1430

PRODUCT: MEGA LOSS 1000 DIET PILLS
 TITLE: "MIRACLE DIET"
 PROGRAM: MOVIE
 STATION: WPIX (NEW YORK)
 PAGE 1

91-11148

120

2:23PM

EXHIBIT C (p. 1)



(MUSIC) ANNCR: You can start losing up to 10, 20, 50 even 100 pounds



with the powerful, doctor approved.



Mega Loss 1000 Miracle Diet Pill Program for only \$9.95.



With this doctor approved Mega Loss 1000 Program, you can burn more body fat



relaxing in the sun then swimming 2 1/2 miles



or exercising 6 hours nonstop



Ohio's Faye Diamond lost a dramatic 15 pounds.



rapidly dropping from a size 8 to a size 4



FAYE DIAMOND: I'm not embarrassed to wear a bikini anymore



ANNCR: Toronto's Debbie Holloway lost 53 pounds trimming from a size 16 to a size 7.



Wisconsin's A.J. Jr. rapidly lost 75 pounds



carving 10 bulging inches from his waist



Tennessee's Sherry Capick lost 38 pounds with her doctor approved Miracle Diet Pill Program



And New York's Jeff Waldo rapidly lost an awesome 92 pounds!



While under her Doctor's care, Mrs. McKinson



quickly lost 32 pounds

ALSO AVAILABLE IN COLOR VIDEO-TAPE CASSETTE

On a Radio-TV Report, ANNCR's Debbie Holloway lost 53 pounds, trimming from a size 16 to a size 7. Wisconsin's A.J. Jr. rapidly lost 75 pounds, carving 10 bulging inches from his waist. Tennessee's Sherry Capick lost 38 pounds with her doctor approved Miracle Diet Pill Program. And New York's Jeff Waldo rapidly lost an awesome 92 pounds! While under her Doctor's care, Mrs. McKinson quickly lost 32 pounds.

Complaint

119 F.T.C.

EXHIBIT C

**RADIO
TVREPORTS**

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

PRODUCT: MEGA LOSS 1000 DIET PILLS 91-11148
TITLE: "MIRACLE DIET"
PROGRAM: MOVIE 10/06/91 120
STATION: WPIX (NEW YORK) 2:23PM
PAGE 2

EXHIBIT C (p. 2)



Lorraine Liberatti rapidly lost 46 pounds.



Lynn Clarey lost an astonishing 65 pounds.



and E.J. Elkar lost an incredible



100 pounds!



Now you can shed excess fat by calling 1-800-641-1200.



for your doctor approved Mega Loss 1000 Miracle Diet Pill Program.



for only \$9.95.



We accept all personal checks and credit card orders by phone.



Call 1-800-641-1200 now to order your 21-day supply.



for only \$9.95.



Call right now and receive



your Nighttime Cellulite Cream absolutely free.



Your satisfaction is 100% guaranteed.



Remember: Have your check book or credit card ready when calling.



That's 1-800-641-1200, call now!

ALSO AVAILABLE IN COLOR VIDEO-TAPE CASSETTE

As a condition of sale, the purchaser of this product shall be deemed to have agreed to the terms and conditions of sale set forth on the enclosed order form.

Billy Graham: The way you pray makes dreams come true



CAN unlock the secrets to life's riches by learning how to pray, says famous evangelist Billy Graham in his sensational new book *Warning*. More than simply putting your hands together explains why only a few people have learned to pray to work. We have no sense of community and expectantly to properly use prayer as a form. Graham sighs. His most revered preaching the correct way to pray our dreams come true. Choose a proper setting for quiet spot where you interrupted ... a spot

BLOCKBUSTER NEW BOOK

where you can be alone with God. Next, clear your mind of anger or animosity and engage in a one-on-one conversation with the Lord. "You may not be able to pray like a clergyman in the beginning, but you can start with just a simple sentence. 'Lord, I love you.' That's a prayer. Or, 'God, help me.' That's a prayer, too. "Snatches of memorized verses are hastily spoken in the morn-

ing, then we say goodbye to God for the rest of the day, until we rush through a few closing petitions at night," he laments. "Since the disciples had to be taught to pray, we, too, ought to study the Scriptures and learn to pray," Dr. Graham says. "Prayer is not a button we can press and get an immediate answer, either. "We can't manipulate God or dictate to him. Knowing far better than we what's good for us, God gives us what we NEED," he says. "Knowing how to pray isn't enough, however. We also need to know WHEN to pray. "Of course, we need to pray in times of adversity, lest we become faithless and unbelieving. But we also need to pray in times of prosperity, lest we become boastful and proud," he writes. "God may not give us what we ask for, for that may not be his wise and loving will for us. But he WILL answer our prayer in his own way. He will not let us down in our hour of need." And in such times of need, Dr. Graham promises, God will provide us with patience, courage and strength.

Worked for Naomi Judd

THE POWER of prayer has cured country singer Naomi Judd of a serious liver disease that forced her into an early retirement last year. "Medical science is a wonderful thing," says the jobless Judd, "but I had to go to a higher authority. "It worked. I'm in full remission." The case of chronic hepatitis she contracted in 1990 forced Naomi to retire from the superstar singing duo with daughter Wynonna last year. Wynonna's now a big hit on her own.

Miracle Diet Pill Program



"My dress size went from a size 16 to a size 7."
Debbie Holloway

"I LOST 53 LBS."

FIND OUT HOW!

Complaint

119 F.T.C.

EXHIBIT D

EXHIBIT D (p. 2)

"I'm Not Embarrassed to Wear A Bikini Anymore!"

Miracle Diet Pill

MegaLoss 1000 Diet Plan **GETS THE FAT OFF FAST!** Program

Your Ultimate Anti-Fat Weapon!

SHRINK MILLIONS OF FAT CELLS IN JUST 24 TO 48 HOURS!

MEGALOSS GETS THE FAT OFF FAST!

MegaLoss 1000 really works wonders. **FAST!** Debbie Hoffway lost an amazing 53 pounds. Harold Albright rapidly burned away 75 pounds and Erma Aure lost 100 pounds so fast her friends could barely recognize her!

RAPIDLY LOSE POUNDS & INCHES

Just imagine yourself beginning to burn away years of unwanted fat as the MegaLoss 1000 diet plan helps you rapidly lose the millions of fat cells almost overnight. Now you, Erma and Faye have the opportunity to rapidly lose weight and regain your figure thanks to the MegaLoss 1000 fat-burning diet and its powerful, clinically tested, medically proven and doctor-recommended diet pill formula.

MEDICALLY PROVEN - DOCTOR APPROVED!

The MegaLoss 1000 diet plan was designed to trigger super fat weight loss. Results are amazing! Your self-confidence and self-esteem will grow each day as you regain your youthful figure with the help of this doctor approved diet pill program's special diet pill ingredients. Formerly available only through doctors, this powerful ingredient is now available to help you lose weight with the doctor-approved MegaLoss 1000 diet pill being recommended for its safety to the United States Government by a distinguished panel of doctors and medical experts.

Watch as you:

- LOSE up to 23 INCHES off your WAIST
- LOSE up to 20 INCHES off your HIPS
- LOSE up to 10 INCHES off your THIGHS

Naturally, individual weight may vary depending largely on how much you need to lose. But you'll surely be amazed as your calorie intake reduces and your fat burner pills flame to burn away years of stubborn fat. The results are fantastic!

NO DANGEROUS SIDE EFFECTS

You'll simply be amazed at how fast the weight comes off. And best of all - you don't have to worry about those nervous jitters, insomnia, laxative effects or dangerous side effects. But you can lose weight so fast your friends may not even recognize you. As if by magic on the MegaLoss diet plan, down go the calories, down go the inches and down go the pounds!

NOW IT'S YOUR TURN

Now it's your turn to rapidly lose weight, to have a new appearance, to have a new self-image, to have a new lifestyle. Now you can:

- Shrink Millions of Fat Cells The Very First Day
- Trigger Awesome Fat-burning In 24 to 48 Hours
- Slim Stubborn Bulges in Record Time
- Dramatically Reshape Your Body

SATISFACTION 100% GUARANTEED OR YOUR MONEY BACK

Now is the proper time - the turning point of your life. Now you can shed your excess fat and have a firm, youthful-looking body faster than you ever dreamed possible. No matter how many years you have been overweight, this amazing anti-fat weapon not only can - but must work wonders for you - or it doesn't cost a single cent! You risk absolutely nothing when you call in your order.

ORDER NOW WITHOUT RISK

You must be 100 percent satisfied with your rapid weight loss and the results you see in your waist, hips and thighs. If you are not completely satisfied in any way, simply return the unused portion in 30 days and receive a full refund of your purchase price. No questions asked. So act now. Call in your order today.

"I lost 100 lbs!"

ULTIMATE ANTI-FAT WEAPON

You'll no longer be a slave to your appetite. MegaLoss 1000's medically proven formula has been praised by leading doctors, featured in thousands of studies, medical books and national magazines. You now have the ultimate anti-fat weapon you need to lose weight fast. As you quickly drop pounds and inches, experience the more vibrant, desirable and exciting new you emerge.

Special Discount Offer!

ORDER NOW SAVE UP TO 50% OR MORE!

WEIGHT	REGULAR PRICE	DISCOUNTED PRICE	WEIGHT	REGULAR PRICE	DISCOUNTED PRICE
100-110 Lbs. 63	\$109.95	\$54.95	100-110 Lbs. 12	\$24.95	\$12.48
90-99 Lbs. 57	\$99.95	\$49.95	10-14 Lbs. 27	\$24.95	\$12.48
80-89 Lbs. 51	\$89.95	\$44.95	14-18 Lbs. 0	\$14.95	\$7.48
70-79 Lbs. 45	\$79.95	\$39.95	18-22 Lbs. 0	\$14.95	\$7.48
60-69 Lbs. 39	\$69.95	\$34.95	22-26 Lbs. 0	\$14.95	\$7.48
			26-30 Lbs. 0	\$14.95	\$7.48
			30-34 Lbs. 0	\$14.95	\$7.48
			34-38 Lbs. 0	\$14.95	\$7.48
			38-42 Lbs. 0	\$14.95	\$7.48
			42-46 Lbs. 0	\$14.95	\$7.48
			46-50 Lbs. 0	\$14.95	\$7.48
			50-54 Lbs. 0	\$14.95	\$7.48
			54-58 Lbs. 0	\$14.95	\$7.48
			58-62 Lbs. 0	\$14.95	\$7.48
			62-66 Lbs. 0	\$14.95	\$7.48
			66-70 Lbs. 0	\$14.95	\$7.48
			70-74 Lbs. 0	\$14.95	\$7.48
			74-78 Lbs. 0	\$14.95	\$7.48
			78-82 Lbs. 0	\$14.95	\$7.48
			82-86 Lbs. 0	\$14.95	\$7.48
			86-90 Lbs. 0	\$14.95	\$7.48
			90-94 Lbs. 0	\$14.95	\$7.48
			94-98 Lbs. 0	\$14.95	\$7.48
			98-102 Lbs. 0	\$14.95	\$7.48

Shipping & handling not included.

CALL TOLL FREE

PERSONAL CHECKS AND CREDIT CARDS ACCEPTED BY PHONE!

1-800-899-1400

FREE WEIGHT LOSS CONSULTATION If Lines Are Busy Call 1-800-652-1188. ASK FOR OPERATOR GE-102 CALL NOW!

\$9.95 ONLY

EXHIBIT E

**RADIO
TV REPORTS**

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

PRODUCT: MIRACLE TRIM DIET PILL SYSTEM
TITLE: "SHRINK FAT CELLS"
PROGRAM: MONTEL WILLIAMS
STATION: WNYW
PAGE: 1 OF 2

93-01018

1/25/93 :90
(NEW YORK) 5:06PM

EXHIBIT E (p. 1)



(MUSIC) ANNCR: Now you can start shrinking millions of fat cells



and begin regaining your youthful figure



in 24 to 48 hours.



The very first day your powerful new Miracle Trim Diet Pill System



attacks years of built up fat.



You can start losing up to 10, 20, 50,



even a typical 100 pounds for only \$9.95.



This new Miracle Trim Diet Pill System



is doctor approved to help you quickly shrink millions of fat cells



so you can easily regain your youthful figure.



You can rapidly shrink up to 10 inches off your thighs.



You can easily shrink as much as 20 inches from your hips



and you can quickly shrink up to an amazing 23 inches from your waist.



WOMAN: Thanks to Miracle Trim I'm enjoying my new body.



ANNCR: Pam rapidly went from a



large size 15 to a slim 7.

ALSO AVAILABLE IN COLOR VIDEO-TAPE CASSETTE

Complaint

119 F.T.C.

EXHIBIT E

**RADIO
TV REPORTS**

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

PRODUCT: MIRACLE TRIM DIET PILL SYSTEM
TITLE: "SHRINK FAT CELLS"
PROGRAM: MONTEL WILLIAMS
STATION: WNYW
PAGE: 2 OF 2

93-01018
1/25/93 :90
(NEW YORK) 5:06PM

EXHIBIT E (p. 2)



After 15 years of diets, Treva



finally found one that really worked.



MAN: I quickly lost 55 pounds.



ANNCR: Jo's incredible 59 pound loss gave her a knockout shape.



Carol lost an astonishing 40 pounds.



And Edie lost a mind boggling 110 pounds.



2nd ANNCR: Now it's your turn to dramatically reshape your figure



by calling 1-800-544-3344 for your new



Miracle Trim Diet Pill System for only \$9.95.



We accept all personal checks and credit card orders by phone.



Call 1-800-544-3344 to order your new



Miracle Trim for only \$9.95



and we'll give you this free supply to complete your 21 day system.



DR. PESHKIN: Order today, you'll receive your own



personal weight loss consultation, absolutely free.



2nd ANNCR: Have your check book or credit card ready when calling. That's 1-800-544-3344, call now. (MUSIC OUT)

ALSO AVAILABLE IN COLOR VIDEO-TAPE CASSETTE

Complaint

EXHIBIT F

**RADIO
TV REPORTS**

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

PRODUCT: NICOTAIN STOP SMOKING PATCH 93-13570 E
TITLE: "YOU KNOW YOU HAVE TO QUIT"
PROGRAM: SPORTS DESK 60
STATION: MSG (NEW YORK) 11/27/93 11:53PM

EXHIBIT F



(MUSIC) ANNCR: You can easily stop smoking with the new non-medicated,



Nicotain Stop Smoking Patch.



This revolutionary new behavior modification,



non-prescription Nicotain Stop Smoking Patch. Program is so effective, you can easily quit.



whether you smoke one, two, even three packs a day, Roxanna Sales smoked for 12 years.



ROXANNA: And I quit in just one week.



MAN: Nicotain made it easy. And I didn't have to go to a doctor for it.



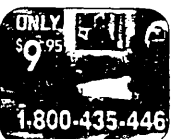
1st WOMAN: Twenty years, twenty cigarettes a day.



and I quit in just two weeks with Nicotain. (MUSIC OUT)



ANNCR: To order Nicotain, call 1-800-435-4466.



2nd WOMAN: I called, I quit, and it only cost \$9.95.



ANNCR: Call 1-800-435-4466 now!



MAN: Every cigarette brings you seven minutes closer to death.



So don't wait. Make the call. Make the call now.



ANNCR: Order Nicotain now. Call 1-800-435-4466.



3rd WOMAN: You know you have to quit. So make the call.

ALSO AVAILABLE IN COLOR VIDEO-TAPE CASSETTE
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DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the 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 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 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 Taleigh Corporation, formerly known as Taleigh, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida. At times relevant hereto, its office and principal place of business was located at 4742 N.W. Boca Raton Boulevard, Boca Raton, FL.

Respondent Choice Diet Products, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York. At times relevant hereto, its office and principal place of business was located at 4800 N.W. Boca Raton Boulevard, Boca Raton, FL.

Respondent William J. Santamaria is an officer and director of said corporations. He formulates, directs and controls the policies,

acts and practices of said corporations and his address is 20640 Baybrooke Court, Boca Raton, FL.

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

For purposes of this order:

1. *"Clearly and prominently"* as used herein shall mean as follows:

(a) In a television or videotape advertisement: (1) an audio disclosure shall be delivered in a volume and cadence and for a duration sufficient for an ordinary consumer to hear and comprehend it; and (2) a video disclosure shall be of a size and shade, and shall appear on the screen for a duration, sufficient for an ordinary consumer to read and comprehend it.

(b) In a print advertisement, the disclosure shall be in close proximity to the representation that triggers the disclosure in at least twelve (12) point type.

(c) In a radio advertisement, the disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it.

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

3. *"Purchase price"* shall mean all amounts paid to respondents in cash or by check, or charged to a consumer's credit card account or debited from a consumer's checking account, including, where applicable, sales tax, and any charges not authorized by consumers to be charged to their charge card accounts or debited from their checking accounts, provided however, with regard to Part XIV, purchase price shall not include shipping or handling charges if such charges are not included in respondents' guarantee or refund offer.

