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FEDERAL TRADE COMMISSION
WASHINGTON, D. C. 20580

BUREAU OF
CONSUMER PROTECTION

April 2, 1987

C.D. Lunsford
Georgia State Auditor's Office
210 Washington Street, Room 207
Atlanta, Georgia 30334

Dear Mr. Lunsford:

The staff of the Federal Trade Commission is pleased to respond to your invitation to participate in the 1987 sunset audits of the Georgia Boards of Dentistry, Optometry and Podiatry.[1]

In this letter we focus primarily on the statutory and rule provisions restricting advertising by dentists, optometrists and podiatrists. Advertising provides information about the individuals or firms offering services that consumers may wish to purchase. This advertising is beneficial to consumers because it facilitates informed purchase decisions and it promotes the efficient delivery of services. We therefore urge the Auditor's Office to seek the repeal of those laws that restrict the use of truthful, nondeceptive advertising. We also comment on other rules that unnecessarily restrict the manner and commercial form in which dentists and optometrists may practice. Such rules limit competition among professionals and tend to raise prices, and we therefore recommend that the Auditor seek their repeal as well.

I. Interest and Experience of the Federal Trade Commission

The Federal Trade Commission is empowered under 15 U.S.C. §§ 41 et seq. to prevent unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce. Under this statutory mandate the Commission encourages competition among members of licensed professions to the maximum extent compatible with other legitimate state and federal goals. For several years, the Commission staff has been investigating the competitive effects of restrictions on state-licensed

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[1] This letter represents the views of the FTC's Bureaus of Consumer Protection, Competition, and Economics, and not necessarily those of the Commission. The Commission has, however, voted to authorize submission of this letter.

We do not comment in this letter on rules governing any of the other regulatory boards listed in your invitation.

professionals, including optometrists, dentists, lawyers, and physicians. Our goal is to identify and seek the removal of restrictions that impede competition and increase costs without providing significant countervailing benefits to consumers.

II. Advertising Restrictions

The Commission, as a part of its efforts to foster competition among state-licensed professionals, has examined the effects of public and private restrictions that limit the ability of professionals to engage in nondeceptive advertising.[2] Empirical studies have shown that prices for professional goods and services are lower where advertising exists than where it is restricted or prohibited.[3] Empirical studies also indicate that,

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[2] See, e.g., American Medical Association, 94 F.T.C. 701 (1979), aff'd 638 F.2d 443 (2d Cir. 1980), aff'd mem. by an equally divided Court, 455 U.S. 676 (1982). The thrust of the AMA decision -- "that broad bans on advertising and soliciting are inconsistent with the nation's public policy" (94 F.T.C. at 1011) -- is consistent with the reasoning of recent Supreme Court decisions involving professional regulations. See, e.g., Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626 (1985) (holding that an attorney may not be disciplined for soliciting legal business through printed advertising containing truthful and nondeceptive information and regarding the legal rights of potential clients or for using nondeceptive illustrations or pictures); Bates v. State Bar of Arizona, 433 U.S. 350 (1977) (holding a state supreme court prohibition on advertising invalid under the First Amendment and according great importance to the role of advertising in the efficient functioning of the market for professional services); and Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976) (holding a Virginia prohibition on advertising by pharmacists invalid).

[3] Cleveland Regional Office and Bureau of Economics, Federal Trade Commission, Improving Consumer Access to Legal Services: The Case for Removing Restrictions on Truthful Advertising (1984); Bureau of Economics, Federal Trade Commission, Effects of Restrictions on Advertising and Commercial Practice in the Professions: The Case of Optometry (1980); Benham and Benham, Regulating Through the Professions: A Perspective on Information Control, 18 J.L. & Econ. 421 (1975); Benham, The Effects of Advertising on the Price of Eyeglasses, 15 J.L. & Econ. 337 (1972).

while restrictions on professional advertising raise prices, they do not increase the quality of goods and services available.[4]

We have examined various justifications that have been offered for restrictions on advertising and have concluded that they do not warrant restraints on truthful, nondeceptive advertising. We therefore believe that only false or deceptive advertising should be prohibited. Any other standard is likely to suppress the dissemination of potentially useful information and contribute to an increase in prices. Below we discuss instances in which restrictions on advertising appear unwarranted.

