

FEDERAL TRADE COMMISSION DECISIONS

FINDINGS, OPINIONS AND ORDERS
JULY 1, 1994 TO DECEMBER 31, 1994

PUBLISHED BY THE COMMISSION

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MEMBERS OF THE FEDERAL TRADE COMMISSION

DURING THE PERIOD JULY 1, 1994 TO DECEMBER 31, 1994

JANET D. STEIGER, *Chairman*

Took oath of office August 11, 1989.

MARY L. AZCUENAGA, *Commissioner*

Took oath of office November 27, 1984

DEBORAH K. OWEN, *Commissioner**

Took oath of office October 25, 1989.

ROSCOE B. STAREK, III, *Commissioner*

Took oath of office November 14, 1990.

DENNIS A. YAO, *Commissioner***

Took oath of office July 16, 1991.

CHRISTINE A. VARNEY, *Commissioner*

Took oath of office October 14, 1994.

DONALD S. CLARK, *Secretary*

Appointed August 28, 1988.

* Resigned, effective September 25, 1994.

** Resigned, effective September 1, 1994.

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FEDERAL TRADE COMMISSION DECISIONS

Findings, Opinions, and Orders

IN THE MATTER OF

AMERICA'S FAVORITE CHICKEN COMPANY

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

Docket C-3504. Complaint, July 5, 1994--Decision, July 5, 1994

This consent order prohibits, among other things, a Georgia-based fast-food corporation from misrepresenting the extent to which any product or package is capable of being recycled, or the extent to which recycling collection programs are available for such products, and from making claims about any environmental benefit of its products or packaging unless it possesses competent and reliable scientific evidence to substantiate the claims.

Appearances

For the Commission: *C. Steven Baker* and *Catherine R. Fuller*.

For the respondent: *Jane B. Long*, in-house counsel, Atlanta, GA.

COMPLAINT

The Federal Trade Commission, having reason to believe that America's Favorite Chicken Company, a corporation ("respondent"), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

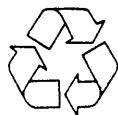
PARAGRAPH 1. Respondent America's Favorite Chicken Company ("A.F.C."), is a Minnesota corporation with its principal office or place of business at Six Concourse Parkway, Suite 1700, Atlanta, Georgia.

PAR. 2. Respondent has offered for sale, sold, advertised, labeled and distributed food products that are contained in disposable paper packaging to the public.

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

PAR. 4. Respondent has disseminated or has caused to be disseminated advertisements, including product labeling, for paper packaging it uses to contain its food products, including but not necessarily limited to the attached Exhibit 1.

The aforesaid product labeling (Exhibit 1) includes the following statement and depiction of a three chasing arrow symbol:



Recyclable Package

PAR. 5. Through the use of the statement and depiction contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisement attached as Exhibit 1, respondent has represented, directly or by implication, that A.F.C. paper packaging is recyclable after ordinary use.

PAR. 6. In truth and in fact, while A.F.C. paper packaging is capable of being recycled, the vast majority of consumers cannot recycle the paper packaging because there are virtually no collection facilities that accept food contaminated paper for recycling. Therefore, the representation set forth in paragraph five was, and is, false and misleading.

PAR. 7. Through the use of the statement and depiction contained in the advertisements referred to in paragraph four, including but not necessarily limited to the attached Exhibit 1, respondent has represented, directly or by implication, that at the time it made the representation set forth in paragraph five, respondent possessed and relied upon a reasonable basis that substantiated such representation.

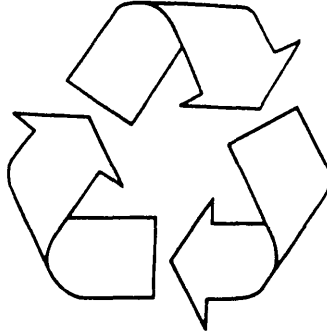
PAR. 8. In truth and in fact, at the time it made the representation set forth in paragraph five, respondent did not possess and rely upon a reasonable basis that substantiated such representation. Therefore, the representation set forth in paragraph seven was, and is, false and misleading.

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

1

Complaint

EXHIBIT 1



**Recyclable
Package**

CHURCH'S CHICKEN

 **CHICKEN** 

1 16 D



POPEYES CHICKEN

EXHIBIT 1

DECISION AND ORDER

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

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and no comments having been filed thereafter by interested parties pursuant to Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent America's Favorite Chicken Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Minnesota with its principal office or place of business at Six Concourse Parkway, Suite 1700, Atlanta, Georgia.

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

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

1

Decision and Order

ORDER

DEFINITIONS

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

The term "*product or package*" means any product or package, including, but not limited to, any item used by respondent to contain, serve, or package goods, offered for sale, sold or distributed to the public by respondent, its successors and assigns, under any brand name of respondent, its successors and assigns; and also means any such product or package sold or distributed to the public by third parties under private labeling agreements with respondent, its successors and assigns.

The term "*competent and reliable scientific evidence*" means 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.

I.

It is ordered, That respondent, America's Favorite Chicken Company, a corporation, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, distribution, or use of any product or package 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 extent to which any such product or package is capable of being recycled or the extent to which recycling collection programs for such product or package are available.

II.

It is further ordered, That respondent, America's Favorite Chicken Company, a corporation, its successors and assigns, and its officers, agents, representatives, and employees, directly or through

any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, distribution, or use of any product or package 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 any product or package offers any environmental benefit, unless at the time of making such representation, respondent possesses and relies 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 for five (5) years after the last date of dissemination of any representation covered by this order, respondent, or its successors and assigns, shall maintain and upon request make available to the Federal Trade Commission for inspection and copying:

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

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

IV.

It is further ordered, That the respondent shall distribute a copy of this order to each of its operating divisions and to each of its officers, agents, representatives, or employees engaged in the preparation and placement of advertisements, promotional materials, product labels or other such sales materials covered by this order.

V.

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

subsidiaries, or any other change in the corporation which may affect compliance obligations under this order.

VI.

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

Complaint

118 F.T.C.

IN THE MATTER OF

COLUMBIA HEALTHCARE CORPORATION, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION
OF SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT*Docket C-3505. Complaint, July 5, 1994--Decision, July 5, 1994*

This consent order requires, among other things, the respondents to operate the HCA Aiken Regional Medical Center, in South Carolina, as a separate, independent hospital until it is divested to a Commission-approved acquirer. In addition, for ten years, the order prohibits the respondents from acquiring, without prior Commission approval, any other hospital in the Augusta-Aiken area.

Appearances

For the Commission: *David M. Narrow, Mark Horoschak and Mary Lou Steptoe.*

For the respondents: *Ky Ewing, Vinson & Elkins, Washington, D.C. Judy Whalley, Howrey & Simon, Washington, D.C.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the respondents, Columbia Healthcare Corporation ("Columbia") and HCA-Hospital Corporation of America ("HCA"), corporations subject to the jurisdiction of the Commission, have entered into an agreement whereby Columbia will acquire 100 percent of the voting stock of HCA; that the acquisition agreement violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; that the proposed acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, the Commission hereby issues its complaint, pursuant to Section 11(b) of the Clayton Act, 15 U.S.C. 21(b), and Section

5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), stating its charges as follows:

DEFINITIONS

PARAGRAPH 1. For purposes of this complaint the following definitions shall apply:

a. “*Columbia*” means Columbia Healthcare Corporation, a corporation organized, existing, and doing business under and by virtue of the laws of Delaware, with its principal place of business at 201 West Main Street, Louisville, Kentucky .

b. “*HCA*” means HCA-Hospital Corporation of America, a corporation organized, existing, and doing business under and by virtue of the laws of Delaware, with its principal place of business at One Park Plaza, Nashville, Tennessee.

c. “*Acute care hospital*” means a health facility, other than a federally owned facility, having a duly organized governing body with overall administrative and professional responsibility, and an organized medical staff, that provides 24-hour inpatient care, as well as outpatient services, and having as a primary function the provision of inpatient services for medical diagnosis, treatment, and care of physically injured or sick persons with short-term or episodic health problems or infirmities.

d. “*Acute care inpatient hospital services*” means 24-hour inpatient health care, and related medical or surgical diagnostic and treatment services, for physically injured or sick persons with short-term or episodic health problems or infirmities. In Georgia and South Carolina, acute care inpatient hospital services are provided only by health care institutions licensed as hospitals and further licensed or certified to provide acute care (as opposed to other types of hospital care, such as psychiatric, substance abuse, rehabilitation or subacute skilled nursing care).

THE PARTIES

PAR. 2. As of October 18, 1993, Columbia owned and operated, directly or through wholly-owned subsidiaries, 87 acute care hospitals in 17 states. In 1992, the predecessors of Columbia, which merged to form Columbia effective September 1, 1993, had

sales of more than \$4.8 billion. Among the acute care hospitals respondent Columbia owns and operates is Augusta Regional Medical Center (“Augusta Regional”), in Augusta, Georgia.

PAR. 3. As of October 18, 1993, HCA owned and operated, directly or through wholly-owned subsidiaries, 72 acute care hospitals in 17 states. As of December 31, 1992, HCA’s hospitals had sales of more than \$5.1 billion. Among the acute care hospitals respondent HCA owns and operates is HCA Aiken Regional Medical Centers (“Aiken Regional”) in Aiken, South Carolina, about 15 miles northeast of Augusta, Georgia.

JURISDICTION

PAR. 4. Columbia and HCA, at all times relevant herein, have been and are now engaged in or affecting commerce, as “commerce” is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12. The businesses of Columbia and HCA, at all times relevant herein, have been and are now in or affecting commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

THE PROPOSED ACQUISITION

PAR. 5. On or about October 2, 1993, Columbia and HCA entered into an agreement whereby Columbia will acquire 100 percent of the voting stock of HCA, and HCA stockholders will receive in exchange Columbia voting stock. The total value of the HCA stock to be acquired by Columbia is about \$4.006 billion.

NATURE OF TRADE AND COMMERCE

PAR. 6. The relevant line of commerce in which to analyze the proposed acquisition is the production and sale of acute care inpatient hospital services and/or any narrower group of services contained therein.

PAR. 7. The relevant section of the country is a three-county urban area including the cities of Augusta, Georgia, and Aiken, South Carolina, and consisting of Richmond County, Georgia, Columbia County, Georgia, and Aiken County, South Carolina (“Augusta-Aiken”).

MARKET STRUCTURE

PAR. 8. The Augusta-Aiken relevant market is highly concentrated, whether measured by the Herfindahl-Hirschmann Index (“HHI”) or by four-firm concentration ratios.

ENTRY CONDITIONS

PAR. 9. Entry into the Augusta-Aiken relevant market is difficult due to certificate-of-need regulation of entry by the States of Georgia and South Carolina, substantial lead times required to establish a new hospital, and other factors.

COMPETITION

PAR. 10. Augusta Regional and Aiken Regional are actual and potential competitors in the Augusta-Aiken relevant market.

EFFECTS

PAR. 11. The effects of the aforesaid acquisition, if consummated, may be substantially to lessen competition in the Augusta-Aiken relevant market in the following ways, among others:

(a) It would eliminate actual and potential competition between Augusta Regional and Aiken Regional, and between Aiken Regional and others;

(b) It would significantly increase the already high level of concentration in the market;

(c) It would eliminate Aiken Regional as a substantial independent competitive force;

(d) It may enhance the possibility of collusion or interdependent coordination by the remaining firms in the relevant market; and

(e) It may deny patients, physicians, third-party payers, and other consumers of hospital services in the relevant market the benefits of free and open competition based on price, quality, and service.

VIOLATIONS CHARGED

PAR. 12. The acquisition agreement described in paragraph five above violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

PAR. 13. The acquisition described in paragraph five, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation into the proposed acquisition of HCA-Hospital Corporation of America by Columbia Healthcare Corporation, 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 Section 7 of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act, as amended; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days (and having duly considered the comments received), 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 Columbia Healthcare Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business at 201 West Main Street, Louisville, Kentucky.

2. Respondent HCA-Hospital Corporation of America is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business at One Park Plaza, Nashville, Tennessee.

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

ORDER

I.

It is ordered, That, as used in this order, the following definitions shall apply:

A. “*Columbia*” means Columbia Healthcare Corporation, a corporation organized, existing and doing business under and by virtue of the laws of Delaware, with its principal place of business at 201 West Main Street, Louisville, Kentucky, as well as its directors, officers, employees, agents, representatives, parents, divisions, subsidiaries, affiliates, and their respective successors and assigns, and the directors, officers, employees, agents, or representatives of Columbia’s divisions, subsidiaries, affiliates, and their respective successors and assigns.

B. “*HCA*” means HCA-Hospital Corporation of America, a corporation organized, existing and doing business under and by virtue of the laws of Delaware, with its principal place of business at One Park Plaza, Nashville, Tennessee, as well as its directors, officers, employees, agents, representatives, parents, divisions, subsidiaries, affiliates, and their respective successors and assigns, and the directors, officers, employees, agents, or representatives of HCA’s divisions, subsidiaries, affiliates, and their respective successors and assigns.

C. “*Respondents*” means Columbia and HCA, collectively and individually.

D. “*Acute care hospital*” means a health facility, other than a federally owned facility, having a duly organized governing body with overall administrative and professional responsibility, and an organized medical staff, that provides 24-hour inpatient care, as well as outpatient services, and having as a primary function the provision of inpatient services for medical diagnosis, treatment, and care of physically injured or sick persons with short-term or episodic health problems or infirmities.

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

F. To “*operate an acute care hospital*” means to own, lease, manage, or otherwise control or direct the operations of an acute care hospital, directly or indirectly.

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

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

I. “*Augusta-Aiken*” means the three-county area consisting of the counties of Richmond and Columbia in Georgia and Aiken County in South Carolina.

J. “*HCA Aiken Regional Medical Centers*” means the general acute care hospital currently owned and operated by HCA at 202 University Parkway, Aiken, South Carolina, all of its title, properties, stock, rights, privileges, and other assets and interests, and all other related HCA assets and interests in Augusta-Aiken, of whatever nature, tangible and intangible, including without limitation all medical office buildings, other buildings, machinery, equipment, and other property of whatever description, except for accounts receivable and cash.

K. “*Commission*” means the Federal Trade Commission.

II.

It is further ordered, That:

A. Within twelve (12) months after the date this order becomes final, respondents shall divest, absolutely and in good faith, HCA Aiken Regional Medical Centers. HCA Aiken Regional Medical Centers shall be divested only to an acquirer or acquirers that receive the prior approval of the Commission, and only in a manner that receives the prior approval of the Commission. A condition of approval by the Commission of the divestiture shall be a written agreement by the party or parties acquiring HCA Aiken Regional Medical Centers that it will not sell for a period of ten (10) years from the date of the divestiture, directly or indirectly, through subsidiaries, partnerships or otherwise, without the prior approval of the Commission, HCA Aiken Regional Medical Centers to any other person who operates, or will operate immediately following such sale, any other acute care hospital in Augusta-Aiken. The purpose of the divestiture required by this order is to ensure the continuation of HCA Aiken Regional Medical Centers as an ongoing, viable acute care hospital and to remedy the lessening of competition alleged in the Commission's complaint.

B. Respondents shall comply with all terms of the Agreement to Hold Separate, attached hereto and made a part hereof as Appendix I. Said Agreement shall continue in effect until such time as respondents have divested HCA Aiken Regional Medical Centers or until such other time provided in the Agreement to Hold Separate.

C. Pending divestiture, respondents shall take such action as is necessary to maintain the viability and marketability of HCA Aiken Regional Medical Centers and shall not cause or permit the destruction, removal or impairment of any assets or businesses of HCA Aiken Regional Medical Centers, except in the ordinary course of business and except for ordinary wear and tear.

III.

It is further ordered, That:

A. If respondents have not divested, absolutely and in good faith and with the prior approval of the Commission, HCA Aiken Regional

Medical Centers as required by paragraph II of this order within twelve (12) months after the date this order becomes final, the Commission may appoint a trustee and respondents shall consent to the appointment of a trustee by the Commission to effect the divestiture required by paragraph II of this order. In the event the Commission or the Attorney General brings an action pursuant to Section 5(l) of the Federal Trade Commission Act, 15 U.S.C. 45(1), or any other statute enforced by the Commission, respondents shall similarly consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to Section 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the respondents to comply with this order.

B. If a trustee is appointed by the Commission or a court pursuant to paragraph III.A. of this order, respondents shall consent to the following terms and conditions regarding the trustee's powers, authorities, duties and responsibilities:

1. The Commission shall select the trustee, subject to the consent of respondents, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures of acute care hospitals. If respondents have not opposed, in writing, the selection of any trustee within ten (10) days after notice by the staff of the Commission to respondents of the identity of any proposed trustee, respondents shall be deemed to have consented to the selection of the proposed trustee.

2. The trustee shall have the exclusive power and authority, subject to the prior approval of the Commission, to divest HCA Aiken Regional Medical Centers.

3. The trustee shall have eighteen (18) months from the date of approval of the trust agreement described in paragraph III.B.8 of this order to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the eighteen-month period the trustee has submitted a plan of divestiture or believes that divestiture can be accomplished within a reasonable time, the divestiture period may be extended by the Commission, or

by the Court for a court-appointed trustee; provided, however, that the divestiture period may only be extended two (2) times.

4. The trustee shall have full and complete access to the personnel, books, records and facilities relating to HCA Aiken Regional Medical Centers, or any other relevant information, as the trustee may reasonably request. Respondents shall develop such financial or other information as such trustee may reasonably request and shall cooperate with any reasonable request of the trustee. Respondents shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays in divestiture caused by respondents shall extend the time for the divestiture under this paragraph III in an amount equal to the delay, as determined by the Commission or the Court for a court-appointed trustee.

5. Subject to respondents, absolute and unconditional obligation to divest at no minimum price and the purpose of the divestiture as stated in paragraph II of this order, the trustee shall use his or her best efforts to negotiate the most favorable price and terms available with each acquiring entity for the divestiture of HCA Aiken Regional Medical Centers. The divestiture shall be made in the manner set out in paragraph II of this order; provided, however, that if the trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest to the acquiring entity or entities selected by respondents from among those approved by the Commission.

6. The trustee shall serve, without bond or other security, at the cost and expense of respondents, on such reasonable and customary terms and conditions as the Commission or a Court may set. The trustee shall have authority to employ, at the cost and expense of respondents, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, or other representatives and assistants as are reasonably necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the sale and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the Court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of respondents and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a

commission arrangement contingent on divestiture through the trustee.

7. Respondents shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, or liabilities arising in any manner out of, or in connection with, the trustee's duties under this order.

8. Within thirty (30) days after appointment of the trustee, and subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the Court, respondents shall execute a trust agreement that transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestiture required by this order.

9. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in paragraph III.A. of this order.

10. The Commission or, in the case of a court-appointed trustee, the Court may on its own initiative or at the request of the trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this order.

11. The trustee shall have no obligation or authority to operate or maintain HCA Aiken Regional Medical Centers.

12. The trustee shall report in writing to respondents and to the Commission every sixty (60) days concerning the trustee's efforts to accomplish the divestiture.

IV.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, no respondent shall, without the prior approval of the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise:

- A. Acquire any acute care hospital in Augusta-Aiken; or
- B. Permit any acute care hospital it operates in Augusta-Aiken to be acquired by any person that operates, or will operate immediately following such acquisition, any other acute care hospital in Augusta-Aiken.

Provided, however, that no acquisition shall be subject to this paragraph IV of this order if the fair market value of (or, in case of a

purchase acquisition, the consideration to be paid for) the acute care hospital or part thereof to be acquired does not exceed one million dollars (\$1,000,000).

V.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, respondents shall not permit all or any substantial part of any acute care hospital they operate in Augusta-Aiken to be acquired by any other person (except pursuant to the divestiture required by paragraph II of this order) unless the acquiring person files with the Commission, prior to the closing of such acquisition, a written agreement to be bound by the provisions of this order, which agreement respondents shall require as a condition precedent to the acquisition.

VI.

It is further ordered, That, for the purposes of determining or securing compliance with this order, and subject to any legally recognized privilege, upon written request and on reasonable notice to respondents made at their principal offices, respondents shall permit any duly authorized representatives 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 all other records and documents in respondents' possession or control relating to any matter contained in this order; and

B. Upon five days' notice to respondents and without restraint or interference from respondents, to interview their officers or employees, who may have counsel present, regarding such matters.

VII.

It is further ordered, That:

A. Within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until respondents have fully satisfied the divestiture obligations of this order, respondents shall

submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with the order. Respondents shall include in their compliance reports, among other things that are required from time to time, a full description of all contacts or negotiations with prospective acquirers for the divestiture required by this order, including the identity of all parties contacted. Respondents also shall include in their compliance reports copies of all written communications to and from such parties, and all internal memoranda, reports, and recommendations concerning the required divestiture.

B. Annually, beginning on the first anniversary of the date this order becomes final, and continuing for nine (9) years thereafter, respondents shall submit a verified report demonstrating the manner in which they have complied and are complying with this order.

VIII.

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

APPENDIX I

AGREEMENT TO HOLD SEPARATE

This Agreement to Hold Separate (the "Agreement") is by and among Columbia Healthcare Corporation, a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business at 201 West Main Street, Louisville, Kentucky, and HCA-Hospital Corporation of America, a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business at One Park Plaza, Nashville, Tennessee (collectively and individually referred to as "respondents"); and the Federal Trade Commission (the "Commission"), an independent agency of the United States Government, established under the

Federal Trade Commission Act of 1914, 15 U.S.C. 41, *et seq.* (collectively, the “Parties”).

Whereas, on or about October 2, 1993, Columbia Healthcare Corporation entered into an agreement to acquire all of the voting stock of HCA-Hospital Corporation of America (hereinafter the “Acquisition”); and

Whereas, the Commission is now investigating the Acquisition to determine if it would violate any of the statutes enforced by the Commission; and

Whereas, if the Commission accepts the attached Agreement Containing Consent Order (“consent order”), which would require divestiture of HCA Aiken Regional Medical Center (“ARMC”) in Aiken, South Carolina, the Commission must place the consent order on the public record for a period of at least sixty (60) days and may subsequently withdraw such acceptance pursuant to the provisions of Section 2.34 of the Commission’s Rules; and

Whereas, the Commission is concerned that if an understanding is not reached, preserving the *status quo ante* of the assets and businesses of ARMC during the period prior to the issuance of the consent order by the Commission (after the 60-day public notice period), divestiture resulting from any proceeding challenging the legality of the Acquisition might not be possible, or might be less than an effective remedy; and

Whereas, the Commission is concerned that if the Acquisition is consummated, it will be necessary to preserve the Commission’s ability to require the divestiture of ARMC as described in paragraph II of the consent order, and the Commission’s right to seek to restore ARMC as a viable independent acute care hospital; and

Whereas, the purpose of this Agreement and the consent order is to:

- (i) Preserve ARMC as a viable independent acute care hospital pending its divestiture, and
- (ii) Remedy any anticompetitive effects of the Acquisition; and

Whereas, respondents’ entering into this Agreement shall in no way be construed as an admission by respondents that the Acquisition is illegal; and

Whereas, respondents understand that no act or transaction contemplated by this Agreement shall be deemed immune or exempt

from the provisions of the antitrust laws or the Federal Trade Commission Act by reason of anything contained in this Agreement.

Now, therefore, the parties agree, upon understanding that the Commission has not yet determined whether the Acquisition will be challenged, and in consideration of the Commission's agreement that, unless the Commission determines to reject the consent order, it will not seek further relief from respondents with respect to the Acquisition, except that the Commission may exercise any and all rights to enforce this Agreement and the consent order to which it is annexed and made a part thereof, and in the event the required divestiture is not accomplished, to seek divestiture of ARMC as held separate pursuant to this Agreement, as follows:

1. Respondents agree to execute and be bound by the attached consent order.

2. Respondents agree that from the date this Agreement is accepted until the earliest of the dates listed in subparagraphs 2.a - 2.c, they will comply with the provisions of paragraph 3 of this Agreement:

a. Three business days after the Commission withdraws its acceptance of the consent order pursuant to the provisions of Section 2.34 of the Commission's Rules;

b. 120 days after publication in the Federal Register of the consent order, unless by that date the Commission has issued such order; or

c. The day after the divestiture required by the consent order has been completed.

3. Respondents will hold the assets and businesses of ARMC as they are presently constituted separate and apart on the following terms and conditions:

a. ARMC, as it is presently constituted, shall be held separate and apart and shall be operated independent of respondents (meaning here and hereinafter, respondents excluding ARMC) except to the extent that respondents must exercise direction and control over ARMC to assure compliance with this Agreement.

b. Respondents shall not exercise direction or control over, or influence directly or indirectly, ARMC or any of its operations or

businesses; provided, however, that respondents may exercise only such direction and control over ARMC as is necessary to assure compliance with this Agreement.

c. Respondents shall maintain the viability and marketability of ARMC and shall not sell, transfer, encumber (other than in the normal course of business), or otherwise impair its marketability or viability.

d. Except for the single respondent director, officer, employee, or agent serving on the "New Board" or "Management Committee" (as defined in subparagraph 3.h), respondents shall not permit any director, officer, employee, or agent of respondents to also be a director, officer or employee of ARMC.

e. Except as required by law, and except to the extent that necessary information is exchanged in the course of evaluating the Acquisition, defending investigations or litigation, or negotiating agreements to dispose of assets, respondents shall not receive or have access to, or use or continue to use, any "material confidential information" of ARMC not in the public domain. Any such information that is obtained pursuant to this subparagraph shall only be used for the purpose set out in this subparagraph. ("Material confidential information," as used herein, means competitively sensitive or proprietary information not independently known to respondents from sources other than ARMC, and includes but is not limited to customer lists, price lists, marketing methods, patents, technologies, processes, or other trade secrets.)

f. Respondents shall not change the composition of the management of ARMC except that the directors or members serving on the New Board or Management Committee of ARMC (as defined in subparagraph 3.h) shall have the power to remove employees for cause.

g. All material transactions, out of the ordinary course of business and not precluded by subparagraphs 3.a-3.f hereof, shall be subject to a majority vote of the New Board or Management Committee (as defined in subparagraph 3.h).

h. Respondents shall either separately incorporate ARMC and adopt new Articles of Incorporation and By-laws that are not inconsistent with other provisions of this Agreement or establish separate business ventures with articles of agreement covering the conduct of ARMC in accordance with this Agreement. Respondents shall also elect a new three person board of directors ("New Board")

or Management Committee ("Management Committee") of ARMC. Respondents may elect the directors to the New Board or select the members of the Management Committee; provided, however, that such New Board or Management Committee shall include no more than one respondent director, officer, employee, or agent. Except as permitted by this Agreement, the director of the New Board or member of the Management Committee who is also a respondent director, officer, employee or agent, shall not receive in his or her capacity as a New Board director or Management Committee member material confidential information and shall not disclose any such information received under this Agreement to respondents or use it to obtain any advantage for respondents. Said director of the New Board or member of the Management Committee who is also a respondent director, officer, employee or agent, shall enter a confidentiality agreement prohibiting disclosure of material confidential information (as that term is defined in subparagraph 3.e.). Such New Board director or Management Committee member shall participate in matters which come before the New Board or Management Committee only for the limited purpose of considering a capital investment or other transaction exceeding \$1,000,000 and carrying out respondents' responsibility to assure that ARMC is maintained in such manner as will permit its divestiture as an ongoing, viable acute care hospital. Except as permitted by this Agreement, such New Board director or Management Committee member shall not participate in any matter, or attempt to influence the votes of the other directors or Management Committee members with respect to matters, that would involve a conflict of interest if respondents and ARMC were separate and independent entities. Meetings of the New Board or Management Committee during the term of this Agreement shall be stenographically transcribed and the transcripts retained for two (2) years after the termination of this Agreement.

i. All earnings and profits of ARMC shall be retained separately in ARMC if necessary, respondents shall provide ARMC with sufficient working capital to operate at its current rate of operation, and to carry out any capital improvement plans for ARMC which have already been approved.

j. Should the Federal Trade Commission seek in any proceeding to compel respondents (meaning here and hereinafter respondents including ARMC) to divest ARMC, or to seek any other injunctive

or equitable relief, respondents shall not raise any objection based upon the expiration of the applicable Hart-Scott-Rodino Antitrust Improvements Act waiting period or the fact that the Commission has permitted the Acquisition. Respondents also waive all rights to contest the validity of this Agreement.

4. For the purpose of determining or securing compliance with this Agreement, subject to any legally recognized privilege, and upon written request with reasonable notice to respondents made to their principal offices, respondents shall permit any duly authorized representative or representatives of the Commission:

a. Access during the office hours of respondents 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 respondents relating to compliance with this Agreement;

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

5. This agreement shall not be binding until approved by the Commission.

STATEMENT OF COMMISSIONER MARY L. AZCUENAGA
CONCURRING IN PART AND DISSENTING IN PART

Having reason to believe that the Columbia Healthcare Corporation's acquisition of HCA-Hospital Corporation of America may substantially lessen competition in the Augusta, Georgia-Aiken, South Carolina market, I concur in the decision to require divestiture of the Aiken Regional Medical Center. I dissent from the decision not to challenge the transaction with respect to the Chattanooga, Tennessee market.

In Chattanooga, the merger will combine HCA's Parkridge Medical Center and Columbia's East Ridge Hospital in an already highly concentrated market. In 1985, after a full administrative hearing, the Commission ordered HCA to divest certain assets, including North Park Hospital, which has considerable similarity to

East Ridge. *Hospital Corporation of America*, 106 FTC 361, *aff'd*, 807 F.2d 1381 (7th Cir. 1986). Although some characteristics of the Chattanooga hospital market may have changed since 1985, I am not persuaded that the competitive situation is so fundamentally different to justify abandonment of the Commission's earlier position.

DISSENTING STATEMENT OF COMMISSIONER DEBORAH K. OWEN

"Please listen to us.... We are the ones who live here."

Thus pled one of over 100 intensely interested residents of South Carolina who commented unfavorably on the Commission's proposal to require the sale of the Aiken Regional Medical Centers ("Aiken RMC"). Despite this outpouring of protest, the Commission has declined to reconsider its stance. I dissent from this decision for two reasons. First, and principally, I do not find reason to believe that, after the merger, anticompetitive effects are likely in the Augusta/Aiken geographic market. Second, the application of the DOJ/FTC hospital merger "safety zone" in another market affected by this merger creates, at the very least, an appearance of inconsistency in our enforcement, and perhaps has even permitted the consummation of an anticompetitive merger to monopoly.

Divestiture

Having read all of the comments submitted to the Commission, I believe that they provide ample support for the projection that anticompetitive effects stemming from common ownership of Augusta Regional Medical Center ("Augusta Regional") and Aiken RMC are unlikely. While the hospitals clearly have competitors in common, they are 25-30 miles apart. Several comments noted that a patient would pass several much larger hospitals, with more services, in driving from Aiken RMC to Augusta Regional.¹ Such travel is "inconvenient at best and impractical under many situations."² An Aiken doctor observed that he could "count

¹ See, e.g., Letter from Philip J. Lord, reporter, Aiken Standard (undated) ("going to Augusta Regional Medical Centers for care is plain dumb.... [Y]ou would pass several, much larger hospitals that offer more services and larger staffs. Passing these ... to get to another community hospital, like Aiken Regional, doesn't make sense."); Letter from Wade M. Brodie, Director, Aiken County National Bank (3/21/94).

