

the agreement, made its jurisdictional findings and entered an order to cease and desist, as set forth in the proposed consent agreement, in disposition of this proceeding.

(Sec. 6, 38 Stat. 721; 15 U.S.C. 46. Interprets or applies sec. 5, 38 Stat. 719, as amended; 15 U.S.C. 45, 52)

Donald S. Clark,

Secretary.

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[File No. 942-3171]

**Zygon International, Inc.; Dane Spotts; Proposed Consent Agreement With Analysis To Aid Public Comment**

**AGENCY:** Federal Trade Commission.

**ACTION:** Proposed Consent Agreement.

**SUMMARY:** In settlement of alleged violations of federal law prohibiting unfair or deceptive acts or practices and unfair methods of competition, this consent agreement, accepted subject to final Commission approval, would prohibit, among other things, a Redmond, Washington-based company and its owner from making any claims about the performance, benefits, efficacy, or safety of any product or service they market without having competent and reliable substantiation to back up the claims. Zygon would also be required to pay up to \$195,000 in consumer refunds. The Consent Agreement settles allegations stemming from Zygon's marketing of five products: the "Learning Machine," "SuperMind," "SuperBrain Nutrient Program," "Fat Burner Pills," and "Day and Night Eyes."

**DATES:** Comments must be received on or before June 17, 1996.

**ADDRESSES:** Comments should be directed to: FTC/Office of the Secretary, Room 159, 6th St. and Pa. Ave., N.W., Washington, D.C. 20580.

**FOR FURTHER INFORMATION CONTACT:**

Joel Winston, Federal Trade Commission, S-4002, 6th Street and Pennsylvania Avenue, NW, Washington, DC. 20580. (202) 326-3153.

Lesley Anne Fair, Federal Trade Commission, S-4002, 6th Street and Pennsylvania Avenue, NW, Washington, DC. 20580. 326-3081.

Dean C. Forbes, Federal Trade Commission, S-4002, 6th Street and Pennsylvania Avenue, NW, Washington, DC. 20580. (202) 326-2831.

**SUPPLEMENTARY INFORMATION:** Pursuant to Section 6(f) of the Federal Trade

Commission Act, 38 Stat. 721, 15 U.S.C. 46 and Section 2.34 of the Commission's Rules of Practice (16 CFR 2.34), notice is hereby given that the following consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of sixty (60) days. Public comment is invited. Such comments or views will be considered by the Commission and will be available for inspection and copying at its principal office in accordance with Section 4.9(b)(6)(ii) of the Commission's Rules of Practice (16 CFR 4.9(b)(6)(ii)).

**Agreement Containing Consent Order to Cease and Desist**

In the Matter of Zygon International, Inc., a corporation, and Dane Spotts, individually and as an officer of said corporation.

The Federal Trade Commission having initiated an investigation of certain acts and practices of Zygon International, Inc., a corporation, and Dane Spotts, individually and as an officer of said corporation ("proposed respondents"), and it now appearing that proposed respondents are willing to enter into an agreement containing an order to cease and desist from the use of the acts and practices being investigated,

It is hereby agreed by and between Zygon International, Inc., by its duly authorized officer, and Dane Spotts, individually and as an officer of said corporation, and their attorney, and counsel for the Federal Trade Commission that:

1. Proposed respondent Zygon International, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Washington, with its principal office of place of business at 18368 Redmond Way, Redmond WA 98052.

Proposed respondent Dane Spotts is an officer of said corporation. He formulates, directs and controls the policies, acts and practices of said corporation and his address is the same as that of said corporation.

2. Proposed respondents admit all the jurisdictional facts set forth in the draft of complaint.

3. Proposed respondents waive:

- (a) Any further procedural steps;
- (b) The requirement that the Commission's decision contain a statement of findings of fact and conclusions of law; and
- (c) All rights to seek judicial review or otherwise to challenge or contest the validity of the order entered pursuant to this agreement.

4. This agreement shall not become part of the public record of the proceeding unless and until it is accepted by the Commission. If this agreement is accepted by the Commission, it, together with the draft of complaint contemplated thereby, will be placed on the public record for a period of sixty (60) days and information in respect thereto publicly released.