4. "*Weight-loss product*" shall mean any product or program designed or used to prevent weight gain or to produce weight loss, reduction or elimination of fat, slimming, or caloric deficit in a user of the product or program.

5. "*Smoking deterrent or cessation product*" shall mean any product or program designed to aid or assist the user to stop or reduce the cigarette urge, break the cigarette habit, or stop or reduce smoking.

I.

It is ordered, That respondents, Taleigh Corporation and Choice Diet Products, Inc., corporations, their successors and assigns, and their officers; and William J. Santamaria, individually and as an officer and director of the corporate respondents; and respondents' agents, representatives, and employees, directly or through any partnership, corporation, subsidiary, division, or other device, in connection with the manufacturing, advertising, packaging, labeling, promotion, offering for sale, sale, or distribution of FormulaTrim 3000, MegaLoss 1000, MegaLoss 3000, MiracleTrim, or any other weightloss product containing phenylpropanolamine as the active ingredient, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, in any manner, directly or by implication, that:

- A. Such product causes or assists in causing rapid weight loss;
- B. Such product causes or assists in causing substantial weight loss without the need to exercise or reduce caloric intake;
- C. Such product is new or unique or contains a new or unique ingredient;
- D. Such product causes the burning of more body fat than five hours of aerobics, running ten miles nonstop, swimming two and a half miles, exercising six hours nonstop, or any similar exercise activity; or
- E. Such product contains an active ingredient that, prior to the sale of such product, was available only through doctors.

II.

It is further ordered, That respondents, Taleigh Corporation and Choice Diet Products, Inc., corporations, their successors and assigns, and their officers; and William J. Santamaria, individually and as an officer and director of the corporate respondents; and respondents' agents, representatives, and employees, directly or through any partnership, corporation, subsidiary, division, or other device, in connection with the manufacturing, advertising, packaging, labeling, promotion, offering for sale, sale, or distribution of any weight-loss product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, in any manner, directly or by implication, that such weight-loss product has any effect on weight or body size, unless respondents disclose, clearly and prominently, and, in a television or videotape advertisement, simultaneously in both the audio and video portions of the advertisement, that reducing caloric intake and/or increasing exercise is required to lose weight; provided however, that this disclosure shall not be required if respondents possess and rely upon competent and reliable scientific evidence demonstrating that such product is effective without reducing caloric intake and/or increasing exercise.

III.

It is further ordered, That respondents, Taleigh Corporation and Choice Diet Products, Inc., corporations, their successors and assigns, and their officers; and William J. Santamaria, individually and as an officer and director of the corporate respondents; and respondents' agents, representatives, and employees, directly or through any partnership, corporation, subsidiary, division, or other device, in connection with the manufacturing, advertising, packaging, labeling, promotion, offering for sale, sale, or distribution of any product or program, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, from representing, in any manner, that:

A. Such product or program weight loss, causes or assists in causing weight loss, or assists in maintaining weight loss;

B. Such product or program causes or assists in causing weight loss without exercise or reducing caloric intake;

C. Such product or program causes the burning of more body fat than any amount of exercise activity; or

D. Such product or program causes or assists the user to stop or reduce smoking easily; unless such representation is true, and, at the time of making such representation, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

IV.

It is further ordered, That respondents, Taleigh Corporation and Choice Diet Products, Inc., corporations, their successors and assigns, and their officers; and William J. Santamaria, individually and as an officer and director of the corporate respondents; and respondents' agents, representatives, and employees, directly or through any partnership, corporation, subsidiary, division, or other device, in connection with the manufacturing, advertising, packaging, labeling, promotion, offering for sale, sale, or distribution of Nicotain, or any substantially similar product or program, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, in any manner, directly or by implication, that:

A. Such product or program enables users to stop smoking easily; or

B. Such product or program works through a mechanism substantially similar or equivalent to a prescription smoking deterrent patch.

V.

It is further ordered, That respondents, Taleigh Corporation and Choice Diet Products, Inc., corporations, their successors and assigns, and their officers; and William J. Santamaria, individually and as an officer and director of the corporate respondents; and respondents' agents, representatives, and employees, directly or through any partnership, corporation, subsidiary, division, or other device, in connection with the manufacturing, advertising, packaging, labeling,

promotion, offering for sale, sale, or distribution of Nicotain, or any other smoking deterrent or cessation product, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from making, in any manner, directly or by implication, any misrepresentation, including through the name of the product, concerning the nature or mechanism of operation of such product, including, but not limited to, that such product contains nicotine or works through a mechanism substantially similar or equivalent to a prescription smoking deterrent patch.

VI.

It is further ordered, That respondents, Taleigh Corporation and Choice Diet Products, Inc., corporations, their successors and assigns, and their officers; and William J. Santamaria, individually and as an officer and director of the corporate respondents; and respondents' agents, representatives, and employees, directly or through any partnership, corporation, subsidiary, division, or other device, in connection with the manufacturing, advertising, packaging, labeling, promotion, offering for sale, sale, or distribution of any product or program, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting, in any manner, directly or by implication, that:

A. Such product or program is new or unique or contains a new or unique ingredient;

B. Consumers who order the product or program will receive a personal consultation from a physician, medical professional or weight-loss counselor; or

C. Any endorsement (as "endorsement" is defined in 16 CFR 255.0(b)) of such product or program represents the typical or ordinary experience of members of the public who use the product or program.

VII.

It is further ordered, That respondents, Taleigh Corporation and Choice Diet Products, Inc., corporations, their successors and assigns, and their officers; and William J. Santamaria, individually and as an

officer and director of the corporate respondents; and respondents' agents, representatives, and employees, directly or through any partnership, corporation, subsidiary, division, or other device, in connection with the manufacturing, advertising, packaging, labeling, promotion, offering for sale, sale, or distribution of any product or program, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from failing to disclose, clearly and prominently, a material connection, where one exists, between a person providing an endorsement of any product or program, as "endorsement" is defined in 16 CFR 255.0 (b), and any respondent, or any other individual or entity manufacturing, labeling, advertising, promoting, offering for sale, selling, or distributing such product or program. For purposes of this order, "material connection" shall mean any relationship that might materially affect the weight or credibility of the endorsement and would not reasonably be expected by consumers.

VIII.

It is further ordered, That respondents, Taleigh Corporation and Choice Diet Products, Inc., corporations, their successors and assigns, and their officers; and William J. Santamaria, individually and as an officer and director of the corporate respondents; and respondents' agents, representatives, and employees, directly or through any partnership, corporation, Subsidiary, division, or other device, in connection with the manufacturing, advertising, packaging, labeling, promotion, offering for sale, sale, or distribution of any product or program, 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 contents, validity, results, conclusions, or interpretations of any test or study.

IX.

It is further ordered, That respondents, Taleigh Corporation and Choice Diet Products, Inc., corporations, their successors and assigns, and their officers; and William J. Santamaria, individually and as an officer and director of the corporate respondents; and respondents' agents, representatives, and employees, directly or through any

partnership, corporation, subsidiary, division, or other device, in connection with the manufacturing, advertising, packaging, labeling, promotion, offering for sale, sale, or distribution of any product or program, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, in any manner, directly or by implication, that:

A. Such product or program does not cause any dangerous side effects, nervous jitters, or insomnia;

B. Such product or program burns, reduces, or diminishes body fat; or

C. Such product or program significantly shrinks fat cells; unless, at the time of making such representation, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

X.

It is further ordered, That respondents, Taleigh Corporation and Choice Diet Products, Inc., corporations, their successors and assigns, and their officers; and William J. Santamaria, individually and as an officer and director of the corporate respondents; and respondents' agents, representatives, and employees, directly or through any partnership, corporation, subsidiary, division, or other device, in connection with the manufacturing, advertising, packaging, labeling, promotion, offering for sale, sale, or distribution of any weight-loss product, smoking deterrent or cessation product, food, food or dietary supplement, drug, or device, as "food," "drug," and "device" are defined in Section 15 of the Federal Trade Commission Act, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from making, in any manner, directly or by implication, any representation regarding the performance, benefits, efficacy, or safety of any such product, unless, at the time of making such representation, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

XI.

Nothing in this order shall prohibit respondents from making any representation that is specifically permitted in labeling for any product by regulations promulgated by the Food and Drug Administration pursuant to the Nutrition Labeling and Education Act of 1990.

XII.

Nothing in this order shall prohibit respondents from making any representation for any drug that is permitted in labeling for any such drug under any tentative final or final standard promulgated by the Food and Drug Administration, or under any new drug application approved by the Food and Drug Administration.

XIII.

It is further ordered, That respondents, Taleigh Corporation and Choice Diet Products, Inc., corporations, their successors and assigns, and their officers; and William J. Santamaria, individually and as an officer and director of the corporate respondents; and respondents' agents, representatives, and employees, directly or through any partnership, corporation, subsidiary, division, or other device, in connection with the manufacturing, advertising, packaging, labeling, promotion, offering for sale, sale, or distribution of any product or program, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from charging a consumer's credit card account or debiting a consumer's checking account in an amount in excess of the amount affirmatively authorized by the consumer.

XIV.

It is further ordered, That respondents, Taleigh Corporation and Choice Diet Products, Inc., corporations, their successors and assigns, and their officers; and William J. Santamaria, individually and as an officer and director of the corporate respondents; and respondents' agents, representatives, and employees, directly or through any partnership, corporation, subsidiary, division, or other device, in

connection with the manufacturing, advertising, packaging, labeling, promotion, offering for sale, sale, or distribution of any product or program, in or affecting commerce, as "commerce" is defined, in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Representing, directly or by implication, that consumers can receive a refund, through such terms as "money back guarantee" or similar terms, unless respondents refund the full purchase price at the consumer's request in accordance with the provisions of this Part;

B. Failing to disclose, clearly and prominently, any material limitations or conditions that apply to a guarantee, warranty or refund policy;

C. Failing to comply, where applicable, with the requirements of Section 166 of the Truth in Lending Act, 15 U.S.C. 1666e and 12 CFR 226.12(e)(1); and

D. Failing to refund the full purchase price in accordance with the terms of a guarantee, warranty or refund policy within a reasonable period of time after a consumer complies with the conditions for receiving a refund. For purposes of this Part, "a reasonable period of time" shall be:

(1) That period of time specified in respondents' solicitation if such period is clearly and prominently disclosed to the consumer in the solicitation; or (2) if no period of time is clearly and prominently disclosed, a period of thirty (30) days following the date that the consumer complies with the conditions for receiving a refund.

For purposes of determining whether a consumer has complied with the conditions for receiving a refund, the date for determining whether the consumer has returned the product or program within the specified time shall be the date the consumer mails or causes the product or program to be shipped to the respondents or respondents' designated agents.

XV.

It is further ordered, That respondents, Taleigh Corporation and Choice Diet Products, Inc., corporations, their successors and assigns, and their officers; and William J. Santamaria, individually and as an officer and director of the corporate respondents; and respondents'

agents, representatives, and employees, directly or through any partnership, corporation, subsidiary, division, or other device, in connection with the manufacturing, advertising, packaging, labeling, promotion, offering for sale, sale, or distribution of any product or program, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from violating any provision of The Mail or Telephone Order Merchandise Rule, 16 CFR Part 435, as amended, effective March 1, 1994, 58 Fed. Reg. 49095.

XVI.

It is further ordered, That respondent William J. Santamaria, and respondent Santamaria's agents, representatives, and employees, directly or through any partnership, corporation, subsidiary, division, joint venture or other device, do forthwith cease and desist from advertising, promoting, offering for sale, selling, or distributing any weight-loss product or smoking deterrent or cessation product to the general public, unless prior to advertising, promoting, offering for sale, selling, or distributing to the general public any such product, respondent Santamaria first obtains a performance bond in the principal sum of three hundred thousand dollars (\$300,000). Said bond shall be conditioned upon compliance by respondent Santamaria with the provisions of the Federal Trade Commission Act, and with the provisions of this order. The bond shall be deemed continuous and remain in full force and effect as long as respondent Santamaria continues to advertise, promote, offer for sale, sell, or distribute any weight-loss product or smoking deterrent or cessation product, directly or indirectly, to the general public, and for at least five (5) years after he has ceased any such activity. The bond shall cite this order as the subject matter of the bond and provide surety against respondent Santamaria's failure to pay consumer redress or disgorgement as set forth herein. Such performance bond shall be an insurance agreement providing surety issued by a surety company that is admitted to do business in a state in which respondent Santamaria is doing business and that holds a Federal Certificate of Authority as Acceptable Surety on Federal Bond and Reinsuring.

Respondent Santamaria shall provide a copy of such performance bond to the associate director of the Federal Trade Commission's Division of Enforcement, 6th Street & Pennsylvania Avenue, N.W.,

Washington, D.C., prior to the commencement of any business for which such bond is required.

Provided, however, in lieu of a performance bond, respondent Santamaria may establish and fund, pursuant to the terms set forth herein, an escrow account in the principal sum of three hundred thousand dollars (\$300,000) in cash, or such other assets of equivalent value, which the Commission, or its representative, in its sole discretion may approve. Respondent Santamaria shall maintain such amount in that account for so long as he continues to advertise, promote, offer for sale, sell, or distribute any weight-loss product or smoking deterrent or cessation product, directly or indirectly, to the general public, and for at least five (5) years after he has ceased any such activity. Respondent Santamaria shall pay all costs associated with the creation, funding, operation, and administration of the escrow account. The Commission, or its representative, shall, in its sole discretion, select the escrow agent. The escrow agreement shall be in substantially the form attached to this order as Exhibit A.

The performance bond or escrow agreement shall provide that the surety company or escrow agent, within thirty days following receipt of notice that a final judgment or an order of the Commission against respondent Santamaria for consumer redress or disgorgement in an action brought under the provisions of the Federal Trade Commission Act has been entered, or, in the case of an order of the Commission, has become final, finding that he has violated the terms of this order or the Federal Trade Commission Act, and determining the amount of consumer redress or disgorgement to be paid, shall pay to the Commission so much of the performance bond or funds of the escrow account as does not exceed the amount of consumer redress or disgorgement ordered, and which remains unsatisfied at the time notice is provided to the surety company or escrow agent, provided that, if respondent Santamaria has agreed to the entry of a court order or an order of the Commission, a specific finding that Santamaria violated the terms of this order or the provisions of the Federal Trade Commission Act shall not be necessary. A copy of the notice provided for herein shall be mailed to respondent Santamaria at his last known address.

Respondent Santamaria may not disclose the existence of the performance bond or escrow account to any consumer, or other purchaser or prospective purchaser, to whom a covered product is advertised, promoted, offered for sale, sold, or distributed, without

also disclosing at the same time and in a like manner that the performance bond or escrow account is required by order of the Federal Trade Commission in settlement of charges that respondent Santamaria engaged in false and misleading representations.

XVII.

It is further ordered, That respondents, Taleigh Corporation and Choice Diet Products, Inc., shall:

A. Within thirty (30) days after service of this order, provide a copy of this order to each of respondents, current principals, officers, directors, and managers, and to all personnel, agents, and representatives having sales, advertising, or policy responsibility with respect to the subject matter of this order; and

B. For a period of five (5) years from the date of issuance of this order, provide a copy of this order to each of respondents, future principals, officers, directors, and managers, and to all personnel, agents, and representatives having sales, advertising, or policy responsibility with respect to the subject matter of this order who are associated with respondents or any subsidiary, successor, or assign, within three (3) days after the person assumes his or her responsibilities.

XVIII.

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 or its staff 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.

XIX.

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

XX.

It is further ordered, That respondent, William J. Santamaria, shall, for a period of seven (7) years from the date of issuance of this order, notify the Commission within thirty (30) days of the discontinuance of his present business or employment and of his affiliation with any new business or employment. Each notice of affiliation with any new business or employment shall include respondent's new business address and telephone number, current home address, and a statement describing the nature of the business or employment and his duties and responsibilities.

XXI.

It is further ordered, That respondents, Taleigh Corporation and Choice Diet Products, Inc., corporations, their successors and assigns, and their officers; and William J. Santamaria, individually and as an officer and director of the corporate respondents; shall, within sixty (60) days after service of this order, and at such other times as the Federal Trade 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.

Chairman Pitofsky not participating.

Decision and Order

119 F.T.C.

EXHIBIT A

THIS ESCROW AGREEMENT, made and entered into this ____ day of _____, _____, by and between William J. Santamaria (hereinafter "Santamaria"); and the Federal Trade Commission, an agency of the Government of the United States of America, by and through _____ (hereinafter "FTC"); and _____ (hereinafter "Escrow Agent");

WITNESSETH:

Whereas, the FTC and Santamaria have entered into an Agreement Containing Consent Order to Cease and Desist (hereinafter "Consent Order"), a copy of which is attached hereto as Exhibit A; and

Whereas, the Consent Order requires that Santamaria cease and desist from advertising, promoting, offering for sale, selling, or distributing any product listed therein to the general public unless he first establishes and maintains an escrow account, under the terms and conditions specified in the Consent Order;

Now, wherefore, in accordance with the terms of the Consent Order, which are incorporated herein by reference, the parties covenant and agree as follows:

1. Santamaria shall establish an Escrow Account at _____ to be styled Santamaria Escrow Account, _____ Escrow Agent. Santamaria shall deposit into the Escrow Account an initial sum of at least three hundred thousand dollars (\$300,000) in cash, or other approved assets of equivalent value. Thereafter, Santamaria shall deposit such additional amounts into the Escrow Account as are necessary to maintain the total amount in the Escrow Account at three hundred thousand dollars (\$300,000).