² Letter from John A. Paulus, President, Medical Center of Aiken, Aiken, S.C. (undated).

comfortably on one hand” the number of his patients who have gone to Augusta Regional in 17 years.³ One comment noted that few, if any, physicians have privileges at both hospitals.⁴ An Aiken family summed it up: “We... have never even seen August [sic] Regional Medical Center.... [W]e do not know anyone who has used Augusta Regional.”⁵

Not only is there little direct competition between the hospitals, but members of the community foresee competitive benefits from combining these two complementary facilities. Many comments voiced the opinion that common ownership of the two modestly sized hospitals, operating at opposite ends of the geographic market, would provide enhanced competition for the much larger University Hospital.⁶ Others noted that managed care providers and local employers would enjoy the efficiency of being able to deal with both hospitals through a single contract.⁷ The Governor of the State of South Carolina argued that joint ownership of the two hospitals would obviate the need for two open heart programs, where one would do, at considerable cost savings.⁸

Finally, I note that the Commission’s action has already had its costs. It has caused “unnecessary anxiety,” according to one letter.⁹ Several comments, including one lengthy, painstakingly handwritten letter, complained that the Commission’s decision has severely disrupted the recruitment and retention of both medical and non-medical staff, and particularly physicians.¹⁰ Perhaps some will merely shrug this off, but I believe that action such as the Commission takes today fosters unnecessary, and otherwise avoidable, resentment toward the federal government in the soul of America that lies outside our Beltway. Three letters to the commission illustrate. An Aiken resident comments: “[T]his is an

³ Letter from Jack L. Ratliff, M.D. (4/21/94).

⁴ Letter from Ronald Paolini, D.O. (2/17/94).

⁵ Letter from Marilyn G. Swanson and J. Lars Swanson (4/16/94).

⁶ *See, e.g.*, Letter from Victoria M. Stoepler, M.D. and Victoria C. Mosteller, M.D. (2/21/94).

⁷ *See, e.g.*, Letter from Georganne Franklin, Employment Coordinator, Aiken Regional Medical Centers (4/13/94).

⁸ Letter from The Honorable Carroll A. Campbell, Jr. (3/3/94).

⁹ Letter from Deidre Collins (4/27/94).

¹⁰ *See, e.g.*, Letter from George A. Poda, M.D. (2/9/94).

excellent example of the kind of 'help' we do not need from Washington with medical care."¹¹ Another citizen of South Carolina writes: "It is this type of governmental decision-making that so angers and baffles the public."¹² One commentator in particular reflects the local dissatisfaction with what is apparently perceived as unnecessary intrusion by the federal government. His message to the FTC: "Get out of my face."¹³

Merger to Monopoly

While I continue to believe that the Columbia/HCA merger does not pose a competitive problem in the Augusta/Aiken area, I cannot, however, conclude with reasonable confidence that the merger has no anticompetitive effects in any hospital market across the country. There is evidence (although incomplete) that in one market, the consolidation of the Columbia and HCA hospitals may create a monopoly that could injure consumers.

In that market, one of the hospitals satisfies the statistical criteria for the hospital merger "safety zone" as set forth in the Statements of Enforcement Policy in the Health Care Area, adopted in September 1993 by the Department of Justice and the Federal Trade Commission (over my dissent).¹⁴ Based on its size alone, the acquisition of this hospital has been declared by the federal enforcement agencies to be immune from antitrust review.¹⁵

¹¹ Letter from Jay D. Bilyeu (undated).

¹² Letter from Sandra F. Hobbs (4/27/94).

¹³ Letter from George P. Fitzgerald (3/20/94).

¹⁴ Department of Justice and Federal Trade Commission Antitrust Enforcement Policy Statements in the Health Care Area, 4 Trade Reg. Rep. (CCH) paragraph 13,150; Dissenting Statement of Commissioner Deborah K. Owen on DOJ/FTC Antitrust Enforcement Policy Statements in the Health Care Area (September 14, 1993).

¹⁵ Department of Justice and Federal Trade Commission Antitrust Enforcement Policy Statements in the Health Care Area, 4 Trade Reg. Rep. (CCH) paragraph 13,150 at 20,757:

The Agencies will not challenge any merger between two general acute-care hospitals where one of the hospitals (1) has an average of fewer than 100 licensed beds over the three most recent years, and (2) has an average daily inpatient census of fewer than 40 patients over the three most recent years, absent extraordinary circumstances. This antitrust safety zone will not apply if that hospital is less than 5 years old.

It is not clear what constitutes "extraordinary circumstances" within the contemplation of the Policy Statement. The Commission's action in this matter may, however, be viewed as implicit support for the proposition that a merger to monopoly does not qualify as an "extraordinary circumstance."

This is not to suggest that the Commission is indifferent to the monopolization of all hospital markets. In January of this year, the Commission voted unanimously to authorize staff to file a preliminary injunction to prevent the merger to monopoly of the only two acute care hospitals in Pueblo, Colorado.¹⁶ In Pueblo, the requirements of the hospital merger “safety zone” were not satisfied, so a full investigation and analysis of the likely competitive effects of the merger were undertaken, in accordance with the 1992 Horizontal Merger Guidelines.¹⁷ In such a traditional analysis, the Commission considers whether the merging hospitals are economically viable, whether significant efficiencies may be achieved by combining the hospitals, whether these efficiencies are merger-specific, and whether cost savings are likely to be passed on to consumers in the form of lower prices or higher quality. Most critically, the Commission also evaluates whether the anticipated efficiency benefits outweigh the substantial anticompetitive risks associated with the creation of a monopoly. Under a Guidelines analysis, the Commission’s action in the Pueblo merger suggests a conclusion that the likely anticompetitive effects outweigh the possible efficiencies stemming from the merger.

The Commission did not, however, conduct a thorough investigation of the market in which the merger of Columbia and HCA may have created a monopoly. The Commission abandoned its traditional approach to merger analysis upon determining that the HCA hospital falls within the “antitrust safety zone.”¹⁸

¹⁶ Parkview Episcopal Medical Center, FTC File No. 931-0125.

¹⁷ U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines, reprinted in 4 Trade Reg. Rep. (CCH) paragraph 13,104 (Apr. 2, 1992).

¹⁸ The Commission’s inconsistent application of the antitrust laws to hospital mergers has apparently not escaped public attention. *See* Letter from Clark D. Moore, M.D. (3/1/94) (“I note in the recent issue of *Modern Health Care*, that Columbia HCA was awarded a three hospital monopoly in the Florida Panhandle, and it simply amazes me that our hospital [Aiken RMC] has been ordered to be divested when monopolies such as this have been allowed to proceed unhindered. In the interests of fairness, I would think that the Federal Trade Commission should reconsider their order to divest our hospital.”); Letter from William R. Marshall, M.D. (3/15/94) (“Please explain the rationale for your approval of the Columbia Health Care merger with Hospital Corporation of America particularly as it applies to Northwest Florida where our medical community has no other alternative for hospital services. This hospital monopoly encompasses Ft. Walton Beach, Niceville and Destin metropolitan areas affecting the lives of 200,000 people.”); Letter from Richard A. Philipp (undated) (inquiring why mergers were allowed in Florida and elsewhere “that created a higher market share of beds” than in Augusta/Aiken).

In sum, the Antitrust Enforcement Policy Statements in the Health Care Area may have claimed their first casualty. Perhaps a full investigation would have demonstrated that the merger, though creating a monopoly, posed no anticompetitive problem. But we will never know at the level of confidence that consumers have a right to expect of us. For this reason, and for the reasons voiced by the anguished health care consumers in Aiken, South Carolina, I dissent.

IN THE MATTER OF

LEPAGE'S, INC., ET AL.

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

Docket C-3506. Complaint, July 19, 1994--Decision, July 19, 1994

This consent order prohibits, among other things, the Pennsylvania manufacturers of adhesive tapes from misrepresenting that any product or package is capable of being recycled, or the extent to which recycling collection programs are available for such products, and from making unsubstantiated claims that its products or packages are degradable, biodegradable or photodegradable, or that their degradability offers any environmental benefit when disposed of as trash in a sanitary landfill.

Appearances

For the Commission: *Michael Dershowitz, Kevin Bank and C. Lee Peeler.*

For the respondents: *Nancy Bryson, Crowell & Moring, Washington, D.C.*

COMPLAINT

The Federal Trade Commission, having reason to believe that LePage's, Inc., a corporation, and LP Holdings, Inc., a corporation ("respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent LePage's, Inc. ("LePage's"), is a Pennsylvania corporation. Respondent LP Holdings, Inc. is a Delaware corporation. It dominated and controlled the acts and practices of its then wholly-owned subsidiary, LePage's, Inc. Respondents have their principal offices or places of business at 120 Delta Drive, Pittsburgh, Pennsylvania.

PAR. 2. Respondents have advertised, labeled, offered for sale, sold, and distributed adhesive tapes, including LePage's Biodegradable Transparent Tape, and other products to the public.

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.

PAR. 4. LePage's Biodegradable Transparent Tape is a cellophane tape made from wood pulp and adhesive material. The retail tape product is sold with a hard clear non-foam polystyrene plastic dispenser. The dispenser does not identify the type(s) of plastic resin from which it is made. The tape and dispenser are attached to a non-corrugated paperboard or cardboard backcard.

PAR. 5. Respondents have disseminated or have caused to be disseminated advertisements, including product labeling, and other promotional materials, for LePage's Biodegradable Transparent Tape, including but not necessarily limited to the attached Exhibits A through C.

The aforesaid product labeling (Exhibit A) includes the following statement on the front:

NEW! BIODEGRADABLE TRANSPARENT TAPE

The aforesaid product labeling (Exhibit A) also includes the following statements on the back:

BIODEGRADABLE TRANSPARENT TAPE
DEGRADES RAPIDLY
ENVIRONMENTALLY SAFE

A subsequent version of the aforesaid product labeling (Exhibit B) includes the following statements on the front:

NEW! BIODEGRADABLE TRANSPARENT TAPE
... ON A RECYCLABLE DISPENSER

The aforesaid product labeling (Exhibit B) also includes the following statements on the back:

BIODEGRADABLE TRANSPARENT TAPE
DEGRADES RAPIDLY
ENVIRONMENTALLY SAFE
Recyclable Package

The aforesaid product labeling (Exhibit B) also includes the following depiction of a three chasing arrow symbol on both the front and back:



Another version of the aforesaid product labeling (Exhibit C) includes the following statements on the front:

NEW! BIODEGRADABLE TRANSPARENT TAPE
DISPENSER IS RECYCLABLE IN COMMUNITIES WHICH HAVE P.S.
RECYCLING FACILITIES

The aforesaid product labeling (Exhibit C) also includes the following statement on the back:

BIODEGRADABLE TRANSPARENT TAPE

PAR. 6. Through the use of the statements contained in the advertisements referred to in paragraph five, including but not necessarily limited to the advertising and labeling attached as Exhibits A through C, respondents have represented, directly or by implication, that:

A. LePage's Biodegradable Transparent Tape will completely break down and return to nature -- *i.e.*, decompose into elements found in nature -- within a reasonably short period of time after customary disposal;

B. Compared to other transparent tape, LePage's Biodegradable Transparent Tape offers a significant environmental benefit after customary disposal.

PAR. 7. Through the use of the statements contained in the advertisements referred to in paragraph five, including but not necessarily limited to the advertisements attached as Exhibits A-C, respondents have represented, directly or by implication, that at the time they made the representations set forth in paragraph six, respondents possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 8. In truth and in fact, at the time they made the representations set forth in paragraph six, respondents did not possess

and rely upon a reasonable basis that substantiated such representations. Therefore, the representation set forth in paragraph seven was, and is, false and misleading.

PAR. 9. Through the use of the statements and depictions contained in the advertisements referred to in paragraph five, including but not necessarily limited to the advertising and labeling attached as Exhibits B and C, respondents have represented, directly or by implication, that their plastic tape dispenser is recyclable.

PAR. 10. In truth and in fact, while the plastic tape dispenser is capable of being recycled, the vast majority of consumers cannot recycle it because there are only a few collection facilities nationwide that will accept the non-foam polystyrene dispenser for recycling. Therefore, the representation set forth in paragraph nine was, and is, false and misleading.

PAR. 11. Through the use of the statements and depictions contained in the advertisements referred to in paragraph five, including but not necessarily limited to the advertising and labeling attached as Exhibit B, respondents have represented, directly or by implication, that their paperboard backcard is recyclable.

PAR. 12. In truth and in fact, while the paperboard backcard is capable of being recycled, the vast majority of consumers cannot recycle it because there are only a few collection facilities nationwide that will accept the non-corrugated paperboard or cardboard backcard for recycling. Therefore, the representation set forth in paragraph eleven was, and is, false and misleading.

PAR. 13. Through the use of the statements and depictions contained in the advertisements referred to in paragraph five, including but not necessarily limited to the advertising and labeling attached as Exhibits B and C, respondents have represented, directly or by implication, that at the time they made the representations set forth in paragraphs nine and eleven, respondents possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 14. In truth and in fact, at the time they made the representations set forth in paragraphs nine and eleven, respondents did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation set forth in paragraph thirteen was, and is, false and misleading.

PAR. 15. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

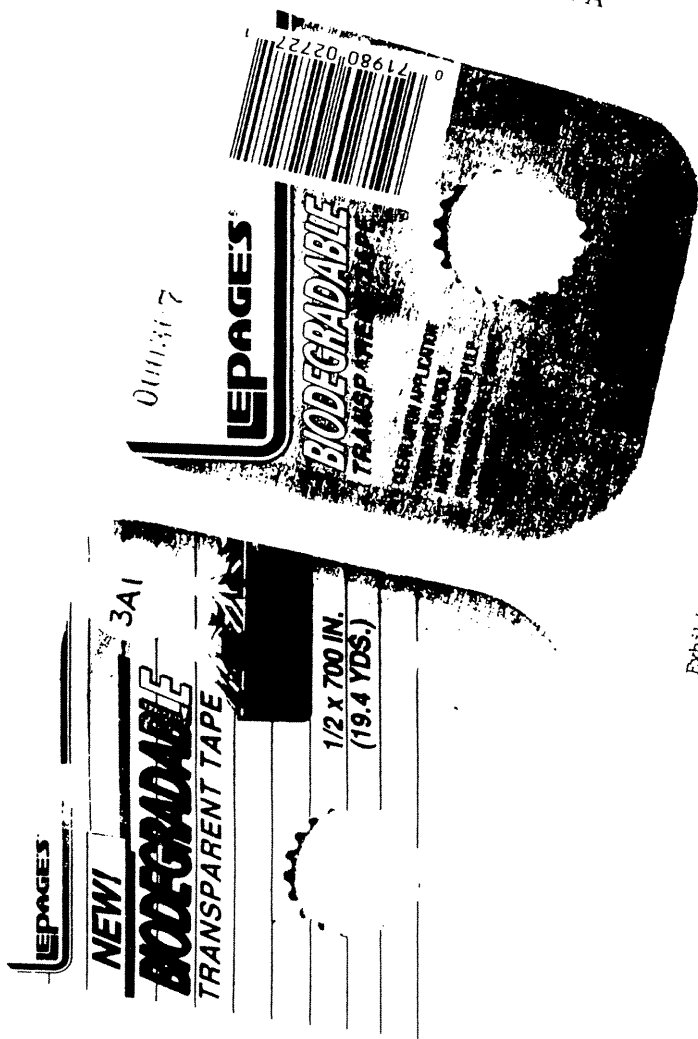


Exhibit A

EXHIBIT B

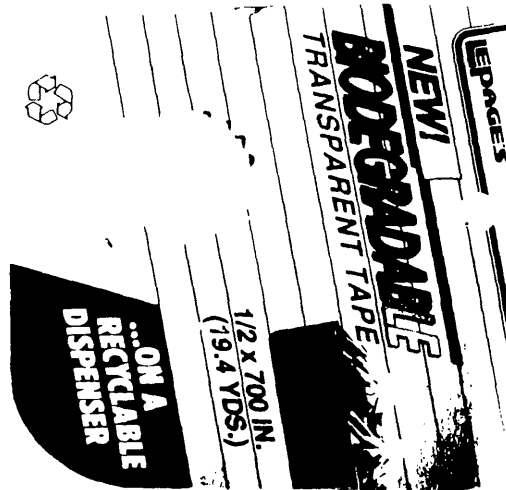


Exhibit B

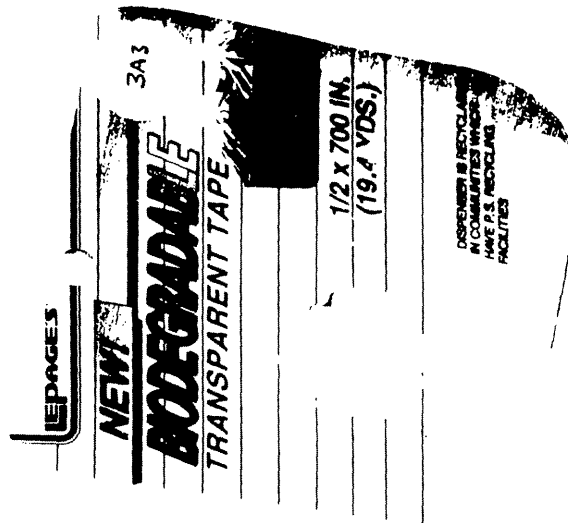


Exhibit C

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 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 complaint, a statement that the signing of the agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the 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 LePage's, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania, with its office and principal place of business located at 120 Delta Drive, in the City of Pittsburgh, State of Pennsylvania.

Respondent LP Holdings, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 120 Delta Drive, in the City of Pittsburgh, State of Pennsylvania. It

dominates and controls the acts and practices of its wholly-owned subsidiary, LePage's, Inc.

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

ORDER

DEFINITIONS

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

The term "*product or package*" means any product or package that is offered for sale, sold or distributed to the public by respondents, their successors and assigns, under the LePage's brand name or any other brand name of respondents, their successors and assigns; and also means any product or package sold or distributed to the public by third parties under private labeling agreements with respondents, their successors and assigns.

"*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.

I.

It is ordered, That respondents, LePage's, Inc., a corporation, and LP Holdings, Inc., a corporation, their successors and assigns, and their officers, representatives, agents, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, labeling, promotion, offering for sale, sale, or distribution of any product or package 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:

(1) That any such product or package is degradable, biodegradable, or photodegradable; or,

(2) Through the use of such terms as degradable, biodegradable, or photodegradable or any other similar term or expression, that any such product or package offers any environmental benefits when consumers dispose of it as trash that is buried in a sanitary landfill,

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

II.

A. *It is further ordered*, That respondents, LePage's, Inc., a corporation, and LP Holdings, Inc., a corporation, their successors and assigns, and their officers, representatives, agents, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, labeling, promotion, offering for sale, sale, or distribution of any product or package 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 extent to which:

(1) Any such product or package is capable of being recycled; or,

(2) Recycling collection programs for such product or package are available.

B. Provided, however, respondents will not be in violation of Part II(A)(2) of this order, in connection with the advertising, labeling, offering for sale, sale, or distribution of any non-foam polystyrene or any non-corrugated paperboard or cardboard product

or package, if they truthfully represent that such product or package is recyclable, provided that:

(1) Respondents disclose clearly, prominently, and in close proximity to such representation:

(a) In regard to any non-foam polystyrene product or package, that such product or package is recyclable in the few communities with recycling collection programs for non-foam polystyrene; and in regard to any non-corrugated paperboard or cardboard product or package, that such product or package is recyclable in the few communities with recycling collection programs for non-corrugated paperboard or cardboard; or

(b) The approximate number of U.S. communities with recycling collection programs for such product or package; or

(c) The approximate percentage of U.S. communities or the U.S. population to which recycling collection programs for such product or package are available; and

(2) In addition, in the case of a non-foam polystyrene product or package, such product or package itself bears a clear identification of the specific plastic resin(s) from which it is made.

For purposes of this provision, a disclosure elsewhere on the product package shall be deemed to be "in close proximity" to such representation if there is a clear and conspicuous cross-reference to the disclosure. The use of an asterisk or other symbol shall not constitute a clear and conspicuous cross-reference. A cross-reference shall be deemed clear and conspicuous if it is of sufficient prominence to be readily noticeable and readable by the prospective purchaser when examining the part of the package on which the representation appears.

III.

It is further ordered, That respondents, LePage's, Inc., a corporation, and LP Holdings, Inc, a corporation, their successors and assigns, and their officers, representatives, agents, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, labeling, promotion, offering for sale, sale, or distribution of any product or package 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 any such product or package offers any environmental benefit, 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 for five (5) years after the last date of dissemination of any representation covered by this order, respondents, or their successors and assigns, shall maintain and upon request make available to the Federal Trade Commission for inspection and copying:

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

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

V.

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

officers, agents, representatives, or employees engaged in the preparation and placement of advertisements, promotional materials, product labels or other such sales materials covered by this order.

VI.

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

VII.

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

IN THE MATTER OF

OAK HILL INDUSTRIES CORP., ET AL.

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

Docket C-3507. Complaint, July 19, 1994--Decision, July 19, 1994

This consent order prohibits, among other things, a New York manufacturer, of plastic plates, bowls and utensils, and its officer from misrepresenting that any product or package is capable of being recycled, or the extent to which recycling collection programs are available for such products, and from making any unsubstantiated representation that any product or package it markets offers any environmental benefit.

Appearances

For the Commission: *Michael Dershowitz.*

For the respondents: *Nancy Cascella, Hahn & Hessen, New York, N.Y.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Oak Hill Industries Corp., a corporation, and Malcolm Foster, individually and as an officer of said corporation ("respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent Oak Hill Industries Corp. ("Oak Hill"), is a New York corporation with its principal office or place of business at 330 East 59th Street, New York, NY.

Respondent Malcolm Foster is an officer of the corporate respondent. Individually or in concert with others, he formulates, directs, and controls the acts and practices of the corporate respondent, including the acts and practices alleged in this complaint. His principal office or place of business is the same as that of the corporate respondent.

PAR. 2. Respondents have advertised, labeled, offered for sale, sold, and distributed Oak Hill brand plastic plates, bowls and utensils, and other products to the public.

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.

PAR. 4. Oak Hill brand plastic plates, bowls and utensils are made from non-foam polystyrene and are packaged in thin plastic packaging which is sometimes made from polypropylene film and at other times from low-density polyethylene film. The plastic plates, bowls, utensils and plastic packaging do not identify the type(s) of plastic resin from which they are made.

PAR. 5. Respondents have disseminated or have caused to be disseminated advertisements, including product labeling, for their Oak Hill brand plastic plates, bowls and utensils, including but not necessarily limited to the attached Exhibits A - C.

The aforesaid product labeling for Oak Hill brand plastic plates and bowls (Exhibits A - B) includes the following statement on the front of the plastic film packaging:

recyclable

The aforesaid product labeling (Exhibits A - B) also includes the following depiction of a three chasing arrow symbol on the front of the plastic film packaging:



The aforesaid product labeling for Oak Hill brand plastic utensils (Exhibit C) includes the following statement on the front of the plastic film packaging:

RECYCLABLE

The aforesaid product labeling (Exhibit C) also includes the following depiction of a three chasing arrow symbol on the front of the plastic film packaging:



PAR. 6. Through the use of the statements and depictions contained in the advertisements referred to in paragraph five, including but not necessarily limited to the advertisements attached as Exhibits A - C, respondents have represented, directly or by implication, that Oak Hill brand plastic plates, bowls and utensils are recyclable.

PAR. 7. In truth and in fact, while Oak Hill brand plastic plates, bowls and utensils are capable of being recycled, the vast majority of consumers cannot recycle them because there are only a few collection facilities nationwide that will accept the non-foam polystyrene plates, bowls or utensils for recycling. Therefore, the representation set forth in paragraph six was, and is, false and misleading.

PAR. 8. Through the use of the statements and depictions contained in the advertisements referred to in paragraph five, including but not necessarily limited to the advertisements attached as Exhibits A - C, respondents have represented, directly or by implication, that the plastic film packaging of Oak Hill brand plastic plates, bowls and utensils is recyclable.

PAR. 9. In truth and in fact, while the plastic film packaging of Oak Hill brand plastic plates, bowls and utensils is capable of being recycled, the vast majority of consumers cannot recycle it because there are only a few collection facilities nationwide that will accept the polypropylene film or low-density polyethylene film plastic packaging for recycling. 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 five, including but not necessarily limited to the advertisements attached as Exhibits A - C, respondents have represented, directly or by implication, that at the time they made the representations set forth in paragraphs six and eight, respondents possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 11. In truth and in fact, at the time they made the representations set forth in paragraphs six and eight, respondents did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation set forth in paragraph ten was, and is, false and misleading.

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

EXHIBIT A

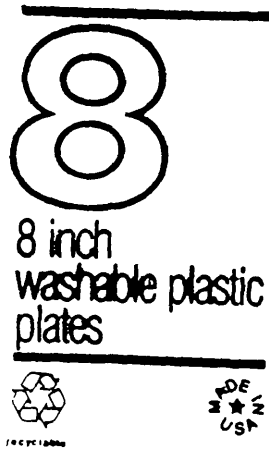


Exhibit A

44

Complaint

EXHIBIT B

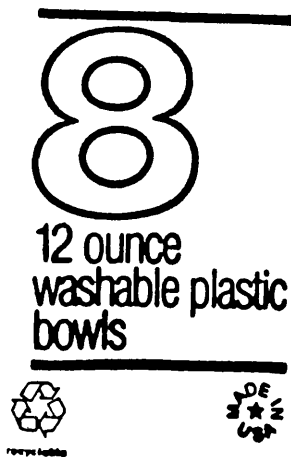


Exhibit B

EXHIBIT C



50

Washable plastic
tableware



Exhibit C

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 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 complaint, a statement that the signing of the agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the 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 Oak Hill Industries Corp. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 330 East 59th Street, in the City of New York, State of New York.

Respondent Malcolm Foster is an officer of said corporation. He formulates, directs, and controls the acts and practices of said corporation. His address is the same as that of said corporation.

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

ORDER

DEFINITIONS

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

The term “*product or package*” means any product or package that is offered for sale, sold or distributed to the public by respondents, their successors and assigns, under the Oak Hill brand name or any other brand name of respondents, their successors and assigns; and also means any product or package sold or distributed to the public by third parties under private labeling agreements with respondents, their successors and assigns.

“*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.

I.

A. *It is ordered*, That respondents, Oak Hill Industries Corp., a corporation, its successors and assigns, and its officers, and Malcolm Foster, 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 labeling, advertising, promotion, offering for sale, sale, or distribution of any product or package 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 extent to which:

- (1) Any such product or package is capable of being recycled; or,
- (2) Recycling collection programs for such product or package are available.

B. Provided, however, respondents will not be in violation of Part I(A)(2) of this order, in connection with the advertising, labeling, offering for sale, sale, or distribution of any non-foam polystyrene,

polypropylene film, or low-density polyethylene film product or package, if they truthfully represent that such product or package is recyclable, provided that:

(1) Respondents disclose clearly, prominently, and in close proximity to such representation:

(a) In regard to any non-foam polystyrene product or package, that such product or package is recyclable in the few communities with recycling collection programs for non-foam polystyrene; in regard to any polypropylene film product or package, that such product or package is recyclable in the few communities with recycling collection programs for polypropylene film; and in regard to any low-density polyethylene film product or package, that such product or package is recyclable in the few communities with recycling collection programs for low-density polyethylene film; or

(b) The approximate number of U.S. communities with recycling collection programs for such product or package; or

(c) The approximate percentage of U.S. communities or the U.S. population to which recycling collection programs for such product or package are available; and

(2) In addition, such product or package itself bears a clear identification of the specific plastic resin(s) from which it is made.

For purposes of this provision, a disclosure elsewhere on the product package shall be deemed to be “in close proximity” to such representation if there is a clear and conspicuous cross-reference to the disclosure. The use of an asterisk or other symbol shall not constitute a clear and conspicuous cross reference. A cross-reference shall be deemed clear and conspicuous if it is of sufficient prominence to be readily noticeable and readable by the prospective purchaser when examining the part of the package on which the representation appears.

II.

It is further ordered, That respondents, Oak Hill Industries Corp., a corporation, its successors and assigns, and its officers, and Malcolm Foster, 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 labeling, advertising, promotion, offering for sale, sale, or distribution of any product or package 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 any such product or package offers any environmental benefit, 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 for five (5) years after the last date of dissemination of any representation covered by this order, respondents, or their successors and assigns, shall maintain and upon request make available to the Federal Trade Commission for inspection and copying:

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

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

IV.

It is further ordered, That the corporate respondent shall distribute a copy of this order to each of its operating divisions and to each of its officers, agents, representatives, or employees engaged in the preparation and placement of advertisements, promotional materials, product labels or other such sales materials covered by this order.

V.

It is further ordered, That the individual respondent shall notify the Commission in the event of the discontinuance of his present business or employment and of each affiliation with a new business or employment. In addition, for a period of five (5) years from the date of service of this order, he shall promptly notify the Commission of each affiliation with a new business or employment whose activities include the sale, distribution, and/or manufacturing of any plastic product or package or of his affiliation with a new business or employment in which his own duties and responsibilities involve the sale, distribution, and/or manufacturing of any plastic product or package. Each such notice shall include the individual respondent's new business address and a statement of the nature of the business or employment in which such respondent is newly engaged, as well as a description of such respondent's duties and responsibilities in connection with the business or employment. The expiration of the notice provision of this paragraph shall not affect any other obligation arising under this order.

VI.

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

VII.

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

IN THE MATTER OF

AJM PACKAGING CORPORATION, ET AL.

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

Docket C-3508. Complaint, July 19, 1994--Decision, July 19, 1994

This consent order prohibits, among other things, a Michigan seller of disposable paper plates and its president from representing that any product it sells offers any environmental benefit unless it can substantiate the claim, or from misrepresenting that any paper product or package is capable of being recycled, or the extent to which recycling collection programs for it is available.

Appearances

For the Commission: *Mary Koelbel Engle* and *Dean C. Forbes*.

For the respondents: *Jeffrey G. Heuer, Jaffe, Raitt, Heuer & Weiss*, Detroit, MI.

COMPLAINT

The Federal Trade Commission, having reason to believe that AJM Packaging Corporation, a corporation, and Abram Epstein, individually and as officer of said corporation ("respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent AJM Packaging Corporation is a Michigan corporation with its office and principal place of business located at 6910 Dix Avenue, Detroit, Michigan.