The Commission thereafter may either withdraw its acceptance of this agreement and so notify the proposed respondents, in which event it will take such action as it may consider appropriate, or issue and serve its complaint (in such form as the circumstances may require) and decision, in disposition of the proceeding.

5. This agreement is for settlement purposes only and does not constitute an admission by proposed respondents that the law has been violated as alleged in the draft of complaint or that the facts as alleged in the draft of complaint other than the jurisdictional facts, are true.

6. This agreement contemplates that, if it is accepted by the Commission, and if such acceptance is not subsequently withdrawn by the Commission pursuant to the provisions of Section 2.34 of the Commission's Rules, the Commission may, without further notice to proposed respondents, (1) issue its complaint corresponding in form and substance with the draft of complaint and its decision containing the following order to cease and desist in disposition of the proceeding and (2) make information public in respect thereto. When so entered, the order to cease and desist shall have the same force and effect and may be altered, modified, or set aside in the same manner and within the same time provided by statute for other orders. The order shall become final upon service. Delivery by the U.S. Postal Service of the complaint and decision containing the agreed-to-order to proposed respondents' address as stated in this agreement shall constitute service. Proposed respondents waive any right they may have to any other manner of service. The complaint may be used in construing the terms of the order, and no agreement, understanding, representation, or interpretation not contained in the order or the agreement may be used to vary or contradict the terms of the order.

7. Proposed respondents have read the proposed complaint and order contemplated hereby. They understand that once the order has been issued, they will be required to file one or more compliance reports showing that they have fully complied with the order.

Proposed respondents further understand that they may be liable for civil penalties in the amount provided by law for each violation of the order after it becomes final.

#### Order

##### I.

*It is ordered* That respondents Zygon International, Inc., a corporation, its successors and assigns, and its officers, and Dane Spotts, individually and as an officer of said corporation, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labeling, advertising, 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 the use of such product or program can or will have any effect on the user's:

A. Health or bodily structure or function, including but not limited to sleep; weight, bodyfat content, or body shape or tone; immune system; eyesight or night vision; stress; or jet lag; or

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

##### II.

*It is further ordered* That respondents Zygon International, Inc., a corporation, its successors and assigns, and its officers, and Dane Spotts, individually and as an officer of said corporation, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labeling, advertising, 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 the use of such product or program

can or will have any effect on the user's cognitive or mental functions or skills, including but not limited to reading, vocabulary, learning, foreign language, verbal or math skills; intelligence or I.Q. or that of the user's children; attention or concentration levels; or memory, unless at the time of making such representation, respondents possess and rely upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates such representation.

##### III.

*It is further ordered* That respondents Zygon International, Inc., a corporation, its successors and assigns, and its officers, and Dane Spotts, individually and as an officer of said corporation, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labeling, advertising, 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 making any representation, in any manner, directly or by implication:

A. Regarding the performance, benefits, efficacy, or safety of any food, drug, or device, as those terms are defined in Section 15 of the Federal Trade Commission Act, 15 U.S.C. 55, or dietary supplement, unless, at the time of making such representation, respondents possess and rely upon competent and reliable scientific evidence that substantiates such representation.

B. Regarding the performance, benefits, efficacy or safety of any product or service (other than a product or service covered under Part III.A herein), unless, at the time of making such representation, respondents possess and rely upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates such representation.

##### IV.

*It is further ordered* That respondents Zygon International, Inc., a corporation, its successors and assigns, and its officers, and Dane Spotts, individually and as an officer of said corporation, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labeling, advertising, 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, directly or by implication, the existence, contents, validity, results, conclusions, or interpretations of any test or study.

##### V.

*It is further ordered* That respondents Zygon International, Inc., a corporation, its successors and assigns, and its officers, and Dane Spotts, individually and as an officer of said corporation, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labeling, advertising, 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, shall 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 Part V.B herein;

B. 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 the consumer complies with the conditions for receiving a refund that are stated clearly and prominently in the advertisement or solicitation. For purposes of this Part, a "reasonable period of time" shall be:

1. That period of time specified in respondents' advertisement or solicitation if such period is clearly and prominently disclosed in the advertisement or solicitation; or

2. If no period of time is clearly and prominently disclosed in the advertisement or solicitation, a period of thirty (30) days following the date that the consumer complies with the conditions for receiving a refund that are stated clearly and prominently in the advertisement or solicitation.