2. The Escrow Agent shall be the sole signatory on the Escrow Account and access to the funds held in that account shall be solely through the Escrow Agent. It is understood by the parties to this Escrow Agreement that upon the signing of this Agreement, Santamaria relinquishes to the Escrow Agent, all legal title to the escrow funds, except as to such amounts in the Escrow Account that are in excess of three hundred thousand dollars (\$300,000). Until and

unless the Escrow Account is terminated as provided for herein, Santamaria agrees to make no claim to or demand for return of the funds, directly or indirectly, through counsel or otherwise; and, in the event of bankruptcy, Santamaria acknowledges that the funds are not part of Santamaria's estate, nor does the estate have any claim or interest therein.

3. The Escrow Agent and the parties hereto agree that the escrow funds shall be held only in accordance with the terms of the Consent Order and the Escrow Agreement. Santamaria shall pay all costs associated with the creation, funding, operation, and administration of the Escrow Account as they become due. In the event that Santamaria fails to pay such costs as they become due, the Escrow Agent shall pay the costs from the interest earned on the escrow funds.

4. The Escrow Agent, within thirty days following receipt of notice that a final judgment or an order of the Commission against Santamaria for consumer redress or disgorgement in an action brought under the provisions of the Federal Trade Commission Act has been entered, or, in the case of an order of the Commission, has become final, finding that he has violated the terms of the Consent Order or the provisions of the Federal Trade Commission Act, and determining the amount of consumer redress or disgorgement to be paid, which notice also shall be mailed to Santamaria at his last known address, shall pay to the Commission so much of the funds of the Escrow Account as does not exceed the amount of consumer redress or disgorgement ordered, and which remains unsatisfied at the time notice is provided to the Escrow Agent, provided that, if Santamaria has agreed to the entry of a court order or an order of the Commission, a specific finding that Santamaria violated the terms of the Consent Order or the provisions of the Federal Trade Commission Act shall not be necessary. The Escrow Agent shall have the power to convert to cash so much of the Escrow Account assets as are necessary to satisfy the obligations of the judgment or order.

5. The Escrow Account shall continue until at least five years after Santamaria last advertises promotes, offers for sale, sells, or distributes any product specified in the consent order, at which time, if there are no pending FTC investigations, legal or administrative actions by the FTC against Santamaria, or unsatisfied obligations pursuant to a judgment or order described in paragraph four herein, for which a claim could be made against the escrow funds under the

terms of the Consent Order, the FTC shall, upon Santamaria's request, instruct the Escrow Agent to terminate the Escrow Account and return the balance of the Escrow Account to Santamaria. At such time, the Escrow Agent shall be fully and completely released from its agency as herein described. The legal title to the escrow funds shall vest in Santamaria at such time as the Escrow Agent, pursuant to instructions from the FTC, returns the funds to Santamaria.

Witness the signatures of the parties, the day and year first above written.

DATE:

WILLIAM J. SANTAMARIA

DATE:

FEDERAL TRADE COMMISSION

COUNSEL FOR THE
FEDERAL TRADE COMMISSION

IN THE MATTER OF

KOREAN VIDEO STORES ASSOCIATION OF MARYLAND, ET AL.

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

Docket C-3588. Complaint, June 20, 1995--Decision, June 20, 1995

This consent order prohibits, among other things, a Maryland-based video store association and its members from entering into any agreement to raise, fix, or maintain prices in the retail video tape rental business; and requires, within 30 days, its members to display a poster announcing the settlement, in both English and Korean, in their respective stores and to publish the entire text of the poster in three Korean-language newspapers in the Washington, D.C. area.

Appearances

For the Commission: *Joseph G. Krauss.*

For the respondents: *Robert Paul, Shaw, Pittman, Potts & Trowbridge, Washington, D.C.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission ("Commission"), having reason to believe that the Korean Video Stores Association of Maryland, Chang Hyun Cho, Bong Soo Ha, Yoo Kwan Jun, Dae Yong Kang, Yong Hoon Kang, Mi La Kim, Ki Sik Kim, Suk C. Kim, Ju Young Lee, Kyeong Hae Lee, Chang Jin Park, Mi Hwa Park, Young Min Ro, Chae Sul Song, Tae Eung Yu, and Seung Man Yun, hereinafter sometimes referred to as respondents, have violated the provision of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

I. RESPONDENTS

1. Respondent Korean Video Stores Association of Maryland is an unincorporated trade association. Its mailing address is c/o Nalee Video, 13-G Aquahart Plaza, Glen Burnie, MD.

2. Respondent Chang Hyun Cho is an individual trading and doing business as Hana Video, 220 N. Crain Highway, Glen Burnie, MD.

3. Respondent Bong Soo Ha is an individual trading and doing business as Video Town, 2092 Veirs Mill Road, Rockville, MD.

4. Respondent Yoo Kwan Jun is an individual trading and doing business as Harford Video, 8904 Harford Road, Baltimore, MD.

5. Respondent Dae Yong Kang is an individual trading and doing business as Daenamoo Video, 5722 York Road, Baltimore, MD.

6. Respondent Yong Hoon Kang is an individual trading and doing business as Lotte Gifts Store, 2201 N. Charles Street, Baltimore, MD.

7. Respondent Mi La Kim is an individual trading and doing business as Koryo Video, 10820-G Rhode Island Avenue, Beltsville, MD.

8. Respondent Ki Sik Kim is an individual trading and doing business as Video Center, 29 W. North Avenue, Baltimore, MD.

9. Respondent Suk C. Kim is an individual trading and doing business as Nalee Video, 13-G Aquahart Plaza, Glen Burnie, Md.

10. Respondent Ju Young Lee is an individual trading and doing business as Young Video, 11790 Parklawn Drive, Rockville, MD.

11. Respondent Kyeong Hae Lee is an individual trading and doing business as Korean Corner, 12207 Veirs Mill Road, Wheaton, MD.

12. Respondent Chang Jin Park is an individual trading and doing business as Samsung Video, 3425 N. Chathom Road #108, Ellicott City, MD.

13. Respondent Mi Hwa Park is an individual trading and doing business as Sarangbang Video, 2430 York Road, Timonium, MD.

14. Respondent Young Min Ro is an individual trading and doing business as Hanyang Video, c/o Lucky World (Laurel), 14222 Cherry Lane Ct., Laurel, MD.

15. Respondent Chae Sul Song is an individual trading and doing business as Lucky Gifts, 1690-D Annapolis Road, Odenton, MD.

16. Respondent Tae Eung Yu is an individual trading and doing business as Hyundai Video, 10539 Greenbelt Road, Seabrook, MD.

17. Respondent Seung Man Yun is an individual trading and doing business as Gaymi Video, 801 S. Crain Highway, Glen Burnie, MD.

II. JURISDICTION

18. Respondents are now, and for some time have been, engaged in the purchasing, offering for rental, and rental of video tapes to retail customers.

19. In the course and conduct of their business, and at all times mentioned herein, respondents have been, and are now, in substantial competition in or affecting commerce with persons engaged in the retail video tape rental business. The retail video tape rental business means the business of renting video tapes for a fee to retail customers.

20. The respondents maintain, and at all times relevant herein have maintained, a substantial course of business, including the acts and practices hereinafter set forth, which are in or affect commerce as "commerce" is defined in the Federal Trade Commission Act.

III. ACTS AND PRACTICES

21. Prior to August 1993, the individual respondents had been in substantial competition with one another in the retail video tape rental business in the Metropolitan Washington, D.C. area.

22. On or about August 22, 1993, several of the individual respondents held a meeting and discussed the retail video tape rental business, among other things, including the costs and pricing of retail video tape rentals.

23. During this meeting, those individual respondents that were present agreed to jointly increase the retail price of Korean language video tape rentals from approximately \$1.00 to \$1.50 per video tape.

24. Those individual respondents that did not attend the above-mentioned meeting learned of the price increase agreement and agreed to adopt and honor the agreement.

25. On or about August 25, 1993, in furtherance of the joint price increase agreement, the respondents announced the price increase to the general public by displaying at each individual respondents' place of business a poster setting forth the joint price increase agreement and signed in the name of the respondent Korean Video Stores Association of Maryland.

IV. EFFECTS OF THE HORIZONTAL PRICE FIXING

26. The aforesaid acts and practices of the respondents have had and are now having the effects, among others, of:

a. Raising, fixing, stabilizing, or otherwise interfering or tampering with the retail prices of Korean language video tape rentals in the Metropolitan Washington, D.C. area; and

b. Hampering and restricting competition in the Korean language retail video tape rental business in the Metropolitan Washington, D.C. area.

V. VIOLATION CHARGED

27. The acts and practices of the respondents described herein constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act. The acts and practices of the respondents, or the effects thereof, are continuing and will continue or recur in the absence of the relief requested.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of 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 Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents

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

1. Respondent Korean Video Stores Association of Maryland is an unincorporated trade association. Its mailing address is c/o Nalee Video, 13-G Aquahart Plaza, Glen Burnie, MD.

Respondent Chang Hyun Cho is an individual trading and doing business as Hana Video, 220 N. Crain Highway, Glen Burnie, MD.

Respondent Bong Soo Ha is an individual trading and doing business as Video Town, 2092 Veirs Mill Road, Rockville, MD.

Respondent Yu Kwan Jeon is an individual trading and doing business as Harford Video, 8904 Harford Road, Baltimore, MD.

Respondent Dae Yong Kang is an individual trading and doing business as Daenamoo Video, 5722 York Road, Baltimore, MD.

Respondent Yong Hoon Kang is an individual trading and doing business as Lotte Gifts Store, 2201 N. Charles Street, Baltimore, MD.

Respondent Mi La Kim is an individual trading and doing business as Koryo Video, 10820-G Rhode Island Avenue, Beltsville, MD.

Respondent Ki Sik Kim is an individual trading and doing business as Video Center, 29 W. North Avenue, Baltimore, MD.

Respondent Suk C. Kim is an individual trading and doing business as Nalee Video, 13-G Aquahart Plaza, Glen Burnie, MD.

Respondent Ju Young Lee is an individual trading and doing business as Young Video, 11790 Parklawn Drive, Rockville, MD.

Respondent Kyeong Hae Lee is an individual trading and doing business as Korean Corner, 12207 Veirs Mill Road, Wheaton, MD.

Respondent Chang Jin Park is an individual trading and doing business as Samsung Video, 3425 N. Chatham Road #108, Ellicott City, MD.

Respondent Mi Hwa Park is an individual trading and doing business as Sarangbang Video, 2430 York Road, Timonium, MD.

Respondent Young Min Ro is an individual trading and doing business as Hanyang Video, c/o Lucky World (Laurel), 14222 Cherry Lane Ct., Laurel, MD.

Respondent Chae Sul Song is an individual trading and doing business as Lucky Gifts, 1690-D Annapolis Road, Odenton, MD.

Respondent Tae Eung Yu is an individual trading and doing business as Hyundai Video, 10539 Greenbelt Road, Seabrook, MD.

Respondent Seung Man Yun is an individual trading and doing business as Gaymi Video, 801 S. Crain Highway, Glen Burnie, MD.

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, as used in this order, the following definitions shall apply:

(A) "*Respondent Korean Video Association*" means the Korean Video Stores Association of Maryland, its predecessors, subsidiaries, divisions, members, committees, and groups and affiliates controlled by the Korean Video Stores Association of Maryland, their directors, officers, employees, agents, and representatives, and their successors and assigns.

(B) "*Individual respondents*" means Chang Hyun Cho, individually and trading and doing business as Hana Video; Bong Soo Ha, individually and trading and doing business as Video Town; Yoo Kwan Jun, individually and trading and doing business as Harford Video; Dae Yong Kang, individually and trading and doing business as Daenamoo Video; Yong Hoon Kang, individually and trading and doing business as Lotte Gifts Store; Mi La Kim, individually and trading and doing business as Koryo Video; Ki Sik Kim, individually and trading and doing business as Video Center; Suk C. Kim, individually and trading and doing business as Nalee Video; Ju Young Lee, individually and trading and doing business as Young Video; Kyeong Hae Lee, individually and trading and doing business as Korean Corner; Chang Jin Park, individually and trading and doing business as Samsung Video; Mi Hwa Park, individually

and trading and doing business as Sarangbang Video; Young Min Ro, individually and trading and doing business as Hanyang Video; Chae Sul Song, individually and trading and doing business as Lucky Gifts; Tae Eung Yu, individually and trading and doing business as Hyundai Video; Seung Man Yun, individually and trading and doing business as Gaymi Video; and their respective successors and assigns.

(C) "*Respondents*" means the respondent Korean Video Association and the individual respondents.

(D) "*Commission*" means the Federal Trade Commission.

(E) "*Video tapes*" means pre-recorded video cassette tapes.

(F) "*Retail video tape rental business*" means the business of renting pre-recorded video cassette tapes for a fee to retail customers.

II.

It is further ordered, That respondents, directly or indirectly, or through any corporation, association, or other device, in connection with the retail video tape rental business, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, forthwith cease and desist from:

(A) Entering into, attempting to enter into, organizing, continuing, adhering to, or maintaining any combination, conspiracy, contract, agreement, understanding, plan, or program with any person in the retail video tape rental business to construct, fix, stabilize, raise, maintain, or otherwise interfere or tamper with the prices charged or other terms or conditions for retail video tape rentals;

(B) Recommending or encouraging any person in the retail video tape rental business to charge certain prices or set other terms or conditions for retail video tape rentals;

(C) For a period of three (3) years after the date this order becomes final, continuing any formal or informal meeting of the respondent Korean Video Association or of any individual respondents, after:

1. Any person makes a statement, addressed to or audible to the body of the meeting, concerning the prices of retail video tape rentals and respondents fail to declare such statement to be out of order;

2. Any person makes two such statements concerning the prices of retail video tape rentals and respondents fail to eject him or her from the meeting; or

3. Two people make such statements concerning the prices of retail video tape rentals.

Provided, however, that without regard to the obligations of respondent Korean Video Association under paragraph II. (C), if a person making a prohibited statement is not ejected, and such meeting continues, then the individual respondents shall instead leave such meeting and within thirty (30) days after such meeting shall report to the Commission the circumstances of such meeting, a description of the prohibited statements and respondents' actions in response thereto.

III.

It is further ordered, That respondent Korean Video Association, directly or indirectly, or through any corporation, association, or other device, in connection with the retail video tape rental business, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, forthwith cease and desist from:

(A) Prohibiting, regulating, or advising against any form of price competition between or among persons in the retail video tape rental business; and

(B) Inviting, coordinating, or providing a forum for any discussion or agreement between or among persons in the retail video tape rental business concerning prices charged for retail video tape rentals.

IV.

It is further ordered, That:

(A) Each individual respondent shall, within thirty (30) days after the date this order becomes final, prepare and for a period of sixty (60) days, clearly display a corrective poster at each individual respondent's place of business. Each poster shall be in both English and Korean, shall be no less than two feet by two feet in size, and

shall have the text of Appendices A and B, attached to this order, enlarged and conspicuously displayed thereon; and

(B) Respondent Korean Video Association shall, within thirty (30) days after the date this order becomes final, publish Appendix B to this order in the Metropolitan Washington, D.C. editions of the periodicals "Korea Times," "Joong Ang Ilbo," and "Chosun Ilbo."

V.

It is further ordered, That:

(A) Respondent Korean Video Association and the individual respondents shall, within ninety (90) days after the date this order becomes final, file with the Secretary of the Federal Trade Commission a verified written report setting forth in detail the manner and form in which respondents have complied and are complying with this order. Among such other information as may be required, the individual respondents' compliance reports shall contain a picture of the corrective poster as displayed and the dates such poster was displayed;

(B) Respondent Korean Video Association shall, annually for three (3) years on the anniversary of the date this order becomes final, file with the Secretary of the Federal Trade Commission a verified written report setting forth in detail the manner and form in which respondents have complied and are complying with this order; and

(C) Respondent Korean Video Association and the individual respondents shall, for a period of three (3) years after the date this order becomes final, notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in any respondent, such as dissolution, assignment, sale resulting in the emergence of a successor organization, or the creation or dissolution of subsidiaries, or any change in such 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, respondents 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 a respondent relating to any matters contained in this order; and

(B) Upon five days' notice to a respondent and without restraint or interference from it, to interview officers, directors, or employees of such respondent.

VII.

It is further ordered, That this order shall terminate on June 20, 2015.