Respondent Abram Epstein is president of the corporate respondent named herein. He formulates, directs, and controls the acts and practices of the corporate respondent. His business address is the same as that of the corporation.

The aforementioned respondents cooperate and act together in carrying out the acts and practices hereinafter set forth.

PAR. 2. Respondents have advertised, offered for sale, sold, and distributed paper plates to the public under such trade names as Nature's Own Green Label.

PAR. 3. The acts or 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.

PAR. 4. Respondents have disseminated or have caused to be disseminated advertisements for Nature's Own Green Label paper plates, including, but not necessarily limited to, package labeling attached as Exhibit A. These advertisements contain the following statement:

MADE FROM 100% RECYCLABLE AND BIODEGRADABLE PAPER

PAR. 5. Through the use of the statement contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisement attached as Exhibit A, respondents have represented, directly or by implication, that respondents' paper plates are recyclable after ordinary use.

PAR. 6. In truth and in fact, while respondents' paper plates are capable of being recycled, the vast majority of consumers cannot recycle them because there are virtually no collection facilities that accept used paper plates for recycling. Therefore, the representation set forth in paragraph five was, and is, false and misleading.

PAR. 7. Through the use of the statement contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisement attached as Exhibit A, respondents have represented, directly or by implication, that:

1. Respondents' paper plates will completely break down and return to nature -- *i.e.*, decompose into elements found in nature -- within a reasonably short period of time after customary disposal;
2. Respondents' paper plates offer a significant environmental benefit after customary disposal.

PAR. 8. Through the use of the statement contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisement attached as Exhibit A, respondents have represented, directly or by implication, that at the time they made the representations set forth in paragraphs five and

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

Complaint

EXHIBIT A



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 complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft 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 the 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 Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent AJM Packaging Corporation is a Michigan corporation with its office and principal place of business at 6910 Dix Avenue, Detroit, Michigan. Respondent Abram Epstein is the president of said corporation. He formulates, directs, and controls the acts and practices of said corporation, and his principal office and place of business is located at the above stated address.

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

DEFINITION

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

“*Product or package*” means any product or package, including but not limited to bags and plates, that is offered for sale, sold, or distributed to the public by respondents, their successors and assigns, under the “Nature’s Own Green Label” brand name or any other brand name of respondents, their successors and assigns; and also means any such product or package sold or distributed to the public by third parties under private labeling agreements with respondents, their successors and assigns.

I.

It is ordered, That respondents AJM Packaging Corporation, a corporation, its successors and assigns, and its officers, and Abram Epstein, individually and as officer of said corporation, and respondents, representatives, agents, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, labeling, offering for sale, sale, or distribution of any paper product or package, 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:

(1) That any such product or package is degradable, biodegradable, or photodegradable; or,

(2) Through the use of such terms as degradable, biodegradable, photodegradable, or any other substantially similar term or expression, that the degradability of any such product or package offers any environmental benefit when disposed of as trash that is ordinarily buried in a sanitary landfill,

unless, at the time of making such representation, respondents possess and rely upon competent and reliable scientific evidence that substantiates the 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 AJM Packaging Corporation, a corporation, its successors and assigns, and its officers, and Abram Epstein, individually and as officer of said corporation, and respondents' representatives, agents, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, labeling, promotion, offering for sale, sale, or distribution of any paper product or package 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 extent to which any such paper product or package is capable of being recycled or the extent to which recycling collection programs for such product or package are available.

III.

It is further ordered, That respondents AJM Packaging Corporation, a corporation, its successors and assigns, and its officers, and Abram Epstein, individually and as officer of said corporation, and respondents' representatives, agents, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, labeling, promotion, offering for sale, sale, or distribution of any product or package 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 any such product or package offers any environmental benefit, 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 may continue to deplete their existing inventory of "Penthouse" brand paper plates product packaging in the normal course of business without violating this order until October 31, 1993.

V.

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

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

B. All test 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.

VI.

It is further ordered, That respondent AJM Packaging Corporation shall distribute a copy of this order within sixty (60) days after service of this order upon it to each of its operating divisions and to each of its officers, agents, representatives, or employees engaged in the preparation of labeling and advertising and placement of newspaper, periodical, broadcast, and cable advertisements covered by this order.

VII.

It is further ordered, That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. In addition, for a period of five (5) years from the service date of this order, the respondent shall promptly notify the Commission of each affiliation with a new business or employment

whose activities relate to the manufacture, sale, or distribution of paper products, or of his affiliation with a new business or employment in which his own duties and responsibilities relate to the manufacture, sale, or distribution of paper products. When so required under this paragraph, each such notice shall include the individual respondent's new business address and a statement of the nature of the business or employment in which such respondent is newly engaged, as well as a description of such respondent's duties and responsibilities in connection with the business or employment. The expiration of the notice provision of this paragraph shall not affect any other obligation arising under this order.

VIII.

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

IX.

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

IN THE MATTER OF

MIA ROSE PRODUCTS, INC., ET AL.

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

Docket C-3509. Complaint, July 19, 1994--Decision, July 19, 1994

This consent order prohibits, among other things, a California-based corporation and its officer from making any representation about the efficacy or performance of any air cleaning, air freshening, or insecticidal product, unless the respondents possess and rely upon competent and reliable scientific evidence to substantiate the representation.

Appearances

For the Commission: *Linda K. Badger* and *Jeffrey Klurfeld*.

For the respondents: *Pro se*.

COMPLAINT

The Federal Trade Commission, having reason to believe that Mia Rose Products, Inc., a corporation, and Mia Palencar, individually and as an officer of said corporation (“respondents”), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent Mia Rose Products, Inc. is a California corporation, with its principal office or place of business at 3555-B Harbor Gateway South, Costa Mesa, California.

Respondent Mia Palencar is an officer of the corporate respondent. Individually or in concert with others, she formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices alleged in this complaint. Her principal office or place of business is the same as that of the corporate respondent.

PAR. 2. Respondents have advertised, labeled, offered for sale, sold, and distributed non-aerosol air freshening sprays, including Air Therapy and Pet Air, and other products to consumers. Air Therapy and Pet Air contain the same active ingredient, “d-limonene,” which

is produced by distilling the essential oils from citrus fruit or certain other plants.

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.

PAR. 4. Respondents have disseminated or have caused to be disseminated advertisements and promotional materials for Air Therapy, including but not necessarily limited to the attached Exhibits A-C. These advertisements and promotional materials contain the following statements:

A. Air Therapy "PURIFIES ... FRESHENS ... PROTECTS ... the air you breathe." (Exhibit A).

B. "AIR THERAPY 100% NATURAL AIR PURIFYING MIST." (Exhibit A).

C. "SAFELY ELIMINATES: Odors, Smoke, Pollen, Household Insects. PERFECT FOR: Home, Office, Fans, Filters, Ventilation Systems." (Exhibit A).

D. "CONCENTRATED - ONE SPRAY DOES IT!" (Exhibit A).

E. "PURIFY your air while you freshen it... 100% Natural Ingredients - 100% Effective." (Exhibit B).

F. "ELIMINATE ODORS, SMOKE, ALLERGY-CAUSING POLLEN, AIRBORNE BACTERIA, cleansing the air while still maintaining natural pureness. CIGARETTE AND CIGAR SMOKE is eliminated instantly as each droplet ATTRACTS AND ABSORBS SMOKE when misted HIGH in the air." (Exhibit B).

G. "Air Therapy remains simple with no unnecessary artificial ingredients or additives that actually harm the mucous membranes and only temporarily mask the existing odors." (Exhibit B).

H. "Highly CONCENTRATED ... GUARANTEED--NON-TOXIC--Long Lasting. 100 TIMES STRONGER than conventional products. One spray does it!" (Exhibit B).

I. "More than an air freshener." (Exhibit C).

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

A. Is effective in cleaning or purifying indoor air.

B. Is more effective in cleaning or purifying indoor air than conventional air cleaning products.

C. Eliminates smoke when sprayed in the air.

D. Eliminates pollen when sprayed in the air.

- E. Eliminates airborne bacteria when sprayed in the air.
- F. Eliminates household insects when sprayed in the air.
- G. Eliminates, rather than masks, odors when sprayed in the air.

PAR. 6. In truth and in fact:

- A. Air Therapy is not effective in cleaning or purifying indoor air.
- B. Air Therapy is not more effective in cleaning or purifying indoor air than conventional air cleaning products.
- C. Spraying Air Therapy into the air does not eliminate smoke.
- D. Spraying Air Therapy into the air does not eliminate pollen.
- E. Spraying Air Therapy into the air does not eliminate airborne bacteria.
- F. Spraying Air Therapy into the air does not eliminate household insects.
- G. Spraying Air Therapy into the air masks, rather than eliminates, odors.

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

PAR. 7. Respondents have disseminated or have caused to be disseminated advertisements and promotional materials for Pet Air, including but not necessarily limited to the attached Exhibit D. These advertisements and promotional materials contain the following statements:

- A. "PET AIR PURIFIES ... FRESHENS ... PROTECTS ... the air you share." (Exhibit D).
- B. "PET AIR is a SAFE, 100% extremely effective method of CLEANING THE AIR, purifying while it protects you and your pets, environment." (Exhibit D).
- C. "ELIMINATE ANIMAL ODORS & SMOKE, ODOR-CAUSING-airborne bacteria, cleansing the air while still maintaining natural pureness." (Exhibit D).
- D. "Each droplet contains millions of active electrical charges (ions), nature's own air cleaners, that ATTRACT AND NEUTRALIZE offensive odors and continually cleanse the air of odor-causing bacteria, allergy-causing pollen, pet dander and harmful microscopic pollutants." (Exhibit D).
- E. "PET AIR remains simple with no unnecessary artificial ingredients or additives that actually harm the mucus membranes and only temporarily mask the existing odors." (Exhibit D).

F. "ONE SPRAY DOES IT! ADVANTAGES: Highly CONCENTRATED ... GUARANTEED--NON-TOXIC ... Long Lasting. 100 TIMES STRONGER than conventional products." (Exhibit D).

PAR. 8. Through the use of the statements contained in the advertisements and promotional materials referred to in paragraph seven, including but not necessarily limited to the advertisements and promotional materials attached as Exhibit D, respondents have represented, directly or by implication, that Pet Air:

- A. Is effective in cleaning or purifying indoor air.
- B. Is more effective in cleaning or purifying indoor air than conventional air cleaning products.
- C. Eliminates smoke when sprayed in the air.
- D. Eliminates pollen when sprayed in the air.
- E. Eliminates airborne bacteria when sprayed in the air.
- F. Eliminates pet dander when sprayed in the air.
- G. Eliminates, rather than masks, odors when sprayed in the air.

PAR. 9. In truth and in fact:

- A. Pet Air is not effective in cleaning or purifying indoor air.
- B. Pet Air is not more effective in cleaning or purifying indoor air than conventional air cleaning products.
- C. Spraying Pet Air into the air does not eliminate smoke.
- D. Spraying Pet Air into the air does not eliminate pollen.
- E. Spraying Pet Air into the air does not eliminate airborne bacteria.
- F. Spraying Pet Air into the air does not eliminate pet dander.
- G. Spraying Pet Air into the air masks, rather than eliminates, odors.

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

PAR. 10. Through the use of the statements contained in the advertisements and promotional materials referred to in paragraphs four and seven, including but not necessarily limited to the advertisements and promotional materials attached as Exhibit A-D, respondents have represented, directly or by implication, that Air Therapy and Pet Air are more effective than conventional air freshening products.

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

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

PAR. 13. The acts or practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

Complaint

118 F.T.C.

EXHIBIT A

PURIFIES...

FRESHENS...

PROTECTS...
the air you breathe

AIR THERAPY.
100% NATURAL
AIR PURIFYING MIST

Contains essential oils distilled from *real citrus*...nothing else!

SMOKE	PROTECTS
• Odors	• Home
• Pollen	• Fans, Filters
• Smoke	• Office
• Household Insects	• Ventilation Systems

CONCENTRATED. ONE AEROSOL BOTTLE.

Available in 1 fl. oz., 5 fl. oz. & 16 fl. oz. Bottles.

NON-ALCOHOL
CHEMICAL-FREE
RECYCLABLE

MIA ROSE®
PRODUCTS, Inc. 1-714-662-5465
1-800-292-6339

C-3509
B157619

EXHIBIT B



C-3509
B157619

"Refresh Your Life"™

PURIFY your air
while you freshen it

Chemical-Free Cruelty-Free

CONTENTS:

Pure essential oils distilled from real citrus
and exotic herbs, nothing else!

100% Natural Ingredients • 100% Effective

NON-AEROSOL

Use with confidence—NO FLUOROCARBONS

UNLIKE ANYTHING ON THE MARKET TODAY

(Read Your Labels)

OBJECTIVE IN PRODUCT DEVELOPMENT

To develop a superior product for today's environmental needs: One of the safest and most effective methods of cleansing the air in your personal environment. Thereby taking the place of commercial, chemical additive air fresheners and deodorizers.

ELIMINATE ODORS, SMOKE, ALLERGY-CAUSING POLLEN, AIRBORNE BACTERIA, cleansing the air while still maintaining natural pureness.

CIGARETTE AND CIGAR SMOKE is eliminated instantly as each droplet actively **ATTRACTS AND ABSORBS SMOKE** when misted **HIGH** in the air.

Air Therapy remains simple with no unnecessary artificial ingredients or additives that actually harm the mucous membranes and only temporarily mask the existing odors.

Air Therapy is also **Aroma Therapy** (healing energy from nature's scents) basically recharging your energy with ionized air.

HOW IT WORKS

Functions similarly to the ionizer machine. Each droplet contains millions of active electrical charges (ions), nature's own air cleansers, that **ATTRACT AND NEUTRALIZE** offensive odors.

MULTI-PURPOSE

- HOMES and AUTOMOBILES. SPRAY INTO CLOSETS, ashtrays, under seats. Spray directly into FANS, ventilation systems, air conditioning units.
- DOCTORS /DENTISTS OFFICE
- HOTELS/RESTAURANTS
- BOATS (pour into bilge and waste holding tanks).
- BEAUTY SALONS (perms and acrylic nail odors).
- GARAGES, CAMPERS, WORKROOMS (tar, kerosene and paint smells). Eliminates AFTER-FIRE ODORS, BURNED FOOD and FISH smells.
- Strong enough for KENNELS, CAGES and STABLES Use after fumigation or flea bombing.
- SAFE for BABY'S NURSERY (diaper pail).

AIR THERAPY® PROVEN EFFECTIVE

MIX directly into CAT LITTER.

SPRAY directly on area where STUBBORN and SOUR odors persist or MILDEW STAINS or MUSTY odors are present, or POUR directly into urinals & garbage chutes. Use by itself or in conjunction with automatic plug-in type air purifiers—portable or permanent models. Lightly spray the filters that are contained within the machine or fill the attached cup.

"Essential oils from citrus fruit have been proven highly effective in eliminating household pests such as flies, ants, wasps, fleas and crickets through both direct contact and close exposure to the vapors. At the same time it is not only safe for humans, but smells good too."
—Science News, October 1983

ADVANTAGES

Highly CONCENTRATED ... GUARANTEED--NON-TOXIC--Long Lasting. 100 TIMES STRONGER than conventional products. **One spray does it!**

- 1 fl. oz. POCKET SIZE--travel, auto.
- 5 fl. oz. CONVENIENT PERSONAL SIZE. (Recyclable Aluminum)--home, office, or countertop usage.
- 15 oz. ECONOMY SIZE. Easy mist top, safe CO₂ propellant
- 16 fl. oz. INDUSTRIAL SIZE for larger areas used with any trigger sprayer or to REFILL the stone cup in our wall-mount dispenser

Also Available:

- A unique WALL-MOUNT DISPENSER with stone filled cup and open-flow fan for continuous scent.

Mia Rose® Products Incorporated
Corporate Office (714) 662-5465
FAX (714) 662-5891
Order Desk 800-292-6339

EXHIBIT B

EXHIBIT C

Also Available in:

- Original Orange
- Extra Lime
- Spearmint

POCKET SIZE
1.02 Oz. Non-Aerated
Bottle of 30 in 14" color display.

POCKET SIZE
1.1 Oz. Non-Aerated
Individually packaged on color display cart. Hang on hook or sell on shelf.

PERSONAL SIZE
5.1 Oz. Non-Aerated Bottle
Bottle of 12
Color display

INDUSTRIAL SIZE
16.1 Oz. Non-Aerated
Atch hand gripper.
Easy to fill.

Refresh Your Life

100% natural purifying mist for the air you breathe...

Refresh Your Life

Keeps "No" fresh your life

Refresh Your Life

Purifies Freshens Refreshes
The air you breathe. NATURALLY

C-3509
B157619
EXHIBIT C

EXHIBIT D

PET AIR

FOR PETS & THE PEOPLE
WHO LOVE THEM!



C-3509
B157619

**PURIFIES, FRESHENS & PROTECTS
THE AIR YOU SHARE...
...NATURALLY**

PET AIR is a **SAFE**, 100% extremely effective method of **CLEANING THE AIR**, purifying, while it protects you and your pets' environment. Experience the longlasting effect of **REAL**, natural citrus scents.

PET AIR contains **IONS** (active electrical charges) that are nature's own air cleaners. Ions **ATTRACT, NEUTRALIZE** and **ABSORB ALL** pet **ODORS** in seconds when misted **HIGH** in the air or directly on source of odor. Eliminates **SMOKE**, too.

Use **PET AIR** for household pests (fleas, flies, ants and crickets). The scent of real citrus keeps insects away from pet beds and carpets.

"Essential oils from citrus fruit have been proven highly effective in eliminating household pests such as flies, ants, wasps, fleas and crickets through both direct contact and close exposure to the vapors. At the same time it is not only safe for humans, but smells good too."

-Science News, October, 1983

CONTENTS

A concentrated clear liquid derived from a perfect blend of organic essential oils. Our essential oils are pure concentrated oils distilled from **CITRUS FRUITS AND HERBS, NOTHING ELSE.**

OBJECTIVE IN PRODUCT DEVELOPMENT

To develop a superior product for today's pet owners' needs: **ELIMINATE ANIMAL ODORS & SMOKE, ODOR-CAUSING** airborne bacteria, cleansing the air while still maintaining natural freshness. **PET AIR** remains simple with no unnecessary, artificial ingredients or additives that actually harm mucus membranes and only temporarily mask the existing odors.

**UNLIKE ANYTHING ON THE MARKET
TODAY**

HOW IT WORKS

Functions similarly to the ionization machine. Each droplet contains millions of active electrical charges (ions), nature's own air cleaners, that **ATTRACT AND NEUTRALIZE** offensive odors and continually cleanse the air of odor-causing bacteria, allergy-causing pollen, pet dander and harmful microscopic pollutants.

CRUELTY FREE

NO HARMFUL CHEMICALS

MULTI-PURPOSE

- **KENNELS, CAGES and STABLES**, use after fleabombing and fumigation
- **DOG HOUSES — PET BEDDING**
- **Spray directly in CAT LITTER**
- **GARBAGE CHUTES and BINS**
- **CAMPERS, GARAGES, TENTS**
- **BOATS, MOTELS** — anywhere you take your pet!

ENVIRONMENTAL BENEFITS

The balance of **NATURAL INGREDIENTS** eliminates the need for chemical preservatives or additives of any kind. **PET AIR** is also **AROMA THERAPY** (healing energy from nature's scents) basically recharging you & your **PET'S ENERGY** with ionized air.

ONE SPRAY DOES IT!

ADVANTAGES

Highly **CONCENTRATED... GUARANTEED—NON-TONIC—** will not harm you, your pet or our natural environment. Long Lasting. **100 TIMES STRONGER** than conventional products.



Mia Rose® Products Incorporated
Corporate Office (714) 662-5465
FAX (714) 662-5891
Order Desk 800-292-6339

EXHIBIT D

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 San Francisco Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; 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; 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 Mia Rose Products, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 3555-B Harbor Gateway South, in the City of Costa Mesa, State of California.

Respondent Mia Rose Palencar is an officer of said corporation. She formulates, directs, and controls the policies, acts and practices of said corporation, and her principal office and place of business is located at the above stated address.

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

ORDER

I.

It is ordered, That respondents Mia Rose Products, Inc., a corporation, its successors and assigns, and its officers, and Mia Palencar, 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 Air Therapy, Pet Air or any substantially similar 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:

- A. Such product is effective in cleaning or purifying indoor air.
- B. Such product is more effective in cleaning or purifying indoor air than conventional air cleaning products.
- C. Spraying such product into the air eliminates smoke.
- D. Spraying such product into the air eliminates pollen.
- E. Spraying such product into the air eliminates airborne bacteria.
- F. Spraying such product into the air eliminates household insects.
- G. Spraying such product into the air eliminates pet dander.
- H. Spraying such product into the air eliminates rather than masks odors.

For the purposes of this order, “substantially similar product” shall mean any air cleaning or air freshening product which contains d-limonene as its sole active ingredient.

II.

It is further ordered, That respondents, Mia Rose Products, Inc., a corporation, its successors and assigns, and its officers, and Mia Palencar, 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 air cleaning, air freshening, or insecticidal 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, the efficacy or performance of any such product, unless such representation is true, and 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. 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.

III.

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

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

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

IV.

It is further ordered, That the provisions of this order shall not apply to the printing on cans of Air Therapy or Pet Air which were manufactured prior to September 1, 1993, and shipped by respondents to distributors or retailers prior to four (4) months from the date of issuance of this order.

V.

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

VI.

It is further ordered, That the individual respondent shall, for a period of five (5) years after the date of service of this order upon her, promptly notify the Commission, in writing, of her discontinuance of her present business or employment and of her affiliation with a new business or employment. For each such new affiliation, the notice shall include the name and address of the new business or employment, a statement of the nature of the new business or employment, and a description of respondent's duties and responsibilities in connection with the new business or employment.

VII.

It is further ordered, That the corporate respondent shall, within ten (10) days from the date of service of this order upon them, distribute a copy of this order to each of its officers, agents, representatives, independent contractors, and employees involved in the preparation and placement of advertisements or promotional materials, or is in communication with customers or prospective customers, or who have any responsibilities with respect to the subject matter of this order; and for a period of five (5) years, from the date of issuance of this order, distribute a copy of this order to all of respondent's future such officers, agents, representatives, independent contractors, and employees.

VIII.

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

IN THE MATTER OF

DETROIT AUTO DEALERS ASSOCIATION, INC., ET AL.

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

Docket 9189. Complaint, Dec. 20, 1984--Decision, July 20, 1994*

This consent order prohibits, among other things, the association of motor vehicle dealers and a former officer, James Daniel Hayes, from entering into, continuing or carrying out any agreement to establish, fix or maintain any hours of operation of any dealer in the Detroit area. In addition, the consent order requires the respondent association to amend its bylaws to comply with the provisions of the order, and to place, in the city's two daily newspapers for four consecutive weeks, at least four advertisements a week stating that certain area dealers are required by the Commission order to maintain extended hours (at least 62 hours a week) for a one-year period and listing the dealers subject to the requirement.

Appearances

For the Commission: *Ernest A. Nagata and Mary Lou Steptoe.*

For the respondents: *Martin E. Crandall, Stringari, Fritz, Krager, Ahearn & Crandall, Detroit, MI. Howard E. O'Leary, Dykema, Gossett, Spencer, Goodnow & Trigg, Washington, D.C. Lawrence F. Raniszewski, Colombo & Colombo, Bloomfield Hill, MI. Christopher J. MacAvoy, Collier, Shannon & Scott, Washington, D.C. Fred L. Woodworth, Dykema, Gossett, Spencer, Goodnow & Trigg, Detroit, MI. Glenn A. Mitchell, Stein, Mitchell & Mezines, Washington, D.C. John F. Youngblood, Abbott, Nicholson, Quilter, Eshaki & Youngblood, Detroit, MI.*

DECISION AND ORDER

The Federal Trade Commission having issued its two count complaint charging the respondents named in the complaint issued in this matter on December 20, 1984, with violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and the respondents having been served with a copy of that complaint, together with a notice of contemplated relief; and

* Complaint previously published at 108 FTC 193 (1986).

Respondents Detroit Auto Dealers Association, Inc. (“DADA”) and James Daniel Hayes, their attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order for Count I of the complaint, an admission by the identified respondents of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in Count I of such complaint, and waivers and other provisions as required by the Commission’s Rules; and

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

The Commission having thereafter considered the matter and 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 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent DADA is an incorporated trade association for motor vehicle dealers with its principal place of business located at 1800 W. Big Beaver Rd., Troy, MI.

2. Respondent James Daniel Hayes was, at relevant times, an officer of DADA, and as such formulated, directed and controlled the acts and practices of DADA. James Daniel Hayes’ mailing address is 2845 Palmerston Rd., Troy, MI.

3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding as it relates to Count I of the complaint and of the identified respondents, and the proceeding is in the public interest.

ORDER

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

1. “*Person*” means any natural person, corporation, partnership, association, joint venture, trust, or other organization or entity, but not governmental entities.

2. “*Dealer*” means any person who receives on consignment or purchases motor vehicles for sale or lease to the public, and any director, officer, employee, representative or agent of any such person.

3. “*Dealer association*” means any trade, civic, service, or social association whose membership is composed primarily of dealers.

4. “*Detroit area*” means the Detroit, Michigan metropolitan area, comprising Macomb County, Wayne County and Oakland County in the State of Michigan.

5. “*Hours of operation*” means the times during which a dealer is open for business to sell or lease motor vehicles.

6. “*Weekday hours*” means the hours of 9:00 a.m. to 6:00 p.m. Monday through Friday.

7. “*Non-weekday hours*” means hours other than 9:00 a.m. to 6:00 p.m. Monday through Friday.

8. “*Respondent*” means any dealership, individual, or association respondent.

I.

It is further ordered, That DADA and James Daniel Hayes shall cease and desist from, directly or indirectly or through any corporate or other device, entering into, continuing, or carrying out any agreement, contract, combination, or conspiracy, in or affecting commerce (as “commerce” is defined in the Federal Trade Commission Act), with any other respondent or other dealer or dealer association in the Detroit area to establish, fix, maintain, adopt, or adhere to any hours of operation.

II.

It is further ordered, That DADA and James Daniel Hayes shall cease and desist from, directly or indirectly or through any corporate or other device, performing any of the following acts or practices or encouraging, inducing, or requiring any person to perform any of the following acts or practices, or entering into, continuing, or carrying out any agreement, contract, combination, or conspiracy with any other person in the Detroit area to do or perform any of the following acts or practices:

A. Exchanging information or communicating with any other respondent or other dealer or dealer association in the Detroit area concerning hours of operation, except to the extent necessary (i) to comply with any order of the Federal Trade Commission, (ii) after two (2) years from the date this order becomes final, to incorporate individual dealers' hours of operation in lawful joint advertisements, and (iii) in connection with special sales events or promotions sponsored or coordinated by DADA, including but not limited to the North American International Auto Show; or

B. Requesting, recommending, coercing, influencing, inducing, encouraging, or persuading, or attempting to request, recommend, coerce, influence, induce, encourage, or persuade, any other respondent or other dealer or dealer association in the Detroit area to maintain, adopt or adhere to any hours of operation.

III.

It is further ordered, That respondent DADA shall:

A. Beginning thirty (30) days after this order becomes final, and for a period of not less than four (4) weeks thereafter, place and cause to be disseminated each week at least four (4) advertisements, including one in the Thursday editions of the Detroit News and the Detroit Free Press, one in the Saturday edition of the combined Detroit News and Free Press, and one in any other edition of the Detroit News, the Detroit Free Press, or the combined Detroit News and Free Press. Each advertisement shall (1) list all dealership respondents which within ten (10) days prior to the placement of the advertisement are subject to a final Commission order to maintain minimum weekly hours of operation, (2) list all non-respondent dealerships in the Detroit area that are owned or operated by an individual respondent who within ten (10) days prior to the placement of the advertisement is subject to a final commission order to maintain minimum weekly hours of operation, and (3) disclose that all such orders have a minimum hours requirement of 62 hours per week, or 58 hours per week where applicable. For the purpose of complying with Part III.A.(2), above, DADA shall use its best efforts to identify all non-respondent dealerships in the Detroit area that are owned or operated by an individual respondent. The advertisements shall be devoted exclusively to the content set forth in paragraph B.

hereto. The advertisements shall be clear and prominent containing a banner headline in 24 point or larger bold type so that it can be readily noticed, with the principal portion of the text in 12 point or larger type, and the list of respondent and nonrespondent dealerships in 9 point or larger type. The advertisement shall be a minimum of one-eighth (1/8) of a page and shall be placed in the same location at which advertisements for the sale of new automobiles ordinarily appear; and

B. The advertisements referred to in paragraph A. of this section shall state as follows:

AUTO DEALERS OPEN
FOR EXTENDED HOURS

Prior to [date of order] most Detroit area automobile dealers have not been open for business on Saturday or on Tuesday, Wednesday, or Friday evening. As a result of a consent order of the Federal Trade Commission, the following Detroit area automobile dealers must offer expanded shopping hours of a minimum of 62 hours per week for one year and are free to choose their own hours thereafter.

[list dealerships]*

* Dealers noted with an asterisk must offer a minimum of 62 shopping hours per week during Daylight Savings Time and a minimum of 58 hours at other times.

IV.

It is further ordered, That DADA shall, for a period of five (5) years from the date this order becomes final, cause to be made minutes of all business meetings of its membership, its board of directors, and its committees. Such minutes shall (i) identify all persons attending such meeting, (ii) include a certification, signed by the presiding officer and the secretary under penalty of perjury, that states whether hours of operation were discussed at the meeting, and (iii) summarize what was discussed at the meeting. If hours of operation were discussed at any business meeting subject to this order, then the minutes of such meeting shall identify the participants in the discussion of hours of operation and state in detail the

substance of the discussions). DADA shall retain such minutes (including, but not limited to, the required certifications) for a period of five (5) years from the date the minutes were created. Such minutes shall be provided to the Commission upon request.

V.

It is further ordered, That DADA shall:

A. Within sixty (60) days from the date this order becomes final, amend its bylaws, rules and regulations to eliminate any provision inconsistent with any provision of this order;

B. Within sixty (60) days from the date this order becomes final, amend its bylaws, rules and regulations to incorporate: (1) a provision that prohibits its members from discussing at any formal or informal membership, board of directors, or committee meeting the hours of operation of any dealer, except to the extent necessary to comply with any order of the Federal Trade Commission; and (2) a provision that requires expulsion from membership of any member who violates such prohibition;

C. Within ten (10) days after the amendment of any bylaws, rules or regulations pursuant to this order, furnish a copy of such amended bylaws, rules or regulations to all members, and within ten (10) days of any new member joining DADA, furnish to such new member a copy of the bylaws, rules and regulations of DADA; and

D. Within sixty (60) days after receiving information from any source concerning a potential violation of any bylaw, rule, or regulation required by Part V.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 V.B. of this order.

VI.