Advertising by Podiatrists

Section 43-35-9 of the Podiatry Practice Act provides that a podiatrist

> may advertise his practice to the public only by the listing of his name, professional title, address, telephone, and office hours on the doors and windows of his office, in letters not more than three inches square; on professional cards and stationery; and in the personal and classified sections of telephone directories.

This provision is clearly broader than necessary. It will result in consumer harm because it prohibits the dissemination of much useful information about the availability, nature, and prices of podiatric services.[5]

As the Supreme Court noted in striking down a blanket ban on truthful advertising by lawyers, advertising about goods and services "performs an indispensable role in the allocation of

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[4] Bureau of Economics, Federal Trade Commission, Effects of Restrictions on Advertising and Commercial Practice in the Professions: The Case of Optometry (1980); Muris and McChesney, Advertising and the Price and Quality of Legal Services: The Case for Legal Clinics, 1979 Am. B. Found. Research J. 179 (1979). See also Cady, Restricted Advertising and Competition: The Case of Retail Drugs (1976).

[5] The provision also forbids the use of print and broadcast media to convey any information about podiatric services. Such methods can be the most effective means of communicating useful information to consumers. This fact has been recognized by at least one federal court, which invalidated a state's statutory prohibitions on radio, television, print and billboard advertising by dentists. See Baker v. Registered Dentists of Oklahoma, 543 F. Supp. 1177 (W.D. Okla. 1982).

resources in a free enterprise system."[6] The lack of price advertising in particular "serves to increase the [consumer's] difficulty of discovering the lowest cost seller of acceptable ability. As a result . . . [professionals] are isolated from competition and the incentive to price competitively is reduced."[7] The absence of such information "serves to perpetuate the market position of established professionals."[8] The Federal Trade Commission has similarly noted that "restraints on the advertising of medical services . . . have a disproportionate effect on the poor, the sick, and the aged."[9] These decisions -- based in part on constitutional grounds -- and the empirical studies cited above call into question the wisdom of restricting nondeceptive advertising. We therefore urge the Auditor to recommend that this provision be amended to prohibit only false or deceptive advertising.

Price Advertising by Dentists

Board of Dentistry Rule 150-11-.02(2) limits permissible price advertising to the publication of fees for routine dental services, defined in rule 150-11-.02(3)(c) as services that are "performed frequently in the dentists' practice, [are] usually provided at a specific fee to substantially all patients receiving the service, and [are] provided with little or no variation in technique or materials." Consequently, this provision apparently prohibits the advertising of fee information for non-routine services, including, for example, fees for new or innovative techniques that are not yet widely used by practitioners. It could also be interpreted to preclude any advertisements that do not state specific prices but use such terms as "discount prices" or "low cost" to attract consumer attention and communicate a message effectively. We do not believe that there is anything inherently deceptive about such advertising. To the contrary, the advertising of any price information can be of great benefit to consumers. We therefore suggest that the Auditor recommend the modification of this provision to allow any nondeceptive fee advertising.

Quality and Superiority Claims

Section 43-11-47(15) of the Dentistry Practice Act prohibits dentists from making "any statement in advertising concerning the

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6 Bates v. State Bar of Arizona, 433 U.S. 350, 364 (1977).

7 Id. at 377.

8 Id. at 378.

9 American Medical Association, 94 F.T.C. 701, 1011, citing Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U. S. 748, 763 (1976).

quality of the dental services rendered by that dentist or any dentist associated with him," whether truthful or not. The Optometry Practice Act contains in Section 43-30-9 the same restraint on optometric advertising. In addition, Rules 150-11-.02(6)(a), (6)(c) and (6)(d) promulgated by the Board of Dentistry respectively forbid advertisements claiming "superiority of a particular method of treatment, material, drug or appliance," the use in advertising of such terms as "quality dentistry" and "skilled dentists," and claims of superior facilities, including such statements as "scientifically equipped office," "modern methods," and "latest modern equipment."