##### VI.

*It is further ordered* That respondents Zygon International, Inc., a corporation, its successors and assigns, and its officers, and Dane Spotts, individually and as an officer of said corporation, are jointly and severally liable for consumer redress as provided herein:

A. Not later than the date this Order becomes final, respondents shall deposit into an escrow account to be established

by the Commission for the purpose of receiving payments due under the provisions of this Order ("first escrow account"), the sum of \$150,000. These funds, together with accrued interest, less any amount necessary to pay the costs of administering the first escrow account and redress program herein, shall be used by the Commission or its representative to provide refunds to any consumers:

1. Who, between the dates of October 15, 1995, and the date this Order becomes final, have returned or return any product(s) purchased from respondents to respondents for a refund within thirty days of their receipt of the product(s); and

2. Who have not previously received either a full refund or a full credit from a credit card issuer for the purchase of the product(s).

B. Any funds remaining in the first escrow account after refunds have been paid to consumers under Part VI.A herein, in the discretion of the Commission:

1. Shall be used to provide redress to purchasers of the Learning Machine who request a refund not later than sixty (60) days after the date this Order becomes final and have not previously received either a refund pursuant to Part VI.A herein, a full refund from respondents, or a full credit from a credit card issuer for the purchase of the product(s);

2. Shall be used to provide redress to purchasers who, prior to October 15, 1995, returned, or contacted respondents for authorization to return, any product(s) purchased from respondents to respondents for a refund within thirty (30) days of their receipt of the product(s); have not previously received either a full refund or a full credit from a credit card issuer for the purchase of the product(s); and whose identities become known to respondents or the Commission within sixty (60) days after the date this Order becomes final;

3. Shall be used to pay any attendant costs of administration; and/or

4. Shall be paid to the United States Treasury.

C. At any time after this Order becomes final, the Commission may direct the escrow agent to transfer funds from the first escrow account, including accrued interest, to the Commission to be distributed as herein provided. Respondents shall be notified as to how the funds are distributed, but shall have no right to contest the manner of distribution chosen by the Commission, *provided that* the manner of distribution chosen by the Commission comports with the terms of this Agreement. The

Commission, or its representative, shall in its sole discretion select the escrow agent. Costs associated with the administration of the first escrow account and refund program provided herein, if any, shall be paid from funds in the first escrow account.

D. Respondents relinquish all dominion, control and title to the funds paid into the first escrow account, and all legal and equitable title to the funds shall vest in the Treasurer of the United States and in the designated purchasers. Respondents shall make no claim to or demand for the return of the funds, directly or indirectly, through counsel or otherwise; and in the event of bankruptcy of respondents, respondents acknowledge that the funds are not part of the debtor's estate, nor does the estate have any claim or interest therein.

E. Not later than the date this Order becomes final, respondents shall deposit into a second escrow account to be established by the Commission for the purpose of receiving payments due under the provisions of this Order ("second escrow account"), the sum of \$45,000. These funds, together with accrued interest, less any amount necessary to pay the costs of administering the escrow account and redress program herein, shall be used by the Commission or its representative to provide refunds to consumers if refunds owed to consumers pursuant to Parts VI.A. and VI.B herein exceed the amount of money in the first escrow account.

F. At any time after this Order becomes final, the Commission may direct the escrow agent to transfer funds from the second escrow account, including accrued interest, to the Commission to be distributed as herein provided. Respondents shall be notified as to how the funds are distributed, but shall have no right to contest the manner of distribution chosen by the Commission, *provided that* the manner of distribution chosen by the Commission comports with the terms of this Agreement. The Commission, or its representative, shall in its sole discretion select the escrow agent. Costs associated with the administration of the second escrow account and refund program provided herein, if any, shall be paid from funds in the second escrow account. Any funds remaining in the second escrow account after all consumers have received refunds pursuant to Part VI.A, VI.B.1, VI.B.2, and VI.E herein shall be returned to respondents. If no funds from the second escrow account are needed to provide redress to consumers provided herein, the funds in the second escrow account, together with accrued interest,

shall be returned to respondents within seventy-five (75) days after the date this Order becomes final. If funds from the second escrow account are needed to provide refunds to consumers as provided herein, the funds remaining in the second escrow account, together with accrued interest, less any amount necessary to pay the costs of administering the escrow account and redress program herein, shall be returned to respondents within one hundred twenty (120) days after the date this Order becomes final.