It is further ordered, That DADA shall, for a period of five (5) years from the date this order becomes final, provide to the Commission the name and address of any member expelled pursuant to the requirements of Part V.D. of this order within ten (10) days after such expulsion.

VII.

It is further ordered, That within ten (10) days after the date this order becomes final DADA shall provide a copy of the order to each of its officers, directors, members and employees. For a period of five (5) years from the date this order becomes final, DADA shall provide a copy to each new member and new employee, within ten (10) days after the date the employee is hired or the new member joins DADA.

VIII.

It is further ordered, That DADA and James Daniel Hayes shall, within ninety (90) days after this order becomes final and annually thereafter for a period of five (5) years, file with the Commission a verified written report setting forth in detail the manner and form in which they have complied with this order. The requirements of Parts VIII and IX shall not apply to James Daniel Hayes; provided, however, that James Daniel Hayes shall, within ninety (90) days after this order becomes final, file with the Commission a verified written report stating that he is no longer employed by DADA or any other dealer association in the Detroit area and does not own or operate a dealership in the Detroit area; provided, further, that if circumstances change whereby James Daniel Hayes shall become employed by DADA or any other dealer association in the Detroit area, or shall own or operate a dealership in the Detroit area, then he shall notify the Commission at the earliest practicable date of such a change and shall begin complying with the requirements of Parts VIII and IX of this order.

IX.

It is further ordered, That for a period of five (5) years from the date this order becomes final, DADA shall notify the Commission at least thirty (30) days prior to any proposed change in corporate status (such as dissolution, assignment, or sale) that results in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in DADA which may affect compliance obligations arising out of the order. James Daniel Hayes shall, for five (5) years from the date the order becomes final,

promptly notify the Commission of the discontinuance of his present business or employment and of any new affiliation or employment with any dealer or dealer association. Such notice shall include his new business address and a statement of the nature of the business or employment in which he is newly engaged, as well as a description of his duties and responsibilities in connection with the new business or employment.

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IN THE MATTER OF

WYATT MARKETING CORPORATION, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3510. Complaint, July 27, 1994--Decision, July 27, 1994*

This consent order prohibits, among other things, a California-based company from distributing an infomercial, from making false claims regarding a book on the availability of government grants and loans, and from making or selling any commercial that misrepresents it as an independent program, rather than a paid advertisement. The respondent is required to have a disclosure statement for any commercial 15 minutes or longer, and to have substantiation for future claims regarding the availability of grants, loans or other benefits from any source, the terms or conditions of getting government loans or grants, and methods for starting or operating a business.

Appearances

For the Commission: *Michael J. Bloom and Donald G. D'Amato.*
For the respondent: *Glenn W. Peterman, McDonough, Holland & Allen, Sacramento, CA.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Wyatt Marketing Corporation, Inc., a corporation, and James R. Wyatt, individually and as an officer and director of said corporation, (hereinafter, collectively, "respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent Wyatt Marketing Corporation, Inc. (formerly doing business as James R. Wyatt & Associates, Inc. and Cornerstone Publishing) is a California corporation that has had its principal office or place of business at 4231 Pacific Street, Suite 4, Rocklin, California.

PAR. 2. Respondent James R. Wyatt, at all times pertinent herein, has been an officer and director of respondent Wyatt Marketing Corporation, Inc. Individually or in concert with others,

he has formulated, directed, and controlled the acts and practices of the corporate respondent, including the acts and practices alleged in this complaint. His principal office or place of business has been the same as that of the corporate respondent.

PAR. 3. Respondents have manufactured, advertised, labeled, offered for sale, sold, and distributed various materials that are represented to feature information on obtaining government benefits to start a new business, to obtain money for college, or to save on taxes, including but not necessarily limited to a book entitled 101 Ways to Get Cash From the Government (hereinafter also referred to as the "Government Benefits Book").

PAR. 4. 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.

COUNT I

PAR. 5. Respondents have disseminated or have caused to be disseminated advertisements for the Government Benefits Book, including but not necessarily limited to a 30-minute advertisement that appears in the form of a talk show entitled "Focus on Success" (hereinafter also referred to as the "Government Benefits Infomercial"), a complete transcript of which is attached hereto as Exhibit A. These advertisements contain the following statements:

[James Wyatt]	". . . there's a program called, through the United States Department of Agriculture, through what they call their Farmers Home Administration agency and they've got a program to where you can qualify for a house for 0 down and 1 percent interest, and I as a general contractor have built 3,000 of those homes and sold them to people back in America. Zero percent down and 1 percent interest. So it's not a fluke. As a matter of fact, this year, I think the government, in that particular agency, the Farmers Home Administration, has a \$5.7 billion program strictly for housing of people. You can buy a single family home as well as apartments."
[George Reading]	"So its not a fluke?"
[James Wyatt]	"No."
[George Reading]	"I heard you right - 0 percent down; 1 percent interest?"
[James Wyatt]	"For 32 years, 31 days."

(Exhibit A)

PAR. 6. Through the use of the statements contained in the advertisements referred to in paragraph five, including but not necessarily limited to the advertisement attached as Exhibit A, respondents have represented, directly or by implication, that the Farmers Home Administration had \$5.7 billion in loan money available for individuals for the purchase of single family homes and apartments.

PAR. 7. In truth and in fact, the Farmers Home Administration did not have \$5.7 billion in loan money available for individuals for the purchase of single family homes and apartments. During the time period that respondents disseminated or caused to be disseminated the Government Benefits Infomercial, the loan money available for individuals from the Farmers Home Administration for the purchase of single family homes and apartments totaled approximately \$1.3 billion per federal fiscal year. Therefore, the representation set forth in paragraph six was false and misleading.

COUNT II

PAR. 8. Respondents have disseminated or have caused to be disseminated advertisements for the Government Benefits Book, including but not necessarily limited to the Government Benefits Infomercial. These advertisements contain the following statements:

[George Reading]	"It gets even better, doesn't it? Here's one that says 'How You May Be Entitled To A \$10,000 Refund.'"
[James Wyatt]	"Yep. Do you know how many people in America that overpay might be entitled to that? Might and I put might because not everybody is, but one out of every three taxpayers in the United States is overpaid in this Social Security Administration system. We give you the telephone number and address of the agency to call. They will send out and tell you, in fact, whether you're in fact owed money back. \$10,000 bucks. They will look it up--they tell you--it's simply done by a telephone call and simple signature on a form and they'll show you how to do it."

(Exhibit A)

PAR. 9. Through the use of the statements contained in the advertisements referred to in paragraph eight, including but not necessarily limited to the advertisement attached as Exhibit A, respondents have represented, directly or by implication, that the

Government Benefits Book gives the reader a telephone number to call to find out whether she or he has overpaid into the Social Security System and to determine whether she or he is entitled to a refund from the Social Security Administration.

PAR. 10. In truth and in fact, the Government Benefits Book does not give the reader a telephone number to call to find out whether she or he has overpaid into the Social Security System and to determine whether she or he is entitled to a refund from the Social Security Administration. Therefore, the representation set forth in paragraph nine was false and misleading.

COUNT III

PAR. 11. Respondents have disseminated or have caused to be disseminated advertisements for the Government Benefits Book, including but not necessarily limited to the Government Benefits Infomercial. These advertisements contain the following statements:

[George Reading]	"All right. 'Collect Social Security Before Age 65.'"
[James Wyatt]	"That's exactly right."
[George Reading]	"Full Benefits?"
[James Wyatt]	"That's right. Full benefits before age 65. You didn't know that, did you?"
[George Reading]	"No I didn't know that. I suspect a lot of people didn't know that."
[James Wyatt]	"No, most people in America don't know that."
[George Reading]	"How do you do that short of being disabled?"
[James Wyatt]	"You ask. You ask, George. I mean I know it sounds too good to be true, but we tell you the agency to call up and say this is what I'm going to do and they will even tell you back, George. They'll tell you how and when you can retire to make the type of income levels you want to."

(Exhibit A)

PAR. 12. Through the use of the statements contained in the advertisements referred to in paragraph eleven, including but not necessarily limited to the advertisement attached as Exhibit A, respondents have represented, directly or by implication, that individuals could retire before age 65 and still collect full social security retirement benefits.

PAR. 13. In truth and in fact, individuals could not retire before age 65 and still collect full Social Security retirement benefits. Under

the Social Security Act, retirement insurance benefits are permanently reduced by 5/9 of 1 percent for each month before age 65 that an individual is entitled to such benefit. Therefore, the representation set forth in paragraph twelve was false and misleading.

COUNT IV

PAR. 14. Respondents have disseminated or have caused to be disseminated advertisements for the Government Benefits Book, including but not necessarily limited to the Government Benefits Infomercial. These advertisements contain the following statements:

[George Reading]	"Pretty fascinating. 'How to Get Up To \$5 Million To Start A Business'."
[James Wyatt]	"Yes, that's right. It's true. It's for a person who wants to start a business or expand an existing business that they have."
[George Reading]	"What kind of money do you need to get into that?"
[James Wyatt]	"It doesn't cost you a dime. You go in and apply through what is called a business plan, George. Okay, you take a business plan into this government agency and they will approve your business plan and give you the money or say no you need have to clean it up, you're missing it over here and they even give you the consulting services for free."
[George Reading]	"How long does it take you?"
[James Wyatt]	"Okay, it takes 47 days. Interest rate is 3 percent to 7.5 percent."
[James Wyatt]	"And anybody here in the TV audience who has a good idea for business can go in and get that money."

(Exhibit A)

PAR. 15. Through the use of the statements contained in the advertisements referred to in paragraph fourteen, including but not necessarily limited to the advertisement attached as Exhibit A, respondents have represented, directly or by implication, that there was a federal agency that would loan an individual with a good idea for a business up to \$5 million to start a business or expand an existing small business at terms of 3 percent to 7.5 percent interest.

PAR. 16. In truth and in fact, there was not a federal agency that would loan an individual with a good idea for a business up to \$5 million to start a business or expand an existing small business at terms of 3 percent to 7.5 percent interest. The United States Small

Business Administration, with few exceptions, only guarantees loans to small businesses. Those federal agencies that do loan money for business do so for very specific types of enterprises, such loans do not approach \$5 million, and, in many instances, the interest rates for these loans are not 3 percent to 7.5 percent. Therefore, the representation set forth in paragraph fifteen was false and misleading.

COUNT V

PAR. 17. Respondents have disseminated or have caused to be disseminated advertisements for the Government Benefits Book, including but not necessarily limited to the Government Benefits Infomercial. These advertisements contain the following statements:

[James Wyatt]

"In the second chapter we talk about educational services that are available. All the way from preschool, all the way to getting your doctorate degree or becoming even a medical doctor. You've got 4 different programs to choose from. One of them is called a grant where you can get up to \$11,000 a year to go to school per year and you never have to pay the money back at all. Then there's another one where there's a student loan at 3% interest. Then there's another one at 7% interest and even if you have payments you don't get a grant to go to school--you don't have to pay any payments at all until you've graduated and you have up to 10 years to repay the loan. So anyone who wants to go to school it's there. The problem is nobody came in and applied for the money, therefore, the budget was cut and then nobody came in and everybody was being told in the newspapers there's no college money so nobody even came in and applied for more money. So there's about 1.3 billion dollars of unused money just last year alone strictly because of media hype."

[George Reading]

"How can you know where you can qualify for a grant or a loan?"

[James Wyatt]

"You just got to go in and ask George. It's based upon need. It's based strictly upon need--how much is it going to cost you to go to school, how beneficial will your education be to society and it's just going and asking the questions. See the problem is George is nobody in America knows which agency to go to get it. That's what the book talks about. It's not a get rich quick book. What it is is a resource book. It tells you which agency to go to, then you go in and ask the

information. What you get in those agencies it is their responsibility to give you the money and that's what they do."

(Exhibit A)

PAR. 18. Through the use of the statements contained in the advertisements referred to in paragraph seventeen, including but not necessarily limited to the advertisement attached as Exhibit A, respondents have represented, directly or by implication, that the Government Benefits Book contains information concerning:

A. The availability of a federal government grant program for college educational purposes under which a student may or could obtain up to \$11,000 annually.

B. The availability of a government student loan with a 3 percent interest rate.

PAR. 19. In truth and in fact:

A. The Government Benefits Book does not contain information concerning the availability of a federal government grant program for college educational purposes under which a student may or could obtain up to \$11,000 annually. During the time period of the airing of the Government Benefits Infomercial, even those students with exceptional financial need could have only obtained just over \$6,000 in government grants for college educational purposes.

B. The Government Benefits Book does not contain information concerning the availability of a government student loan with a 3 percent interest rate. During the time period of the airing of the Government Benefits Infomercial, the lowest interest rate for a government student loan was 5 percent.

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

COUNT VI

PAR. 20. Respondents have disseminated or have caused to be disseminated advertisements for the Government Benefits Book, including but not necessarily limited to the Government Benefits Infomercial. These advertisements contain the following statements:

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[Question from
the audience]

"I am a part-time student and I work part-time also and I heard you mention something about getting a home for \$1. I'd really be interested in purchasing a home for \$1, but I can't come up with a down payment right now. Who would I get in touch with to find out about HUD -- is that what you call that?"

[James Wyatt]

"That's one agency. The Housing and Urban Development -- that's known as HUD. The book gives you seven ways to buy a house for nothing down. With programs sponsored by the United States government 0 down-1 percent interest. Urban Homesteading -- \$1 to totally buy the house. We got a variety of other programs that are in there that require nothing down. Now, see I know that people laugh about this, but I've built 3,000 houses for people in America where their total down payment was \$0 down and their interest payment was 1 percent. On a \$60,000 house -- principal, interest, taxes and insurance your monthly payments are 127 bucks. That's cheaper than rent and so anybody in America that sits back and says I can't afford a house is nonsense. What you can't afford to do is not to buy the book. I'm sorry but that's the truth."

(Exhibit A)

PAR. 21. Through the use of the statements contained in the advertisements referred to in paragraph twenty, including but not necessarily limited to the advertisement attached as Exhibit A, respondents have represented, directly or by implication, that the Government Benefits Book contains information on seven different federally sponsored programs that allow individuals to buy a house with \$0 down and at loan terms of 1 percent annual interest.

PAR. 22. In truth and in fact, the Government Benefits Book does not contain information on seven different federally sponsored programs that allow individuals to buy a house with \$0 down and at loan terms of 1 percent annual interest. The Government Benefits Book only contains information about a federal program available through the United States Department of Agriculture's Farmers Home Administration that allows families with moderate incomes to buy houses in rural areas of less than 10,000 people with \$0 down and at loan terms of 1 percent annual interest. Therefore, the representation set forth in paragraph twenty-one was false and misleading.

COUNT VII

PAR. 23. Respondents have disseminated or have caused to be disseminated advertisements for the Government Benefits Book, including but not necessarily limited to the Government Benefits Infomercial. These advertisements contain the following statements:

- [James Wyatt] "George, you won't believe me, your audience won't believe me. You can get almost \$5 million--almost \$5 million if you use all of the sources in that particular book (the Government Benefits Book). Let's be more realistic."
- [George Reading] "Let's be more realistic. What is the average cash return or cash take?"
- [James Wyatt] "The book is designed if people will buy the book and then use it, and that's the secret is using it, just like Mary did, about \$87,500."

(Exhibit A)

PAR. 24. Through the use of the statements contained in the advertisements referred to in paragraph twenty-three, including but not necessarily limited to the advertisement attached as Exhibit A, respondents have represented, directly or by implication, that consumers who made use of the Government Benefits Book would realize an average of \$87,500 in government grants and loans.

PAR. 25. In truth and in fact, consumers who made use of the Government Benefits Book would not realize an average of \$87,500 in government grants and loans. Therefore, the representation set forth in paragraph twenty-four was false and misleading.

COUNT VIII

PAR. 26. Through the advertising and dissemination of the Government Benefits Infomercial, respondents have represented, directly or by implication, that the Government Benefits Infomercial was an independent television program and was not paid advertising.

PAR. 27. In truth and in fact, the Government Benefits Infomercial was not an independent television program and was paid commercial advertising. Therefore, the representation set forth in paragraph twenty-six was false and misleading.

PAR. 28. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices in or

affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

EXHIBIT A

TRANSCRIPT OF THE
JAMES R. WYATT INFOMERCIAL

"FOCUS ON SUCCESS"

George Reading, Host: Do you pay taxes? How many of you don't pay any taxes? How would you like to pay taxes to the government and get cash back? That's what this program is all about - 101 Ways To Get Cash From the Government.

Welcome to "Focus on Success"

Blind Speaker: Welcome to another edition of "Focus on Success." The program that takes your financial success seriously. Today's program will feature James Wyatt, author, publisher, entrepreneur who will show you 101 ways to get cash from the government cash for business, education, real estate and more. Here's our host George Reading.

George Reading: "101 Ways To Get Cash From the Government." I know it sounds too good to be true, doesn't it? Let's meet the man who says it is -- James Wyatt author, entrepreneur, publisher. Is that -- is that you.

James Wyatt: It's good to see you again, George.

George Reading: I can tell, I can feel people out there saying okay, come on James Wyatt, you're suggesting there's cash in the government just for the asking.

James Wyatt: Sure, I mean, we pay as taxpayers money into the system and that money is used back for its citizens, why can't we consider ourselves a citizen and go get some of it back.

George Reading: Okay, why does the government do this?

James Wyatt: Well, basically the government is involved in it for a variety of different reasons. I mean, this economy is based upon income being produced by businesses. So there's business loans available to people to start new businesses or expand their current businesses and the long and the short of it is George, is really the more money that can be generated by businesses, the more taxes are going to be created so the more jobs that are created the larger the government can get. So all I'm

- saying is that if you want some of the money you've been paying all your life for taxes, go out and get it.
- George Reading: Well, okay, how do you do that? Is it hard to get?
- James Wyatt: No. It's not that difficult. The problem is there's so many agencies that have so much money trying to give it out to the public, we don't have one central government agency we can go to and say I'd like to start a business, I'd like to go on welfare, I'd like to get a house, I'd like to get some of my veteran's benefits, I'd like some employment services like to learn how to, in fact, become a doctor. Also, educational type benefits. There's no one central agency we can go to. We have to go to a variety of different agencies, and that's what creates a problem.
- George Reading: I can hear a lot of people now saying you have now Jim, yeah, you have to be a minority, to be a low income person in order to qualify.
- James Wyatt: George, that's not the case. In fact, those are called entitlement programs and they only in fact represent about 10% of the money the government gives back to people. So, yes, there are those types of programs, but that's not the rule of thumb.
- George Reading: Okay. I understand in your book that you have low interest rate housing loans that amount to a 1% interest loan.
- James Wyatt: Sure. That's how I started as a businessman.
- George Reading: You've got to be kidding.
- James Wyatt: No, I'm not George. The problem is that there's a variety of government agencies that provide housing to the people of the United States. We typically think of the Federal Housing Administration, the FHA, as a single source of funds, however, there's a program called, through the United States Department of Agriculture, through what they call their Farmers Home Administration agency and they've got a program to where you can qualify for a house for \$0 down and 1% interest, and I as a general contractor have built 3,000 of those homes and sold them to people back in America. 0 down and 1% interest. So it's not a fluke. As a matter of fact, this year I think the government, in that particular agency, the Farmers Home Administration, has a \$5.7 billion program strictly for housing of people. You can buy a single family home as well as apartments.
- George Reading: So it's not a fluke.
- James Wyatt: No.
- George Reading: I heard you right - 0% down; 1% interest.
- James Wyatt: For 32 years, 31 days.
- George Reading: All right, where do you get this information?

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James Wyatt: You have to go to the government agency and ask for it. The problem is...is the government itself is not a good public relations person. They aren't. They don't know how to disseminate information back to people. You know, it's so...(unclear).

George Reading: But couldn't anybody simply ask for this information?
James Wyatt: Well, you got to know which agency to go to. We see about them in the newspapers, we hear about them, we hear even about other people doing it. Let's take an example for housing, and there's lots more than housing in this book. You've heard about a 0 down - 1% interest for the first time in your life George. You have been in newscasting for how many years?

George Reading: More than I care to admit.
James Wyatt: But that's the first time you've heard about it. Now what happens, we have the FHA, the Federal Housing Administration, we got the Farmers Home Administration (FHA) so people call the FHA and say I want a 0 down - 1% interest rate and the FHA says someone is lying to you and hangs up the phone. You've got to call the U. S. Department of Agriculture Farmers Home Administration and they'll say yes we've got the program and I'll send you out information.

George Reading: So you got to know where to go.
James Wyatt: You got to know where to go and what questions to ask.
George Reading: Then you get back what?
James Wyatt: You get back information from the government that really shows you what to do.

George Reading: Well you're talking about what, pounds and pounds of information.

James Wyatt: No. No. I think what you're talking about is a variety of information that's available for people. I mean people don't have to buy my book to, in fact, learn this information. What I have done is that I have got some books over there which I saw you looking at. Let's look at the books the government send us. Okay.

George Reading: Pretty hard to avoid them. Look at the size of them.
James Wyatt: George. It's not 1, 2 or 3 little pamphlets you get from the government. You can see over here I brought the pamphlets with me. It's actually 265 books each year you have to research and it's not free. That subscription to that which you pay to the U. S. Superintendent of Printing is \$345 per year. Now there is 150,000 pages of information you've got to research to get to what we got here. Now this is a 100 page book that condenses what's in that information. It takes out all attorney talk and lawmaking talk and it puts into normal English

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- where someone can understand, how do you get the money.
- George Reading: Okay, okay. But Jim, we also know that laws and programs are changing all the time.
- James Wyatt: Absolutely.
- George Reading: Now how can one book like this keep up with all the information you need and keep you current on programs?
- James Wyatt: That's a good point. Now we get this subscription at our office.
- George Reading: All right.
- James Wyatt: One day, every day, somebody researches this for our company and tells us what changes have, in fact, taken place. So somebody has a question on this, all they have to do is just call our hotline and we will research and tell them in what way the new law has been changed. Now the thing that has become even more confusing is let's say there's a new law or change to the law and it says okay, we're changing the law that was developed in 1937 and it tells us right here in this book that we received today. Now what we have to do is take this information, go research the statute from 1937 to figure out what the law really in fact was. So you can either use a short circuit system which the book talks about or you can spend about 5 hours a day to research this so you can get the same information that comes in this book. Time is money.
- George Reading: Yes. Of course. Some of the headings in your book are absolutely fascinating.
- James Wyatt: Well, those are the headings that are given to us by the government.
- George Reading: Pretty fascinating. "How To Get Up To \$5 Million To Start A Business."
- James Wyatt: Yes, that's right. It's true. It's for a person who wants to start a business or expand an existing business that they have.
- George Reading: What kind of money do you need to get into that?
- James Wyatt: It doesn't cost you a dime. You go in and apply through what is called a business plan, George. Okay, you take a business plan in to this government agency and they will approve your business plan and give you the money and say no you need have to clean it up, you're missing it over here and they even give you the consulting services for free.
- George Reading: How long does it take you?
- James Wyatt: Okay, it takes 47 days. Interest rate is 3 percent to 7-1/2 percent.
- George Reading: Criteria? Complicated?

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James Wyatt: Criteria is not. How many people are going to be employed, what is your product going to be, is it safe and sane and also will it employ jobs and will they be able to create _____ (unclear).

George Reading: Give me the interest figure again.

James Wyatt: 3 to 7%

George Reading: On \$5 million?

James Wyatt: And anybody here in the T.V. audience who has a good idea for business can go in and get that money.

George Reading: How to get the SBA to guarantee your rent?

James Wyatt: That's right. The SBA will come in and guarantee your landlord your rent that you're supposed to in fact pay.

George Reading: Free college money for veterans?

James Wyatt: Yeah. Now isn't that interesting?

George Reading: It's very interesting.

James Wyatt: We have been hearing how educational tuition and grants for students have been cut back. We hear this blitzed on the media and you know why, nobody comes in and applies for the money that's there.

George Reading: And you personally got money back?

James Wyatt: Yes. I have. I have received over \$180 million in my life.

George Reading: You personally know anybody else who got money back?

James Wyatt: Oh sure -- absolutely -- several people. As a matter of fact, the government gave away \$37.5 billion last year and I brought one of those people with me today.

George Reading: All right. We'll take a minute and come right back and meet that person.

[Commercial Break]: Stay tuned for book 101 Ways to Get Cash From Government]

Visual text [Fact: the U.S. government has 110 billion dollars to lend or give away!] [Do you need money to start a business? Go to college? Buy a house? Invest in property?] [1-800-332-6200]

Blind Speaker: Fact: the United States government has over 110 billion dollars to lend or give away this year, how much of that 110 billion will you get this year from Uncle Sam. If you need money to start a business, go to college, or a vocational school to buy a house, buy an investment property, or want to save money on your taxes this year, this man can help. Jim Wyatt, noted international entrepreneur, publisher and best selling author has written "101 Ways to Get Cash From the Government." This easy to understand book tells you where you can get money for a business, for college, for employment, real estate and social services. And there is a bonus chapter especially designed to show American veterans

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their new benefits. Don't delay, order today by calling this toll free number. And if you order today, you'll receive a bonus cassette tape by Jim Wyatt, forty-nine, ninety-five plus three dollars shipping and handling is all it takes to get information that could return thousands of dollars to you. Call now, have your charge card number ready. Sorry no C.O.D orders. California and New York residents add sales tax, or you may send check or money order to this address.

George Reading:

Okay, Jim, let's meet your guest.

James Wyatt:

Good, let me introduce Mary Brown to you.

George Reading:

Mary, thanks for joining us. Sit down. How did you two meet?

James Wyatt:

I got to tell you the story. About two years ago I get this nice call from this nice young lady saying Jim we would like you to come to college and talk about real estate financing because I go out and lecture at schools. It happened to be that Mary Brown was at the end of that telephone line. When she graduated I asked her to go to work for me. That's how we met.

George Reading:

How much cash, Mary, did you get back?

Mary Brown:

I got a total of \$28,000 as a grant from the City of Crescent to help build an apartment complex there. So it's a 20-unit complex and I went in and asked for it -- and it was just sitting there. No one had even asked for it and they were going to have to send the money back to the state because nobody was using it and no one knew it was available.

James Wyatt:

Isn't that incredible?

George Reading:

Yeah.

Mary Brown:

And after working with Jim I found out . . . he just exposed me to the idea that it was available, to go and look it up.

George Reading:

Incredible, but complicated?

James Wyatt:

No, not really.

George Reading:

How long did it take you?

Mary Brown:

Well, we got a commitment on it within 2 or 3 days. Well, in fact, the first time we went in and talked to the city manager he gave us a commitment at that time. He was anxious to give the money out. If he didn't give the money out, he would have lost it, and he would not have been able to help build up the city and get some future income.

George Reading:

2 or 3 days to get the commitment. How many days to get the money -- weeks, months, years?

Mary Brown:

Oh, probably. No it only too, um . . . So we came up with the idea in April and then we were actually funded about 2 months later and of course, that was after we got our plans all drawn and so it was --

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James Wyatt: They weren't ready for the money. They could have gotten it sooner for they were ready for the money earlier.

Mary Brown: Yeah.

James Wyatt: How long has it been since you made \$28,000 in 2 days. How many people in America would like to make that?

George Reading: Never, never. All right. If you could tap all 101 ways to get cash from the government, Jim, how much cash could you get?

James Wyatt: George, you won't believe me, your audience won't believe me. You can get almost \$5 million -- almost \$5 million. If you use all of the sources in that particular book. Let's be more realistic.

George Reading: What is the average cash return or cash take?

James Wyatt: The book is designed if people will buy the book and then use it, and that's the secret is using it, just like Mary did, about \$87,500.

George Reading: \$87,500.

James Wyatt: That's a pretty good return on buying a book.

George Reading: Not a bad return for a book that costs less than \$50. The book--

James Wyatt: Okay.

George Reading: Some of the chapters are intriguing--

James Wyatt: Okay, its broken down alphabetically.

George Reading: Too good to be true. How to get up to \$400 per week for not working. Come on. They're going to make you laugh. Right?

James Wyatt: I know, but those are taken from the heading of the government literature. I mean, I didn't create them. Some of them I created.

George Reading: Give me an example. How do you get \$400 per week for not doing anything?

James Wyatt: There's several ways. There's several different ways. What about disability insurance, what about unemployment insurance?

George Reading: Well, I can't qualify for either one.

James Wyatt: Why not?

George Reading: Because I'm not disabled and I'm not unemployed.

James Wyatt: What happens if you are fired tomorrow?

George Reading: Okay - you take it from there.

James Wyatt: So you've got seven varieties, I mean, to get \$400 on a weekly basis by not working. But you know what happens?

George Reading: I never wanted to get fired before, but you are making it very enticing.

James Wyatt: No, I know and a lot of people can't live on \$400, but it's there available for you and I think most people

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know about those type of things. What's exciting about that particular chapter is let's say that you want to go overseas to work. The government has a source in the Bureau to where, in fact, they will hire you, ship you across to any country you want and pay you a salary to work there. If you want to change career and I know you don't want to do this, but if you want to change from newscasting and being an anchor person -- recognize let's now say you want to become a ditch digger, there's a transformation that takes place. Go in for some free counseling -- doesn't cost you one dime and they will do a career change for you free of charge, George. It's there, just nobody knows where to go to get it.

- George Reading: Quote "How To Buy A House For \$1."
 James Wyatt: \$1.
 George Reading: \$1.
 James Wyatt: Okay. I will tell you the program. It is a program run by HUD, Housing and Urban Development and called Urban Home Study and the program's been around since 1846. It's not a new program. \$1. The maximum you would pay for a house under that program is \$2,500 George and when I say \$1 or 25 -- that's not the down payment, you have bought it for that amount of money and there's 126 cities within the United States that run the program.
- George Reading: It gets even better, doesn't it? Here's one that says "How You May Be Entitled To A \$10,000 Refund."
 James Wyatt: Yep. Do you know how many people in America overpay might be entitled to that? Might and I put might because not everybody is, but one out of every three taxpayers in the United States is overpaid in this Social Security Administration system. We give you the telephone number and address of the agency to call. They will send out and tell you, in fact, whether you're in fact owed money back. \$10,000 bucks. They will look it up -- they tell you -- it's simply done by a telephone call and simple signature on a form and they'll show you how to do it.
- George Reading: All right. "Collect Social Security Before Age 65."
 James Wyatt: That's exactly right.
 George Reading: Full benefits.
 James Wyatt: That's right. Full benefits before age 65. You didn't know that, did you?
 George Reading: No I didn't know that. I suspect a lot of people didn't know that.
 James Wyatt: No, most people in America don't know that.
 George Reading: How do you do that short of being disabled?

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James Wyatt: You ask. You ask, George. I mean I know it sounds too good to be true, but we tell you the agency to call up and say this is what I'm going to do and they will even tell you back, George. They'll tell you how and when you can retire to make the type of income levels you want to.

George Reading: Now I have been told that, for instance, that the charitable work and I'm sure others have too, that charitable work can't be used as a tax deduction. And, I notice here you have a chapter that says "Charitable Work As A Tax Deduction."