We urge the Auditor to recommend elimination of these provisions. Bans on quality and superiority claims clearly lessen competition among sellers. They restrict many forms of comparative advertising, which can be a highly effective means of informing and attracting customers. When sellers cannot truthfully compare the attributes of their services to those of their competitors, their incentive to improve or offer different products, services, or prices is likely to be reduced.

Bans on claims of superiority are particularly likely to injure competition and consumers when they are interpreted to prohibit a wide range of factual statements. For example, virtually all statements about a practitioner's qualifications, experience, or performance can be considered to be implicit claims of quality or superiority. Bans on all such claims would make it very difficult for dentists and optometrists to provide consumers with truthful information about the differences between their services and those of their competitors.

Specialization Claims

Board of Dentistry Rule 150-11-.02(6)(b) forbids statements in advertising that a dentist

> is a specialist or specializes in any branch of dentistry, unless that specialty is recognized by the Georgia Board of Dentistry and the dentist has met the existing educational requirements and standards for that recognized specialty.

We have two concerns about this provision. First, it inhibits truthful claims about special training or experience by dentists who have not obtained formal certification; and second, it prevents truthful claims about such expertise in areas not recognized by the Board as specialties.[10]

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[10] We take no position on the appropriateness of the state establishing areas of specialization generally, or on the appropriateness of the eight dental specialties the Board has recognized.

We believe it is important that a general dentist with expertise or experience in specific areas, whether certified or not, be allowed to communicate that expertise or experience to the public. In our view, only specialization claims that are deceptive need be prohibited. Such a rule would leave dentists free to make truthful, nondeceptive claims that they concentrate in a particular field of dentistry, that their practice is limited to a particular area, or otherwise advertise their expertise in a particular field of dentistry.[11]

The rule also restricts dentists to announcing only the eight areas of specialization approved by the Board and set forth in Rule 150-11-.01. It therefore prevents dentists who may be experts in areas other than the specified eight from advertising that fact. This limitation unnecessarily restricts the flow of relevant, truthful information that is likely to help consumers locate providers they need.[12]

For these reasons, we urge the Auditor to recommend eliminating Board of Dentistry Rule 150-11-.02(6)(b).

Vague and Subjective Standards

Rule 430-4-.01(2)(d) of the Board of Examiners in Optometry deems unprofessional conduct to include the advertising of "improbable statements or flamboyant or extravagant claims concerning the [optometrist's] skills which are likely to deceive the public."

This rule appears to be intended to proscribe deception. However, the rule may also inhibit nondeceptive advertising. It includes vague criteria susceptible to subjective interpretations that may have little to do with the truth or falsity of particular statements in advertisements. Such standards may be overbroad and may serve to chill the communication of nondeceptive information.

The provision may also be construed to inhibit the use of innovative advertising and marketing techniques commonly used by providers of other goods and services. Techniques used to make claims about an optometrist's skills may be characterized as "flamboyant" or "extravagant" and yet not be deceptive. They can be very useful to advertisers to attract and hold consumers'

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[11] If interpreted broadly, Rule 150-11-.02(6)(b) could prohibit announcements of practice limitation that use such terms as "practice limited to," or "practice concentrates in" a particular field. Such claims are not likely to give rise to public misunderstanding concerning certification or expertise, but can be extremely useful to consumers in selecting a provider.

[12] See In re R.M.J., 455 U.S. 191, 205 (1982).

attention. They can therefore help to communicate messages more effectively to consumers, and their prohibition may result in higher costs and less frequent advertising. Moreover, deceptive claims about an optometrist's skills would be covered under § 43-30-9 of the Optometry Practice Act, which bans any fraudulent or deceptive statements in advertising. We therefore suggest that the Auditor recommend the repeal of this provision.