APPENDIX A

ANNOUNCEMENT

The Korean Video Stores Association of Maryland (the "Korean Video Association") and its individual members (Chang Hyun Cho, Bong Soo Ha, Yoo Kwan Jun, Dae Yong Kang, Yong Hoon Kang, Mi La Kim, Ki Sik Kim, Suk C. Kim, Ju Young Lee, Kyeong Hae Lee, Chang Jin Park, Mi Hwa Park, Young Min Ro, Chae Sul Song, Tae Eung Yu, and Seung Man Yun) have entered into a consent agreement with the Federal Trade Commission ("Commission") to settle the Commission's charges that the Korean Video Association and its individual members named above violated Section 5 of the Federal Trade Commission Act when they jointly decided to increase prices for retail video tape rentals in 1993. The U.S. antitrust laws, including the Sherman Act and the Federal Trade Commission Act, prohibit competitors in the same line of business from jointly setting prices they charge to their customers.

Pursuant to this consent agreement, the Commission has issued an Order that prohibits the Korean Video Association and its individual members from jointly deciding prices that they charge to their customers in the retail video tape rental business. The Order also prohibits the Korean Video Association and its individual members from taking any other actions that may harm price competition.

The Korean Video Association and its individual members also understand and agree to honor that each person in the retail video tape rental business must unilaterally and independently determine its own prices.

Korean Video Stores Association of Maryland

Chang Hyun Cho Hana Video	Bong Soo Ha Video Town	Yoo Kwan Jun Harford Video
Dae Yong Kang Daenamoo Video	Yong Hoon Kang Lotte Gifts Store	Mi La Kim Koryo Video
Ki Sik Kim Video Center	Suk C. Kim Nalee Video	Ju Young Lee YoungVideo
Kyeong Hae Lee Korean Corner	Chang Jin Park Samsung Video	Mi Hwa Park Sarangbang Video
Young Min Ro Hanyang Video	Chae Sul Song Lucky Gifts	Tae Eung Yu Hyundai Video
Seung Man Yun Gaymi Video		

APPENDIX B

(Appendix B is the Korean version of Appendix A.)

Appendix B

공고문

미국 연방 공정거래 위원회 (U.S. Federal Trade Commission) 가 본 메릴랜드 한인 비디오 협회와 회원들 (밑에 보쳐있는 회원들)의 활동중의 일부가 미 연방 공정거래 위원회법 (Federal Trade Commission Act)에 저촉이 된다고 사료하여 민사소송을 제기 하였습니다. 구체적으로, 1993년에 본 협회가 협회 회원들에게 일괄적으로 비디오 테이프를 빌리는 소매 가격을 인상, 책정한 점이 미 연방 공정거래 위원회법의 제 5 조항 (Section 5 of the Federal Trade Commission Act)에 위배되는 행동이라는 지적을 받았습니다. 미 독점 금지법 (Sherman Act) 그리고 연방 공정거래 위원회법)은 같은 종류의 사업을 하는 경쟁자들이 함께 판매 가격을 책정, 인상, 또는 유지하는 것을 금지하고 있습니다.

본 협회와 각 회원들이 미 연방 공정거래 위원회 (U.S. Federal Trade Commission)와 맺은 협정에 의하여 미 연방 공정거래 위원회가 본 협회나 회원들이 비디오 테이프 빌리는 소매 가격을 함께 책정, 인상, 또는 유지하는 것을 금지 하였고, 또 본 협회나 회원들이 소매가격 경쟁을 방지하거나 왜방하는 행동도 금지하였습니다.

본 협회와 회원들은 각 비디오 소매상들이 비디오 테이프 빌리는 가격을 독자적으로 결정해야만 된다는 것을 알고 있으며 또 존중할 것 입니다.

메릴랜드 비디오 테이프 협회

조 창현	하 봉수	전 유관
하나 비디오	비디오 타운	하포드 동양식품
강 대용	강 용훈	김 미라
대나무 비디오	롯데 선물	고려 비디오
김 기식	김 속자	이 주영
한국서적 비디오	나리 비디오	롯데 수퍼 (영 비디오)
이 경혜	박 창진	박 미화
코리언 코너	삼성 비디오	사랑방 비디오
노 영민	송 계술	유 태용
한양식품 (로럴 장터)	럭키 선물	현대식품 (한아름 마켓)
윤 승만		
개미네 집		

IN THE MATTER OF

DETROIT AUTO DEALERS ASSOCIATION, INC., ET AL.

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

Docket 9189, Final Order, Feb. 22, 1989--Modified Final Order, June 20, 1995

This order modifies an earlier Commission order to require, for one year, that the automobile dealership and dealership owner respondents involved in the proceeding to open their showrooms for a minimum of 64 hours per week, or, at their option, to maintain minimum hours of operation of an average of ten and one half hours per day on weekdays, plus a minimum of eight hours on Saturdays. In addition, the Commission modifies Part VII.D of the final order (111 FTC 417), issued in 1989, by changing from 30 days to 60 days the time period within which the dealership association respondent must investigate and resolve allegations that association members have violated by-laws, rules, or regulations affected by the order.

ORDER

This matter has been heard by the Commission on remand from the United States Court of Appeals for the Sixth Circuit and on briefs, proposed findings of fact, affidavits and other materials filed by complaint counsel and by respondents. For the reasons stated in the accompanying opinion, the Commission has determined to modify the final order, issued on February 22, 1989, 111 FTC at 513-521, as set forth below and to issue the modified order with respect to all respondents that remain in the proceeding.

Part III of the order of February 22, 1989, is hereby deleted, and *It is hereby ordered*, That the following is substituted as new Part III:

III.

It is further ordered, That each dealership and individual respondent shall, commencing thirty (30) days after this order becomes final and continuing for a period of one (1) year, either maintain a minimum of sixty-four (64) hours of operation per week for the sale and lease of motor vehicles, or alternatively, maintain a minimum of an average of ten and a half hours of operation per day during weekdays for the sale and lease of motor vehicles, plus an

additional eight hours of operation on Saturdays for the sale and lease of motor vehicles. Each dealership and individual respondent shall post conspicuously its hours of operation at each of its places of business subject to this order in a manner and location readily visible to the public from outside the showroom of the dealership. Each dealership and individual respondent shall conduct its sales operation during any non-weekday hours in all respects in the same manner as during weekday hours, except that the motor vehicle sales force on duty during non-weekday hours may equal in number no less than one-third of the motor vehicle sales force generally on duty during weekday hours.

The requirement of this Part III to maintain minimum weekly hours of operation shall not apply to any individual respondent who does not own or operate any dealership in the Detroit area.

Subpart VII.D of the order of February 22, 1989 is hereby deleted, and it is hereby ordered that the following is substituted as new Subpart VII.D:

D. Within sixty (60) days after receiving information from any source concerning a potential violation of any bylaw, rule, or regulation required by Part VII.B of this order, investigate the potential violation, record the findings of the investigation, and expel for a period of one (1) year any member who is found to have violated any of the bylaws, rules or regulations required by Part VII.B of this order.

Chairman Pitofsky and Commissioner Varney not participating.

OPINION OF THE COMMISSION

BY AZCUENAGA, *Commissioner*:

On February 22, 1989, the Commission ordered the Detroit Auto Dealers Association, Inc. ("DADA"), other associations of automobile dealers in the Detroit area, and many dealerships and individuals to cease and desist from agreeing to fix their hours of operation.¹ The respondents appealed, and on January 31, 1992, the

¹ In addition, the order prohibited certain exchanges of information about hours of operation and prohibited the coercion of other dealers to adopt particular hours of operation. The order required the dealership to remain open for a minimum of sixty-four hours of operation per week for a one-year period and contained other provisions to prevent a recurrence of unlawful agreements on hours of business operation.

United States Court of Appeals for the Sixth Circuit "generally" affirmed the Commission, but remanded for the limited purposes of further proceedings as set forth in Section II of the Court of Appeals' opinion and for consideration of two remedial issues.² The Supreme Court denied cross petitions for *certiorari* on November 9, 1992.

Subsequently, sixty-one individuals, sixty-eight dealerships, and fifteen dealer associations signed a consent agreement settling the charges.³ The consent order with these respondents was made final on May 5, 1994. The Detroit Automobile Dealers Association and a former association officer settled on similar terms on July 27, 1994. In addition, the Commission dismissed the complaint against certain individual respondents who died during the course of the litigation and against dealerships that had their franchises terminated and are no longer in business. As a result of the settlements and dismissals, the case remains pending against a total of twenty-seven respondents. Twenty-two respondents, including twelve dealerships and ten individuals, filed a joint brief and evidentiary materials in response to the Commission's Order On Remand.⁴

I. INTRODUCTION

A. *Factual Background*

The complaint alleged that the Detroit automobile dealers violated Section 5 of the Federal Trade Commission Act by agreeing to close their automobile sales showrooms on Saturday and three weekday evenings. The existence of agreements among dealers to close, orchestrated by the Detroit Auto Dealers Association and the line groups (associations of dealers of a particular automobile brand), is not in dispute at this point in the proceeding.

The agreement to close on Saturdays and three weekday evenings evolved over a fourteen-year period when the automobile dealers in Detroit were resisting union efforts to organize their sales employees. Until 1959, Detroit auto dealerships were open weekday evenings

² *Detroit Auto Dealers Association, Inc. v. Federal Trade Commission*, 955 F.2d 457, 472 (6th Cir.), *cert. denied*, 113 S. Ct. 461 (1992).

³ In January 1993, the parties filed a joint memorandum requesting that the Commission take no action for forty-five days, pending settlement discussions. On March 17, 1993, after the expiration of that period, the Commission issued an Order On Remand, requesting briefing on certain remand issues. Briefs were filed on August 20, 1993, and Answering Briefs were filed on September 20, 1993.

⁴ The other five respondents did not file briefs or any other documents in response to the Commission's Order on Remand.

and Saturdays. IDF ¶ 9.⁵ Beginning in June 1959, the Detroit Auto Dealers Association encouraged members to close early two evenings per week. IDF ¶¶ 11-18. When this agreement to close proved successful, in 1961, members of the Association agreed to close early on a third weekday evening. IDF ¶¶ 19-34. From 1968 to 1971, members of the various line groups agreed to close on Saturdays during the summer months. IDF ¶¶ 38-46. In 1973, the dealers agreed to close year-round on Saturdays. IDF ¶¶ 47-50.⁶

Union organizing drives occurred contemporaneously with the agreements among dealers to reduce hours of operation. Before 1959, most dealers were open a total of 69 hours per week. IDF ¶ 92. Some dealers required the sales staff to work during all hours of operation. IDF ¶ 96. Others used split shifts, but sales employees felt pressure to be present during all hours of business for fear of losing commissions. IDF ¶¶ 98, 101, 120-21.

Both the Teamsters and the Salesmen's Guild of America began organizing campaigns in 1959. Both unions demanded multi-employer bargaining, uniform five-day work weeks, higher commissions, and other concessions. IDF ¶ 125-130. In 1960, the line groups recommended that member dealers adopt minimum employment standards to satisfy many of the demands being made by the unions. 111 FTC at 481. These changes included paid vacations, minimum commissions, shorter work weeks and group insurance. *Id.* This strategy proved to be successful, and by the end of 1960, the Teamsters lost most representation elections. IDF ¶ 145.

By the end of 1960, most dealerships were closed on Wednesday, Friday and Saturday evenings, but the sales employees remained dissatisfied with the length of the work week. IDF ¶¶ 148, 151. In 1966, the Automotive Sales Association ("ASA") began to recruit

⁵ References to the record are abbreviated, as follows:

- ID -- Initial Decision
- IDF -- Initial Decision Finding
- Tr. -- Transcript of Hearing
- CX -- Complaint Counsel's Exhibit
- RX -- Respondents' Exhibit
- RRX -- Respondents' Remand Exhibit
- RPF -- Respondents, Proposed Finding
- RPSF -- Respondents' Proposed Supplemental Finding

⁶ The Commission adopted these findings by the ALJ. *Detroit Auto Dealers Association, Inc.*, 111 FTC 4171 47G-79 (1989), *aff'd* in part and remanded in part, *Detroit Auto Dealers Association, Inc. v. FTC*, 955 F.2d 457 (6th Cir.), *cert. denied*, 113 S. Ct. 461 (1992).

members and demanded evening and Saturday closing as a primary union objective. IDF ¶¶ 152-53. Although the ASA won approximately 81 representation elections, it was not successful in negotiating Saturday closing as part of collective bargaining agreements. IDF ¶¶ 166-69. In 1967, the ASA struck some dealers and picketed some nonunion dealers. IDF ¶¶ 184-86. Threats, assaults, and property damage against dealers occurred during this period. IDF ¶¶ 186-92.

The ASA affiliated with the Teamsters who made uniform Saturday closing the centerpiece of their organizing efforts. IDF ¶¶ 205-206. The dealers discussed the Teamsters' demands at line group meetings and discussed making concessions to achieve labor stability. IDF ¶ 232. The dealers decided that the only way to end the labor strife was to adopt uniform year-round Saturday closing. IDF ¶ 238. Saturday closing was adopted to satisfy the salesmen and avert further unionization. IDF ¶¶ 240-41.

A period of relative labor peace has prevailed since the dealers agreed to adopt uniform Saturday closing in 1973. IDF ¶ 242. Since 1973, however, dealers who have attempted to open on Saturday have been picketed and have suffered vandalism and threats of violence. IDF ¶¶ 245-284. Although the Commission found that some salesmen participated in the picketing, it concluded that "the perpetrators of the threats and vandalism remain unidentified." 111 FTC at 483 (footnote omitted).

B. Commission Proceedings

The Administrative Law Judge ("ALJ") dismissed the complaint, concluding that the non-statutory labor exemption shielded the agreement among dealers to establish uniform hours of operation. 111 FTC at 474-75. The ALJ stated that the exemption depended on the following considerations: whether a labor dispute led to the concerted activity, whether labor concerns were the motivation for the concerted action, and whether its primary effect was on the labor concern. *Id.* at 466. He found that the automobile dealers were motivated by the labor dispute to enter into the agreement and that its primary effect would be on the sales employees, and not the customers, who would suffer comparatively little inconvenience in shopping. *Id.*

The Commission reversed, deciding that the non-statutory labor exemption did not apply to the agreement among dealers. The Commission concluded that the agreement was not part of a labor negotiation, but rather was adopted by employers to forestall unionization of their employees and to head off collective bargaining. 111 FTC at 488. Rejecting the ALJ's motivation test for determining the applicability of the exemption, the Commission observed that such a subjective test would simply invite abuse. Since the employees and the dealers had parallel incentives, the benefit to the employees from reduced hours of operation did not provide a basis for exemption from Section 5. *Id.* at 489.

The Commission found that the respondents did not present any evidence that the agreement among dealers resulted from "arm's length negotiation with their sales employees." 111 FTC at 492 (footnote omitted). It observed that the purpose of the non-statutory labor exemption was to preserve the integrity of the labor negotiation process, and that it would be inconsistent with national labor policy to use the exemption to immunize conduct that was designed to head off collective bargaining. *Id.* Further, the Commission decided that a finding of a Section 5 violation would not upset any carefully negotiated balance of interests between employers and employees.

II. THE REMAND BY THE COURT OF APPEALS

The respondents sought judicial review of the Commission's final order and opinion. On January 31, 1992, the Court of Appeals for the Sixth Circuit remanded the case to the Commission.

A. The Opinion of the Court of Appeals

The Court of Appeals "agreed with the FTC's conclusion generally that the agreement in controversy was not subject to the non-statutory labor exemption," but remanded for consideration whether "this same conclusion applies to the distinct minority of petitioner dealers who entered into collective bargaining agreements" 955 F2d at 467. The court pointed out that as a factual matter, it was unclear whether these agreements were the result of *bona fide* negotiations. *Id.*

The Administrative Law Judge made findings that seven dealerships entered agreements with their employees. IDF ¶ 288-

299. The Commission opinion dismissed the significance of those agreements, saying that they did not establish "bargained-for" hours, but merely incorporated, by maintenance of standards provisions, the unlawful hours limitations orchestrated by the Detroit Automobile Dealers Association. 111 FTC at 491.

The Court of Appeals, however, indicated that the Commission had failed to deal adequately with the individual collective bargaining agreements. It said that a petitioner "may well be able to claim" the exemption if direct negotiations and collective bargaining brought about "additional or different limits on showroom hours." 955 F.2d at 468. The court said that individual, good faith negotiations between a dealer and the employee union should not be discounted, emphasizing that the important question is "whether *bona fide* bargaining took place" with respect to hours. *Id.*

Recognizing that the agreement to establish uniform showroom hours was among dealers, the court nonetheless found it "material for the FTC to consider whether" the individual dealer-union agreements contained hours restrictions that were the product of "genuine collective bargaining." *Id.* Although the Sixth Circuit agreed with the Commission that the dealers' association could not claim the exemption, it nevertheless directed the Commission to examine dealers individually "with respect to whether some may actually have negotiated with unions or representatives for shorter showroom hours in good faith (or under force and threats of vandalism, violence, picketing and property damage)." *Id.*

The court concluded that the Commission had not adequately analyzed the ALJ's findings of fact and conclusions of law. It directed the Commission on remand to consider the record and findings "regarding any individual dealers who may be entitled to claim an exemption under the circumstances of *bona fide* collective bargaining with a union for shorter showroom hours or as a direct result of union directed violence and force for shorter showroom hours." *Id.* at 468 (emphasis in original, footnote omitted).