James Wyatt: That's in the chapter "How To Save Money With The IRS."

George Reading: Have I been misinformed?

James Wyatt: You have been totally misinformed.

George Reading: How do I do that?

James Wyatt: Do you ever do any broadcasting at all for charitable organizations?

George Reading: Absolutely.

James Wyatt: Okay. Why don't you send them a bill and then when you, when they've in fact, received the bill they pay you, and you give it back to them as a donation. Have you ever done that? George you have good CPA's, you have good attorneys around you. They did not tell you that information, did they?

George Reading: Well, not good enough.

James Wyatt: What you do when you get that charitable organization, you write it off on your income tax and, therefore, the government helps you pay less money.

George Reading: Well, that makes sense.

James Wyatt: Sure it does. Sure it does.

George Reading: Leases. "Leases That Save You Money."

James Wyatt: Yeah. With the 1986 Tax Reform Act there are some basic laws that have hit hard home and every American in the United States is paying taxes and we have a system in there that the IRS has, in fact, approved to where if you lease certain items you can totally write it off and have the government, in fact, pay it for you.

George Reading: This one intrigues me. "Free Medical Benefits For Life." Now that's a big question.

James Wyatt: Yeah.

George Reading: [To] Anybody who is growing older?

James Wyatt: No. What that is is kind of a bonus chapter, if you will. You'll notice that there's more than 101 ways to make money. What it is is that there's a bonus chapter that talks specifically about the veterans in the United States that have been in the service for greater than 191 days. 181 days, excuse me. They are entitled to free medical

benefits for the rest of their lives, but nobody tells them about it.

George Reading:

Jim, hang tight.

James Wyatt:

Thank you. I get excited about it. I'm sorry.

George Reading:

In one minute we'll be back with questions from the audience.

[Another commercial for Book 101 Ways . . .]

Visual text

[Want to start a business? Get a higher paying job? Retire?] [Get a part of the government giveaway.] [Start a business Expand Current Business Money for college Get a better Job] [Get \$10,000 back save taxes]

Blind Speaker:

Do you want to start a business? Get a higher paying job, buy a house or investment property or retire this year. Well if you do, you need Jim Wyatt's best selling book "101 Ways to Get Cash From the Government." Jim Wyatt, international businessman, publisher and best selling author has just written this exciting new book that will show you how you can get a part of the 110 billion dollar government giveaway this year. He shows you step by step how to get money from the government to start a business where to get money to expend your current business, where to get money to go to college or to go to a vocational school, how the government will help you to get a better job. How you can get up to 10,000 dollars back from social security and how to save taxes this year. He also has included a special bonus chapter just for veterans describing their benefits from the newly formed U.S. Department of Veterans Affairs. If you are tired of paying taxes to the government and would like to learn how to get those tax dollars back, place your order today by calling this toll free number. Forty-nine, ninety-five plus three dollars shipping and handling will get you information that could change your life. Order now and you'll receive a free copy of Jim Wyatt's cassette tape on getting cash from the government. You may send a check or money order to this address. California and New York residents please add sales tax.

Questions From The Audience

George Reading:

Okay, I can tell from the faces there are questions.

Question:

I am a part-time student and I work part time also and I heard you mention something about getting a home for \$1. I'd be really interested in purchasing a home for \$1, but I can't come up with a down payment right now.

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Who would I get in touch with to find out about HUD-- is that what you call that?

James Wyatt:

That's one agency. The Housing and Urban Development -- that's known as HUD. The book gives you 7 ways to buy a house for nothing down. With programs sponsored by the United States Government 0 down - 1% interest. Urban Homesteading -- \$1 to totally buy the house. We got a variety of other programs that are in there that require nothing down. Now, see I know that people laugh about this, but I've built 3,000 houses for people in America where their total down payment was \$0 down and their interest payment was 1%. On a \$60,000 house -- principal interest, taxes and insurance your monthly payments are 127 bucks. That's cheaper than rent and so anybody in America that sits back and says I can't afford a house is nonsense. What you can't afford to do is not to buy the book. I'm sorry but that's the truth.

George Reading:

Anybody who wants to start a business, expand a business?

Question:

Yes, I live in the Sacramento area and I'd like to move my business up into the Lake Tahoe region and I don't have any connections of banks or credit there. Is there something that can help me in the book.

James Wyatt:

Yeah. Okay. In the first chapter what we've done is we listed employment services. Priorities like businesses, education so it's alphabetically done. The first chapter has 21 different ways to get money to start a business. Whether you're going to be in the metropolitan area or a very very rural area. One of the most exciting things that's happened in my opinion, last year, with the government is in rural areas. They are now encouraging people to move to rural areas to produce jobs. So they got a \$500,000 grant program available that only became available two months ago and you get up to \$500,000 and you never have to pay the money back. If that's not encouragement to start a business, I don't know what is. 500,000 and you never have to make one payment for the money. So yes, plenty programs.

Question:

I am currently a senior in high school right now and college finances are going to be a big problem in the coming year--and you mentioned something about educational loans from the government?

James Wyatt:

In the second chapter we talk about educational services that are available. All the way from preschool, all the way to getting your doctorate degree or becoming even a medical doctor. You've got 4 different programs to choose from. One of them is

called a grant where you can get up to \$11,000 a year to go to school per year and you never have to pay the money back at all. Then there's another one where there's a student loan at 3% interest. Then there's another one at 7% interest and even if you have payments you don't get a grant to go to school -- you don't have to pay any payments at all until you've graduated and you have up to 10 years to repay the loan. So anyone who wants to go to school it's there. The problem is nobody came in and applied for the money, therefore, the budget was cut and then nobody came in and everybody was being told in the newspapers there's no college money so nobody even came in and applied for more money. So there's about 1.3 billion dollars of unused money just last year alone strictly because of media hype.

George Reading: How can you know where you can qualify for a grant or a loan?

James Wyatt: You just got to go in and ask, George, it's based upon need. It's based strictly upon need - how much is it going to cost you to go to school, how beneficial will your education be to society and it's just going and asking the questions. See the problem is, George, is nobody in America knows which agency to go to get it. That's what the book talks about. It's not a get rich quick book. What it is is a resource book. It tells you which agency to go to, then you go in and ask the information. What you get in those agencies it is their responsibility to give you the money and that's what they do.

George Reading: It's not a "How To Book." It's an "Idea Book."

James Wyatt: It's nothing more than a resource book that shows you 101 ways to get cash back from the government.

George Reading: Okay, I saw a hand over here. Yes.

Question: The government money that's not applied for -- is that accounted for in government spending? Is it in the budget?

James Wyatt: That's a good question. Because sometimes nobody knows what happens to it. Okay? In all honesty we have to tell you that. We all heard it in government. If you don't use it, you lose it. So if a government agency, I know one state agency here in California that got \$159 million from the federal government to produce housing in California. They spent \$2 million of it and gave back \$157 million because nobody came in and applied for it. \$157 million of non interest money. You never have to pay back -- they just gave it to you.

George Reading: Okay. Let's go up...

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James Wyatt: That's a tragedy.

George Reading: Let's go to the top row -- (unclear), here, I saw a question up here.

Question: I'm interested in expanding my business. Is there like a limit at all to any kind of loan I can get from the government in the money that I need to expand?

James Wyatt: Yeah. There is basically some maximum levels and there's some minimal levels. Generally and typically to expand a business the maximum loan you can receive is \$6 million. The minimum, however, is \$25,000 so never ask for \$25,000 or less because you'll get denied. That within itself is worth watching this program.

Question: Is there an agency you can contact to help you with hearing aid problems?

James Wyatt: There's several. There's two agencies off the top. First of all are you a veteran?

Questioner: Yes. Yes.

James Wyatt: Okay, then all you have to do is call the VA because you've got free medical benefits for the rest of your life and they'll buy it for you. If that's not good enough, are you 62 years of age or older?

Questioner: Yes. Yes.

James Wyatt: Then go to the Social Security Administration because they buy it for you as well. So that's two sources for a hearing aid.

George Reading: You don't have to pay it back.

James Wyatt: We don't actually talk about hearing aids. (in the book?)

George Reading: That's a gift, you don't have to pay it back?

James Wyatt: That's a gift.

George Reading: More questions?

Question: If you want to start a business, don't you have to prove to the government that your business plan will provide a profit and hire people?

James Wyatt: That's a great, great question and I'm glad somebody asked it. You know this money its not hard to get, but you need to show that there's a need. I mean that's only right. We're not just going to give this money away freely and you as taxpayers, I'm sure you don't want that to occur. So what you need to do your application is basically a business plan. Now most people in America do not know how to write a business plan. I consult for major corporations in the United States and they don't have a business plan so you know what they do, these government agencies, the four government agencies I talked about in the book, they all have people that will show you how to write it for free and you never even have to do it. They will, in fact, show you how to write the business plan and that's the

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application, but I'm not talking about how to write a business plan, you know, to get government contracts, I'm talking about writing a business plan to get the working capital necessary to start a business.

George Reading: Jim Wyatt, thanks a lot for being our guest tonight.

James Wyatt: Well, thank you for having me back. I appreciate it.

George Reading: And thank you, you've been a great audience and thank you, you've been listening to another edition of focus on success.

[Commercial for "101 Ways to Get Cash From the Government"]

Visual text [Fact: Average 1977 income tax paid \$1647.91]
 [Fact: Average 1987 income tax paid \$3628.33]
 [Fact: 220% increase] [Fact?] [Get tax dollars back]
 [James R. Wyatt] [Want to start a business? Receive a scholarship? Get a high paying job? Retire?]

Blind Speaker: Fact: the IRS report that the average amount of income taxes paid by each working adult paid in 1977 was \$1,647 and ninety-one cents.

Fact: the IRS reports that the average amount of income taxes paid by each working adult in 1987 was \$3,629 and thirty-three cents, an increase of two hundred twenty per cent in ten years. Have your wages gone up two hundred twenty per cent in the last ten years to keep pace with these income tax increases. If you are paying taxes to the government and would like to know how to get some of that money back through the government's giant giveaway and loan programs or just feel you're not getting your money's worth. You need this man's book today. If you want to learn how to get money to start a business, expand your current business, get a government scholarship to go to college, get a high paying job directly from the government or if you're planning to retire this year or if you just want to save taxes next year. You need this book now. How much can you expect to get back? You can get up to \$87,500 in just ninety days by using this simple and easy to understand book. It comes with a ten day money back guarantee. Order your copy now by calling this toll free number. Please have your charge card number ready. California and New York residents must add state sales tax. Sorry no C.O.D. orders. Or you may send a check or money order to P.O. Box 2937 South Hampton, New York 11969. order now and you'll receive a free copy of Jim Wyatt's cassette tape about getting money from the government.

Visual text [The 180 million dollars Mr. Wyatt mentions in this program refers to the construction and development

funds he and his corporation have received since 1968. This figure does not include his volunteer services to state, counties and cities which have received additional government funding.]

[James Wyatt, producer; Tom Thompson, director; George Reading, host; Scott Eckern, community director; Bob O'Conner, commercial announcer, Ross du Clair, technical director; Dan Alexander, editor; David Evans, graphic designer; Bill Gary, floor designer; Dan O'Reily, Camera; Brent Hamilton, Camera; David Bunge, lighting director; Scott Neil, lighting; Matt Flynn, audio; Tyler Thompson, original music; Phillip Gross, gaffer; Guy Ortoleva, Project Coordinator]

[Special Thanks to: Sacramento House of Furs, New York Diamonds, Comm Arts/ Talent, Street of Dreams, Presidential Limousine.]

[Produced at the Alexander Media Services Broadcast Center. A WMC Production.]

[THE DIALOGUE BELOW OCCURS AS THE VISUAL TEXT ABOVE IS BEING SHOWN TO THE VIEWERS]

George Reading:	Collect Social Security before age sixty-five?
James Wyatt:	That's exactly right.
George Reading:	Full benefits?
James Wyatt:	Full benefits before sixty-five. You didn't know that did you?
George Reading:	No. I didn't know that.
James Wyatt:	Let's say that you want to go over seas to work. The government has a source and a bureau to where they will, in fact, hire you, ship you across to any country you want and pay you a salary to work there. If you want to change a career and I know you don't want to do this, but if you wanted to change from newscasting and being an anchorperson recognize let's say you want to become a ditch digger. There's a transformation that takes place, go in for some free counseling and it doesn't cost you one dime and they will do a career change for free of charge George. Its there, its just nobody knows where to get it.
George Reading:	Well, how to buy a house for a dollar?
James Wyatt:	A dollar.
George Reading:	A dollar.
James Wyatt:	Okay, I'll tell you the program, its a program run by HUD, Housing and Urban Development. Its called urban homesteading and the program has been around since 1846. Its not a new program. One dollar, the

maximum you pay for a house under that program is twenty-five hundred dollars George, and when I say a dollar or twenty-five that's not the down payment, you have bought it for that amount of money and there are one hundred twenty-six cities within the United States that run the program.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the Wyatt Marketing Corporation, Inc., a corporation ("respondent"), and the respondent having been furnished thereafter with a copy of a draft of complaint which the New York Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, 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 respondent has violated the said Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Wyatt Marketing Corporation, Inc. (formerly doing business as James R. Wyatt & Associates and Cornerstone Publishing) is a corporation organized, existing, and doing business under and by virtue of the laws of the State of California, with its

principal place of business located at 4231 Pacific Street, Suite 4, in the City of Rocklin, State of California.

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

ORDER

DEFINITION

For purposes of this order, "*grant*" shall mean any money or item of value that is given or awarded without a concomitant obligation to repay or to provide goods or services.

I.

It is ordered, That respondent Wyatt Marketing corporation, Inc., a corporation, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any partnership, corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product or service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from selling, broadcasting, or otherwise disseminating, or assisting others to sell, broadcast or otherwise disseminate, in part or in whole the program-length television advertisement entitled "Focus On Success" for the book entitled 101 Ways to Get Cash From the Government.

II.

It is further ordered, That respondent Wyatt Marketing Corporation, Inc., a corporation, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any partnership, corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product or service, 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. The Farmers Home Administration has or had \$5.7 billion in loan money available for individuals for the purchase of single family homes and apartments;

B. The book entitled 101 Ways To Get Cash From the Government gives the reader a telephone number to call to find out whether she or he has overpaid into the Social Security System and to determine whether she or he is entitled to a refund from the Social Security Administration;

C. Individuals can or could retire before age 65 and still collect full Social Security retirement benefits;

D. There is a federal agency that will or would loan an individual with a good idea for a business up to \$5 million to start a business or expand an existing small business at terms of 3 percent to 7.5 percent interest;

E. There is or was a federal government grant program available for college educational purposes under which a student may or could obtain up to \$11,000 annually;

F. There is or was a government student loan available at 3 percent interest;

G. The book entitled 101 Ways To Get Cash From the Government contains information on seven different federally sponsored programs that allow individuals to buy a house with \$0 down and at loan terms of 1 percent annual interest; and

H. Consumers who make use of the book entitled 101 Ways To Get Cash From the Government realize or can realize an average of \$87,500 in government grants and loans.

III.

It is further ordered, That respondent Wyatt Marketing Corporation, Inc., a corporation, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any partnership, corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product or service, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from making any direct or implied representation concerning:

- A. The availability of grants, loans or other benefits from any source for any purpose;
- B. Whether any book or other writing contains information about a particular subject or topic;
- C. The terms or conditions upon which any person, firm, agency, or institution will award a grant, loan or other benefit to any other person, firm, or organization;
- D. The terms or conditions of any government or private business opportunity, business assistance program, grant program, educational program, loan program, housing procurement or other procurement program; or
- E. Any method or technique for starting, operating, or financing any profession or business;

unless, at the time of making such representation, respondent possesses and relies upon competent and reliable evidence that substantiates the representation; provided, however, that whenever respondent represents that any book or other writing contains information about a particular subject or topic, subpart B. shall not be construed to require respondent to possess and rely upon evidence that such information in said book or other writing is true, but only that it is present in said book or other writing.

IV.

It is further ordered, That respondent Wyatt Marketing Corporation, Inc., a corporation, its successors and assigns, and its officers, representatives, agents, and employees, directly or through any partnership, corporation, subsidiary, division, or other device, in connection with the advertising, promotion, offering for sale, sale or distribution of any product or service, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from creating, producing, selling or disseminating:

- A. Any advertisement that misrepresents, directly or by implication, that it is not a paid advertisement; and
- B. Any commercial or other video advertisement fifteen (15) minutes in length or longer or intended to fill a broadcasting or cable casting time slot of fifteen (15) minutes in length or longer that does not display visually, in a clear and prominent manner and for a length

of time sufficient for an ordinary consumer to read, within the first thirty (30) seconds of the commercial and immediately before each presentation of ordering instructions for the product or service, the following disclosure:

"THE PROGRAM YOU ARE WATCHING IS A PAID
ADVERTISEMENT FOR [THE PRODUCT OR SERVICE]."

Provided that, for the purposes of this provision, the oral or visual presentation of the telephone number or address for viewers to contact to place an order for the product or service shall be deemed a presentation of ordering instructions so as to require the display of the disclosure provided herein.

V.

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

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.

VI.

It is further ordered, That respondent shall:

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

B. For a period of ten (10) years from the date of entry of this order, provide a copy of this order to each of respondent's 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 the respondent or any subsidiary, successor, or assign, within three (3) days after the person assumes his or her position.

VII.

It is further ordered, That respondent Wyatt Marketing Corporation, Inc. 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(s), 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.

VIII.

It is further ordered, That if the respondent is no longer the subject of the Eastern District of California's Wyatt Marketing Corporation, Inc. Chapter 7 bankruptcy proceeding (No. 90-26755-C-7), it shall within sixty (60) days after it has ceased to be the subject of such proceeding, file with the Federal Trade Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

CONCURRING STATEMENT OF COMMISSIONER ROSCOE B. STAREK, III

Although I have voted to approve final issuance of the complaint and consent order in this matter, I have reservations about the proviso to one of the substantiation requirements set forth in Part III of the Order. That proviso is designed to accommodate the Commission's Mirror Image Doctrine, which provides as follows:

The Commission, as a matter of policy, ordinarily will not proceed against advertising claims which promote the sale of books or other publications: Provided, The advertising only purports to express the opinion of the author or to quote the contents of the publication; The advertising discloses the source of statements quoted or derived from the contents of the publication; and the advertising discloses the author to be the source of opinions expressed about the publication. Whether the advice being offered by the publication will achieve, in fact, the results claimed for it in the advertising will not be controlling if appropriate disclosures have been made. This policy does not apply, however, if the publication, or its advertising, is used to promote the sale of some other product as part of a commercial scheme.

Advertising in Books, Enforcement Policy, 36 Fed. Reg. 13,414 (1971). The order proviso in Part III states as follows:

[W]henever respondent represents that any book or other writing contains information about a particular subject or topic, [the referenced substantiation provision] shall not be construed to require respondent to possess and rely upon evidence that such information in said book or other writing is true, but only that it is present in said book or other writing.

While the Mirror Image Doctrine is designed to accommodate the Commission's enforcement authority with the protections of the First Amendment, it is at heart a statement of the Commission's enforcement policy, *i.e.*, how the Commission intends to exercise its prosecutorial discretion in cases involving advertising of books and publications. Not all Commission cases involving advertising for books and publications have included a Mirror Image Doctrine proviso.¹ Including such a proviso in an order may raise enforcement difficulties. An inventive respondent could specifically design a deceptive scheme to bring its actions within the protection of a Mirror Image Doctrine order proviso. In addition, a court enforcing the order might construe the proviso more favorably for the defendant than the Commission considers proper.

Further, I am concerned about the particular language of the proviso in the order in this case. It does not require the respondents to make the disclosures required under the Mirror Image Doctrine, and it does not include the exemption from protection for publications used to promote the sale of other products. The ability of a respondent to circumvent the proviso would be limited if the proviso more closely tracked the Commission's Mirror Image Doctrine. Accordingly, in order to limit the possibility that our orders will protect deceptive speech that is not First Amendment-protected, I would prefer that, if safe harbors designed to accommodate the Mirror Image Doctrine are used in the future, they incorporate all of the Doctrine's clauses.²

¹ *E.g.*, Del Dotto Enterprises, FTC Dkt. No. 9257 (April 21, 1994) (consent order).

² *E.g.*, *FTC v. National Credit Savers, Inc.*, No. 91-A-1218-S (M.D. Ala. Dec. 21, 1992) (final judgment and consent order).

IN THE MATTER OF

JAMES R. WYATT

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3511. Complaint, July 27, 1994--Decision, July 27, 1994*

This consent order prohibits, among other things, the owner of the Wyatt Marketing Corporation from distributing an infomercial, from making false claims regarding a book on the availability of government grants and loans, and from making or selling any commercial that misrepresents it as an independent program, rather than a paid advertisement. The respondent is required to have a disclosure statement for any commercial 15 minutes or longer, and to have substantiation for future claims regarding the availability of grants, loans or other benefits from any source, the terms or conditions of getting government loans or grants, and methods for starting or operating a business.

Appearances

For the Commission: *Michael J. Bloom* and *Donald G. D'Amato*.

For the respondent: *Glenn W. Peterman, McDonough, Holland & Allen*, Sacramento, CA.

COMPLAINT

The Federal Trade Commission, having reason to believe that Wyatt Marketing Corporation, Inc., a corporation, and James R. Wyatt, individually and as an officer and director of said corporation, (hereinafter, collectively, "respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent Wyatt Marketing Corporation, Inc. (formerly doing business as James R. Wyatt & Associates, Inc. and Cornerstone Publishing) is a California corporation that has had its principal office or place of business at 4231 Pacific Street, Suite 4, Rocklin, California.

PAR. 2. Respondent James R. Wyatt, at all times pertinent herein, has been an officer and director of respondent Wyatt

Marketing Corporation, Inc. Individually or in concert with others, he has formulated, directed, and controlled the acts and practices of the corporate respondent, including the acts and practices alleged in this complaint. His principal office or place of business has been the same as that of the corporate respondent.

PAR. 3. Respondents have manufactured, advertised, labeled, offered for sale, sold, and distributed various materials that are represented to feature information on obtaining government benefits to start a new business, to obtain money for college, or to save on taxes including but not necessarily limited to a book, entitled 101 Ways to Get Cash From the Government (hereinafter also referred to as the "Government Benefits Book."

PAR. 4. 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.

COUNT I

PAR. 5. Respondents have disseminated or have caused to be disseminated advertisements for the Government Benefits Book, including but not necessarily limited to a 30-minute advertisement that appears in the form of a talk show entitled "Focus on Success" (hereinafter also referred to as the "Government Benefits Infomercial"), a complete transcript of which is attached hereto as Exhibit A. These advertisements contain the following statements:

[James Wyatt]

". . . there's a program called, through the United States Department of Agriculture, through what they call their Farmers Home Administration agency and they've got a program to where you can qualify for a house for 0 down and 1 percent interest, and I as a general contractor have built 3,000 of those homes and sold them to people back in America. Zero percent down and 1 percent interest. So it's not a fluke. As a matter of fact, this year, I think the government, in that particular agency, the Farmers Home Administration, has a \$5.7 billion program strictly for housing of people. You can buy a single family home as well as apartments."

[George Reading]

"So its not a fluke?"

(James Wyatt)

"No."

[George Reading]

"I heard you right - 0 percent down; 1 percent interest?"

[James Wyatt]

"For 32 years, 31 days."

(Exhibit A)

PAR. 6. Through the use of the statements contained in the advertisements referred to in paragraph five, including but not necessarily limited to the advertisement attached as Exhibit A, respondents have represented, directly or by implication, that the Farmers Home Administration had \$5.7 billion in loan money available for individuals for the purchase of single family homes and apartments.

PAR. 7. In truth and in fact, the Farmers Home Administration did not have \$5.7 billion in loan money available for individuals for the purchase of single family homes and apartments. During the time period that respondents disseminated or caused to be disseminated the Government Benefits Infomercial, the loan money available for individuals from the Farmers Home Administration for the purchase of single family homes and apartments totaled approximately \$1.3 billion per federal fiscal year. Therefore, the representation set forth in paragraph six was false and misleading.

COUNT II

PAR. 8. Respondents have disseminated or have caused to be disseminated advertisements for the Government Benefits Book, including but not necessarily limited to the Government Benefits Infomercial. These advertisements contain the following statements:

[George Reading]	"It gets even better, doesn't it? Here's one that says 'How You May Be Entitled To A \$10,000 Refund.'"
[James Wyatt]	"Yep. Do you know how many people in America that overpay might be entitled to that? Might and I put might because not everybody is, but one out of every three taxpayers in the United States is overpaid in this Social Security Administration system. We give you the telephone number and address of the agency to call. They will send out and tell you, in fact, whether you're in fact owed money back. \$10,000 bucks. They will look it up--they tell you--it's simply done by a telephone call and simple signature on a form and they'll show you how to do it."

(Exhibit A)

PAR. 9. Through the use of the statements contained in the advertisements referred to in paragraph eight, including but not necessarily limited to the advertisement attached as Exhibit A,

respondents have represented, directly or by implication, that the Government Benefits Book gives the reader a telephone number to call to find out whether she or he has overpaid into the Social Security System and to determine whether she or he is entitled to a refund from the Social Security Administration.

PAR. 10. In truth and in fact, the Government Benefits Book does not give the reader a telephone number to call to find out whether she or he has overpaid into the Social Security System and to determine whether she or he is entitled to a refund from the Social Security Administration. Therefore, the representation set forth in paragraph nine was false and misleading.

COUNT III

PAR. 11. Respondents have disseminated or have caused to be disseminated advertisements for the Government Benefits Book, including but not necessarily limited to the Government Benefits Infomercial. These advertisements contain the following statements:

[George Reading]	"All right. 'Collect Social Security Before Age 65.'"
[James Wyatt]	"That's exactly right."
[George Reading]	"Full benefits?"
[James Wyatt]	"That's right. Full benefits before age 65. You didn't know that, did you?"
[George Reading]	"No I didn't know that. I suspect a lot of people didn't know that."
[James Wyatt]	"No, most people in America don't know that."
[George Reading]	"How do you do that short of being disabled?"
[James Wyatt]	"You ask. You ask, George. I mean I know it sounds too good to be true, but we tell you the agency to call up and say this is what I'm going to do and they will even tell you back, George. They'll tell you how and when you can retire to make the type of income levels you want to."

(Exhibit A)

PAR. 12. Through the use of the statements contained in the advertisements referred to in paragraph eleven, including but not necessarily limited to the advertisement attached as Exhibit A, respondents have represented, directly or by implication, that individuals could retire before age 65 and still collect full social security retirement benefits.

PAR. 13. In truth and in fact, individuals could not retire before age 65 and still collect full Social Security retirement benefits. Under the Social Security Act, retirement insurance benefits are permanently reduced by 5/9 of 1 percent for each month before age 65 that an individual is entitled to such benefit. Therefore, the representation set forth in paragraph twelve was false and misleading.

COUNT IV

PAR. 14. Respondents have disseminated or have caused to be disseminated advertisements for the Government Benefits Book, including but not necessarily limited to the Government Benefits Infomercial. These advertisements contain the following statements:

[George Reading]	"Pretty fascinating. 'How to Get Up To \$5 Million To Start A Business'."
[James Wyatt]	"Yes, that's right. It's true. It's for a person who wants to start a business or expand an existing business that they have."
[George Reading]	"What kind of money do you need to get into that?"
[James Wyatt]	"It doesn't cost you a dime. You go in and apply through what is called a business plan, George. Okay, you take a business plan into this government agency and they will approve your business plan and give you the money or say no you need have to clean it up, you're missing it over here and they even give you the consulting services for free."
[George Reading]	"How long does it take you?"
[James Wyatt]	"Okay, it takes 47 days. Interest rate is 3 percent to 7.5 percent."
[James Wyatt]	"... And anybody here in the TV audience who has a good idea for business can go in and get that money."

(Exhibit A)

PAR. 15. Through the use of the statements contained in the advertisements referred to in paragraph fourteen, including but not necessarily limited to the advertisement attached as Exhibit A, respondents have represented, directly or by implication, that there was a federal agency that would loan an individual with a good idea for a business up to \$5 million to start a business or expand an existing small business at terms of 3 percent to 7.5 percent interest.

PAR. 16. In truth and in fact, there was not a federal agency that would loan an individual with a good idea for a business up to \$5

million to start a business or expand an existing small business at terms of 3 percent to 7.5 percent interest. The United States Small Business Administration, with few exceptions, only guarantees loans to small businesses. Those federal agencies that do loan money for business do so for very specific types of enterprises, such loans do not approach \$5 million, and, in many instances, the interest rates for these loans are not 3 percent to 7.5 percent. Therefore, the representation set forth in paragraph fifteen was false and misleading.

COUNT V

PAR. 17. Respondents have disseminated or have caused to be disseminated advertisements for the Government Benefits Book, including but not necessarily limited to the Government Benefits Infomercial. These advertisements contain the following statements:

[James Wyatt]

"In the second chapter we talk about educational services that are available. All the way from preschool, all the way to getting your doctorate degree or becoming even a medical doctor. You've got 4 different programs to choose from. One of them is called a grant where you can get up to \$11,000 a year to go to school per year and you never have to pay the money back at all. Then there's another one where there's a student loan at 3% interest. Then there's another one at 7% interest and even if you have payments you don't get a grant to go to school--you don't have to pay any payments at all until you've graduated and you have up to 10 years to repay the loan. So anyone who wants to go to school it's there. The problem is nobody came in and applied for the money, therefore, the budget was cut and then nobody came in and everybody was being told in the newspapers there's no college money so nobody even came in and applied for more money. So there's about 1.3 billion dollars of unused money just last year alone strictly because of media hype."

[George Reading]

"How can you know where you can qualify for a grant or a loan?"

[James Wyatt]

"You just got to go in and ask George. It's based upon need. It's based strictly upon need--how much is it going to cost you to go to school, how beneficial will your education be to society and it's just going and asking the questions. See the problem is George is nobody in America knows which agency to go to get it."

That's what the book talks about. It's not a get rich quick book. What it is a resource book. It tells you which agency to go to, then you go in and ask the information. What you get in those agencies it is their responsibility to give you the money and that's what they do."

(Exhibit A)

PAR. 18. Through the use of the statements contained in the advertisements referred to in paragraph seventeen, including but not necessarily limited to the advertisement attached as Exhibit A, respondents have represented, directly or by implication, that the Government Benefits Book contains information concerning:

A. The availability of a federal government grant program for college educational purposes under which a student may or could obtain up to \$11,000 annually.

B. The availability of a government student loan with a 3 percent interest rate.

PAR. 19. In truth and in fact:

A. The Government Benefits Book does not contain information concerning the availability of a federal government grant program for college educational purposes under which a student may or could obtain up to \$11,000 annually. During the time period of the airing of the Government Benefits Infomercial, even those students with exceptional financial need could have only obtained just over \$6,000 in government grants for college educational purposes.