#### VII.

*It is further ordered* That within three (3) days after the date this Order becomes final, respondents shall, to the extent available, provide to the Commission, in computer readable form (standard MS-DOS diskettes or IBM-mainframe compatible tape) and in computer print-out form, a list of:

A. The name and address of all consumers in the United States who purchased the Learning Machine;

B. The name, address, and date of refund of all consumers in the United States who purchased the Learning Machine and received a full refund from respondents;

C. The name, address, and date of credit of all consumers in the United States who purchased the Learning Machine and received a full credit from a credit card issuer for the purchase of the product(s); and

D. The name, address, and date of refund of all consumers in the United States who purchased any product(s) from respondents and received a full refund between October 15, 1993 and October 15, 1995.

#### VIII.

*It is further ordered* That for three (3) years after this Order becomes final, respondents, and their successors and assigns, shall maintain and upon request make available to the Commission within three (3) business days:

A. Documents and records demonstrating the manner and form of respondents' compliance with Part VI of this Order; and

B. Copies of all correspondence and memorialization of other communications to or from any consumer regarding refunds or requests for refunds for any product(s) purchased from respondents.

#### IX.

*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 upon which respondents relied for such representation, including but not limited to, including complaints from consumers, and complaints or inquiries from government organizations.

X.

*It is further ordered* That respondent Zygon International, Inc., its successors and assigns, shall:

A. Within thirty (30) days after service of this Order, provide a copy of this Order to each of its 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 entry of this Order, provide a copy of this Order to each of its 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 within three (3) days after the person commences his or her responsibilities.

XI.

*It is further ordered* That respondent Zygon International, Inc., its successors and assigns, shall notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in its corporate structure, 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 change in the corporation that may affect compliance obligations arising out of this Order.

*It is further ordered* That respondent Dane Spotts shall, for a period of seven (7) years from the date of entry 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 involving the advertising, offering for sale, sale, or distribution of any consumer product or service. Each notice of affiliation with

any new business or employment shall include the 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.

XIII.

This order will terminate twenty (20) years from the date of its issuance, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the Order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any paragraph in this Order that terminates in less than twenty years;

B. This Order's application to any respondent that is not named as a defendant in such complaint; and

C. This Order if such complaint is filed after the Order has terminated pursuant to this paragraph.

Provided further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the Order, and the dismissal or ruling is either not appealed or upheld on appeal, then the Order will terminate according to this paragraph as though the complaint was never filed, except that the Order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

XIV.

*It is further ordered* that 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.

#### *Escrow Agreement*

Whereas Zygon International, Inc. and Dane Spotts ("Zygon and Mr. Spotts") have agreed with the staff of the Federal Trade Commission ("the staff") to settle a certain proposed action against them, and as part of the settlement of the proposed action for alleged violations of Sections 5(a) and 12 of the Federal Trade Commission Act, it was agreed that consumer redress will be paid;

Whereas the proposed Agreement Containing Consent Order to Cease and Desist executed by the parties provides for the payment by Zygon and Mr.

Spotts of: (a) a minimum of \$150,000 to be used for consumer redress or as otherwise specified in the Agreement Containing Consent Order to Cease and Desist; and (b) should the amount necessary for consumer redress exceed \$150,000, up to an additional \$45,000 to be used for consumer redress or as otherwise specified in the Agreement Containing Consent Order to Cease and Desist;

Whereas the staff requires as a condition of its recommendation of the proposed settlement to the Commission that \$150,000 be held in escrow ("first escrow") and \$45,000 be held in a separate escrow ("second escrow"), pending approval of the settlement by the Commission, before being disbursed as directed by the terms of the Agreement Containing Consent Order to Cease and Desist;