B. The Positions of the Parties on the Scope of the Remand

On remand, complaint counsel take the position that none of the dealers is entitled to the protection of the non-statutory labor exemption. The respondents take the opposite position that all are exempt. Complaint counsel's position is consistent with the holding

of the Commission in 1989 that whatever antitrust immunity might attach to individual dealer-employee negotiations does not extend to shield an agreement among dealers. 111 FTC at 492. The Commission is mindful, however, that although the Court of Appeals agreed with the Commission that the non-statutory labor exemption does not shield an agreement among dealers, the court's remand requires us to consider individual claims by dealers that their restrictions on hours of operation were the result of *bona fide* negotiations either with a union or their employees in order to decide whether any individual dealers might be exempt.

The respondents argue that the dealers (apparently meaning all Detroit auto dealers) should be exempt from Section 5 if they acted in response either to union directed violence or to nonviolent, lawful union pressure. Brief of respondents at 91. The respondents argue that in light of national labor policy to encourage unions to use lawful economic pressure, such as strikes, to resolve labor disputes, antitrust immunity should be extended to collective action responsive to such lawful pressure. *Id.* at 91-92.

The respondents further argue that the antitrust exemption should not be limited to those dealers who were the specific targets of union directed violence or force. *Id.* at 94-101. They argue that immunity should extend to any dealer who acted in response to press reports or other reports of union violence. The respondents also argue that there is no reason to require proof of union involvement in specific acts of coercion, as long as some violence was attributable to a union and the dealers perceived the violence to be union directed. *Id.* at 105. We do not so read the opinion of the Court of Appeals.⁷

The court affirmed the Commission's decision that the non-statutory labor exemption does not shield the agreement among dealers to reduce their hours of operation. Indeed, the court explicitly affirmed the Commission's finding that "motivation by labor concerns" is not sufficient to support the exemption. 955 F.2d at 466. The Commission concludes that for purposes of this remand, motivation "by labor concerns" includes motivation based on dealers' subjective perceptions of union violence or threats thereof and,

⁷ Under the respondents' interpretation of the non-statutory labor exemption, businesses would be excused from compliance with the antitrust laws if they acted in response to lawful union pressure or in response to their own subjective perception of union violence. This position appears to be a variation of the coercion defense that the respondents unsuccessfully asserted before the Administrative Law Judge and did not pursue on appeal to the Commission or the Court of Appeals. Respondents' Memoranda and Proposed Conclusions of Law, April 21, 1987, at V-43 to V-47, V-100 to V-102.

consistent with the opinion of the court, is not sufficient to justify the exemption.

C. The Scope of the Remand

The Court of Appeals indicated that the remand is for the "limited purposes," set forth in Part II of the opinion. In Part II, the court indicated that it was considering whether the non-statutory labor exemption "applies to the distinct minority of petitioner dealers who entered collective bargaining agreements with unions" 955 F.2d at 467. This statement suggests that the remand is limited only to those respondents that engaged in formal collective bargaining with their sales employees.⁸ This interpretation is supported by the court's subsequent statement that if a petitioner's "direct negotiations and collective bargaining with salesperson employees or their representatives" brought about "additional or different limits on showroom hours," that dealer might be able to claim the protection of the exemption. 955 F.2d at 468.

The respondents, however, argue that the Commission should grant the exemption to any dealer who reduced hours either as a direct result of union directed violence and force or as a result of bargaining for shorter hours. The respondents would not require proof that the hours reduction resulted from *bona fide* bargaining between the dealer and the union or the employees, but would require only a showing that the hours reduction was at least partly motivated by a perception of union violence. The respondents rely heavily on the following sentence of the Court of Appeals, opinion:

Our remand, then, concerns a requirement that the Commission consider carefully the record and the ALJ findings regarding any individual dealers who may be entitled to claim an exemption under the circumstances of *bona fide* collective bargaining with a union for shorter showroom hours or as a direct result of union directed violence and force for shorter showroom hours. 955 F.2d at 468 (emphasis in original; footnote omitted)

We reject the respondents' position, because the opinion, read as an entirety, indicates that the exemption applies only to dealers who actually engaged in *bona fide* bargaining, either with a union or in response to union directed violence. The sentence immediately

⁸ The seven dealerships and four individual respondents found to have engaged in some form of collective bargaining are identified in the Initial Decision. IDF 288-299.

preceding the quoted language states that the Commission should consider individual dealerships "with respect to whether some may actually have negotiated with unions or representatives for shorter showroom hours in good faith (or under force and threats of vandalism, violence, picketing and property damage)." *Id.* This phrasing indicates that the court required either bargaining in good faith or bargaining in response to violence, and not, as the respondents suggest, either bargaining or a perception of violence.

Other statements in the opinion confirm that the Court of Appeals intended that the exemption apply only if the dealers engaged in good faith negotiation with their employees. The court stated: "The important question, as stated by the FTC, is 'whether *bona fide* bargaining took place' with respect to restrictions on hours of operation." *Id.* It continued that "we find it material for the FTC to consider whether separate dealer union agreements existed with unions which 'contained bargained for hours restrictions,' which were the product of genuine bargaining." *Id.* Indeed, the sentence that the respondents emphasize so heavily, quoted above, directs the Commission to consider the record and findings of the ALJ, quoting six of the ALJ's conclusions in a footnote. 955 F.2d at 468 n.9, quoting 111 FTC at 467-68 and n.20. These six conclusions from the ALJ's opinion refer repeatedly to bargaining, to collective bargaining agreements, and to dealers' agreements with their employees. *Id.*

Our reading of the court's opinion that bargaining between the employer and the union or employees is an essential element of the non-statutory labor exemption and that unlawful agreements are not immunized simply because they are a result of union directed violence and force is consistent with the law of this case and established precedent. In *Allen Bradley Co. v. Local Union No. 3, International Brotherhood of Electrical Workers*, 325 U.S. 797, 799-800 (1945), the Supreme Court held that the labor exemption did not shield "industry-wide understandings, looking not merely to terms and conditions of employment but also to price and market control." Employers and the union entered collective bargaining agreements under which the employers would decline to deal with companies that employed workers who were not members of Local Union No. 3. Without addressing whether those collective bargaining agreements violated the Sherman Act, the Court found that they were only one element in a broader scheme among the manufacturers and contractors to monopolize the New York City market. *Id.* at 809.

Allen Bradley stands for the proposition that even collective bargaining agreements between an employer and union cannot shield an unlawful agreement among employers to restrain trade outside the labor market in question.⁹

Our reading of the Court of Appeals' opinion is supported by the court's specific endorsement of the Commission's analysis of *Mackey v. National Football League*, 543 F.2d 606, 612 (8th cir. 1976), cert. dismissed, 434 U.S. 801 (1977), and *McCourt v. California Sports, Inc.*, 600 F.2d 1193 (6th Cir. 1979) (applying the Mackey test). 955 F.2d at 467. Under the Mackey test, the nonstatutory labor exemption is available only if: (1) the restraint of trade "primarily affects only the parties to a collective bargaining relationship"; (2) the agreement concerns a mandatory subject of collective bargaining; and (3) the agreement is the product of *bona fide*, arm's length bargaining. 434 F.2d at 614. The Commission found that since the hours restriction was not established through *bona fide*, arm's length bargaining between dealers and employees, respondents failed to satisfy the third element of this test. Because the third element was not satisfied, the Commission found no need to consider the other elements of the test. 111 FTC at 488 n.9. Mackey and McCourt require that any agreement immunized under the exemption be the product of good faith bargaining between employer and employees.

Our interpretation of the Court of Appeals' opinion ordering this remand is also consistent with three recent decisions that take a highly expansive view of the non-statutory labor exemption. In *Brown v. Pro Football Inc.*, No. 93-7165, (D.C. Cir. March 21, 1995), the Court of Appeals decided that the exemption protected action by the National Football League taken without the consent of the players after the League and the union had reached impasse in multi-employer bargaining.¹⁰ The court held that the "exemption waives antitrust liability for restraints on competition imposed

⁹ *Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 106*, 421 U.S. 616 (1975), the Supreme Court held that the non-statutory labor exemption did not shield a collective bargaining agreement between a general contractor and Local 100 under which the general contractor would deal only with mechanical subcontractors that were parties to the general contractor's agreement with the union. Local 100 did not represent the employees of the general contractor, but represented the employees of certain mechanical subcontractors. The agreement eliminated competition in the mechanical subcontracting market from non-union mechanical subcontractors. The Court observed that this restraint had anticompetitive effects that did not follow from elimination of competition over wages and working conditions and was not protected by the nonstatutory labor exemption. 421 U.S. at 625.

¹⁰ Judge Wald wrote a vigorous dissent, arguing that to preserve the bargaining process, the exemption should protect only the bargaining process before impasse. The Commission in deciding the instant case takes no position on the merits of the issue in *Brown*.

through the collective bargaining process, so long as such restraints operate primarily in a labor market characterized by collective bargaining." Slip Op. at 27. The court further stated that if the players wanted to seek the protection of the Sherman Act, they may "forego unionization or...decertify their unions." Slip Op. at 28. See also *National Basketball Ass'n v. Williams*, 45 F.3d 684 (2d Cir. 1995); *Powell v. National Football League*, 930 F.2d 1293 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991). In the instant case, the respondent automobile dealers entered into a conspiracy to discourage the unionization of their employees and, thereby, to avoid the bargaining relationship that the non-statutory labor exemption protects. Even the expansive view of the exemption in these court decisions stops at protecting the overall bargaining process and does not extend to employer conspiracies to defeat unionization of their employees.

III. REVIEW OF EVIDENCE REGARDING INDIVIDUAL RESPONDENTS

A. Introduction

As developed above, we conclude that the Court of Appeals directed the Commission to review the record and the ALJ's findings with respect to those dealers who entered collective bargaining agreements with their employees. Although the Court of Appeals remanded for the Commission to consider the hours restraint imposed by the "distinct minority . . . of dealers who entered into collective bargaining agreements with unions representing their sales employees," 955 F.2d at 467, the respondents urge the Commission to review the evidence for all the respondents who participated in the remand proceeding. As set forth below, the Commission has reviewed the record and the findings with respect to all the respondents who participated in the remand proceeding to determine whether the reductions in showroom hours were the result of good faith, arm's length negotiations between the dealers and their employees, whether or not part of formal collective bargaining.¹¹

¹¹ The five respondents who did not participate in the remand have not supplemented the record beyond what was before the Commission in the first instance. The five respondents who did not participate in the remand were not among those identified in the initial decision as having entered a collective bargaining agreement. Because we are not aware of evidence suggesting that they imposed the hours restraint as a result of good faith bargaining with a union or their employees, we conclude that the non-statutory labor exemption does not protect them from liability and that they are subject to Part III of the order.

In addition to reviewing the record and findings developed during the administrative trial, the Court of Appeals stated that "[f]urther proof may be presented on this issue, if necessary." 955 F.2d at 468. In light of this directive to permit further proof, the Commission's order on remand invited the parties to proffer evidence and propose supplemental findings of fact. The respondents proffered a number of supplemental affidavits and documents, primarily newspaper clippings, and proposed supplemental findings. Complaint counsel opposed the admission of the supplemental affidavits and other evidentiary material on the ground that it is hearsay (often, double or triple hearsay) and requested the opportunity to conduct discovery and cross-examine the affiants. Complaint Counsel's Answer to Respondents' Brief on Remand at 6.

Although complaint counsel's objections to the introduction of much of the supplemental material appear to be well founded, in the interest of economy we have decided not to remand the matter for supplemental administrative hearings. We assume the truth of the allegations in the affidavits and supplemental materials, but find that they do not provide the evidentiary basis for applying the nonstatutory labor exemption.

B. Thompson Chrysler-Plymouth, Inc., and Joseph P. Thomson

Joseph Thompson was the President and Chief Executive officer of Thompson Chrysler-Plymouth, Inc., from 1960 to 1981. Tr. 1938-40. When Mr. Thompson began his career in Detroit automobile sales, his hours of operation were from 8:30 a.m. until 9:00 p.m. weekdays and until 6:00 p.m. on Saturday. Tr. 1942-43.

On September 14, 1960, Mr. Thompson's dealership began to close its showroom on Wednesday and Saturday evenings at 6:00 p.m. Tr. 1944-45. Thompson and eleven other Chrysler-Plymouth dealers placed a joint advertisement in the Detroit Free Press on September 14, 1960, stating, "[t]he Chrysler Dealers of Greater Detroit have agreed to close their new car showrooms and used car lots" on Wednesday and Saturday evenings at 6:00 p.m. CX 3379, Tr. 1944. Mr. Thompson testified that the sales employees constantly complained about their long hours and that the closings were discussed at the Chrysler-Plymouth line group as a means to satisfy the complaints. Tr. 1944-46. His trial testimony did not refer to any negotiation or collective bargaining with employees or a union about

this reduction of hours. In the early 1960's, the Chrysler-Plymouth dealers in Detroit all began to close early on Friday evenings. Tr. 1951-52. In the mid-1960's, Thompson's dealership and all the other Chrysler-Plymouth dealers began to close early on Tuesday evenings, as well. Tr. 1956.

On June 12, 1969, Thompson Chrysler-Plymouth, Inc., together with twenty-eight other dealers, placed an ad in the Detroit News stating that "a majority" of the Detroit area Chrysler-Plymouth dealers had decided to close on Saturday during the summer months. CX 3306, Tr. 1956-57. Mr. Thompson again testified that this action was in response to requests for shorter hours from the sales staff, but again, he did not testify about any bargaining or negotiation with the employees or a union. Tr. 1957.

On August 14, 1973, Thompson Chrysler-Plymouth executed a collective bargaining agreement with Local 212 of the Teamsters union. RX 1006.¹² The agreement did not explicitly cover the hours of operation, but contained the following "Maintenance of Standards" clause:

The Employer agrees that conditions of employment relating to direct wages and hours of work as set forth in this Agreement shall be maintained at not less than the highest minimum standards in effect on the effective date of this Agreement. The Employer may, however, change hours of work to conform to local practices characteristic of the industry. Conditions of employment may be improved; however, if modified, upon the request of the Union, the Employer agrees to consult with the Union about the matter. The Employer may, where the Agreement leaves it to its discretion to do so, including by way of illustration, but not by way of limitation, add special incentive programs the Employer considers necessary due to present circumstances, sales contests, special "spiffs" on old inventory, etc., the existence, nature and duration of which shall be determined at the sole discretion of management.

RX 1006T. According to Mr. Thompson, the provision was a compromise. The first and third sentences reflected the union demands, and the second and fourth sentences reflected the dealership's position. Tr. 1962-64. With the exception of a five-year period in the 1980's, the employees of Thompson Chrysler-Plymouth have been covered by a collective bargaining agreement that contains a provision substantially the same as the one quoted above. RRX

¹² Apparently Thompson Chrysler-Plymouth had an agreement with the Automotive Sales Association in 1971. The text of the agreement is not in the record, and the respondents did not offer it as a supplemental exhibit or argue that it constrained hours of operation.

145, RRX 146, RX 1006, RX 1011, RX 1013, RX 1030, RX 1053, RX T1, RX T2.

On December 1, 1973, Thompson Chrysler-Plymouth began to close on Saturday throughout the year, not just during the summer months. Tr. 1966. The full year Saturday closings were discussed at the Chrysler-Plymouth line group meetings. Tr. 1967. Three months earlier, on September 8, 1973, the Chrysler-Plymouth dealers had jointly announced that they would reopen on Saturday after the summer period of Saturday closure. CX-3416. The reversal of this action and the decision by the Chrysler-Plymouth dealers to close year-round on Saturday followed similar actions by other automobile line groups in October and November 1973. IDF ¶¶ 47-50. Mr. Thompson said that the dealers were trying to give their employees shorter work weeks. Tr. 1966-67. Mr. Thompson did not testify that he bargained with either the Teamsters or his employees about Saturday closing. He did testify that the Chrysler-Plymouth dealers discussed it among themselves at the line group meeting, but the nonstatutory labor exemption does not protect negotiations among employers.

The Administrative Law Judge found that the maintenance of standards clause prevented Thompson from extending his hours of operation. IDF ¶ 288. The ALJ also found that the maintenance of standards was a compromise between the dealer's and union's positions, and that "[t]he restraint also was the product of *bona fide* arm's-length bargaining." IDF ¶ 289. Although the restraint on hours of operation imposed by the collective bargaining agreement was the product of good faith bargaining between Thompson and the Teamsters local, and that provision compelled the dealership to follow the "highest minimum standards" regarding hours of operation, it is important to distinguish that restraint from restraints resulting from the unlawful agreements among dealers to reduce hours of operation.