B. The Government Benefits Book does not contain information concerning the availability of a government student loan with a 3 percent interest rate. During the time period of the airing of the Government Benefits Infomercial, the lowest interest rate for a government student loan was 5 percent.

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

COUNT VI

PAR. 20. Respondents have disseminated or have caused to be disseminated advertisements for the Government Benefits Book, including but not necessarily limited to the Government Benefits Infomercial. These advertisements contain the following statements:

[Question from the audience]

"I am a part-time student and I work part-time also and I heard you mention something about getting a home for \$1. I'd really be interested in purchasing a home for \$1, but I can't come up with a down payment right now. Who would I get in touch with to find out about HUD -- is that what you call that?"

[James Wyatt]

"That's one agency. The Housing and Urban Development--that's known as HUD. The book gives you seven ways to buy a house for nothing down. With programs sponsored by the United States government 0 down 1 percent interest. Urban Homesteading -- \$1 to totally buy the house. We got a variety of other programs that are in there that require nothing down. Now, see I know that people laugh about this, but I've built 3,000 houses for people in America where their total down payment was \$0 down and their interest payment was 1 percent. On a \$60,000 house -- principal, interest, taxes and insurance your monthly payments are 127 bucks. That's cheaper than rent and so anybody in America that sits back and says I can't afford a house is nonsense. What you can't afford to do is not to buy the book. I'm sorry but that's the truth."

(Exhibit A)

PAR. 21. Through the use of the statements contained in the advertisements referred to in paragraph twenty, including but not necessarily limited to the advertisement attached as Exhibit A, respondents have represented, directly or by implication, that the Government Benefits Book contains information on seven different federally sponsored programs that allow individuals to buy a house with \$0 down and at loan terms of 1 percent annual interest.

PAR. 22. In truth and in fact, the Government Benefits Book does not contain information on seven different federally sponsored programs that allow individuals to buy a house with \$0 down and at loan terms of 1 percent annual interest. The Government Benefits Book only contains information about a federal program available through the United States Department of Agriculture's Farmers Home

Administration that allows families with moderate incomes to buy houses in rural areas of less than 10,000 people with \$0 down and at loan terms of I percent annual interest. Therefore, the representation set forth in paragraph twenty-one was false and misleading.

COUNT VII

PAR. 23. Respondents have disseminated or have caused to be disseminated advertisements for the Government Benefits Book, including but not necessarily limited to the Government Benefits Infomercial. These advertisements contain the following statements:

[James Wyatt]	"George, you won't believe me, your audience won't believe me. You can get almost \$5 million almost \$5 million if you use all of the sources in that particular book [the Government Benefits Book]. Let's be more realistic."
[George Reading]	"Let's be more realistic. What is the average cash return or cash take?"
[James Wyatt]	"The book is designed if people will buy the book and then use it, and that's the secret is using it, just like Mary did, about \$87,500."

(Exhibit A)

PAR. 24. Through the use of the statements contained in the advertisements referred to in paragraph twenty-three, including but not necessarily limited to the advertisement attached as Exhibit A, respondents have represented, directly or by implication, that consumers who made use of the Government Benefits Book would realize an average of \$87,500 in government grants and loans.

PAR. 25. In truth and in fact, consumers who made use of the Government Benefits Book would not realize an average of \$87,500 in government grants and loans. Therefore, the representation set forth in paragraph twenty-four was false and misleading.

COUNT VIII

PAR. 26. Through the advertising and dissemination of the Government Benefits Infomercial, respondents have represented, directly or by implication, that the Government Benefits Infomercial was an independent television program and was not paid advertising.

PAR. 27. In truth and in fact, the Government Benefits Infomercial was not an independent television program and was paid commercial advertising. Therefore, the representation set forth in paragraph twenty-six was false and misleading.

PAR. 28. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

EXHIBIT A

TRANSCRIPT OF THE
JAMES R. WYATT INFOMERCIAL

"FOCUS ON SUCCESS"

George Reading, Host: Do you pay taxes? How many of you don't pay any taxes? How would you like to pay taxes to the government and get cash back? That's what this program is all about - 101 Ways To Get Cash From The Government.

Welcome to "Focus on Success"

Blind Speaker: Welcome to another edition of "Focus on Success." The program that takes your financial success seriously. Today's program will feature James Wyatt, author, publisher, entrepreneur who will show you 101 ways to get cash from the government cash for business, education, real estate and more. Here's our host George Reading.

George Reading: "101 Ways To Get Cash From The Government." I know it sounds too good to be true, doesn't it? Let's meet the man who says it is -- James Wyatt author, entrepreneur, publisher. Is that -- is that you.

James Wyatt: It's good to see you again, George.

George Reading: I can tell, I can feel people out there saying okay, come on James Wyatt, you're suggesting there's cash in the government just for the asking.

James Wyatt: Sure, I mean, we pay as taxpayers money into the system and that money is used back for its citizens, why can't we consider ourselves a citizen and go get some of it back.

George Reading: Okay, why does the government do this?

James Wyatt: Well, basically the government is involved in it for a variety of different reasons. I mean, this economy is based upon income being produced by businesses. So

- there's business loans available to people to start new businesses or expand their current businesses and the long and the short of it is George, is really the more money that can be generated by businesses, the more taxes are going to be created so the more jobs that are created the larger the government can get. So all I'm saying is that if you want some of the money you've been paying all your life for taxes, go out and get it.
- George Reading: Well, okay, how do you do that? Is it hard to get?
- James Wyatt: No. It's not that difficult. The problem is there's so many agencies that have so much money trying to give it out to the public, we don't have one central government agency we can go to and say I'd like to start a business, I'd like to go on welfare, I'd like to get a house, I'd like to get some of my veteran's benefits, I'd like some employment services like to learn how to, in fact, become a doctor. Also, educational type benefits. There's no one central agency we can go to. We have to go to a variety of different agencies, and that's what creates a problem.
- George Reading: I can hear a lot of people now saying you have now Jim, yeah, you have to be a minority, to be a low income person in order to qualify.
- James Wyatt: George, that's not the case. In fact, those are called entitlement programs and they only in fact represent about 10% of the money the government gives back to people. So, yes, there are those types of programs, but that's not the rule of thumb.
- George Reading: Okay. I understand in your book that you have low interest rate housing loans that amount to a 1% interest loan.
- James Wyatt: Sure. That's how I started as a businessman.
- George Reading: You've got to be kidding.
- James Wyatt: No, I'm not George. The problem is that there's a variety of government agencies that provide housing to the people of the United States. We typically think of the Federal Housing Administration, the FHA, as a single source of funds, however, there's a program called, through the United States Department of Agriculture, through what they call their Farmers Home Administration agency and they've got a program to where you can qualify for a house for \$0 down and 1% interest, and I as a general contractor have built 3,000 of those homes and sold them to people back in America. 0 down and 1% interest. So it's not a fluke. As a matter of fact, this year I think the government, in that particular agency, the Farmers Home Administration, has a \$5.7 billion program strictly for housing

- of people. You can buy a single family home as well as apartments.
- George Reading: So it's not a fluke.
- James Wyatt: No.
- George Reading: I heard you right - 0% down; 1% interest.
- James Wyatt: For 32 years, 31 days.
- George Reading: All right, where do you get this information?
- James Wyatt: You have to go to the government agency and ask for it. The problem is . . . is the government itself is not a good public relations person. They aren't. They don't know how to disseminate information back to people. You know, it's so... (unclear).
- George Reading: But couldn't anybody simply ask for this information?
- James Wyatt: Well, you got to know which agency to go to. We see about them in the newspapers, we hear about them, we hear even about other people doing it. Let's take an example for housing, and there's lots more than housing in this book. You've heard about a 0 down -1% interest for the first time in your life George. You have been in newscasting for how many years?
- George Reading: More than I care to admit.
- James Wyatt: But that's the first time you've heard about it. Now what happens, we have the FHA, the Federal Housing Administration, we got the Farmers Home Administration (FHA) so people call the FHA and say I want a 0 down -1% interest rate and the FHA says someone is lying to you and hangs up the phone. You've got to call the U. S. Department of Agriculture Farmers Home Administration and they'll say yes we've got the program and I'll send you out information.
- George Reading: So you got to know where to go.
- James Wyatt: You got to know where to go and what questions to ask.
- George Reading: Then you get back what?
- James Wyatt: You get back information from the government that really shows you what to do.
- George Reading: Well you're talking about what, pounds and pounds of information.
- James Wyatt: No. No. I think what you're talking about is a variety of information that's available for people. I mean people don't have to buy my book to, in fact, learn this information. What I have done is that I have got some books over there which I saw you looking at. Let's look at the books the government send us. Okay.
- George Reading: Pretty hard to avoid them. Look at the size of them.
- James Wyatt: George. It's not 1, 2 or 3 little pamphlets you get from the government. You can see over here I brought the pamphlets with me. It's actually 265 books each year you have to research and it's not free. That subscription

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Complaint

to that which you pay to the U. S. Superintendent of Printing is \$345 per year. Now there is 150,000 pages of information you've got to research to get to what we got here. Now this is a 100 page book that condenses what's in that information. It takes out all attorney talk and lawmaking talk and it puts into normal English where someone can understand, how do you get the money.

George Reading:

Okay, okay. But Jim, we also know that laws and programs are changing all the time.

James Wyatt:

Absolutely.

George Reading:

Now how can one book like this keep up with all the information you need and keep you current on programs?

James Wyatt:

That's a good point. Now we get this subscription at our office.

George Reading:

All right.

James Wyatt:

One day, every day, somebody researches this for our company and tells us what changes have, in fact, taken place. So somebody has a question on this, all they have to do is just call our hotline and we will research and tell them in what way the new law has been changed. Now the thing that has become even more confusing is let's say there's a new law or change to the law and it says okay, we're changing the law that was developed in 1937 and it tells us right here in this book that we received today. Now what we have to do is take this information, go research the statute from 1937 to figure out what the law really in fact was. So you can either use a short circuit system which the book talks about or you can spend about 5 hours a day to research this so you can get the same information that comes in this book. Time is money.

George Reading:

Yes. Of course. Some of the headings in your book are absolutely fascinating.

James Wyatt:

Well, those are the headings that are given to us by the government.

George Reading:

Pretty fascinating. "How To Get Up To \$5 Million To Start A Business."

James Wyatt:

Yes, that's right. It's true. It's for a person who wants to start a business or expand an existing business that they have.

George Reading:

What kind of money do you need to get into that?

James Wyatt:

It doesn't cost you a dime. You go in and apply through what is called a business plan, George. Okay, you take a business plan in to this government agency and they will approve your business plan and give you the money and say no you need have to clean it up, you're

missing it over here and they even give you the consulting services for free.

George Reading: How long does it take you?
James Wyatt: Okay, it takes 47 days. Interest rate is 3 percent to 7-1/2 percent.

George Reading: Criteria? Complicated?
James Wyatt: Criteria is not. How many people are going to be employed, what is your product going to be, is it safe and sane and also will it employ jobs and will they be able to create ____ (unclear).

George Reading: Give me the interest figure again.
James Wyatt: 3 to 7%.

George Reading: On \$5 million?
James Wyatt: And anybody here in the T.V. audience who has a good idea for business can go in and get that money.

George Reading: How to get the SBA to guarantee your rent?
James Wyatt: That's right. The SBA will come in and guarantee your landlord your rent that you're supposed to in fact pay.

George Reading: Free college money for veterans?
James Wyatt: Yeah. Now isn't that interesting?
George Reading: It's very interesting.
James Wyatt: We have been hearing how educational tuition and grants for students have been cut back. We hear this blitzed on the media and you know why, nobody comes in and applies for the money that's there.

George Reading: And you personally got money back?
James Wyatt: Yes. I have. I have received over \$180 million in my life.

George Reading: You personally know anybody else who got money back?
James Wyatt: Oh sure -- absolutely -- several people. As a matter of fact, the government gave away \$37.5 billion last year and I brought one of those people with me today.

George Reading: All right. We'll take a minute and come right back and meet that person.

[Commercial Break]: Stay tuned for book 101 Ways to Get Cash From the Government]

Visual text [Fact: the U.S. government has 110 billion dollars to lend or give away!] [Do you need money to start a business? Go to college? Buy a house? Invest in property?] [1-800-332-6200]

Blind Speaker: Fact: the United States government has over 110 billion dollars to lend or give away this year, how much of that 110 billion will you get this year from Uncle Sam. If you need money to start a business, go to college, or a vocational school to buy a house, buy an investment property, or want to save money on your taxes this year, this man can help. Jim Wyatt, noted international entrepreneur, publisher and best selling author has

written "101 Ways to Get Cash From the Government." This easy to understand book tells you where you can get money for a business, for college, for employment, real estate and social services. And there is a bonus chapter especially designed to show American veterans their new benefits. Don't delay, order today by calling this toll free number. And if you order today, you'll receive a bonus cassette tape by Jim Wyatt, forty-nine, ninety-five plus three dollars shipping and handling is all it takes to get information that could return thousands of dollars to you. Call now, have your charge card number ready. Sorry no C.O.D orders. California and New York residents add sales tax, or you may send check or money order to this address.

George Reading:

Okay, Jim, let's meet your guest.

James Wyatt:

Good, let me introduce Mary Brown to you.

George Reading:

Mary, thanks for joining us. Sit down. How did you two meet?

James Wyatt:

I got to tell you the story. About two years ago I get this nice call from this nice young lady saying Jim we would like you to come to college and talk about real estate financing because I go out and lecture at schools. It happened to be that Mary Brown was at the end of that telephone line. When she graduated I asked her to go to work for me. That's how we met.

George Reading:

How much cash, Mary, did you get back?

Mary Brown:

I got a total of \$28,000 as a grant from the City of Crescent to help build an apartment complex there. So it's a 20 unit complex and I went in and asked for it -- and it was just sitting there. No one had even asked for it and they were going to have to send the money back to the state because nobody was using it and no one knew it was available.

James Wyatt:

Isn't that incredible?

George Reading:

Yeah.

Mary Brown:

And after working with Jim I found out . . . he just exposed me to the idea that it was available, to go and look it up.

George Reading:

Incredible, but complicated?

James Wyatt:

No, not really.

George Reading:

How long did it take you?

Mary Brown:

Well, we got a commitment on it within 2 or 3 days. Well, in fact, the first time we went in and talked to the city manager he gave us a commitment at that time. He was anxious to give the money out. If he didn't give the money out, he would have lost it, and he would not have been able to help build up the city and get some future income.

- George Reading: 2 or 3 days to get the commitment. How many days to get the money -- weeks, months, years?
- Mary Brown: Oh, probably. No it only too, um . . . So we came up with the idea in April and then we were actually funded about 2 months later and of course, that was after we got our plans all drawn and so it was --
- James Wyatt: They weren't ready for the money. They could have gotten it sooner for they were ready for the money earlier.
- Mary Brown: Yeah.
- James Wyatt: How long has it been since you made \$28,000 in 2 days. How many people in America would like to make that?
- George Reading: Never, never. All right. If you could tap all 101 ways to get cash from the government, Jim, how much cash could you get?
- James Wyatt: George, you won't believe me, your audience won't believe me. You can get almost \$5 million -- almost \$5 million. If you use all of the sources in that particular book. Let's be more realistic.
- George Reading: What is the average cash return or cash take?
- James Wyatt: The book is designed if people will buy the book and then use it, and that's the secret is using it, just like Mary did, about \$87,500.
- George Reading: \$87,500.
- James Wyatt: That's a pretty good return on buying a book.
- George Reading: Not a bad return for a book that costs less than \$50. The book --
- James Wyatt: Okay.
- George Reading: Some of the chapters are intriguing --
- James Wyatt: Okay, its broken down alphabetically.
- George Reading: Too good to be true. How to get up to \$400 per week for not working. Come on. They're going to make you laugh. Right?
- James Wyatt: I know, but those are taken from the heading of the government literature. I mean, I didn't create them. Some of them I created.
- George Reading: Give me an example. How do you get \$400 per week for not doing anything?
- James Wyatt: There's several ways. There's several different ways. What about disability insurance, what about unemployment insurance?
- George Reading: Well, I can't qualify for either one.
- James Wyatt: Why not?
- George Reading: Because I'm not disabled and I'm not unemployed.
- James Wyatt: What happens if you are fired tomorrow?
- George Reading: Okay - you take it from there.

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- James Wyatt: So you've got seven varieties, I mean, to get \$400 on a weekly basis by not working. But you know what happens?
- George Reading: I never wanted to get fired before, but you are making it very enticing.
- James Wyatt: No, I know and a lot of people can't live on \$400, but it's there available for You and I think most people know about those type of things. What's exciting about that particular chapter is let's say that you want to go overseas to work. The government has a source in the Bureau to where, in fact, they will hire you, ship you across to any country you want and pay you a salary to work there. If you want to change career and I know you don't want to do this, but if you want to change from newscasting and being an anchor person -- recognize let's now say you want to become a ditch digger, there's a transformation that takes place. Go in for some free counseling -- doesn't cost you one dime and they will do a career change for you free of charge, George. It's there, just nobody knows where to go to get it.
- George Reading: Quote "How To Buy A House For \$1."
- James Wyatt: \$1.
- George Reading: \$1.
- James Wyatt: Okay. I will tell you the program. it is a program run by HUD, Housing and Urban Development and called Urban Home Study and the program's been around since 1846. It's not a new program. \$1. The maximum you would pay for a house under that program is \$2,500 George and when I say \$1 or 25 -- that's not the down payment, you have bought it for that amount of money and there's 126 cities within the United States that run the program.
- George Reading: It gets even better, doesn't it? Here's one that says "How You May Be Entitled To A \$10,000 Refund."
- James Wyatt: Yep. Do you know how many people in America overpay might be entitled to that? Might and I put might because not everybody is, but one out of every three taxpayers in the United States is overpaid in this Social Security Administration system. We give you the telephone number and address of the agency to call. They will send out and tell you, in fact, whether you're in fact owed money back. \$10,000 bucks. They will look it up -- they tell you -- it's simply done by a telephone call and simple signature on a form and they'll show you how to do it.
- George Reading: All right. "Collect Social Security Before Age 65."
- James Wyatt: That's exactly right.

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George Reading: Full benefits.
James Wyatt: That's right. Full benefits before age 65. You didn't know that, did you?

George Reading: No I didn't know that. I suspect a lot of people didn't know that.

James Wyatt: No, most people in America don't know that.
George Reading: How do you do that short of being disabled?
James Wyatt: You ask. You ask, George. I mean I know it sounds too good to be true, but we tell you the agency to call up and say this is what I'm going to do and they will even tell you back, George. They'll tell you how and when you can retire to make the type of income levels you want to.

George Reading: Now I have been told that, for instance, that the charitable work and I'm sure others have too, that charitable work can't be used as a tax deduction. And, I notice here you have a chapter that says "Charitable Work As A Tax Deduction."

James Wyatt: That's in the chapter "How To Save Money With The IRS."

George Reading: Have I been misinformed?
James Wyatt: You have been totally misinformed.
George Reading: How do I do that?
James Wyatt: Do you ever do any broadcasting at all for charitable organizations?

George Reading: Absolutely.
James Wyatt: Okay. Why don't you send them a bill and then when you, when they've in fact, received the bill they pay you, and you give it back to them as a donation. Have you ever done that? George you have good CPA's, you have good attorneys around you. They did not tell you that information, did they?

George Reading: Well, not good enough.
James Wyatt: What you do when you get that charitable organization, you write it off on your income tax and, therefore, the government helps you pay less money.

George Reading: Well, that makes sense.
James Wyatt: Sure it does. Sure it does.
George Reading: Leases. "Leases That Save You Money."
James Wyatt: Yeah. With the 1986 Tax Reform Act there are some basic laws that have hit hard home and every American in the United States is paying taxes and we have a system in there that the IRS has, in fact, approved to where if you lease certain items you can totally write it off and have the government, in fact, pay it for you.

George Reading: This one intrigues me. "Free Medical Benefits For Life." Now that's a big question.
James Wyatt: Yeah.
George Reading: [To] Anybody who's growing older?

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James Wyatt: No. What that is is kind of a bonus chapter, if you will. You'll notice that there's more than 101 ways to make money. What it is is that there's a bonus chapter that talks specifically about the veterans in the United States that have been in the service for greater than 191 days. 181 days, excuse me. They are entitled to free medical benefits for the rest of their lives, but nobody tells them about it.

George Reading: Jim, hang tight.

James Wyatt: Thank you. I get excited about it. I'm sorry.

George Reading: In one minute we'll be back with questions from the audience.

[Another commercial for Book 101 Ways]

Visual text [Want to start a business? Get a higher paying job? Retire?] [Get a part of the government giveaway.] [Start a business Expand Current Business Money for college Get a better Job] [Get \$10,000 back save taxes]

Blind Speaker: Do you want to start a business? Get a higher paying job, buy a house or investment property or retire this year. Well if you do, you need Jim Wyatt's best selling book "101 Ways to Get Cash From the Government." Jim Wyatt, international businessman, publisher and best selling author has just written this exciting new book that will show you how you can get a part of the 110 billion dollar government giveaway this year. He shows you step by step how to get money from the government to start a business where to get money to expend your current business, where to get money to go to college or to go to a vocational school, how the government will help you to get a better job. How you can get up to 10,000 dollars back from social security and how to save taxes this year. He also has included a special bonus chapter just for veterans describing their benefits from the newly formed U.S. Department of Veterans Affairs. If you are tired of paying taxes to the government and would like to learn how to get those tax dollars back, place your order today by calling this toll free number. Forty-nine, ninety-five plus three dollars shipping and handling will get you information that could change your life. Order now and you'll receive a free copy of Jim Wyatt's cassette tape on getting cash from the government. You may send a check or money order to this address. California and New York residents please add sales tax.

Questions From The Audience

- George Reading: Okay, I can tell from the faces there are questions.
- Question: I am a part-time student and I work part time also and I heard you mention something about getting a home for \$1. I'd be really interested in purchasing a home for \$1, but I can't come up with a down payment right now. Who would I get in touch with to find out about HUD-- is that what you call that?
- James Wyatt: That's one agency. The Housing and Urban Development -- that's known as HUD. The book gives you 7 ways to buy a house for nothing down. With programs sponsored by the United States Government 0 down - 1%, interest. Urban Homesteading -- \$1 to totally buy the house. We got a variety of other programs that are in there that require nothing down. Now, see I know that people laugh about this, but I've built 3,000 houses for people in America where their total down payment was \$0 down and their interest payment was 1%. On a \$60,000 house -- principal interest, taxes and insurance your monthly payments are 127 bucks. That's cheaper than rent and so anybody in America that sits back and says I can't afford a house is nonsense. What you can't afford to do is not to buy the book. I'm sorry but that's the truth.
- George Reading: Anybody who wants to start a business, expand a business?
- Question: Yes, I live in the Sacramento area and I'd like to move my business up into the Lake Tahoe region and I don't have any connections of banks or credit there. Is there something that can help me in the book.
- James Wyatt: Yeah. Okay. In the first chapter what we've done is we listed employment services. Priorities like businesses, education so it's alphabetically done. The first chapter has 21 different ways to get money to start a business. Whether you're going to be in the metropolitan area or a very very rural area. One of the most exciting things that's happened in my opinion, last year, with the government is in rural areas. They are now encouraging people to move to rural areas to produce jobs. So they got a \$500,000 grant program available that only became available two months ago and you get up to \$500,000 and you never have to pay the money back. If that's not encouragement to start a business, I don't know what is. \$500,000 and you never have to make one payment for the money. So yes, plenty programs.
- Question: I am currently a senior in high school right now and college finances are going to be a big problem in the

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- coming year and you mentioned something about educational loans from the government?
- James Wyatt: In the second chapter we talk about educational services that are available. All the way from preschool, all the way to getting your doctorate degree or becoming even a medical doctor. You've got 4 different programs to choose from. One of them is called a grant where you can get up to \$11,000 a year to go to school per year and you never have to pay the money back at all. Then there's another one where there's a student loan at 3% interest. Then there's another one at 7% interest and even if you have payments you don't get a grant to go to school -- you don't have to pay any payments at all until you've graduated and you have up to 10 years to repay the loan. So anyone who wants to go to school it's there. The problem is nobody came in and applied for the money, therefore, the budget was cut and then nobody came in and everybody was being told in the newspapers there's no college money so nobody even came in and applied for more money. So there's about 1.3 billion dollars of unused money just last year alone strictly because of media hype.
- George Reading: How can you know where you can qualify for a grant or a loan?
- James Wyatt: You just got to go in and ask, George. It's based upon need. It's based strictly upon need - how much is it going to cost you to go to school, how beneficial will your education be to society and it's just going and asking the questions. See the problem is, George, is nobody in America knows which agency to go to get it. That's what the book talks about. It's not a get rich quick book. What it is is a resource book. It tells you which agency to go to, then you go in and ask the information. What you get in those agencies it is their responsibility to give you the money and that's what they do.
- George Reading: It's not a "How To Book." It's an "Idea Book."
- James Wyatt: It's nothing more than a resource book that shows you 101 ways to get cash back from the government.
- George Reading: Okay, I saw a hand over here. Yes.
- Question: The government money that's not applied for -- is that accounted for in government spending? Is it in the budget?
- James Wyatt: That's a good question. Because sometimes nobody knows what happens to it. Okay? In all honesty we have to tell you that. We all heard it in government. If you don't use it, you lose it. So if a government agency, I know one state agency here in California that

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got \$159 million from the federal government to produce housing in California. They spent \$2 million of it and gave back \$157 million because nobody came in and applied for it. \$157 million of non interest money. You never have to pay back--they just gave it to you.

George Reading:

Okay. Let's go up...

James Wyatt:

That's a tragedy.

George Reading:

Let's go to the top row--(unclear), here, I saw a question up here.

Question:

I'm interested in expanding my business. Is there like a limit at all to any kind of loan I can get from the government in the money that I need to expand?

James Wyatt:

Yeah. There is basically some maximum levels and there's some minimal levels. Generally and typically to expand a business the maximum loan you can receive is \$6 million. The minimum, however, is \$25,000 so never ask for \$25,000 or less because you'll get denied. That within itself is worth watching this program.

Question:

Is there an agency you can contact to help you with hearing aid problems?

James Wyatt:

There's several. There's two agencies off the top. First of all are you a veteran?

Questioner:

Yes. Yes.

James Wyatt:

Okay, then all you have to do is call the VA because you've got free medical benefits for the rest of your life and they'll buy it for you. If that's not good enough, are you 62 years of age or older?

Questioner:

Yes. Yes.

James Wyatt:

Then go to the Social Security Administration because they buy it for you as well. So that's two sources for a hearing aid.

George Reading:

You don't have to pay it back.

James Wyatt:

We don't actually talk about hearing aids. (in the book?)

George Reading:

That's a gift, you don't have to pay it back?

James Wyatt:

That's a gift.

George Reading:

More questions?

Question:

If you want to start a business, don't you have to prove to the government that your business plan will provide a profit and hire people?

James Wyatt:

That's a great, great question and I'm glad somebody asked it. You know this money its not hard to get, but you need to show that there's a need. I mean that's only right. We're not just going to give this money away freely and you as taxpayers, I'm sure you don't want that to occur. So what you need to do your application is basically a business plan. Now most people in America do not know how to write a business plan. I consult for major corporations in the United States and

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they don't have a business plan so you know what they do, these government agencies, the four government agencies I talked about in the book, they all have people that will show you how to write it for free and you never even have to do it. They will, in fact, show you how to write the business plan and that's the application, but I'm not talking about how to write a business plan, you know, to get government contracts, I'm talking about writing a business plan to get the working capital necessary to start a business.

George Reading:

Jim Wyatt, thanks a lot for being our guest tonight.

James Wyatt:

Well, thank you for having me back. I appreciate it.

George Reading:

And thank you, you've been a great audience and thank you, you've been listening to another edition of focus on success.

[Commercial for "101 Ways to Get Cash From the Government"]

Visual text

[Fact: Average 1977 income tax paid \$1647.91]
 [Fact: Average 1987 income tax paid \$3628.33]
 [Fact: 220% increase] [Fact?] [Get tax dollars back]
 [James R. Wyatt] [Want to start a business? Receive a scholarship? Get a high paying job? Retire?]

Blind Speaker:

Fact: the IRS report that the average amount of income taxes paid by each working adult paid in 1977 was \$1,647 and ninety-one cents. Fact: the IRS reports that the average amount of income taxes paid by each working adult in 1987 was \$3,629 and thirty-three cents, an increase of two hundred twenty per cent in ten years. Have your wages gone up two hundred twenty per cent in the last ten years to keep pace with these income tax increases. If you are paying taxes to the government and would like to know how to get some of that money back through the government's giant giveaway and loan programs or just feel you're not getting your money's worth. You need this man's book today. If you want to learn how to get money to start a business, expand your current business, get a government scholarship to go to college, get a high paying job directly from the government or if you're planning to retire this year or if you just want to save taxes next year. You need this book now. How much can you expect to get back? You can get up to \$87,500 in just ninety days by using this simple and easy to understand book. It comes with a ten day money back guarantee. Order your copy now by calling this toll free number. Please have your charge card number ready. California and New York residents must add

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state sales tax. Sorry no C.O.D. orders. Or you may send a check or money order to P.O. Box 2937 South Hampton, New York 11969. Order now and you'll receive a free copy of Jim Wyatt's cassette tape about getting money from the government.

Visual text:

[The 180 million dollars Mr. Wyatt mentions in this program refers to the construction and development funds he and his corporation have received since 1968. This figure does not include his volunteer services to state, counties and cities which have received additional government funding.]

[James Wyatt, producer; Tom Thompson, director; George Reading, host; Scott Eckern, community director; Bob O'Conner, commercial announcer, Ross du Clair, technical director; Dan Alexander, editor; David Evans, graphic designer; Bill Gary, floor designer; Dan O'Reily, Camera; Brent Hamilton, Camera; David Bunge, lighting director; Scott Neil, lighting; Matt Flynn, audio; Tyler Thompson, original music; Phillip Gross, gaffer; Guy Ortoleva, Project Coordinator]

[Special Thanks to: Sacramento House of Furs, New York Diamonds, Comm Arts/ Talent, Street of Dreams, Presidential Limousine.]

[Produced at the Alexander Media Services Broadcast Center. A WMC Production.]

[THE DIALOGUE BELOW OCCURS AS THE VISUAL TEXT ABOVE IS BEING SHOWN TO THE VIEWERS]

George Reading: Collect Social Security before age sixty-five?
 James Wyatt: That's exactly right.
 George Reading: Full benefits?
 James Wyatt: Full benefits before sixty-five. You didn't know that did you?
 George Reading: No. I didn't know that.
 James Wyatt: Let's say that you want to go over seas to work. The government has a source and a bureau to where they will, in fact, hire you, ship you across to any country you want and pay you a salary to work there. If you want to change a career and I know you don't want to do this, but if you wanted to change from newscasting and being an anchor person recognize let's say you want to become a ditch digger. There's a transformation that takes place, go in for some free counseling and it doesn't cost you one dime and they will do a career change for free of charge George. Its there, its just nobody knows where to get it.
 George Reading: Well, how to buy a house for a dollar?