Now, therefore, in consideration of the promises and mutual covenants, agreements, and conditions herein contained, Zygon and Mr. Spotts and the staff do hereby agree to and with each other as follows:

1. The Federal Trade Commission shall select the Escrow Agent for the first escrow account. The Escrow Agent shall receive from Zygon and Mr. Spotts the amount of \$150,000, and will hold the same in trust for designated purchasers of products sold by Zygon and Mr. Spotts ("designated purchasers"), in accordance with the Agreement Containing Consent Order to Cease and Desist, for paying any attendant costs of administration, and for the Treasurer of the United States, by depositing the same into the Escrow Agent's interest-bearing trustee account. Zygon and Mr. Spotts will pay such \$150,000 by a certified or cashier's check or cash.

2. It is understood and agreed by the parties to this Escrow Agreement that, by executing this Escrow Agreement, Zygon and Mr. Spotts acknowledge that they relinquish all dominion, control and title to the \$150,000, and that all legal and equitable title to the \$150,000 vests in designated purchasers, in accordance with the Agreement Containing Consent Order to Cease and Desist, with remaining funds, after the payment of any attendant costs of administration, vesting in the Treasurer of the United States, subject to being divested as specified in Paragraph 7 of this Escrow Agreement. Unless and until the first escrow is terminated as provided herein, Zygon and Mr. Spotts agree to make no claim to or demand the return of the \$150,000, directly or indirectly, through counsel, or otherwise. In the event of Zygon's and/or Mr. Spotts' bankruptcy, Zygon and

Mr. Spotts agree to acknowledge by an appropriate written statement to the bankruptcy court that the \$150,000 is not part of their estate(s), nor do their estate(s) have any claim or interest therein, unless and until the first escrow is terminated and the \$150,000 is returned to Zygon and Mr. Spotts as specified in Paragraph 7 of this Escrow Agreement.

3. The Federal Trade Commission shall select the Escrow Agent for the second escrow account. The Escrow Agent shall receive from Zygon and Mr. Spotts the amount of \$45,000, and will hold the same in trust for designated purchasers, in accordance with the Agreement Containing Consent Order to Cease and Desist, and for paying any attendant costs of administration, by depositing the same into the Escrow Agent's interest-bearing trustee account. Zygon and Mr. Spotts will pay such \$45,000 by a certified or cashier's check or cash.

4. It is understood and agreed by the parties to this Escrow Agreement that, by executing this Escrow Agreement, Zygon and Mr. Spotts acknowledge that they relinquish all dominion, control and title to that portion of the \$45,000 in the second escrow necessary to pay refunds to designated purchasers and any attendant costs of administration, and that all legal and equitable title to the portion of the \$45,000 reserved for those designated purchasers vests in those designated purchasers with remaining funds, after the payment of any attendant costs of administration, vesting in Zygon and Mr. Spotts, subject to being divested as specified in Paragraph 7 of this Escrow Agreement. If no funds in the second escrow account are required to provide redress to designated purchasers, the second escrow principal, together with any interest earned on the second escrow principal during the pendency of the second escrow, less any attendant costs of administration, shall be returned to Zygon and Mr. Spotts in accordance with the Agreement Containing Consent Order to Cease and Desist. If funds in the second escrow account are required to provide redress to designated purchasers, the remaining second escrow principal, together with any interest earned on the second escrow principal during the pendency of the second escrow, shall thereafter be returned to Zygon and Mr. Spotts, less any attendant costs of administration, in accordance with the Agreement Containing Consent Order to Cease and Desist. Unless and until the second escrow is terminated as provided herein, Zygon and Mr. Spotts agree to make no claim to or demand the return

of that portion of the \$45,000 required to pay designated purchasers, or that portion required for paying any attendant costs of administration, directly or indirectly, through counsel, or otherwise. In the event of Zygon's and/or Mr. Spotts' bankruptcy, Zygon and Mr. Spotts agree to acknowledge by an appropriate written statement to the bankruptcy court that the portion of the \$45,000 required to pay designated purchasers, or that portion required for paying any attendant costs of administration, is not part of their estate(s), nor do their estate(s) have any claim or interest therein, unless and until the second escrow is terminated and the \$45,000 is returned to Zygon and Mr. Spotts as specified in Paragraph 7 of this Escrow Agreement.