As developed above, the evidence shows that Thompson Chrysler-Plymouth entered agreements on hour limitations with other members of the Chrysler-Plymouth line group: (1) on September 14, 1960, to close at 6:00 p.m. on Wednesday and Saturday; (2) in the early 1960's, to close at 6:00 p.m. on Friday; (3) in the mid-1960's, to close at 6:00 pm on Tuesday; and (4) in June 1969, to close on Saturday during the summer months. These agreements among

dealers cannot retroactively be rendered lawful by the subsequent inclusion of a maintenance of standards clause in a labor contract.

In December 1973, four months after Thompson signed the collective bargaining agreement, dated August 14, 1973, with Teamsters Local 212, Thompson and the other Chrysler-Plymouth dealers agreed to close on Saturdays throughout the year. IDF ¶ 50. Thompson's collective bargaining agreement was for a three-year period, expiring on August 13, 1976. RX 1006W. Mr. Thompson's trial testimony and the supplemental affidavits do not provide a basis for finding that the year-round Saturday closings were the product of negotiations with the union or the sales employees. If the Thompson dealership had been willing to make such a concession to the union or the employees, the appropriate terms could have been included in the August collective bargaining agreement. Thompson did not strike such a bargain with the union or his employees but, rather, entered into that agreement only with his competitors.

Indeed, absent the unlawful agreement among dealers, it is unclear that the bargaining agreement would restrict the hours of operation. The maintenance of standards clause provides that Thompson Chrysler-Plymouth may change its hours of operation to "conform to local practices characteristic of the industry." RX 1006. This language seems to suggest that Thompson may stay open if the other dealers are open. The agreements among dealers, however, established the "local practices characteristic of the industry" in Detroit. Absent the agreement among dealers, the "local practice" in Detroit might differ considerably from the local practices that evolved through their unlawful agreements.

Mr. Joseph Thompson's supplemental affidavit states that he was "aware generally" of the history of union force and violence in Detroit. RRX 145 at 3. His affidavit states that in setting hours of operation, "I followed the hours in effect at most Detroit area retail automobile dealerships at the time. I did so in part because of fear of union force and violence" *Id.* at 6. Assuming this to be true, it is not a sufficient basis for the non-statutory labor exemption. As developed in Section II.C above, some collective bargaining or negotiation with the union or the employees is required to support the exemption. Even if the courts were to expand the non-statutory labor exemption to include an exemption for actions coerced by union violence, which they have not, a general awareness of the possibility

of union violence would likely be too thin a basis for a claim of coercion.

In sum, whether or not any restraint imposed by the maintenance of standards clause of Thompson Chrysler-Plymouth's August 14, 1973, collective bargaining agreement is exempt from antitrust scrutiny, we conclude that the bargaining agreement does not provide retroactive immunity to the unlawful agreements among Chrysler-Plymouth dealers in the 1960's to reduce evening hours of operation and does not prospectively extend immunity to the December 1973 agreement among dealers to reduce Saturday hours during the full year, not just the summer months.

Although the nonstatutory labor exemption does not apply to the original decision to reduce hours, Mr. Thompson and his dealership subsequently, in good faith, negotiated bargaining agreements on the basis of expectations arising from the maintenance of standards provision, and these subsequent agreements between the employees and the Thompson respondents do provide a basis for the exemption. *See* RRX 147 at 22; RRX 148 at 24. As the original Commission opinion indicated, the finding that the agreement among dealers was unlawful does not "affect expectations that a settlement negotiated in the future -- whether through formal, multi-employer collective bargaining or at arm's length talks at individual dealerships -- would be protected from antitrust sanctions." 111 FTC at 492. Accordingly, we conclude that Part III of the order will not require Mr. Thompson or Thompson Chrysler-Plymouth, Inc., to remain open beyond the provisions of the current labor contract, provided there continues in effect a collective bargaining agreement containing a maintenance of standards provision like that in effect from September 14, 1989, through March 31, 1994, or that otherwise provides a basis for the exemption.¹³

C. Crestwood Dodge, Inc.

Mr. George Beals operated Crestwood Dodge, Inc., from October 1967 to March 1972. RX 3442. At the time Beals took over, the hours of operation were from 8:30 a.m. to 6:00 p.m. on Tuesday,

¹³ Mr. Thompson, in his remand affidavit of August 20, 1993, stated that the dealership was subject to a collective bargaining agreement, dated October 1, 1992, and that the agreement contained a maintenance of standards provision that limited his authority to extend hours of operation. RRX 146 and RRX 148 at 24. That agreement expired on March 31, 1994, according to the affidavit. RRX 146 at 10. To the extent that no such agreement presently exists, Part III of the order applies to Mr. Thompson and Thompson Chrysler-Plymouth, Inc.

Wednesday, Friday and Saturday and from 8:30 a.m. until 9:00 p.m. on Monday and Thursday, and he continued those hours. RX 3442E. Mr. Alfred Dittrich operated Crestwood Dodge, Inc., from October 1, 1973, until approximately April 1976. RRX 138 at 1, Tr. 31606

In October 1967, Crestwood Dodge, Inc., signed a collective agreement with the Automotive Sales Association. RX 1300.¹⁴ That agreement did not specify the hours of operation or contain a maintenance of standards clause. *Id.* The agreement expired in 1970. RX 3442G. In 1970-1971, Crestwood Dodge negotiated a second three-year collective bargaining agreement with ASA. RX 3442H. Although the text of the second agreement is not in the record, Mr. Beals' affidavit states that it was similar to RX 2991, which is a bargaining agreement between Suburban Motors Co. and the ASA containing specified hours of operation. *Id.* The Suburban agreement specified that the hours of operation were to be 8:30 a.m. to 9:00 p.m. on Monday and Thursday and 8:30 a.m. to 6:00 p.m. on Tuesday, Wednesday, Friday and Saturday. RX 2991 at Z8. According to Mr. Beals' affidavit, under the bargaining agreement, he "could not increase Crestwood's hours of operation during the term of the agreement, unless the ASA consented to such a change." RX 3442H.

On June 13, 1969, the Detroit area "Dodge Boys" ran an advertisement in the Detroit News stating that "practically all" the Detroit area Dodge dealers would close on Saturday. CX 3307. According to Mr. Beals' affidavit, 1969 was the first year that Crestwood and other Dodge dealers closed on Saturday during the summer months, and the Dodge dealers placed a joint advertisement announcing the closing. RX 3442F. A union was then attempting to organize automobile sales employees, and Mr. Beals discussed the proposed closing with the other Dodge dealers as a response to labor demands. RX 3442G. He said that "my understanding at the time was that most of the other Dodge dealers closed their dealerships for the same reasons." RX 3442G.¹⁵

Mr. Beals' affidavit indicates that in June 1969, he made the decision to close the dealership on Saturday during the summer months. That decision was made after discussions with the other

¹⁴ RX 1300 may not be the full text of the bargaining agreement, but it appears to be all that remains available. RX 3442E.

¹⁵ Minutes of meetings of the Greater Detroit Dodge Dealers Association, Inc., at which Crestwood representatives were present, reflect that the association concurred in proposals for summertime Saturday closing when that issue was discussed at meetings of the Detroit Auto Dealers Association. CX 606B, CX 615A.

Dodge dealers and with the understanding that the other dealers would also close on Saturday. The decision was collectively announced in an advertisement by the Dodge dealers association. At the time of this agreement among the Dodge dealers, Crestwood had a collective bargaining agreement with the ASA, but that bargaining agreement did not contain any restriction on the hours of operation. RX 1300. In his affidavit, Mr. Beals does not claim that he negotiated with the union regarding the decision made in 1969 to close on Saturdays during the summer.

On November 13, 1973, the members of the Greater Detroit Dodge Dealers Association, Inc., including Mr. Dittrich for Crestwood, met and voted to prepare a notice to the media that they would close on Saturdays year-round, beginning on December 1, 1973. CXG22B. This vote followed a report to the meeting that "essentially all the line groups" had decided to close on Saturday beginning on December 1, 1973. *Id.* On November 30, 1973, the "Dodge Boys" placed an advertisement in the Detroit News that their showrooms would be closed on Saturday as of December 1, 1973, listing the names of twenty participating Dodge dealers, including Crestwood Dodge, Inc. CX 3357.

When Mr. Dittrich took control of Crestwood Dodge in October 1973, the union contract negotiated by Mr. Beals was still in effect. According to Mr. Beals' affidavit, he negotiated the bargaining agreement in late 1970 or early 1971, and the agreement was for a three-year term. RX 3442G, H. We, therefore, assume that the agreement would have expired in late 1973 or early 1974. According to Mr. Beals' recollection, as discussed above, the bargaining agreement set forth the hours of operation, including hours of operation from 8:30 a.m. until 6:00 p.m. on Saturday.¹⁶ In November 1973, Mr. Dittrich attended the Dodge line group meeting at which the members voted to announce their closing every Saturday beginning on December 1, 1973. Crestwood Dodge, Inc., participated in the advertisement announcing this reduction of hours.

Mr. Dittrich testified that shortly after he took over Crestwood Dodge, the union steward, Nicola Shelly, told him, "You know we're going to close Saturdays in a few weeks." Tr. 3166. Dittrich said that this was a "shocker for me," and that "I understood her to be telling

¹⁶ Since this collective bargaining agreement did not provide for elimination of Saturday sales hours, the anticompetitive effects of the agreement among dealers to reduce Saturday hours cannot be attributed to the collective bargaining agreement.

me that all the dealerships were going to close on Saturdays shortly." *Id.* At that time, Dittrich had not attended any line group meetings and was unaware of any plan to close all dealerships on Saturdays.

Although Mr. Dittrich testified that he first learned of the plan to close on Saturday from the union steward, he did not testify or even suggest that he bargained with the union for this reduction in hours of operation. His testimony was that Ms. Shelly informed him that "all dealerships" were going to close on Saturday. Whether he first learned about the conspiracy among dealers from the union steward or at the Dodge line group meeting does not change the fact that Mr. Dittrich apparently decided to join an agreement among dealers to close on Saturday throughout the year, and he did not reach that decision through negotiation with his employees. Because the reduction in hours was the result of an agreement among dealers, not a good faith negotiation with employees, the non-statutory labor exemption does not apply.

Both Mr. Beals and Mr. Dittrich submitted affidavits containing precisely the same language as Mr. Thompson's affidavit, namely that "[i]n establishing the Dealership's showroom hours during this period, I followed the hours in effect at most Detroit area retail automobile dealerships at the time. I did so in part because of fear of union force and violence" RRX 138 at 4 (Dittrich), RRX 144 at 5 (Beals). Mr. Dittrich was more precise about the union threat that persuaded him to close: "I closed the Dealership on Saturdays year-round in late 1973 because of fear of union directed force and violence, namely, because of the certainty that Crestwood would be struck if the Dealership attempted to stay open." RRX 138 at ¶ 10. This general assertion is not sufficient to support an exemption from Section 5 for the reasons stated above.

The supplemental materials do not show that Crestwood currently operates under a collective bargaining agreement or other negotiated agreement on hours of operation with its employees. Part III of the order, therefore, applies to Crestwood Dodge.

D. Bob Borst Lincoln-Mercury Sales, Inc., and Robert C. Borst

Robert C. Borst is the majority shareholder of Bob Borst Lincoln-Mercury Sales, Inc., which has been in business since 1961. Its current hours of operation are from 7:30 a.m. to 9:00 p.m. on Monday and Thursday and 7:30 a.m. to 6:00 p.m. on Tuesday, Wednesday and

Friday. RRX 139 at 1. Robert Borst has represented Bob Borst Lincoln-Mercury Sales, Inc., at Detroit Automobile Dealers Association meetings since 1961. RRX 139 at 1.

Robert Borst closed his dealership on weekday evenings "at or around the same time most of the other dealers" also closed. RPF ¶ 1634. Before reducing his hours of operation, Mr. Borst discussed uniform hours reductions with other dealers and in some instances, the effective dates for the hours reductions. RPF ¶ 1635. In 1966, the Lincoln-Mercury line group agreed to close on Tuesday evenings. CX-172. In 1969, the Lincoln-Mercury dealers agreed to close on Saturdays for the summer months. *See* CX-51. In May 1972, and May 1973, the Lincoln-Mercury dealers placed joint newspaper advertisements stating that "all Detroit area Lincoln-Mercury dealers" would close on Saturday for the summer months. CX-3336, CX-3340. In late 1973, a time when Robert Borst was the President of the Metropolitan Lincoln-Mercury Dealers Association, the line group placed an advertisement in the Detroit Free Press stating that Lincoln-Mercury dealers would close on Saturday. CX-3353, CX-2935-C.

The respondents' Proposed Findings of Fact were filed with the Administrative Law Judge on April 21, 1987. In addition to general findings, they include proposed findings with respect to each respondent. The respondents proposed eight findings relating to Bob Borst Lincoln-Mercury Sales, Inc., and Robert C. Borst. RPF ¶¶ 1632-39. Respondents' Proposed Finding ¶ 1636 states that "Borst's reasons for closing his dealership's showroom on certain evenings and Saturday in the summer and then year-round and his reasons for maintaining his current hours were and are": (1) to respond to demands by and on behalf of employees; (2) to avoid unionization; (3) because too few sales were made to justify remaining open; and (4) to reduce energy consumption following the oil embargo. RPF ¶ 1636. None of the eight proposed findings relate to bargaining between Borst and a union or his employees, and none suggests that Borst reduced hours out of fear of union violence. RPF ¶¶ 1632-39.

On this remand, Mr. Borst submitted a supplemental affidavit consisting first of an approximately ten page recital of his recollection of incidents of union force and violence in Detroit. RRX 139. With the exception of one incident that had nothing to do with hours of operation and that occurred in 1948 (thirteen years before Bob Borst Lincoln-Mercury was founded), when Borst was working

at Burt Baker Used Cars, Mr. Borst's recollections appear to be of events that happened to other auto dealers. Respondents' Proposed Supplemental Findings of Fact with respect to Bob Borst Lincoln-Mercury recite that Mr. Borst "was aware of" the various incidents of violence and intimidation and that he "kept abreast of" published news reports about the retail automobile sales business in Detroit. RPSF ¶¶ 49-57.

Robert Borst's and Bob Borst Lincoln-Mercury's claim under the non-statutory labor exemption rests on the assertion that in setting the hours of operation, Robert Borst "followed" the hours in effect at other dealerships and "did so primarily because of fear of union force and violence . . ." RRX 139 at ¶ 36. Mr. Borst's affidavit on remand does not refer to the four reasons for closing his dealership that were stated in the 1987 proposed finding of fact, RPF ¶ 1636, or offer any explanation why the 1987 proposed findings failed to refer to the fear of union force and violence as a reason for reducing hours of operation. RRX 139. Mr. Borst's affidavit also claims that although he was opposed to closing on Saturday, he "had to close in light of union violence, union threats, property damage and to preserve my family's safety." RRX 139 at ¶ 40.¹⁷

Mr. Borst's claim of exemption appears to be based on his subjective perception of union directed violence. Given the apparent inconsistency in the reasons for closing offered in respondents Proposed Findings and the supplemental affidavit, a full hearing would be required to make findings on his perceptions and fears. Such a hearing is unnecessary because, as developed above, proof of *bona fide* arm's length negotiations between the employer and his employees or the union regarding hours of operation is a prerequisite to establishing a claim based on the non-statutory labor exemption. Whatever Mr. Borst's perceptions or recollections, there is no evidentiary basis to support a finding that his reductions in showroom hours were the product of *bona fide* negotiations with his employees or any union.

Since the supplemental materials do not state that Bob Borst Lincoln-Mercury currently operates under a collective bargaining agreement with a union or an agreement with its employees relating

¹⁷ Mr. Borst's remand affidavit, which does not identify a particular event that caused him to close on Saturday at the time he did so, describes incidents of alleged union violence from 1947 on and states that Mr. Borst was "always aware" of the employees' desire for a five-day work week.

to hours of operation, Part III of the order applies to these respondents.

E. Bob Dusseau Lincoln-Mercury and Robert F. Dusseau

In 1955, Bob Dusseau started Bob Dusseau Lincoln-Mercury as President and, since that time, has been the majority shareholder in the business. RPF ¶ 1717. He was a member of the Metropolitan Lincoln-Mercury Dealers Association and was president of the association in 1970-1971. RPSF ¶ 4. When it opened for business, Bob Dusseau Lincoln-Mercury was open from 7:30 a.m. to 9:00 p.m. weekdays and 7:30 a.m. to 6:00 p.m. on Saturday. Its current hours are 8:30 a.m. to 9:00 p.m. on Monday and Thursday and 8:30 a.m. to 6:00 p.m. on Tuesday, Wednesday and Friday. RPSF ¶ 2.