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Decision and Order

James Wyatt: A dollar.
George Reading: A dollar.
James Wyatt: Okay, I'll tell you the program, its a program run by HUD, Housing and Urban Development. Its called urban homesteading and the program has been around since 1846. Its not a new program. One dollar, the maximum you pay for a house under that program is twenty-five hundred dollars George, and when I say a dollar or twenty-five that's not the down payment, you have bought it for that amount of money and there are one hundred twenty-six cities within the United States that run the program.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the Wyatt Marketing Corporation, Inc., a corporation, and James R. Wyatt, individually and as an officer and director of said corporation ("respondent"), and the respondent having been furnished thereafter with a copy of a draft of complaint which the New York Regional office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, 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 respondent has violated the said Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Wyatt Marketing Corporation, Inc. (formerly doing business as James R. Wyatt & Associates and Cornerstone Publishing) is a corporation organized, existing, and doing business under and by virtue of the laws of the State of California, with its principal place of business located at 4231 Pacific Street, Suite 4, in the City of Rocklin, State of California.

2. Respondent James R. Wyatt, at all times pertinent herein, has been an officer of said corporation. Individually or in concert with others, he has formulated, directed, and controlled the policies, acts and practices of said corporation, and his principal office and place of business has been located at the above stated address.

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

ORDER

DEFINITION

For purposes of this order, "*grant*" shall mean any money or item of value that is given or awarded without a concomitant obligation to repay or to provide goods or services.

I.

It is ordered, That respondent James R. Wyatt, individually, and as an officer and director of Wyatt Marketing Corporation, Inc., a corporation, and respondent's agents, representatives, and employees, directly or through any partnership, corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product or service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from selling, broadcasting, or otherwise disseminating, or assisting others to sell, broadcast or, otherwise disseminate, in part or in whole the program-length television advertisement entitled "Focus On Success" for the book entitled 101 Ways to Get Cash From the Government.

II.

It is further ordered, That respondent James R. Wyatt, individually, and as an officer and director of Wyatt Marketing Corporation, Inc., a corporation, and respondent's agents, representatives, and employees, directly or through any partnership, corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product or service, 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. The Farmers Home Administration has or had \$5.7 billion in loan money available for individuals for the purchase of single family homes and apartments;

B. The book entitled 101 Ways To Get Cash From the Government gives the reader a telephone number to call to find out whether she or he has overpaid into the Social Security System and to determine whether she or he is entitled to a refund from the Social Security Administration;

C. Individuals can or could retire before age 65 and still collect full Social Security retirement benefits;

D. There is a federal agency that will or would loan an individual with a good idea for a business up to \$5 million to start a business or expand an existing small business at terms of 3 percent to 7.5 percent interest;

E. There is or was a federal government grant program available for college educational purposes under which a student may or could obtain up to \$11,000 annually;

F. There is or was a government student loan available at 3 percent interest;

G. The book entitled 101 Ways To Get From the Government contains information on seven different federally sponsored programs that allow individuals to buy a house with \$0 down and at loan terms of 1 percent annual interest; and

H. Consumers who make use of the book entitled 101 Ways To Get Cash From the Government realize or can realize an average of \$87,500 in government grants and loans.

III.

It is further ordered, That respondent James R. Wyatt, individually, and as an officer and director of Wyatt Marketing Corporation, Inc., a corporation, and respondent's agents, representatives, and employees, directly or through any partnership, corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product or service, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from making any direct or implied representation concerning:

A. The availability of grants, loans or other benefits from any source for any purpose;

B. Whether any book or other writing contains information about a particular subject or topic;

C. The terms or conditions upon which any person, firm, agency, or institution will award a grant, loan or other benefit to any other person, firm, or organization;

D. The terms or conditions of any government or private business opportunity, business assistance program, grant program, educational program, loan program, housing procurement or other procurement program; or

E. Any method or technique for starting, operating, or financing any profession or business;

unless, at the time of making such representation, respondent possesses and relies upon competent and reliable evidence that substantiates the representation; provided, however, that whenever respondent represents that any book or other writing contains information about a particular subject or topic, subpart B. shall not be construed to require respondent to possess and rely upon evidence that such information in said book or other writing is true, but only that it is present in said book or other writing.

IV.

It is further ordered, That respondent James R. Wyatt, individually, and as an officer and director of Wyatt Marketing

Corporation, Inc., and respondent's agents, representatives, and employees, directly or through any partnership, corporation, subsidiary, division, or other device, in connection with the advertising, promotion, offering for sale, sale or distribution of any product or service, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from creating, producing, selling or disseminating:

A. Any advertisement that misrepresents, directly or by implication, that it is not a paid advertisement; and

B. Any commercial or other video advertisement fifteen (15) minutes in length or longer or intended to fill a broadcasting or cable casting time slot of fifteen (15) minutes in length or longer that does not display visually, in a clear and prominent manner and for a length of time sufficient for an ordinary consumer to read, within the first thirty (30) seconds of the commercial and immediately before each presentation of ordering instructions for the product or service, the following disclosure:

"THE PROGRAM YOU ARE WATCHING IS A PAID ADVERTISEMENT FOR [THE PRODUCT OR SERVICE]."

Provided that, for the purposes of this provision, the oral or visual presentation of the telephone number or address for viewers to contact to place an order for the product or service shall be deemed a presentation of ordering instructions so as to require the display of the disclosure provided herein.

V.

It is further ordered, That for five (5) years after the last date of dissemination of any representation covered by this order, respondent shall maintain and upon request make available to the Federal Trade Commission for inspection and copying, within five (5) business days of such request:

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.

VI.

It is further ordered:

A. That respondent shall pay to the Federal Trade Commission as consumer redress the sum of two million and five hundred and sixty-eight thousand and four hundred and forty-three dollars (\$2,568,443); provided however, that this liability will be suspended, subject to the provisions of subparts B and C below.

B. That any funds paid by respondent pursuant to subpart A above shall be paid into a redress fund administered by the Federal Trade Commission and shall be used to provide direct redress to purchasers of the book *101 Ways To Get Cash From the Government*, by respondent James R. Wyatt. If the Federal Trade Commission determines, in its sole discretion, that redress to purchasers is wholly or partially impracticable, any funds not so used shall be paid to the United States Treasury. Respondent shall be notified as to how the funds are disbursed, but shall have no right to contest the manner of distribution chosen by the Commission.

C. That the Commission's acceptance of this order is expressly premised upon the financial statements and related documents provided by respondent to the Federal Trade Commission, including the Financial Statement of Debtor form that was executed by James R. Wyatt on November 15, 1992, and respondent's written responses to Commission inquiries, subsequently submitted in January 1993 to the Federal Trade Commission (together designated as the "Financial Statements"). After service upon the respondent of an order to show cause, the Federal Trade Commission may reopen this proceeding to make a determination whether there are any material misrepresentations or omissions in said financial statements and related documents. Respondent shall be given an opportunity to present evidence on this issue. If, upon consideration of respondent's evidence and other information before it, the Commission determines that there are any material misrepresentations or omissions in said financial statements and related documents, that determination shall cause the entire amount of monetary liability of two million and five hundred and sixty-eight thousand and four hundred and forty-three

dollars (\$2,568,443) to become immediately due and payable to the Federal Trade Commission, and interest computed at the rate prescribed in 28 U.S.C. 1961, as amended, shall immediately begin to accrue on any unpaid balance. Proceedings initiated under Part VI are in addition to, and not in lieu of, any other civil or criminal remedies as may be provided by law, including any proceedings the Federal Trade Commission may initiate to enforce this order.

D. Any and all payments required under paragraph A, including any amounts that may be required pursuant to paragraph C, constitute compensation for money obtained by false pretenses, a false representation, or actual fraud, and do not constitute a penalty of any sort whatsoever.

VII.

It is further ordered, That respondent shall:

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

B. For a period of ten (10) years from the date of entry of this order, provide a copy of this order to each of respondent's 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 respondent directly or through any corporation, partnership, subsidiary, or division, within three (3) days after the person assumes his or her position.

VIII.

It is further ordered, That respondent shall, for a period of ten (10) years from the date of entry of this order, notify the Federal Trade 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 the respondent's new business

address and telephone number, and a statement describing the nature of the business or employment and his duties and responsibilities.

IX.

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

CONCURRING STATEMENT OF COMMISSIONER ROSCOE B. STAREK, III

Although I have voted to approve final issuance of the complaint and consent order in this matter, I have reservations about the proviso to one of the substantiation requirements set forth in Part III of the order. That proviso is designed to accommodate the Commission's Mirror Image Doctrine, which provides as follows:

The Commission, as a matter of policy, ordinarily will not proceed against advertising claims which promote the sale of books or other publications: *Provided*, The advertising only purports to express the opinion of the author or to quote the contents of the publication; the advertising discloses the source of statements quoted or derived from the contents of the publication; and the advertising discloses the author to be the source of opinions expressed about the publication. Whether the advice being offered by the publication will achieve, in fact, the results claimed for it in the advertising will not be controlling if appropriate disclosures have been made. This policy does not apply, however, if the publication, or its advertising, is used to promote the sale of some other product as part of a commercial scheme.

Advertising in Books, Enforcement Policy, 36 Fed. Reg. 13,414 (1971). The order proviso in Part III states as follows:

[W]henver respondent represents that any book or other writing contains information about a particular subject or topic, [the referenced substantiation provision] shall not be construed to require respondent to possess and rely upon evidence that such information in said book or other writing is true, but only that it is present in said book or other writing.

While the Mirror Image Doctrine is designed to accommodate the Commission's enforcement authority with the protections of the First Amendment, it is at heart a statement of the Commission's enforcement policy, *i.e.*, how the Commission intends to exercise its prosecutorial discretion in cases involving advertising of books and

publications. Not all Commission cases involving advertising for books and publications have included a Mirror Image Doctrine proviso.¹ Including such a proviso in an order may raise enforcement difficulties. An inventive respondent could specifically design a deceptive scheme to bring its actions within the protection of a Mirror Image Doctrine order proviso. In addition, a court enforcing the order might construe the proviso more favorably for the defendant than the Commission considers proper.

Further, I am concerned about the particular language of the proviso in the order in this case. It does not require the respondents to make the disclosures required under the Mirror Image Doctrine, and it does not include the exemption from protection for publications used to promote the sale of other products. The ability of a respondent to circumvent the proviso would be limited if the proviso more closely tracked the Commission's Mirror Image Doctrine. Accordingly, in order to limit the possibility that our orders will protect deceptive speech that is not First Amendment-protected, I would prefer that, if safe harbors designed to accommodate the Mirror Image Doctrine are used in the future, they incorporate all of the Doctrine's clauses.²

¹ *E.g.*, Del Dotto Enterprises, FTC Dkt. No. 9257 (April 21, 1994) (consent order).

² *E.g.*, *FTC v. National Credit Savers, Inc.*, No. 91-A-1218-S (M.D. Ala. Dec. 21, 1992) (final judgment and consent order).

IN THE MATTER OF

KEYES FIBRE COMPANY

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

Docket C-3512. Complaint, Aug. 2, 1994--Decision, Aug. 2, 1994

This consent order prohibits, among other things, a Connecticut-based company, that manufactures Chinet disposable tableware, from representing that any of its paper products or packages are degradable, biodegradable, or photodegradable, or offers any environmental benefits when disposed of in a sanitary landfill, unless the respondent possesses competent and reliable scientific evidence to substantiate such representation. In addition, the consent order prohibits the respondent from misrepresenting the extent to which any paper product or package is capable of being recycled or the extent to which recycling collection programs are available.

Appearances

For the Commission: *Michael Dershowitz.*

For the respondent: *William L. Patton and Lisa Ropple, Ropes & Gray, Boston, MA.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Keyes Fibre Company, a corporation (“respondent”), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent Keyes Fibre Company (“Keyes Fibre”), is a Delaware corporation with its principal office or place of business at 301 Merritt 7, Norwalk, Connecticut.

PAR. 2. Respondent has manufactured, advertised, labeled, offered for sale, sold, and distributed disposable paper tableware products, including Chinet® disposable tableware, and other products to the public.

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

150

Complaint

PAR. 4. Respondent has disseminated or has caused to be disseminated advertisements, including product labeling and other promotional materials, for its Chinet® disposable tableware, including but not necessarily limited to the attached Exhibits A - H.

The aforesaid product labeling (Exhibit A) includes the following statement:

BIODEGRADABLE

The aforesaid product labeling (Exhibit B) includes the following statement:

100% BIODEGRADABLE

The aforesaid promotional material (Exhibit C) includes the following statement:

ECOLOGICALLY SOUND.

Chinet® is 100% biodegradable in landfill operations

The aforesaid promotional material (Exhibit D) includes the following statements:

Biodegradable

. . . While not everyone is in agreement with regard to solid waste management, most concur that a solution can be found in the combined use of landfills, recycling/composting and waste-to-energy incineration. Concerned consumers can feel confident that Chinet® paper plates perform in whatever disposal method is used in their community.

The aforesaid promotional material (Exhibit E) includes the following statements:

Protecting the Environment

. . . Chinet® is . . . fully biodegradable And . . . it degrades much faster than most ordinary paper plates.

In a 12-week soil-burial study, an independent research firm tested Chinet® against seven other types of paper and plastic plates. Products were labeled and buried in open mesh bags in an environment simulating a landfill. Every two weeks, they were unearthed and examined for signs of deterioration.

Chinet® plates reached an advanced state of decomposition in just two weeks. The other plastic and foam plates showed almost no signs of deterioration after 12 weeks.

The aforesaid promotional material (Exhibit F) includes the following statements:

Unlike foam and plastic alternatives, our molded fiber paper products are biodegradable and can be safely and efficiently disposed of in virtually any method of solid waste management, including waste-to-energy incineration and municipal composting.

Regardless of what it is used for, molded fiber paper is the responsible alternative to foam and plastic. It offers a viable solution to today's methods of solid waste disposal.

We have commissioned independent studies which compare the biodegradability of molded fiber paper, laminated paper, plastic and polystyrene foam. The studies show that Keyes molded fiber paper products biodegrade faster than any of the other materials. In fact, the [Chinet®] molded fiber paper almost completely decomposed in two weeks, while plastic and foam products remained intact indefinitely.

The aforesaid promotional material (Exhibit G) includes the following statements:

WE CARE ABOUT THE ENVIRONMENT

That's why we use biodegradable tableware.

Chinet® makes food look good and its biodegradability is a good step in controlling solid waste volume.

It also contains a three chasing arrow symbol with the words "RECYCLE" and "BIODEGRADABLE" around it.

The aforesaid promotional material (Exhibit H) includes the following statements:

Chinet® disposable tableware, the environmentally sound line of molded paper products (they're biodegradable, made from recycled paper, and are recyclable, especially via municipal composting)

Look for products that are biodegradable. Contrary to claims that biodegradability isn't important, it will be a key attribute as more cities turn to composting of solid waste as an alternative to landfills. Municipal composting works with biodegradable material *only*.

. . . it's biodegradable and recyclable, especially via composting. And don't forget that biodegradable products are recyclable via municipal composting.

PAR. 5. Through the use of the statements contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits A - H, respondent has represented, directly or by implication, that:

A. Chinet® disposable tableware will completely break down and return to nature -- *i.e.*, decompose into elements found in nature -- within a reasonably short period of time after customary disposal.

B. Chinet® disposable tableware offers a significant environmental benefit after customary disposal.

PAR. 6. Through the use of the statements contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisement attached as Exhibit G, respondent has represented, directly or by implication, that Chinet disposable tableware will completely break down and return to nature -- *i.e.*, compose into elements found in nature -- within a short enough period of time after customary disposal to significantly reduce the amount of garbage in landfills.

PAR. 7. Through the use of the statements contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits E and F, respondent has represented, directly or by implication, that after customary disposal Chinet® disposable tableware will completely break down and return to nature -- *i.e.*, decompose into elements found in nature significantly faster than other paper plates, or plastic or foam products, to provide a significant environmental benefit.

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

PAR. 9. In truth and in fact, at the time it made the representations set forth in paragraphs five, six and seven, respondent did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation set forth in paragraph ten was, and is, false and misleading.

PAR. 10. Through the use of the statements contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits F and

H, respondent has represented, directly or by implication, that Chinet® disposable tableware is compostable through municipal solid waste composting.

PAR. 11. In truth and in fact, while Chinet® disposable tableware is capable of being composted in municipal solid waste composting facilities, the vast majority of consumers cannot compost the product through municipal solid waste composting because there are only a few municipal solid waste composting facilities nationwide. Therefore, the representation set forth in paragraph ten was, and is, false and misleading.

PAR. 12. 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 G and H, respondent has represented, directly or by implication, that Chinet® disposable tableware is recyclable after ordinary use.

PAR. 13. In truth and in fact, while Chinet® disposable tableware is capable of being recycled, the vast majority of consumers cannot recycle the product because there are virtually no collection facilities that accept used Chinet® disposable tableware for recycling. Therefore, the representation set forth in paragraph twelve was, and is, false and misleading.

PAR. 14. 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 F - H, respondent has represented, directly or by implication, that at the time it made the representations set forth in paragraphs ten and twelve, respondent possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 15. In truth and in fact, at the time it made the representations set forth in paragraphs ten and twelve, respondent did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation set forth in paragraph fourteen was, and is, false and misleading.

PAR. 16. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

150

Complaint

EXHIBIT A

NO LEAKS
Chinet

9223045
B158142



BIODEGRADABLE • MICROWAVABLE



Chinet

THE NEXT BEST THING TO CHINA



- NO LEAKS
- NO DRIPS
- NO DISASTERS



37700 32214 9

25-8³/₄ IN.

DISPOSABLE LUNCH PLATE
KEYES FIBRE CO., DANVILLE, NORFOLK, VA

Exhibit A

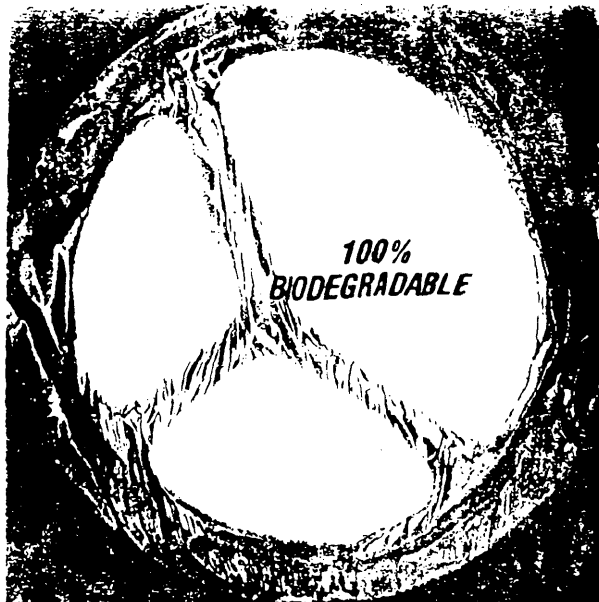
Complaint

118 F.T.C.

EXHIBIT B



Front of package



Back of package

Exhibit B

EXHIBIT C



WHAT'S SO GOOD ABOUT IT?

- =====
- **RIGID.** As strong as any disposable plate on the market, and stronger than most. Rigid enough for any food service application.
 - **ANTI-LEAK PROTECTION.** Resists penetration from grease, water and oil; even 350° french fry oil!
 - **MICROWAVE SAFE.** Try to fry bacon in a microwave on a styrene plate. Good luck! But, Chinet[®] is completely microwave safe.
 - **WHITER THAN EVER.** Chinet[®] has a "china-like" appearance. As "white" as any plastic.
 - **TWO STOCK PRINT DESIGNS,** at no extra cost! Our Value Enhancer designs are functional too.
 - **DEEP DISH DESIGN** for ease in serving entrees on Chinet[®] plate, and keeping them there.
 - **MATTE FINISH.** Sauces and gravies "cling" better to a Chinet[®] plate, instead of "beading up" on the slick surface of plastic.
 - **VERSATILITY.** Chinet[®] comes in every possible shape and size for any possible function. This versatility aids portion control planning.
 - **ECOLOGICALLY SOUND.** Chinet[®] is 100% biodegradable in landfill operations, and burns clean, without polluting, when incinerated. And, it's made from a renewable resource!

WHAT'S SO GOOD ABOUT CHINET[®]? PLENTY

FS-89-05

Exhibit C

00231

EXHIBIT D

Just how beneficial are we?

Made from Recycled Paper

- The manufacturing process of Chinet® molded paper plates recycles approximately 35,000 tons of paper per year.
- Every ton of paper recycled can save 17 trees and conserve related energy costs in processing to pulp.
- Recycling also reduces the amount of solid waste going into landfills.

Biodegradable



bio-de-grad-able: Readily decomposed by bacterial action.

- Biodegradability is an integral part of composting technology - a fast-emerging, solid waste recycling method.
- Chinet® paper plates are the ideal choice as they do not have a plastic or wax coating that may interfere with decomposition.

While not everyone is in agreement with regard to solid waste management, most concur that a solution can be found in the combined use of landfills, recycling/composting and waste-to-energy incineration. Concerned consumers can feel confident that Chinet® paper plates perform in whatever disposal method is used in their community.

The Original Molded Paper Plate

Exhibit D

00013

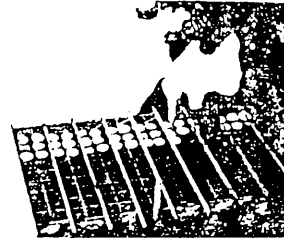
150

Complaint

EXHIBIT E

Chinet

Quality
from
Start
to
Finish

*Soil burial site preparation*

Protecting the Environment

It's been called the "greening" of America: growing concern among consumers about the environmental impact of every product they buy. From plastics to paper, and from Maine to Maui, consumers are increasingly looking at biodegradability as an important factor in their buying decisions.

Chinet is the strongest disposable plate money can buy, and completely biodegradable. In fact, Chinet is one of the few fully biodegradable lines. And despite its remarkable strength, it degrades much faster than most ordinary paper plates.

In a 12-week soil-burial study, an independent research firm tested Chinet against seven other types of paper and plastic plates. Products were labeled and buried in open

*Chinet plate before burial**Chinet plate after 12 weeks*

mesh bags in an environment simulating a landfill. Every two weeks, they were unearthed and examined for signs of deterioration.

Chinet plates reached an advanced state of decomposition in just two weeks. The other plastic and foam plates showed almost no signs of deterioration after 12 weeks.

In a recent nationwide survey conducted by the Michael Peters Group, 89% of American consumers are concerned about the environmental impact of products purchased, and 78% said they're willing to pay more for recyclable or biodegradable packaging.

Chinet doesn't just keep the kitchen clean - it keeps the environment clean. For a growing number of environmentally conscious consumers, that's one more reason to buy Chinet.

00022

EXHIBIT E

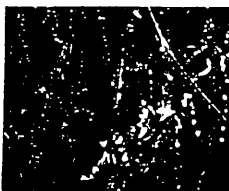
Complaint

118 F.T.C.

EXHIBIT F

... in the past several years, it is making increasing use of the nationwide recycling program, in which discarded school books are recycled, with the amount of recycling going for landfill. The program is a joint effort of business and industry, and has been established as a model.

- We have commissioned independent firms to conduct studies of the paper industry and the school book recycling program. The studies have shown that the school book recycling program is the only one of its kind in the world, and that the amount of recycling is increasing. In fact, the amount of paper recycled in the United States is now almost double the amount of paper that is being produced. This is a significant achievement, and we are proud to be a part of it.
- Keyes Fibre Company is pleased to be part of this program, and we are committed to the goal of recycling.



... to be part of the environmental label program, we have looked for ways to reduce the amount of waste that we produce. We are pleased to be part of the nationwide recycling program, and we are committed to the goal of recycling.

TABLE COMBAT

Keyes Fibre Company has instituted programs to reduce the amount of waste that we produce. We are pleased to be part of the nationwide recycling program, and we are committed to the goal of recycling.



We have implemented a major environmental education program which reaches consumers through the media and supermarkets. And we've prepared and distributed tips on how to be an environmentally smart shopper.

Keyes Fibre believes that it is important to help our customers to be environmentally conscious. We've developed a classroom kit on the environment, and we're pleased to be part of it. We're also pleased to be part of the nationwide recycling program, and we are committed to the goal of recycling.

TABLE 1

Keyes Fibre Company believes that...

TABLE 2

... in a corporate and industry effort to reduce the amount of waste that we produce. We are pleased to be part of the nationwide recycling program, and we are committed to the goal of recycling.

- Does your community have a recycling program? If not, drop off your old newspapers, magazines, and other dry recyclables to a recycling center.
- Be a part of the local waste stream. Use the curbside recycling service, or take your old newspapers, magazines, and other dry recyclables to a recycling center.
- Recycle, reuse, and reduce. Use only what you need, and reuse what you can. Recycle what you cannot reuse.

Your buying decisions make your world a better place. Always buy what is environmentally responsible. Look for the Recycle Right logo on the bottom of the packaging. It tells you if the product is made from recycled materials, and if it is 100% recycled.



Keyes Fibre Company
1000 North 1st Street, Newark, NJ 07102

TABLE 3

DARING TO BE GREEN
FOR OVER 85 YEARS



Protecting the environment has become one of the most important and visible issues of the 1990s. Many of us are now looking for products that are made from recycled materials, and that are also environmentally friendly.

00025

Exhibit F

Complaint

EXHIBIT F



...the material must be made with his...
...the material must be made with his...
...the material must be made with his...



...the material must be made with his...
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Exhibit F

Complaint

118 F.T.C.

EXHIBIT G
(FRONT)

WE CARE ABOUT THE ENVIRONMENT

**That's why we
use biodegradable
tableware.**



ROYAL
Chinet.
DISPOSABLE TABLEWARE

00215

RECYCLE
BIODEGRADABLE

Exhibit G
(front)

Complaint

EXHIBIT H

TIPS FOR A GREEN KITCHEN

00022

Plastic made a great insider than he who did nothing less than the world only do a little.

Edward Burke

However, every single thing we do, no matter how small, has an impact on the environment. We attract a different kind of attention.

Fortunately, most of us really haven't got involved and do our part in order to be earth. Unfortunately, the risk at hand can be so overwhelming, it's hard to know where to start.

Why not begin right in your own kitchen? Take a look at the trash you take out to the curb. You'll notice the vast majority of it consists of materials that are trash.

Change disposable tableware, the customarily soft line of milked paper products, and paper products made from recycled paper. You'll also find that many products, especially those made from plastic, are made from recycled materials. They will have a big effect on what you add to the solid waste stream.



HERE YOU'LL FIND YOUR SHOPPING CART:

- Look for symbols, such as, circles, and other recycling symbols, on products made from recycled paper. The less you'll look away waste instead of adding.
- Buy from the companies, help, foods, and stores in recycled plastic instead of plastic.
- Buy eggs in milked paper cartons — usually made from recycled paper — instead of polystyrene foam cartons.

Buy in bulk whenever possible, or the larger product size available.

• "Tough" by anything products with multi-layered packaging, e.g. a plastic container, sealed with foil, wrapped in more plastic, and contained in a box.

• Avoid "separable" plastic containers. They are made of several layers of different plastics and are not recyclable.

• Look for products that are biodegradable. Contrary to claims that biodegradability isn't important, it will be a key attribute as more cities turn to composting of solid waste as an alternative to landfill. Municipal composting works with biodegradable material only.

• When buying disposable tableware, take paper — prefer by recycled paper — over plastic. Paper products are biodegradable and recyclable, especially via composting.

• When you go to the store for run, walk or fast a few items, take a canvas or string bag to carry home your purchases.

• The less you buy, the more you can save. When you're buying a week's worth of groceries, however, they aren't always portable. If you need new bags, ask for paper instead of plastic. Recycle them as much as possible. Don't forget to take them home and put them back in your next trip.



SMART STORAGE IDEAS

- Choose reusable containers to store food instead of foil or plastic wrap.
- The biodegradable waxed paper to wrap sandwiches instead of plastic bags.

Before you throw them out, remove and sign up the plastic 6-ply ring used on canned pete seeds, and the plastic bottle are harmful to marine and other wildlife.



CLEANING AND CLEANING

- When washing dishes, fill a pail rather than the sink with water only when it's full to save water and energy.
- The liquid dishwasher detergent instead of phosphate-containing powders.
- Microwaves use only 1 to 1.2 as much energy as conventional ovens. Toasters are also more energy-efficient.
- Buy appliances with the highest energy rating.



RECYCLING WRAP-UP

- Recycle everything possible — glass, aluminum, tin, newspapers, food, and cardboard.
- Look for products with the international recycling symbol. They make sure you recycle them.
- Buy products made from recycled materials. It will save you on the label. You can also buy products made from recycled paper that could have ended up in the waste stream.
- And don't forget that biodegradable products are recyclable via municipal composting.

DECISION AND ORDER

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

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the 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 Keyes Fibre Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 301 Merritt 7, in the City of Norwalk, State of Connecticut.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

DEFINITIONS

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

The term “*product or package*” means any product or package that is offered for sale, sold or distributed to the public by respondent, its successors and assigns, under the Chinet[®] brand name or any other brand name of respondent, its successors and assigns; and also means any product or package sold or distributed to the public by third parties under private labeling agreements with respondent, its successors and assigns.

“*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.

I.

A. *It is ordered*, That respondent Keyes Fibre Company, a corporation, its successors and assigns, and its officers, 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 paper product or package 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:

(1) That any such product or package is degradable, biodegradable, or photo degradable; or,

(2) Through the use of such terms as degradable, biodegradable, or photo degradable, or any other similar term or expression, that any such product or package offers any environmental benefits when consumers dispose of it as trash that is buried in a sanitary landfill,

unless at the time of making such representation, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

B. Provided, however, respondent will not be in violation of Part I(A) of this order, in connection with the advertising, labeling, offering for sale, sale, or distribution of any paper product or package, if it truthfully represents that such product or package will degrade into usable compost (*e.g.*, soil-conditioning material, mulch) in a safe and timely manner, when disposed of in home compost piles or devices or in municipal solid waste composting facilities, provided that respondent complies with Part II of this order and discloses clearly, prominently, and in close proximity to such representation that such product or package is not designed to degrade in landfills.

II.

A. *It is further ordered*, That respondent, Keyes Fibre Company, a corporation, its successors and assigns, and its officers, 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 paper product or package 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 extent to which any such product or package can be composted by any means or the extent to which municipal solid waste composting facilities for such product or package are available.

B. Provided, however, respondent will not be in violation of Part II(A) of this order, in connection with the advertising, labeling, offering for sale, sale, or distribution of any paper product or package, if it truthfully represents that such product or package will compost or otherwise be converted into usable compost (*e.g.*, soil-conditioning material, mulch) in a safe and timely manner, when disposed of in home compost piles or devices or in municipal solid waste composting facilities, provided that respondent discloses clearly, prominently, and in close proximity to any representation referring or relating to municipal solid waste composting:

(1) That such product or package is compostable where municipal solid waste composting facilities exist, and the current number of municipal solid waste composting facilities in the U.S.; or

(2) That such product or package is compostable in the few communities with municipal solid waste composting facilities; or

(3) The approximate percentage of U.S. communities or the U.S. population to which municipal solid waste composting facilities are available.