5. The \$150,000 so held in the first escrow and the \$45,000 so held in the second escrow shall be disbursed in accordance with the Agreement Containing Consent Order to Cease and Desist executed by the parties, as well as with such other ancillary Federal Trade Commission regulations or procedures respecting such disbursements as may be applicable at the time.

6. The first escrow and the second escrow shall be irrevocable, and the escrow funds, less any amount necessary to pay the cost of administering the escrow accounts and redress program, shall be used for no purpose other than payment of the consumer redress as specified in the Agreement Containing Consent Order to Cease and Desist, except that the unused portion of the second escrow principal, together with any interest earned on the second escrow principal during the pendency of the second escrow, shall be the property of Zygon and Mr. Spotts. The parties agree, however, that this fact is not and will not be interpreted as an admission or acknowledgment by either side that any dominion, title or interest, either legal or equitable, in the portion of the second escrow principal required to pay redress to designated purchasers, or to pay any attendant costs of administration, remains in Zygon and Mr. Spotts. The Escrow Agent shall return such unused portion of the second escrow principal, together with any interest earned on the second escrow principal during the pendency of the second escrow, to Zygon and Mr. Spotts after consumer redress is paid to the designated purchasers, and the attendant costs of administration are paid, as specified in the Agreement Containing Consent Order to Cease and Desist.

7. Except as otherwise provided in Paragraphs 4 and 6 of this Escrow

Agreement regarding the return of the unused portion of the second escrow principal and any interest earned on the second escrow principal during the pendency of the second escrow to Zygon and Mr. Spotts, the Escrow Agent may terminate the first and second escrows and return the principal and accrued interest from both escrow accounts to Zygon and Mr. Spotts only if the Agreement Containing Consent Order to Cease and Desist is not issued within two (2) years from the date the first and second escrows are created.

8. The parties of this Escrow Agreement expressly agree that in the event of a dispute, the escrow law of the State of New York shall apply.

#### *Analysis of Proposed Consent Order to Aid Public Comment*

The Federal Trade Commission has accepted an agreement to a proposed consent order from Zygon International, Inc. ("Zygon"), and its owner and officer, Dane Spotts.

The proposed consent order has been placed on the public record for sixty (60) days for reception of comments by interested persons. Comments received during this period will become part of the public record. After sixty (60) days, the Commission will again review the agreement and the comments received and will decide whether it should withdraw from the agreement or make final the agreement's proposed order.

The Commission's complaint in this matter charges respondents with deceptively advertising five products: the "Learning Machine" and the "SuperMind," purported accelerated learning devices; the "SuperBrain Nutrient Program," a supplement claimed to improve intelligence and memory; "Fat Burner" pills, a purported diet aid; and "Day and Night Eyes" pills, a supplement claimed to improve vision. The complaint also alleges that in many cases, respondents failed to honor their advertised money-back guarantee. Ads for the products appeared in national periodicals such as USA Today, Omni, Longevity, and USAir's in-flight magazine, as well as in Zygon's "SuperLife" catalog and on the Internet's World Wide Web.

According to the complaint, respondents made unsubstantiated representations that the Learning Machine enables users to learn foreign languages overnight, quadruple their reading speed, lose weight, stop smoking, and improve their vocabulary, memory, math skills, and learning ability. In addition, respondents claimed that the device would enable children to learn at a rate of 300% to 500% faster than their peers.

The complaint also alleges that respondents made unsubstantiated representations that the SuperMind enables users to learn foreign languages overnight, lose weight, and stop smoking; treats stress and jet lag; improves the functioning of the immune system; increases I.Q.; gives users the equivalent of eight hours of sleep after twenty minutes of use; and improves users' ability to learn and retain information. The complaint further alleges that respondents falsely represented that the SuperMind has been proven in a university study to teach foreign languages in one-third the time of traditional methods.

In addition, the complaint alleges that respondents represented without substantiation that the SuperBrain Nutrient Program improves users' memory, intelligence, concentration, and cognitive and mental functions, and that when taken by pregnant women, will enhance the intelligence of their children. According to the complaint, respondent's claims that Fat Burner pills could enhance the body's ability to burn fat and enable users to lose weight were also unsubstantiated. Regarding Day and Night Eyes pills, the complaint alleges that respondents made unsubstantiated claims that the product could improve night blindness and give users clearer vision during the day.