Disclosure Obligations

Board of Dentistry Rule 150-11-.02(4)(a) and Board of Optometry Rules 430-6-.01(3)(a) and (3)(d) contain provisions requiring certain disclosures in price advertisements. The dentistry rule requires that "range of fee" advertising for a routine dental service, including use of such terms as "from," "as low as," or "starting at," must disclose the minimum and maximum fees. The optometry rules require that all price advertisements for eyeglasses or contact lenses include: (1) a statement of whether or not the cost of an eye examination is included in the price; and (2) a "complete description of optical goods and services included in that price and any extra charges that may be required to serve the consumer's health and visual needs."

Any disclosure obligation increases advertising cost, either because it increases the length of the message or requires practitioners to forego some portion of the advertising message they would have delivered had the space not been taken by the disclosure. Unnecessary disclosure requirements could therefore result in less information being made available to consumers. Consequently, we believe that disclosures should be mandated only where they are necessary to prevent deception.

The last disclosure requirement noted above is particularly troubling because it could be interpreted to require detailed and lengthy disclosures that are not necessary to prevent deception but that impose extra costs on optometric advertisers. Further, the vague language of the provision is likely to chill legitimate price advertising because potential advertisers may be unsure of its meaning and scope.

For these reasons, we suggest that the Auditor consider recommending the removal of these provisions.

Trade Names

Section 43-11-18 of the Dentistry Practice Act requires that all promotions for dental firms include the names "of each individual practicing in such place." Similarly, Board of Optometry Rule 430-4-.01(2)(f)1. requires that optometric trade name advertising include "the name of the doctor of optometry currently practicing at the location advertised who will provide [the optometric services]."

These provisions appear to inhibit advertising by dental and optometric group practices or chain firms unnecessarily. Because such practices may have large numbers of dentists or optometrists, they would face burdensome advertising costs as a result of the requirement to list in promotions every dentist or optometrist associated with the practice at the advertised location(s). The rule could make national or regional advertisements by such firms impractical. We recognize the necessity of ensuring identification and accountability of individual practitioners. However, this goal could be accomplished through several methods less burdensome than the ones in these provisions. For example, the Dental Practice Act or Board of Optometry rule could require that the names of individual practitioners be conspicuously posted in the reception area of dental and optometric offices or noted on bills, receipts and patient records.

In addition, Section 43-11-18 appears to be inconsistent with section 43-11-47(8) of the Dental Practice Act, which specifically permits dentists to use approved trade names. At a minimum, one presumed purpose of section 43-11-47(8) -- to allow dentists associated with high-volume practices to establish a business identity in their community, as other businesses do -- would be frustrated by the need to list the names of all dentists in a practice every time their trade name is used to announce the availability of dental services.

For these reasons, we urge the Auditor to recommend repeal of these provisions.

Fee-Splitting for Solicitation and Referrals

Board of Optometry Rule 430-4-.01(2)(o) prohibits optometrists from dividing or splitting fees with any nonoptometrist for "soliciting, referring or bringing a patient." This provision appears unnecessarily to preclude optometrists from engaging in a variety of legitimate promotional activities that can be useful to consumers in locating and selecting suitable practitioners. We therefore urge the Auditor to seek the repeal of this provision.

For example, the rule prevents optometrists from participating in legitimate referral services that charge a fee for participation. Such services refer prospective patients to one or more providers based on the stated needs of the patients and the qualifications or prices of the providers, and may thus be valuable in helping consumers locate appropriate optometric care. By facilitating the gathering of information by consumers, referral services may increase competition among health care professionals.

In addition, this provision may interfere both with certain franchise arrangements whereby providers pay a percentage of their fees to a franchisor in return for marketing, advertising

services, and the use of a trade name, and with lease arrangements wherein rent is based on a percent of gross revenues. As we discuss in Section III. below, such practice arrangements may help to lower the cost of optometric services, and do not pose any inherent danger of reducing the quality of services provided.

Finally, the rule could be interpreted to prohibit optometrists from hiring third parties such as advertising agencies or public relations firms to assist in marketing vision care services and products. Restrictions that prohibit all third-party solicitation, including solicitation in situations where there is little or no risk of coercion, harassment, or similar abuses, unnecessarily restrict the dissemination of truthful information about and inhibit the sale of vision care services and goods to willing and competent purchasers. Similarly, restrictions that permit only licensed optometrists to engage in solicitation unnecessarily limit the dissemination of information about their services that is beneficial to consumers and for which the presence of an optometrist is not required.