Dusseau closed his dealership during evening hours and on Saturdays at or around the same time that most other Detroit auto dealers did so. RPF ¶ 1722. In 1966, the Lincoln-Mercury line group agreed to close on Tuesday evenings. CX 172. In 1969, the Lincoln-Mercury dealers agreed to close on Saturdays during the summer months. CX 51. On May 26, 1972, and May 24, 1973, the Lincoln-Mercury line group placed advertisements in Detroit newspapers indicating that all Lincoln-Mercury dealers would close on Saturday for the summer months. CX 3336, CX 3340. Later in 1973, the Lincoln-Mercury line group placed an advertisement that they would close on Saturday during the remainder of the year. CX 3353.

The respondents' Proposed Findings of Fact, filed on April 21, 1987, include ten specific findings related to Bob Dusseau Lincoln-Mercury, Inc., and Robert F. Dusseau. RPF ¶¶ 1717-26. Respondents' Proposed Finding ¶ 1723 states that Dusseau's "reasons for closing his dealership's showroom on certain evenings and Saturdays during the summer and then year round and his reasons for maintaining his current hours were and are": (1) to respond to demands by employees, (2) to avoid unionization, (3) because too few sales were made to justify remaining open, and (4) to reduce energy consumption following the oil embargo. RPF ¶ 1723. None of the ten proposed findings relate to bargaining between Dusseau and a union or the employees, and none indicate that Dusseau reduced hours out of fear of union violence. RPF ¶¶ 1717-26.

Like Mr. Borst, Mr. Dusseau submitted a supplemental affidavit consisting first of an approximately ten page recital of his

recollections of incidents of union force and violence in Detroit from 1947 on. RRX 140. Mr. Dusseau describes one incident he found intimidating in which "two union goons" came to his showroom to talk with salesmen and refused to leave until after he called the police and the police arrived and threatened to arrest them. RRX 140, ¶ 8. With the exception of this single, albeit unfortunate incident, Mr. Dusseau's recollections are of events that happened to others. The proposed Supplemental Findings of Fact recite that Mr. Dusseau "was aware of" various incidents of violence and that he "kept abreast of" press reports on labor relations in Detroit. RPSF ¶¶ 66-71.

Like Mr. Borst, Mr. Dusseau's claim under the non-statutory labor exemption rests on the assertion that in setting the hours of operation at his dealership, he "followed" the hours in effect at most other dealerships and "did so primarily because of fear of union force and violence . . ." RRX 140 at ¶ 35. Mr. Dusseau's perceptions regarding any incidents of labor strife, even assuming that those perceptions are based on fact, do not support his claim of exemption, because they do not bear on any employer-employee or employer-union bargaining.

As developed above, proof of *bona fide* negotiations between the employer and a labor union or the employees is necessary to establish a claim under the non-statutory labor exemption. Evidence of Mr. Dusseau's motivation or perception alone is not sufficient to support a finding that the reductions in showroom hours were protected by the non-statutory labor exemption. There is no indication of a current collective bargaining agreement relating to hours of operation between this dealership and a union or the employees. Part III of the order, therefore, applies to Mr. Dusseau and to Bob Dusseau Lincoln-Mercury.

F. Bob Maxey Lincoln-Mercury Sales, Inc. and Robert Maxey

Robert Maxey is and has been the President and owner of Bob Maxey Lincoln-Mercury since 1972. RPSF ¶ 78. Bob Maxey Lincoln-Mercury Sales, Inc., has been a member of the Lincoln-Mercury dealers association since 1972. CX 2962. The dealership's hours of operation are from 8:30 a.m. to 9:00 p.m. on Monday and Thursday and from 8:30 a.m. to 6:00 p.m. on Tuesday, Wednesday and Friday. RRX 141 at ¶ 2.

In May 1972, the Lincoln-Mercury line group ran a newspaper advertisement stating that all Lincoln-Mercury dealers would be

closed on Saturdays during the summer. CX 3336. In May 1973, the line group ran another advertisement announcing Saturday closing for the summer. CX 3340. In September 1973, the line group ran an advertisement announcing that the Lincoln-Mercury dealers were again opening on Saturday, and Bob Maxey Lincoln-Mercury was specifically listed in the advertisement. CX 3422. In November 1973, the group ran an advertisement announcing the full year Saturday closing. CX 3353.

The respondents filed Proposed Findings of Fact on April 21, 1987, including six findings dealing specifically with Bob Maxey Lincoln-Mercury and Robert Maxey. RPF ¶¶ 1673-79. We find nothing in the record that the sales employees of this dealership have ever been unionized. RRX 141. Proposed Finding ¶ 1675 recites that before Mr. Maxey opened his Lincoln-Mercury dealership, he was sales manager at Al Long, Inc., in 1968, during a violent strike by the ASA. The proposed findings state that Maxey closed on Saturday when the other dealers did so to avoid the union, to obtain labor peace, and to conserve energy and that further sales on Saturday were "too poor to justify being open." RPF ¶ 1676.

Like the affidavits of Messrs. Dusseau and Borst, Mr. Maxey submitted a supplemental affidavit containing a lengthy statement of recollections of incidents of union violence that occurred to others. RRX 141. Mr. Maxey's affidavit describes the 1968 strike at Al Long Ford. RRX 141 at ¶ 17. Apparently Mr. Maxey's extensive recollections of labor unrest through the 1960's did not persuade him to close on Saturday because his affidavit recites that he was opposed to closing on Saturday until 1973. RRX 141 ¶ 26. In 1973, he "started receiving startling phone calls. Once they had threatened to blow up my house, at that point I had enough. . . ." RRX 141 at ¶ 26. The affidavit provides no other information about the phone calls and no indication about the identity of the callers beyond the word "they."

Robert Maxey's claim of exemption under the non-statutory labor exemption rests on the claim that he "followed" the hours in effect at most other dealerships "primarily because of fear of union force and violence" RRX 141 at ¶ 37. Like Messrs. Borst and Dusseau, Mr. Maxey bases his claim for the non-statutory exemption primarily on his perception of union violence. The primary difference between his claim and the claims of Messrs. Borst and Dusseau is the cryptic reference to "startling phone calls" and a threat from an unidentified source. Although startling or threatening phone calls are unfortunate,

we do not understand the respondents to be urging a coercion defense,¹⁸ and as explained above, the non-statutory labor exemption requires proof of *bona fide* arm's length negotiations between employer and the employees or a union. Neither the original proposed findings with respect to Mr. Maxey and his dealership nor the supplemental materials filed on remand support a finding that the reduction in showroom hours was a product of negotiations with his employees or a union. We conclude that the non-statutory labor exemption does not apply to these respondents. In addition, there is no indication that Bob Maxey Lincoln-Mercury is currently party to a collective bargaining agreement with an hours provision or a maintenance of standards clause. Part III of the order, therefore, applies to Mr. Maxey and Bob Maxey Lincoln-Mercury.

G. Crest Lincoln-Mercury Sales, Inc., and William R. Ritchie

Mr. William Ritchie is the President and owner of Crest Lincoln-Mercury Sales, Inc., and was president and sales manager from 1968 to 1972. Tr. 1286-87, 1295-96. He acquired an ownership interest after 1972. Tr. 1303. When Mr. Ritchie took over the dealership in 1968, the showroom hours of operation were 8:30 a.m. to 6:00 p.m. on Tuesday, Wednesday, Friday and Saturday and 8:30 a.m. to 9:00 p.m. on Monday and Thursday. Tr. 1305.

When Mr. Ritchie took over Crest, the parts department employees and the mechanics were unionized. Tr. 1296. In 1971, the union struck his dealership. Tr. 1299. Mr. Ritchie testified that the 1971 strike involved violence. He said that he was run off the road "by a couple of cars" when driving home one night. Tr. 1303. The porch of a next door neighbor's house was bombed, and according to Ritchie, the police thought that his house had been the intended target. Tr. 1404. His family was threatened. Tr. 1304-04. Mr. Ritchie resolved the strike by telling the striking workers that he was going to reopen the dealership with replacement workers, and he made no concessions to resolve the strike. Tr. 1301. Ultimately, the striking employees returned to work. *Id.*

Mr. Ritchie testified that his sales employees continued to demand shorter working hours. He initially tried to shorten Saturday hours by opening one hour later and closing two hours earlier than on

¹⁸ See Note 7, *supra* and accompanying text.

weekdays, but that did not satisfy his sales people. Tr. 1312. Mr. Ritchie testified that, in the late 1960's or early 1970's, he decided to close his showroom on Saturday in the summer in response to demands by the employees. Tr. 1313-14. Mr. Ritchie testified that other competing dealers closed on Saturday at the same time and that he had discussed the summer Saturday closing with his competitors. Tr. 1314-15. He said that the employees' demand was for uniform Saturday closing during the summer by all dealers, and his discussions with other dealers were in response to this demand for uniformity. Tr. 1315. Ritchie said that he did not simply close his dealership unilaterally, because that "is not what [the employees] wanted." He added: "They wanted the city closed. They wanted all dealerships closed." Tr. 1315. Mr. Ritchie said that he discussed with his sales employees the possibility of his unilaterally closing his dealership on Saturdays, but they did not think that he "was working for their better interest if I couldn't help them influence other dealerships to close." Tr. 1316. Mr. Ritchie testified that he did not want to see other dealers picketed because he wanted to avoid multi-employer bargaining (Tr. 1316), an arrangement by which "an authorized representative of a certain group of employees bargain [sic] for that whole industry." Tr. 1323. Multi-employer bargaining was a consistent demand by the ASA. ID ¶ 157.

Mr. Ritchie testified that, at the end of the summer, about three weeks before the dealership was to reopen on Saturdays for the winter, his employees began to demand that the Saturday closings be extended to be effective year-round. Tr. 1317-18. Mr. Ritchie opposed this and entered into a "dialogue" with his sales force over that demand. Tr. 1318. Nonetheless, the dealership reopened on Saturdays, and Mr. Ritchie testified that this resulted in his employees' "[t]otal dissatisfaction" and a "morale problem." *Id.* Mr. Ritchie stated that, in about 1971, he began closing on Saturdays year-round, but that he would not have eliminated Saturday operations year-round except for the demands of his sales force. Tr. 1319. He further testified that his concerns when making the decision to close were the same as those he had when he conceded to his employees' demands to close on Saturdays during the summer. *Id.*

Mr. Ritchie testified that he discussed his concerns about union activity with other dealers in Detroit, and other dealers shared the same concerns. Tr. 1317. He said that the discussions occurred at

line group meetings, association meetings and social functions. Tr. 1320. At the line group meetings, Mr. Ritchie opposed making concessions to employees on a dealer-by-dealer basis because "[w]e were going to get nothing but run our expenses up." Tr. 1325. He also expressed the view that uniform shorter hours would avoid unionization and bring labor peace. Tr. 1325-26.

Mr. Ritchie was a member of the Board of Directors of the Detroit Automobile Dealers Association from 1972 to 1976. Tr. 1351. He was also president of the Association. *Id.* When he was a director, the DADA Board discussed uniform hours of showroom operations. Tr. 1353. Mr. Ritchie said that he tried to persuade other dealers to close on Saturdays. Tr. 1354.

Mr. Ritchie testified in his supplemental affidavit that he tried to "appease my employees over the years" (RRX 142 ¶ 22), and that he made the "concession [to close on Saturdays] only after long negotiation with my employees" (RXX-142 ¶ 24), who demanded short hours not just for themselves, but for all Detroit dealerships. RXX 142 ¶ 23.

As a DADA board member and president, Mr. Ritchie played a lead role as an organizer with the dealers, and he adamantly opposed negotiations between individual dealers and their employees or their union. He testified that he opposed any dealer-by-dealer, unilateral concessions because that would merely "run our expenses up." He was concerned that piecemeal, unilateral concessions by individual dealers might lead to multi-employer bargaining and believed that any concessions to the unions or their members "absolutely had to be uniform." In addition, Mr. Ritchie's supplemental affidavit indicates that he would not have reduced hours absent the demands of the workforce and "my fear of union directed violence." RRX 142 ¶ 22.

Had Mr. Ritchie closed the dealership on Saturday as a direct result of negotiations with employees, his action would have been protected by the non-statutory labor exemption. This, however, was not the case. We conclude that Mr. Ritchie's closure of his dealership was not the product of an agreement with his employees but was the product of his conspiracy with the other competing dealers.

Put somewhat differently, whatever discussions occurred between Mr. Ritchie and his employees, they did not result in an agreement negotiated in good faith for Crest Lincoln-Mercury unilaterally to limit hours or to close on Saturdays. Indeed, according to the respondent, such an agreement on the part of the dealership would

not have been satisfactory to the employees. The agreement reached on this subject was the product of negotiation, but the negotiation was among the employers, not between the employers and their employees or representatives of their employees. There also is no claim that the dealership operates under any other bargaining agreement with an hours or maintenance of standards provision. We conclude, therefore, that the non-statutory labor exemption does not apply to these respondents, and that Part III of the order properly should apply to Mr. Ritchie and Crest Lincoln-Mercury Sales, Inc.

H. Stewart Chevrolet, Inc., and Gordon Stewart

Gordon Stewart was the dealer-operator of Stewart Chevrolet, Inc., from 1980 through 1983. Tr. 3433. He owns a company that retains a controlling interest in Stewart Chevrolet, but Mr. Melavid has been the dealer-operator since 1983. Tr. 3433. When Mr. Stewart first opened Stewart Chevrolet in October 1980, he opened from 8:30 a.m. to 9:00 p.m. on Monday and Thursday and 8:30 a.m. to 6:00 p.m. on Tuesday, Wednesday and Friday, which were the hours of operation adopted by the previous owner of the franchise. Tr. 3452.

Although Mr. Stewart became a Detroit automobile dealer after the agreed upon hours of operation had been firmly established for a number of years, he participated in many decisions by the Chevrolet line group to open or close on specific days. For example, the minutes of the March 17, 1982, Greater Detroit Chevrolet Dealers Association, at which he was present, reflect an agreement to open on the evenings of March 29, 30 and 31 because of the end of a rebate program. CX-361. The record contains a number of similar examples of collective decisions by the Detroit area Chevrolet dealers, including Mr. Stewart, to open or close on specific dates, such as the day preceding or following a major holiday. CX-362, CX-363, CX-364, CX-365, CX-370, CX-371.

The record does not reflect that the sales employees at Stewart Chevrolet were unionized or that Mr. Stewart ever negotiated a collective bargaining agreement with a union relating to the hours of operation of Stewart Chevrolet. Indeed, Mr. Stewart's testimony indicates a distaste for dealing with a union. When he purchased the dealership, the mechanics were unionized, and he did not want to purchase it until he received an assurance that he had a 95 percent

chance of eliminating the union after the transaction. Tr. 3450. In 1985, after the Commission initiated this proceeding, Teamsters Local 376 attempted to organize the sales employees at Stewart Chevrolet but were unsuccessful. Tr. 3458-59.

Mr. Stewart's supplemental affidavit recites his "awareness" of and recollection of incidents of union force and violence in the retail automobile business in Detroit. Most incidents discussed in the affidavit allegedly happened to other dealers during the 1960's and 1970's, although Mr. Stewart worked at Merollis Chevrolet during a violent strike. RRX 133 ¶ 20. Once when Mr. Stewart held a special sale on Saturday, a salesman from Dexter Chevrolet identified himself and told him that his business would suffer if he opened regularly on Saturday. Tr. 3455.

As discussed above, the nonstatutory labor exemption applies only to restraints arising from good faith, arm's length negotiation between an employer and his employees or their union, and there appears to be no basis on which to find that Stewart Chevrolet's hours of operation resulted from such good faith negotiations. The specific decisions to remain open or to close on the dates discussed above were made at the meetings of the Chevrolet line group, and there is no suggestion of negotiation with employees or a union. We conclude that the non-statutory labor exemption does not protect the activities of Mr. Stewart or Stewart Chevrolet. There is no claim of a current collective bargaining agreement with an hours provision or a maintenance of standards provision. Part III of the order, therefore, applies to Mr. Stewart and Stewart Chevrolet.

I. Woody Pontiac Sales, Inc., and Woodrow W. Woody

Woodrow Woody has been the owner and president of Woody Pontiac Sales since it went into business in 1940. RRX 151 ¶ 3,4. Woody Pontiac is currently open weekdays until 6:00 p.m., except Monday and Thursday when it is open until 8:00 p.m. RRX 151 at ¶ 2.

Mr. Woody represented Woody Pontiac at the Pontiac line group meeting in which a decision was reached to close on Saturday during the summer months, beginning in 1969. CX-209. Woody Pontiac was listed as a participating dealership in the Pontiac line group advertisement of June 13, 1969, announcing the summertime Saturday closing. CX-3308. Woody similarly participated in the

1970, 1971 and 1972 Saturday summer closing. CX-213, CX-3314, CX-216, CX-217, CX-3324, CX-219-20, CX-3332. Woodrow Woody represented his dealership at the November 27, 1973, line group meeting in which the members of the association considered permanent Saturday closing. CX-225. In the line group's published advertisement, Woody Pontiac was listed as one of the dealerships that would close permanently on Saturday, beginning on December 1, 1973. CX-3354.