The complaint also alleges that respondents misrepresented that consumers who returned products within thirty (30) days would receive a full refund within a reasonable period of time. According to the complaint, in numerous instances, refunds were not provided within a reasonable period of time or at all. These practices are alleged to be deceptive.

The proposed consent order contains provisions designed to remedy the violations charged and to prevent respondents from engaging in similar acts and practices in the future.

Part I of the order requires respondents to possess competent and reliable scientific evidence to support any claim that a product or program affects the user's health, bodily structure or function, or smoking behavior. Part II requires respondents to possess adequate substantiation for any claims that a product or program affects the user's cognitive or mental functions, including reading, vocabulary, learning, foreign languages, math skills, intelligence, I.Q., concentration levels, or memory. The substantiation level required is competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence.

Part III.A requires respondents to possess competent and reliable scientific evidence to substantiate performance, benefits, efficacy or safety claims for foods, drugs, devices, or dietary supplements. Part III.B requires that similar claims for all other products or services be supported by competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence.

Part IV prohibits respondents from misrepresenting the existence, contents, results, conclusions, or interpretations of any test or study. Part V requires respondents to honor the terms of any advertised refund policy, including an obligation to make refunds within a reasonable period of time.

Part VI outlines a program to give refunds totalling up to \$195,000 to eligible consumers. Refunds will be sent to Zygon customers who returned products for a refund between October 15, 1995 and the date the order becomes final, but never received a refund. Any remaining funds may be returned to purchasers of the Learning Machine who seek a refund from the Commission or respondents within sixty (60) days after the order is final, and to other purchasers who sought a refund prior to October 15, 1995, but never received it.

Parts VII through XII and XIV relate to respondents' obligations to make available to the Commission records concerning consumer refunds and future substantiation materials; to provide copies of the order to certain Zygon personnel; to notify the Commission of changes in corporate structure, or, in the case of the Mr. Spotts, changes in employment that would involve the advertising, sale, or distribution of any consumer product or service; and to file compliance reports with the Commission. Part XIII provides that the order will terminate after twenty years under certain circumstances.

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

Donald S. Clark,

Secretary.

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BILLING CODE 6750-01-M

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Office of the Secretary

#### Findings of Scientific Misconduct

**AGENCY:** Office of the Secretary, HHS.

**ACTION:** Notice.

**SUMMARY:** Notice is hereby given that the Office of Research Integrity (ORI) has made final findings of scientific misconduct in the following case:

*Jamal Z. Farooqui, Ph.D., University of Cincinnati College of Medicine (UCCM):* Based on an investigation conducted by the institution as well as information obtained by ORI during its oversight review, ORI found that Jamal Z. Farooqui, Ph.D., Research Associate Professor, Department of Dermatology at UCCM, committed scientific misconduct by plagiarizing material in a Public Health Service (PHS) grant application from an application another research as submitted to the National Science Foundation (NSF). Dr. Farooqui received the NSF application from another faculty member at UCCM while that application was undergoing confidential peer review. Dr. Farooqui included the plagiarized material in the "Prospective Significance" and "Methodology" sections of his application entitled "Proopimelanocortin expression in human epidermis," submitted to the National Institute of Arthritis and Musculoskeletal and Skin Diseases.

Dr. Farooqui has entered into a Voluntary Exclusion Agreement with ORI in which he has voluntarily agreed, for the three (3) year period beginning April 3, 1996:

(1) that he is required to certify in every PHS research application or report that all contributors to the application or report are properly cited or otherwise acknowledged, that an institutional official must endorse the certification, and that the institution must send a copy of the certification to ORI; and

(2) to exclude himself from serving in any advisory capacity to PHS, including but not limited to service on any PHS advisory committee, board, and/or peer review committee, or as a consultant.

No scientific publications were required to be corrected as part of this Agreement.

**FOR FURTHER INFORMATION CONTACT:**  
Director, Division of Research  
Investigations, Office of Research