III. Commercial Practice Restrictions

Section 43-11-47(7) of the Dental Practice Act prohibits dentists from practicing as an employee of a lay corporation. Similarly, Board of Optometry Rules 430-4-.01(2)(r), (s) and (t) apparently operate to preclude such practice by optometrists as well as other business associations between optometrists and lay entities.[13]

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[13] These rules prohibit optometrists from:

(r) Placing his license at the disposal or in the service or control of any person, firm, association or corporation not licensed to practice optometry in this state.

(s) Entering into any agreement that allows an unlicensed person, firm, association, or corporation to control or attempt to control the professional judgment, the manner of practice, or the practice of a doctor of optometry. For purposes of this section, "control or attempt to control the professional judgment, the manner of practice, or the practice of the doctor of optometry" shall include but not be limited to:

1. setting or attempting to influence the professional fees of a doctor of optometry;

2. restricting or attempting to restrict a doctor of optometry's freedom to see patients on an appointment basis . . . .

(t) It is the intent of subsection (s) to prevent
(footnote continued)

These provisions unnecessarily hamper dentists and optometrists who wish to market their services in a cost-efficient manner, and we therefore urge their removal.[14] The bans on corporate employment and on entering agreements under which a lay entity may exercise supervisory functions hinder dentists and optometrists from locating their practices inside larger retail stores. In these locations, practitioners can establish and maintain a high volume of patients because of the convenience of the location and a high number of "walk-in" patients. In addition, optometrists may be precluded from association with retail optical firms where they can see a high volume of patients because of the "one-stop shopping" that such

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manufacturers, wholesalers, or retailers of optical goods from controlling or attempting to control the professional judgment, manner of practice or the practice of a doctor of optometry, and the provisions of this section shall be liberally construed to carry out this intent.

[14] On January 4, 1985, the Commission proposed an Ophthalmic Practices Trade Regulation Rule ("Eyeglasses II") that would prohibit state-imposed bans on locating in retail centers, bans on employment or other business relationships between optometrists and nonoptometrists, bans on nondeceptive trade names, and bans on branch offices. The Commission stated in its Notice of Proposed Rulemaking that public restraints on the permissible forms of ophthalmic practice appear to increase consumer prices for ophthalmic goods and services, but do not appear to protect the public health or safety. See 50 Fed. Reg. 598, 599-600 (1985).

The Commission staff has recently published its report on the proposed rule. The staff concluded that "the rulemaking record demonstrates that these restrictions raise prices to consumers and, by reducing the frequency with which consumers obtain vision care, decrease the quality of care in the market." The staff also concluded that the restrictions provide no quality-related benefits to consumers. The staff therefore recommended that the Commission promulgate a trade regulation rule prohibiting these restrictions. Bureau of Consumer Protection, Federal Trade Commission, Ophthalmic Practice Rules: State Restrictions on Commercial Practice (1986).

While the Presiding Officer also found that commercial practice restrictions raise prices to consumers and limit access to eyecare, he did not believe that the evidence cited in the two Commission studies, discussed infra at 10-11, provided an adequate basis upon which conclusions about the quality of care issue could be drawn. Federal Trade Commission, Report of the Presiding Officer on Proposed Trade Regulation Rule: Ophthalmic Practice Rules (1986). Both the staff and Presiding Officer reports will shortly be under review by the Commission.

firms could offer. This high volume may, in turn, allow dentists and optometrists to realize economies of scale that may be passed on to consumers in the form of lower prices. In addition, these restraints may limit the sources of equity capital for professional practices, which may increase the cost of obtaining capital and further hinder the development of high-volume practices that may be able to reduce costs through economies of scale.