Mr. Woody's supplemental affidavit recites that at the time that he closed the dealership on Saturday, "I remember thinking about the union and the violence they had perpetrated in the past." RRX 151 at ¶ 7. He decided that it was not worth it to stay open on Saturday. *Id.*

As discussed above, the non-statutory labor exemption requires proof of good faith bargaining between the employer and the union or employees regarding the hours. Mr. Woody's supplemental affidavit and proposed findings make no claim that such negotiations occurred. We conclude that the non-statutory labor exemption does not shield Woody Pontiac's or Woodrow Woody's participation in an agreement among Pontiac dealers to reduce hours of operation. Part III of the order, therefore, applies to Mr. Woody and Woody Pontiac.

J. Jack Demmer Ford and John E. Demmer

Jack Demmer Ford was established in 1957 as an Edsel and Studebaker dealer, and in December 1959, it became a Ford dealer. Tr. 2564. In 1963, the dealership was open until 9:00 p.m. on Monday, Tuesday, Thursday and Friday, and was open until 6:00 p.m. on Wednesday and Saturday. Tr. 2568.

After discussions at the Ford line group meetings, of complaints by sales employees about the long hours, the dealers closed at 6:00 p.m. on Friday. Tr. 2572. In 1966, when the ASA was trying to organize the dealerships, the Ford line group discussed closing Tuesday at 6:00 p.m. and decided that the Ford dealers would all close at one time. Tr. 2576-77.

After a representation election in December 1966, the ASA became the bargaining representative of the sales employees at Jack Demmer Ford. Tr. 2578. In 1967, John Demmer began negotiations with the union regarding a collective bargaining agreement. Tr. 2579. In 1968, there was a long strike at Jack Demmer Ford, and the strike involved violence and vandalism, including an attempted bombing of

the clean-up shop. Tr. 2586-87. Jack Demmer Ford offered to close the dealership on Saturday, but despite the violence, he refused to agree to the union's demand for a closed union shop and never signed a contract with the union. Tr. 2579, 2588. After the strike, the sales employees at Jack Demmer Ford voted to decertify the union in October 1968. Tr. 2595. The dealership remained open on Saturdays after the decertification election. Tr. 2597.

In late 1968, the Ford line group met to discuss the complaints of the sales employees, and according to Mr. Demmer, "we kind of reached an agreement that we asked everybody to go along with and that was to close [on Saturday] from July the 4th the following year, I believe it was, until Labor Day, which is a period of about eight weeks." Tr. 2598-99. The following year the dealers decided to close on Saturday from Memorial Day until Labor Day. Tr. 2600. They subsequently decided to close on Saturday year-round. Tr. 2600.

Mr. Demmer's supplemental affidavit recites that he was familiar with a number of incidents of union violence. RRX 135. His affidavit states that "[h]e would not have reduced his hours or agreed with other dealers concerning his hours but for the demands of his employees and the employee unions and his apprehension of force and violence by the various unions which had demanded uniform hours reductions and who would enforce their demands through force and violence." RRX 135 at ¶ 28.

As developed above, the non-statutory labor exemption requires a showing of negotiations with a union or employees. During the period in 1967 and 1968 when the ASA represented the sales employees at Jack Demmer Ford, Mr. Demmer did negotiate with the union about closing the dealership on Saturdays, and he closed during the strike. No collective bargaining agreement was ever reached, and after the employees voted to decertify the union, the dealership remained open on Saturdays. According to Mr. Demmer's own testimony, the subsequent decisions to close on Saturday were the product of an agreement among dealers, not a result of good faith negotiation with employees. We conclude that the non-statutory labor exemption does not apply to the conduct of these respondents. In addition, they have not claimed to have a current bargaining agreement with a union or their employees. Part III of the order, therefore, applies to Mr. Demmer and Jack Demmer Ford.

K. Al Long Ford, Inc.

Tarik Daoud is and has been since 1972 the president and majority shareholder of Al Long Ford, Inc. RRX 134. In the 1960's, Al Long Ford was open from 8:30 a.m. to 9:00 p.m. on Monday, Tuesday and Thursday and from 8:30 a.m. to 6:00 p.m. on Wednesday, Friday and Saturday. RRX 134 at ¶ 6.

In May 1971, the Metropolitan Ford Dealers Association, of which Al Long Ford was a member, published advertisements, stating that "the majority" of metropolitan Ford Dealers would be closed on Saturday during the summer. CX-3326, 3327. On November 30, 1973, the Ford line group of which Al Long Ford was a member ran an advertisement stating that participating dealers would be closed on Saturdays, effective December 1, 1973. CX-3356. On December 2, 1973, Avis Ford ran an advertisement stating that the "Ford dealers of Metropolitan Detroit voted overwhelmingly to close" on Saturdays. CX-3358.

Mr. Daoud's supplemental affidavit recites that he was aware of various incidents of union violence at other dealerships. RRX 134. In addition to recollections about incidents that occurred elsewhere, Mr. Daoud also said that he witnessed violence during a strike at Al Long Ford in 1968 when he was the sales manager. RRX 134 at ¶¶ 12-13. According to his affidavit, rifle bullets were fired through the windows of the dealership, and cars on the lot were scratched and their windows broken. *Id.* He received threatening phone calls at home. *Id.*

Mr. Daoud's supplemental affidavit states that there were many discussions at the Metropolitan Detroit Ford Dealers Association regarding Saturday closing in 1972 and 1973. RRX 134 at ¶ 19. He states that the pressure from salespeople caused him to close. *Id.* His affidavit states that "I concluded and agreed to accommodate the sales personnel by instituting uniform hours and year round Saturday closing . . . to avoid unionization and similar violence against the Al Long Ford dealership." RRX 134 at ¶ 22. Although this sentence does not state with whom Mr. Daoud reached his agreement, the next sentence explains that the agreement was with the other dealers, not his employees. The next sentence in the affidavit is: "I would not have reduced the hours at the dealership or agreed with other dealers concerning the hours but for the demands of my employees and my apprehension of force and violence" RRX 134 ¶ 22.

Although Mr Daoud's affidavit refers to demands and pressure from the employees for shorter hours of work, he does not state that he entered negotiations or reached agreement with his employees or a union regarding hours of operation. Instead, it appears that whatever agreement was reached was among dealers. He candidly stated that one objective of the reduction in hours was to avoid unionization and violence. Al Long Ford survived a violent strike in the late 1960's, when Mr. Daoud was manager, without capitulating to the union and agreeing to eliminate Saturday work. Only in 1973 did the dealers agree among themselves to reduce hours as a means to avoid unionization. We reject the conclusion that the restraint on hours, which was adopted to forestall unionization was "imposed by a union," and find that the reduced hours were not the product of bargaining and agreement between the dealership and its employees. We conclude that the nonstatutory labor exemption does not apply to this respondent. There is no evidence of a current labor contract with a maintenance of standards or hours of operation clause. Part III of the order, therefore, applies to Al Long Ford.

L. Ed Schmid Ford, Inc., and Edward Schmid

Edward Schmid became the general manager of Ed Schmid Ford, Inc., in 1961 and purchased the dealership in 1962. Tr. 1891. When Mr. Schmid took over, the hours of operation were from 8:30 a.m. to 9:00 p.m. on Monday, Tuesday, Thursday and Friday and were 8:30 a.m. to 6:00 p.m. on Wednesday and Saturday. Tr. 1894. The service department was organized by the Teamsters. Tr. 1892. Mr. Schmid was opposed to unionization of his dealership and believed that the union hindered his ability to deliver high quality service to his customers. Tr. 1908.

The sales employees complained to Schmid about the long hours. Tr. 1897. During a time when a union was passing out literature to organize salesmen, the members of the Ford line group discussed early closing and picked Friday night to close early. Tr. 1899. The Ford line group's labor counsel recommended the early closing. Tr. 1900.

In 1967, the ASA won an organizing election at Ed Schmid Ford, and the dealership began the collective bargaining process with the union. Tr. 1914. The ASA demanded an end to all Saturday and night work, among other things. Tr. 1914-15. The dealership and

union reached an impasse in the bargaining, and the union went on strike in January 1968. Tr. 1915. There were incidents of vandalism at the dealership, and threats were made at the time of the strike. Tr. 1917. During the ASA strike of the sales employees, the employees of the parts and service department who were members of the Teamsters Union crossed the picket line and continued to work. Tr. 1915. Mr. Schmid said that the sales employees had not honored a Teamsters' picket line in 1964, and so the Teamsters refused to honor the ASA line. Tr. 1916. Mr. Schmid refused to sign a union contract, and the sales employees eventually gave up the strike and returned to work. Tr. 1918. According to his supplemental affidavit, when Mr. Schmid obtained an injunction against the picketing of his dealership, the strikers gave up, and no collective bargaining agreement was ever signed. RRX 137 at ¶ 26.

The dealers at the Ford line group meetings continued to discuss Saturday closing "to possibly head off union organizing." Tr. 1923. The summertime Saturday closing was discussed at the line group meetings, and the closing by other dealers influenced Mr. Schmid's decision to close on Saturday. Tr. 1928.

Mr. Schmid's supplemental affidavit recites the incidents of violence that occurred during the 1967-68 ASA strike at his dealership and his awareness of vandalism and violence at other dealerships. RRX 137. According to the affidavit, Mr. Schmid lived in fear of having both his sales and service departments organized by a union. RRX ¶ 15. He thought that would be "fatal" to a dealership in the event of a strike. *Id.* According to the affidavit, Mr. Schmid "would not have reduced his hours or agreed with other dealers concerning his hours but for the demands of his employees and the employee unions and his apprehension of force and violence directed by the various unions which had demanded uniform hours reductions and who would enforce their demands through force and violence." RRX 137 at ¶ 36. The agreement among dealers to close year round was made in 1973, approximately five years after Mr. Schmid had succeeded in breaking the ASA strike. In light of the dealers' agreement and Mr. Schmid's willingness to wait out a long and violent strike in 1967 and 1968 until the union gave up, we do not find that, in 1973, when no strike was in progress, the restraint arose from *bona fide* collective bargaining for shorter hours or as a direct result of union directed violence and force for shorter showroom hours. 955 F.2d at 468. Although the sales employees favored a

shorter work week, the affidavit does not claim that the restraint was a product of good faith bargaining between the employer and his employees or a union. The agreement to which Mr. Schmid refers is among dealers, not with employees. As developed above, proof of good faith negotiation is an essential element of the non-statutory labor exemption. We conclude that the non-statutory labor exemption does not apply. The record does not show that these respondents currently have a bargaining agreement. Part III of the order, therefore, applies to Mr. Schmid and Ed Schmid Ford.

M. Ray Whitfield Ford, Inc., and Raymond Whitfield

Raymond Whitfield has been the president and owner of Ray Whitfield Ford, Inc., since 1961. CX-3867 at 8, 13. Like many other dealers, Ray Whitfield Ford eliminated its evening hours on Friday, Tuesday, and Wednesday in the 1960's, and in the late 1960's, it began to close on Saturday in the summer. *Id.* at 41. It closed on Saturday throughout the year in the early 1970's. *Id.*

According to Mr. Whitfield's deposition, he participated in discussions at the Metropolitan Ford Dealers Association concerning whether to eliminate Saturday hours. CX 3867 at 48. He had many conversations with other dealers about closing on Saturday. *Id.* at 53. Whitfield said that his business was good on Saturday, and he did not want to close. *Id.* at 55. He was concerned about vandalism and wanted to avoid unionization of his dealership. *Id.*

Mr. Whitfield's supplemental affidavit recites that he was familiar with the incidents of violence at Demmer Ford and Al Long Ford. RRX 136. Mr. Whitfield's affidavit states that in the mid-1960's, the ASA tried to organize salespeople, and that an ASA union organizer, Mr. Van Zant, told him that the union would "use whatever means were necessary" to close auto dealers on Saturday. *Id.* at ¶ 8. Shortly thereafter, some cars at his dealership were vandalized, and he found bullet holes in his showroom windows. *Id.* at ¶¶ 9-10. In the late 1960's, the Seafarers Union and a Teamsters local attempted unsuccessfully to organize his dealership. RRX 136 at ¶¶ 13-14.

Mr. Whitfield's remand affidavit states that he closed his dealership on Saturdays through the year in 1973, after threats that the union would use "any and all means, including violence, to shut" down all dealers and that he "would not have reduced his hours or agreed with other dealers concerning his hours but for the demands

of the employee unions and his apprehension of force and violence directed by the union." RRX 136 at ¶ 20. Neither the supplemental affidavit nor Mr. Whitfield's deposition, which was entered as an exhibit at trial, indicates that he reduced his hours of operation pursuant to an agreement reached after good faith negotiations with his employees or their union. The non-statutory labor exemption requires that the restraint be the result of good faith bargaining with the union or the employees.

Mr. Whitfield claims that concern about union violence motivated his decision to reach agreement with other dealers regarding hours rather than that he bargained in good faith with his employees or acted as a direct result of union directed violence. Indeed, according to the affidavit, the threat to use any means necessary and the vandalism occurred in the mid- or late-1960's, and the agreement among dealers to close Saturdays throughout the year was not reached until late 1973. The timing confirms that the restraint on hours resulted from the agreement among dealers, and not bargaining or other clash between Whitfield and his employees or a union representing the employees of Ray Whitfield Ford. Accordingly, we conclude that the exemption does not apply to these respondents. There is no claim that the employees of this dealership are covered by a collective bargaining agreement with an hours provision or a maintenance of standards clause. Part III of the order, therefore, applies to Mr. Whitfield and Ray Whitfield Ford.

In summary, we find that the respondents who participated in the remand proceeding did not restrict their hours of operation as a result of *bona fide*, arm's-length bargaining with employees or a union and are not exempt under the non-statutory labor exemption.¹⁹ Although the respondents produced some evidence of violent incidents and threats of violence, the non-statutory labor exemption requires a showing of bargaining with employees or a union representing employees, not an agreement with competitors to limit hours because of violence or perceptions of violence. The record shows that some of the dealers who suffered the worst incidents of violence and threats did not concede, at the time of those incidents, to demands to restrict hours and appear to have been willing to endure the risks and losses in order to defeat the union. Such fortitude seems inconsistent with a claim that they were compelled at other points in time to join a conspiracy against their will.

¹⁹ But see *supra* at 15 and Note 13.

Overall, the evidence shows that the automobile dealers in Detroit were unwilling to bargain with their employees over hours of operation. Instead, they reserved hours of operation for resolution with their competitors.

IV. THE SCOPE OF RELIEF

Apart from the interpretation of the non-statutory labor exemption, the Court of Appeals expressed "concern" about two aspects of the remedy imposed by the Commission.

First, the Court of Appeals directed the Commission to consider whether the thirty-day time period in Part VII.D of the order was sufficiently long. After due consideration and in accordance with the suggestion of the court, the Commission modifies Part VII.D to specify a sixty-day period, as provided in the accompanying order.

Second, Part III of the Commission's original order required the dealers to remain open for a minimum of 64 hours per week for a one-year period. The Commission found that a simple cease and desist order would not adequately remedy the violation of Section 5, and it imposed the requirement that dealerships remain open for 64 hours per week in an effort to "encourage competitive forces to operate." 111 FTC at 506.

The Court of Appeals stated:

We suggest that the Commission consider giving dealers an option to maintain showroom hours for at least an average of ten and a half hours a day during weekdays, coupled with operation on Saturdays for some minimum additional time for the one year period.

955 F.2d at 472. After due consideration and in accordance with the suggestion of the court, the Commission modifies Part III of the order to give the respondents the option of electing, for the one year remedial period, either: (1) to maintain a minimum sixty-four hours of operation per week for the sale and lease of motor vehicles; or (2) to maintain a minimum hours of operation for the sale and lease of motor vehicles of an average of ten and a half hours per day during weekdays plus a minimum of eight hours on Saturday.

CONCLUSION

In accordance with the direction of the Court of Appeals, the Commission has reviewed the record, findings and supplemental evidentiary material submitted by the twenty-two respondents who participated in this remand proceeding. For the reasons stated above, the Commission concludes that the respondents entered agreements with competitors to reduce their hours of operation in violation of Section 5 of the Federal Trade Commission Act and concludes that these agreements are not exempt under the non-statutory labor exemption. The Commission further concludes that Part III of the order does not apply to Thompson Chrysler-Plymouth, Inc., or Joseph P. Thompson, provided there continues in effect a collective bargaining agreement containing a maintenance of standards provision like that in effect from September 14, 1989, through March 31, 1994, or that otherwise provides a basis for the exemption.²⁰

In accordance with the direction of the Court of Appeals, the Commission hereby modifies Part III of the order to give the respondents the option to open for ten and one half hours per day on weekdays and ten hours per day on Saturdays and modifies Part VII.D to substitute a sixty-day period for the thirty-day period.

²⁰ See Note 13, *supra*.