The Federal Trade Commission considered the effects of restrictions on associations between professionals and nonprofessionals in American Medical Association.[15] There the Commission examined the AMA rules prohibiting physicians from working on a salaried basis with hospitals or other lay entities, and from entering into partnerships or similar business arrangements with nonphysicians. The Commission concluded that those restrictions unreasonably restrained competition and thereby violated the antitrust laws. It reasoned that the AMA's restrictions kept physicians from adopting more economically efficient business formats and that, in particular, those restrictions precluded competition from organizations not directly and completely under the control of physicians. The Commission also found no countervailing procompetitive justifications for the restraints.

Commercial practice restrictions such as those in Georgia are frequently defended on the grounds that they help to maintain a high level of quality in the professional services market. Proponents claim, for example, that business relationships between professionals and nonprofessionals are undesirable because they permit lay interference with the professional judgment of licensees. They also allege that, while lay firms might offer lower prices, such firms might also encourage their professional employees to cut corners to maintain profits.

The available evidence, including comprehensive survey evidence in the optometry field, contradicts the contentions of commercial practice opponents. Two empirical studies conducted by the staff of the Federal Trade Commission indicate that restrictions on commercial practice, including restraints on corporate employment and other business associations between professionals and lay entities, may in fact harm consumers by increasing prices without providing any quality-related benefits.[16]

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[15] 94 F.T.C. 701 (1979).

[16] Although these studies deal specifically with restrictions on optometric practice, the results may be applicable to analogous restrictions in other areas, such as dentistry.

The first study,[17] conducted with the help of two colleges of optometry and the chief optometrist of the Veterans Administration, compared the price and quality of eye examinations and eyeglasses provided by optometrists in markets with a variety of regulatory environments. The study found that eye examinations and eyeglasses cost significantly more in markets where business associations between professionals and lay entities are prohibited than in markets where they are allowed. The study data showed that prices were almost 18% higher in the restricted markets.

The study also provided evidence that restrictions on commercial practice do not result in higher quality eye care. The thoroughness of eye exams, the accuracy of eyeglass prescriptions, the accuracy and workmanship of eyeglasses, and the extent of unnecessary prescribing were, on average, the same in restrictive and nonrestrictive markets.

A second study[18] of cosmetic contact lens fitting concluded that, on average, "commercial" optometrists -- that is, for example, optometrists who were associated with chain optical firms, used trade names, or practiced in commercial locations -- fitted cosmetic contact lenses at least as well as other fitters, but charged significantly lower prices.

Other evidence, including survey evidence, indicates that state restrictions on commercial practice may actually decrease the quality of care in the market by decreasing the frequency with which consumers obtain care. As a result of the higher prices associated with the restrictions, consumers tend to purchase eyecare less frequently and may even forego care altogether.[19]

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[17] Bureau of Economics, Federal Trade Commission, Effects of Restrictions on Advertising and Commercial Practice in the Professions: The Case of Optometry (1980).

[18] Bureaus of Consumer Protection and Economics, Federal Trade Commission, A Comparative Analysis of Cosmetic Contact Lens Fitting by Ophthalmologists, Optometrists and Opticians (1983). This study was designed and conducted with the assistance of the major national professional associations representing ophthalmology, optometry and opticianry. Its findings are based on examinations and interviews of more than 500 contact lens wearers in 18 urban areas.

[19] Public Health Service, Eyeglasses and Contact Lenses: Purchases, Expenditures, and Sources of Payment, National Health Care Expenditures Study 4 (1979); Benham and Benham, Regulating through the Professions: A Perspective on Information Control, 18 J.L. & Econ. 421, 438 (1975); Kernan, U.S. Health Profile, Washington Post, Apr. 26, 1979, at p. C-1, col. 4.

IV. Conclusion

In sum, restrictions on truthful, nondeceptive advertising and on the forms of commercial practice harm consumers. Such restrictions raise prices above the levels that would otherwise prevail, decrease the quality of care, and fail to provide any consumer benefits. We recommend, therefore, that the Auditor seek to repeal or amend the rules discussed above to remove unnecessary constraints on innovative forms of dental and optometric practice and advertising by dentists, optometrists and podiatrists.

Thank you for inviting our comments. If you would like to have copies of any studies or other materials referred to in this letter, we would be happy to supply them.

Sincerely yours,

William MacLeod
Director