For purposes of this order, a disclosure elsewhere on the product package shall be deemed to be “in close proximity” to such terms if there is a clear and conspicuous cross-reference to the disclosure. The use of an asterisk or other symbol shall not constitute a clear and conspicuous cross-reference. A cross-reference shall be deemed clear and conspicuous if it is of sufficient prominence to be readily noticeable and readable by the prospective purchaser when examining the part of the package on which the representation appears.

III.

It is further ordered, That respondent, Keyes Fibre Company, a corporation, its successors and assigns, and its officers, 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 paper product or package 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 extent to which any such product or package is capable of being recycled or the extent to which recycling collection programs for such product or package are available.

IV.

It is further ordered, That respondent, Keyes Fibre Company, a corporation, its successors and assigns, and its officers, 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 package 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 any product or package offers any environmental benefit, unless at the time of making such representation, respondent possesses and relies upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates such representation.

V.

Nothing in this order shall prevent respondent from using any of the terms cited in Parts I, II and III, or similar terms or expressions, if necessary to comply with any federal rule, regulation, or law governing the use of such terms in advertising or labeling.

VI.

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

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

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

VII.

It is further ordered, That the respondent shall distribute a copy of this order to each of its operating divisions and to each of its officers, agents, representatives, or employees engaged in the preparation and placement of advertisements, promotional materials, product labels or other such sales materials covered by this order.

VIII.

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

IX.

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

IN THE MATTER OF

LIFESTYLE FASCINATION, INC., ET AL.

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

Docket C-3513. Complaint, Aug. 4, 1994--Decision, Aug. 4, 1994

This consent order prohibits, among other things, a New Jersey-based corporation, its owner, and its general manager from making specified false representations for five products (a gasoline additive, an automobile retrofit device, an electric stimulation device, an electric acupuncture device, and pinhole eyeglasses), advertised in their catalog. It also prohibits the respondents from making any claim regarding the performance, safety, attributes, benefits, or efficacy of the electric and electronic products they market unless they possess competent and reliable scientific evidence that substantiates the representation. In addition, the consent order prohibits the respondents from misrepresenting the existence, contents, validity, results, conclusions, or interpretations of any test or study, and from misrepresenting that any endorsement or testimonial for health related products represents the typical or ordinary experiences of users.

Appearances

For the Commission: *Lesley A. Fair, Joel Winston, Loren Weinstein, C. Lee Peeler and Christian White.*

For the respondents: *Robert Ullman, Bass & Ullman, New York, N.Y.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Lifestyle Fascination, Inc., a corporation, Eli Zabare, individually and as an officer of said corporation, and Simon Pantierer, individually ("respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent Lifestyle Fascination, Inc. is a Delaware corporation with its office and principal place of business located at 12 Progress Place, Jackson, New Jersey. Respondent Eli Zabare is the owner, president and sole officer of the corporate

respondent. Respondent Simon Pantierer is the general manager of the corporate respondent. These individual respondents have their offices and principal places of business at 12 Progress Place, Jackson, New Jersey. Respondents Zabare and Pantierer formulate, direct, and control the acts and practices of the corporate respondent, including the acts and practices alleged in this complaint.

PAR. 2. Respondents have advertised, offered for sale, sold, and distributed consumer products through their Lifestyle Fascination mail-order catalogue. These products include, but are not limited to, Fuelon, an automotive fuel additive; the Vitalizer, an automotive retrofit device; the Brain Tuner, a purported electro-stimulation device; the Rhythm, a purported electronic acupuncture device; and the Aerobic Eye Exercise Glasses, plastic eyeglasses with opaque lenses containing multiple pinholes. The Brain Tuner, the Rhythm, and the Aerobic Eye Exercise Glasses are devices within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

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.

Fuelon Fuel Additive

PAR. 4. Respondents have disseminated or have caused to be disseminated advertisements for Fuelon, including but not necessarily limited to the attached Exhibit A. This advertisement contains the following statements:

"Don't be held hostage by petroleum prices - Get 15% to 40% more miles per gallon with just one ounce of Fuelon, the miracle new fuel additive! One ounce in a tankful of gas (two ounces for diesel) will give your car or truck an internal engine tune-up every time you drive. Say goodbye to morning start-up problems. No more 'knocks' and 'pings' as your car climbs hills or overtakes on a highway. What's more: by making your fuel burn at peak efficiency, Fuelon will ensure that your car passes the yearly emissions inspection with ease - year after year."

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

A. Under normal driving conditions, when used as directed, consumers can increase their gas mileage by between 15% and 40% by adding one ounce of Fuelon to their gas tanks;

B. The use of Fuelon will ensure that a car will pass government emissions inspections.

PAR. 6. In truth and in fact:

A. Under normal driving conditions, when used as directed, consumers will not increase their gas mileage by between 15% and 40% by adding one ounce of Fuelon to their gas tanks;

B. The use of Fuelon will not ensure that a car will pass government emissions inspections.

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

PAR. 7. Through the use of the statements contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisement attached as Exhibit A, respondents have represented, directly or by implication, that the use of Fuelon provides the benefits of an engine tune up, including the elimination of morning start-up problems, and engine knocking and pinging.

PAR. 8. Through the use of the statements contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisement attached as Exhibit A, respondents have represented, directly or by implication, that at the time they made the representations set forth in paragraphs five and seven, respondents 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 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.

The Vitalizer Automobile Retrofit Device

PAR. 10. Respondents have disseminated or have caused to be disseminated advertisements for the Vitalizer automobile retrofit

device, including but not necessarily limited to the attached Exhibit B. This advertisement contains the following statements:

“Now your car can get that ‘winning-edge’ with increased performance and fuel economy while reducing polluting emissions! Go with this secret of race car drivers-Vitalizer is currently used by race car drivers to help provide a winning edge through increased power and mileage. Now, after years of research, you can benefit from this much need [sic] breakthrough in combustion vehicle engineering with Vitalizer! . . . But don’t just take my word for it, listen to the experts. I’m sitting here with stacks of testimonials and documentation from engineers, mechanics, state emission control stations, trade publications, trucking firms, auto centers, city bus operators and folks like you and me. Even radio station KFOX in Encino, California tested Vitalizer on 16 vehicles! Vitalizer was tested for years on old vehicles as well as new ones. Here’s what all this means to you: You are absolutely guaranteed to get up to 23% more miles per gallon, cut exhaust emissions up to 90%, increase engine power - faster acceleration and top-end speed or your money back!”

PAR. 11. Through the use of the statements contained in the advertisements referred to in paragraph ten, including but not necessarily limited to the advertisement attached as Exhibit B, respondents have represented, directly or by implication, that:

A. Under normal driving conditions, when used as directed, an appreciable number of consumers will increase their gas mileage by 23%, or close to 23%, when the Vitalizer is installed in their automobiles;

B. Under normal driving conditions, when used as directed, an appreciable number of consumers will obtain reduced exhaust emissions of 90%, or close to 90%, when the Vitalizer is installed in their automobiles;

C. Tests, research and expert evaluations prove that the Vitalizer reduces polluting emissions by up to 90% and increases fuel economy by up to 23%.

PAR. 12. In truth and in fact:

A. Under normal driving conditions, when used as directed, in few, if any, cases will consumers increase their gas mileage by 23%, or close to 23%, when the Vitalizer is installed in their automobiles;

B. Under normal driving conditions, when used as directed, in few, if any, cases will consumers reduce their exhaust emissions by

90%, or close to 90%, when the Vitalizer is installed in their automobiles;

C. Tests, research and expert evaluations do not prove that the Vitalizer reduces polluting exhaust emissions by up to 90% or increases fuel economy by up to 23%.

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

PAR. 13. Through the use of the statements contained in the advertisements referred to in paragraph ten, including but not necessarily limited to the advertisement attached as Exhibit B, respondents have represented, directly or by implication, that use of the Vitalizer will increase engine power, including faster acceleration and top-end speed.

PAR. 14. Through the use of the statements contained in the advertisements referred to in paragraph ten, including but not necessarily limited to the advertisement attached as Exhibit B, respondents have represented, directly or by implication, that at the time they made the representations set forth in paragraphs eleven and thirteen, respondents possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 15. In truth and in fact, at the time they made the representations set forth in paragraphs eleven and thirteen, respondents did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation set forth in paragraph fourteen was, and is, false and misleading.

The Brain Tuner Electro-Stimulation Device

PAR. 16. Respondents have disseminated or have caused to be disseminated advertisements for the Brain Tuner electro-stimulation device, including but not necessarily limited to the attached Exhibit C. This advertisement contains the following statements:

“Increase your I.Q., expand your creativity and feel totally relaxed in just 40 minutes! If you’re looking for the ultimate in self-improvement techniques that promises to be easy, quick and highly effective, here is something exciting you should know about. . . . It is called the Brain Tuner. . . . Everyone is different and not all people respond to the same frequencies. So Engineer/Physicist Bob Peck designed the Brain Tuner so that it would produce 256 simultaneous frequencies all known to be beneficial for the natural stimulation of the brain’s neurotransmitters.

A tiny ten hertz signal enters the brain and speeds up the production and turnover rate of serotonin - a neurotransmitter that acts as a stimulant to the nervous system. The Brain Tuner simply coaxes the brain to restore it's [sic] own chemical balance. The body heals itself. The neurotransmitter beta endorphin normalizes in about 40 minutes - which is the body's own built in pain killer. According to articles published by scientific and medical journals and OMNI Magazine, other results commonly reported by users of the Brain Tuner are increased energy levels and improved concentration, increased endorphin production for pain control, decreases in worry, depression and anxiety, normalized sleep patterns, reduced sleep requirements, more vivid and lucid dreams, improvement in both short term and long term memory, and reduced psychophysiological craving and withdrawal symptoms from drugs and alcohol. All this may sound hard to believe but the technical data that exists to support these claims is overwhelming (a 12 page bibliography of over 350 medical articles came with our research materials). I.Q. gains of 20 to 30 points! A published report from the University of Wisconsin Medical College reports I.Q. gains of 20 to 30 points after stimulation originally intended to reduce student final exam anxiety. This was replicated by the University of Louisiana and is now generally accepted. Stimulation appears to enhance neural efficiency which shortens access time to answers. Although no medical claims can be made until FDA certification, full satisfaction is guaranteed or your money back.

PAR. 17. Through the use of the statements contained in the advertisements referred to in paragraph sixteen, including but not necessarily limited to the advertisement attached as Exhibit C, respondents have represented, directly or by implication, that scientific studies prove that the use of the Brain Tuner:

- A. Increases one's I.Q. by 20 to 30 points;
- B. Increases energy levels;
- C. Improves concentration;
- D. Controls pain;
- E. Reduces depression and anxiety;
- F. Normalizes sleep patterns and reduces sleep requirements;
- G. Improves short term and long term memory; and
- H. Reduces psychophysiological cravings for and withdrawal symptoms from drugs and alcohol.

PAR. 18. In truth and in fact, scientific studies do not prove that use of the Brain Tuner:

- A. Increases one's I.Q. by 20 to 30 points;
- B. Increases energy levels;
- C. Improves concentration;

- D. Controls pain;
- E. Reduces depression and anxiety;
- F. Normalizes sleep patterns and reduces sleep requirements;
- G. Improves short term and long term memory; and
- H. Reduces psychophysiological cravings for and withdrawal symptoms from drugs and alcohol.

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

PAR. 19. Through the use of the statements contained in the advertisements referred to in paragraph sixteen, including but not necessarily limited to the advertisement attached as Exhibit C, respondents have represented, directly or by implication, that use of the Brain Tuner:

- A. Increases one's I.Q. by 20 to 30 points;
- B. Increases energy levels;
- C. Improves concentration;
- D. Controls pain;
- E. Reduces depression and anxiety;
- F. Normalizes sleep patterns and reduces sleep requirements;
- G. Improves short term and long term memory; and
- H. Reduces psychophysiological cravings for and withdrawal symptoms from drugs and alcohol.

PAR. 20. Through the use of the statements contained in the advertisements referred to in paragraph sixteen, including but not necessarily limited to the advertisement attached as Exhibit C, respondents have represented, directly or by implication, that at the time they made the representations set forth in paragraphs seventeen and nineteen, respondents possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 21. In truth and in fact, at the time they made the representations set forth in paragraphs seventeen and nineteen, respondents did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation set forth in paragraph twenty was, and is, false and misleading.

The Rhythm Electronic Acupuncture Device

PAR. 22. Respondents have disseminated or have caused to be disseminated advertisements for the Rhythm electronic acupuncture device, including but not necessarily limited to the attached Exhibit D. This advertisement contains the following statements:

“Electronic acupuncture with slimming effect[.] The Rhythm - your electronic pain killer and body toner[.] Rhythm combines traditional Chinese Acupuncture treatment with modern electronic technology. Electronic acupuncture is sweeping the country. The Rhythm is the most powerful most advanced instrument ever developed for home use. Touch it to specific body points to gain relief from muscle, digestive, and nervous ailments And because the Rhythm caused [sic] muscle contractionsjust like normal exercise, it will help you tone up. Latest reports from leading hospitals suggest that such treatment will also reduce craving for sugar and other add-weight foods (as reported on the CBS News; July 6, 1990). This will further aid in restoring the trimmer you. Does it really work? Our suggestion: when you have a backache, a headache, fatigue, a muscle pain, stiff shoulders, insomnia, or any of the other conditions for which acupuncture has achieved its reputation, Try It. . . . (Most of the people in our own office have bought one[.] They tell us they wouldn't part with it.)”

PAR. 23. Through the use of the statements contained in the advertisements referred to in paragraph twenty-two, including but not necessarily limited to the advertisement attached as Exhibit D, respondents have represented, directly or by implication, that:

- A. Use of the Rhythm relieves muscle, digestive, and nervous ailments;
- B. Use of the Rhythm tones muscles;
- C. Use of the Rhythm helps the user lose weight by reducing the craving for sugar and other high caloric foods;
- D. Use of the Rhythm relieves backaches, headaches, muscle pain, stiff shoulders, insomnia, and fatigue.

PAR. 24. Through the use of the statements contained in the advertisements referred to in paragraph twenty-two, including but not necessarily limited to the advertisement attached as Exhibit D, respondents have represented, directly or by implication, that at the time they made the representations set forth in paragraph twenty-three, respondents 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 paragraph 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.

The Aerobic Eye Exercise Glasses

PAR. 26. Respondents have disseminated or caused to be disseminated advertisements for the Aerobic Eye Exercise Glasses, including but not necessarily limited to the attached Exhibit E. This advertisement contains the following statements:

"If you are reading this through glasses, maybe you could throw them away! . . . The developers of these incredible Aerobic Eye Exercise Glasses have files filled with letters like this - letters testifying to almost miraculous rescues of failing eyesight . . . The lenses of these glasses are precision-pierced with hundreds of tiny apertures that admit only parallel light. This allows the retina to focus while the eye muscles remain totally relaxed! Remove your prescription glasses; put on the exercise glasses; do your hobby or watch TV. You will be astonished to find your eyes focusing without effort, without your glasses! Do that for 20 minutes daily and each day you will become less and less dependent on your prescription glasses!" [Testimonial: "I received your vision kit. . . September 1987 and began using it immediately. By December 1987, I no longer needed my prescription lenses. I had worn glasses for 25 years."]

PAR. 27. Through the use of the statements contained in the advertisements referred to in paragraph twenty-six, including but not necessarily limited to the advertisement attached as Exhibit E, respondents have represented, directly or by implication, that:

A. Wearing the Aerobic Eye Exercise Glasses results in a long-term improvement in the vision of persons with vision problems;

B. The Aerobic Eye Exercise Glasses, while being worn, are an adequate substitute for prescription glasses or contact lenses to improve vision;

C. The testimonial contained in the advertisement reflects the typical or ordinary experiences of consumers who have used the Aerobic Eye Exercise Glasses, in terms of long-term improvement in vision.

PAR. 28. In truth and in fact:

A. Wearing the Aerobic Eye Exercise Glasses will not result in a long-term improvement in the vision of persons with vision problems;

B. The Aerobic Eye Exercise glasses, while being worn, are not an adequate substitute for prescription glasses or contact lenses to improve vision;

C. The testimonial contained in the advertisement does not reflect the typical or ordinary experiences of consumers who have used the Aerobic Eye Exercise Glasses, in terms of long-term improvement in vision.

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

PAR. 29. Through the use of the statements contained in the advertisements referred to in paragraph twenty-six, 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 paragraph twenty-seven, respondents possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 30. In truth and in fact, at the time they made the representations set forth in paragraph twenty-seven, respondents did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation set forth in paragraph twenty-nine, was, and is, false and misleading.

PAR. 31. 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.

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Complaint

EXHIBIT A



**Don't be held
hostage by
petroleum prices - Get 15%
to 40% more miles per
gallon with just one ounce
of Fuelon, the miracle new
fuel additive!**

One ounce in a tankful of gas (two ounces for diesel) will give your car or truck an internal engine tune-up every time you drive. Say good-bye to morning start-up problems. No more "knocks" and "pings" as your car climbs hills or overtakes on a highway. What's more: by making your fuel burn at peak efficiency, Fuelon will ensure that your car passes the yearly emissions inspection with ease - year after year.

Just one bottle of Fuelon is enough to treat 480 gallons of gas (treats 256 gallons of diesel fuel). Fuelon's pour-o-matic spout makes dispensing the right amount easy every time. You owe it to yourself to get a bottle of Fuelon and see that this amazing product will do for your car's engine and your fuel budget. 32 oz. bottle.

#ELE226 - Gas Extender - \$39.95

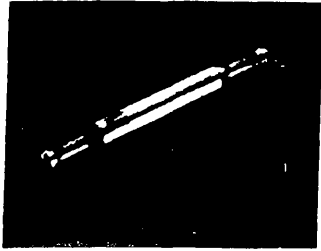
#ELE227 - Diesel Extender - \$39.95

Exhibit A

Complaint

118 F.T.C.

EXHIBIT B



**Now your car can get that "winning-edge"
with increased performance and fuel economy
while reducing polluting emissions!**

Go with this secret of race car drivers - Vitalizer is currently used by race car drivers to help provide a winning edge through increased power and mileage. Now, after years of research, you can benefit from this much need breakthrough in combustion vehicle engineering with Vitalizer!

It's hard to believe that this easy to install (installs in 20 minutes right on your fuel line and has no moving parts) state-of-the-art marvel can really do so much. But don't just take my word for it, listen to the experts.

I'm sitting here with stacks of testimonials and documentation from engineers, mechanics, state emission control stations, trade publications, trucking firms, auto centers, city

bus operators and folks like you and me. Even Radio Station KFOX in Encino, California tested Vitalizer on 16 vehicles! Vitalizer was tested for years on old vehicles as well as new ones.

Here's what all this means to you: You are absolutely guaranteed to get up to 23% more miles per gallon, cut exhaust emissions up to 90%, increase engine power - faster acceleration and top-end speed or your money back!

You have nothing to lose and plenty to gain with Vitalizer!

#EVT888 - Vitalizer, 4-6 cylinder engines - a wise investment at only \$139.95

#EVT889 - Vitalizer, for 8 cylinder engines - \$139.95

Exhibit B

171

Complaint

EXHIBIT C

Increase your I.Q., expand your creativity and feel totally relaxed in just 40 minutes!

If you're looking for the ultimate in self-improvement technology that promises to be easy, quick and highly effective, here's something exciting you should know about

The Brain Tuner (BT-5+)

It is called the Brain Tuner (BT-5+) and it is an experimental research instrument that provides minute electrical stimulation through stethoscope shaped electrodes behind the ears.

Apparently very low levels of pulsed electrical current have major effects upon the highest functions of the brain. The BT-5+ transmits a tiny electrical signal that appears to harmonize with natural brain rhythms to produce a feeling of mild stimulation but the sensation felt by most individuals is reportedly one of complete relaxation even if high stress, anxiety, or depression is present.

How does it work?

Everyone is different and not all people respond to the same frequencies. So Engineer/Physicist Bob Peck designed the Brain Tuner so that it would produce over 256 simultaneous frequencies all known to be beneficial for the natural stimulation of the brain's neurotransmitters.

A tiny ten hertz signal enters the brain and speeds up the production and turnover rate of serotonin - a neurotransmitter that acts as a stimulant to the nervous system. The Brain Tuner simply coaxes the brain to restore it's own chemical balance. The body heals itself. The neurotransmitter beta endorphin normalizes in about 40 minutes - which is the body's own built in pain killer.

According to articles published by scientific and medical journals and OMNI Magazine, other results commonly reported by users of the Brain Tuner are increased energy levels and improved concentration, increased endorphin production for pain control, decreases in worry, depression and anxiety, nor-

malized sleep patterns, reduced sleep requirements, more vivid and lucid dreams, improvement in both short term and long term memory, and reduced psychophysiological craving and withdrawal symptoms from drugs and alcohol.

All this may sound hard to believe but the technical data that exists to support these claims is overwhelming! A 12 page bibliography of over 350 medical articles came with our research materials.

I.Q. gains of 20 to 30 points!

A published report from the University of Wisconsin Medical College reports I.Q. gains of 20 to 30 points after stimulation originally intended to reduce student final exam anxiety. This was replicated by the University of Louisiana and is now generally accepted. Stimulation appears to enhance neural efficiency which shortens access time to answers.

Although no medical claims can be made until FDA certification, full satisfaction is guaranteed or your money back. The Brain Tuner is completely safe and there are no side-effects such as those caused by drugs or pharmaceuticals. It looks like a Walkman (pocket size, 1" x 3-5/8" x 4.5"), and weighs 4.6 oz. with self contained, externally replaceable transistor radio battery available anywhere. Other models have sold for \$600-\$1,000. Order your Brain Tuner (BT-5+) today! Only \$249.95!

#EBT600 - Brain Tuner (BT-5+) - Only \$249.95!



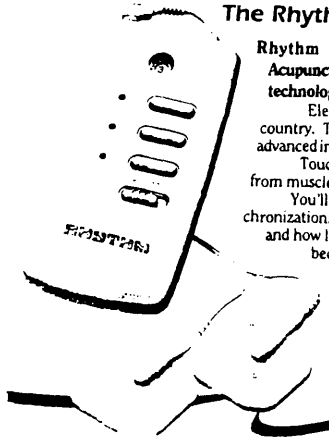
Exhibit C

Complaint

118 F.T.C.

EXHIBIT D

Electronic Acupuncture with slimming effect
The Rhythm - your electronic pain killer & body toner



Rhythm combines traditional Chinese Acupuncture treatment with modern electronic technology.

Electronic acupuncture is sweeping the country. The Rhythm is the most powerful most advanced instrument ever developed for home use. Touch it to specific body points to gain relief from muscle, digestive, and nervous ailments.


You'll feel the "pulsing"; a light flashes in synchronization. Soon you'll know exactly how intense and how long each "treatment" should be. And because the Rhythm caused muscle contractions...just like normal exercise, it will help you to ne up. Latest reports from leading hospitals suggest that such treatment will

also reduce craving for sugar and other add-weight foods (as reported on the CBS News; July 6, 1990). This will further aid in restoring the trimmer you.

Extended electrodes let you reach any part of your body comfortably. Lifestyle presents this to you as the finest electronic acupuncture instrument available today- and it's available only from us.

Does it really work?

Our suggestion: when you have a backache, a headache, fatigue, a muscle pain, stiff shoulders, insomnia, or any of the other conditions for which acupuncture has achieved its reputation, Try It. Use the Rhythm on yourself and other members of your family for one full month. If you don't feel it's a valuable aid to have in your home, return it for full refund. (Most of the people in our own office have bought one. They tell us they wouldn't part with it.) *Measures only 5x3x1". Operates on 1.9V Battery*
#ERR641 - The Rhythm - \$89.95

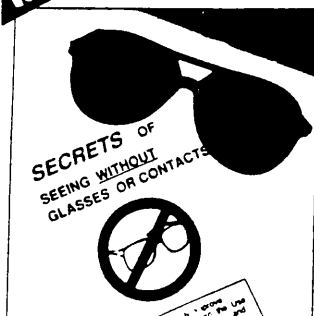


171

Complaint

EXHIBIT E

NEW *If you are reading this through glasses, maybe you could throw them away!*



"I received your vision kit...September 1987 and began using it immediately, by December 1987 I no longer needed my prescription lenses. I had worn glasses for 25 years."

Val Dewane, Valders, WI

The developers of these incredible Aerobic Eye Exercise Glasses have files filled with letters like this - letters testifying to almost miraculous rescues of failing eyesight; relief from eyestrain, headaches, tension!

The lenses of these glasses are precision-pierced with hundreds of tiny apertures that admit only parallel light. This allows the retina to focus while the eye muscles remain totally relaxed!

Remove your prescription glasses; put on the exercise glasses; do your hobby or watch TV. You will be astonished to find your eyes focusing without effort,

without your glasses! Do that for 20 minutes daily and each day you will become less and less dependent on your prescription glasses! Glasses adjust for fit. Kit includes complete instructions and an eye chart to check your daily progress. The best investment you will ever make!

#LEE100 - Aerobic Eye Exercise Glasses kit - \$39.95

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 the complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents, their attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the 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 a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Lifestyle Fascination, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business at 12 Progress Place, Jackson, New Jersey.

Respondent Eli Zabare is the owner and sole officer of Lifestyle Fascination, Inc. He formulated, directed, and controlled the acts and practices of said corporation, and his principal office and place of business is located at the above stated address.

Respondent Simon Pantierer is the general manager of Lifestyle Fascination, Inc. He formulated, directed, and controlled the acts and practices of said corporation, and his principal office and place of business is located at the above stated address.

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

ORDER

I.

It is ordered, That respondents Lifestyle Fascination, Inc., a corporation, its successors and assigns, and its officers, Eli Zabare, individually and as an officer of said corporation, and Simon Pantierer, individually, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, promotion, offering for sale, sale or distribution of Fuelon, or any substantially similar fuel additive device, 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. Under normal driving conditions, when used as directed, consumers can increase their gas mileage by between 15% and 40% by adding such product to their gas tanks; or

B. The use of such product will ensure that a car will pass government emissions inspections.

II.

It is further ordered, That respondents Lifestyle Fascination, Inc., a corporation, its successors and assigns, and its officers, Eli Zabare, individually and as an officer of said corporation, and Simon Pantierer, individually, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, promotion, offering for sale, sale or distribution of the Vitalizer, or any substantially similar automobile retrofit device, 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. Under normal driving conditions, when used as directed, consumers will increase their gas mileage by 23%, or up to 23%, when such product is installed in their automobiles; or

B. Under normal driving conditions, when used as directed, consumers can obtain reduced exhaust emissions of 90%, or up to 90%, when such product is installed in their automobiles.

III.

It is further ordered, That respondents Lifestyle Fascination, Inc., a corporation, its successors and assigns, and its officers, Eli Zabare, individually and as an officer of said corporation, and Simon Pantierer, individually, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, promotion, offering for sale, sale or distribution of Aerobic Eye Exercise Glasses, or any other eyeglasses with opaque lenses and multiple pinholes, 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. Wearing such product results in long-term improvement in the vision of persons with vision problems; or

B. Such product, while being worn, is an adequate substitute for prescription glasses or contact lenses to improve vision.

IV.

It is further ordered, That respondents Lifestyle Fascination, Inc., a corporation, its successors and assigns, and its officers, Eli Zabare, individually and as an officer of said corporation, and Simon Pantierer, individually, and respondents agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, promotion, offering for sale, sale or distribution of any product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting, directly or by implication, the existence, contents, validity, results, conclusions or interpretations of any test or study.

V.

It is further ordered, That respondents Lifestyle Fascination, Inc., a corporation, its successors and assigns, and its officers, Eli Zabare, individually and as officer of said corporation, and Simon Pantierer, individually, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, promotion, offering for sale, sale or distribution of any automotive fuel economy product, including but not limited to any automobile gasoline additive, engine oil additive, or automobile retrofit device (as "automobile retrofit device" is defined in Section 511 of the Motor Vehicle Information and Cost Savings Act, 15 U.S.C. 2011) in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, that use of such device will or may result in fuel economy improvement, unless, and only to the extent, respondents possess and rely on competent and reliable scientific tests which substantiate the representations, such as:

A. Chassis dynamometer tests done according to procedures that simulate typical urban and highway driving patterns, such as the then current urban and highway driving test schedules established by the Environmental Protection Agency; or

B. Track or road tests done according to procedures that simulate urban and highway driving patterns, such as the then current procedures established in the Society of Engineers J1082b test protocol.

Respondents shall, when using the results of any tests required by this Part, clearly and conspicuously disclose the limitations upon the applicability of the results to any automobile, truck, recreational vehicle, or other motor vehicle. Where the results of such tests are used in connection with the representation of fuel economy-improvement expressed in miles per gallon (or liter), miles per tankful, or percentage, or where the representation of the benefit is expressed as a monetary saving in dollars or percentages, all advertising and other promotional materials that contain the representation must also clearly and conspicuously disclose the following disclaimer: "REMINDER: Your actual saving may vary.

It depends on the kind of driving you do, how you drive, and the condition of your car.”

VI.

It is further ordered, That respondents Lifestyle Fascination, Inc., a corporation, its successors and assigns, and its officers, Eli Zabare, individually and as an officer of said corporation, and Simon Pantierer, individually, and respondents’ agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, promotion, offering for sale, sale or distribution of any product in or affecting commerce, as “commerce” is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, that:

A. Use of such product can or will have any effect on the user’s intelligence; energy levels; muscle strength or tone; weight; mental concentration; pain; depression or anxiety; sleep patterns or requirements; short or long term memory; cravings for or withdrawal symptoms from drugs or alcohol; or any other effect on health or the structure or function of the human body; or

B. Use of such product can or will have any effect on acceleration, power, engine condition, exhaust emissions, or any other aspect of automobile performance;

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 have been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

VII.

It is further ordered, That respondents Lifestyle Fascination, Inc., a corporation, its successors and assigns, and its officers, Eli Zabare,

individually and as an officer of said corporation, and Simon Pantierer, individually, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, promotion, offering for sale, sale or distribution of any consumer electric or electronic product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from making any representation, directly or by implication, regarding the performance, safety, attributes, benefits, or efficacy of such product, 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. Provided that, the terms of this Part shall not apply to the advertising, promotion, offering for sale, sale, or distribution of any television; videocassette, audio cassette, or compact disc player or recorder; radio; stereo component; telephone; shaver; vacuum cleaner; kitchen appliance; hair grooming appliance; binoculars; exercise equipment; or camera. Further provided that, nothing in this Part shall be construed as exempting from this order any product otherwise subject to the terms of any other Part of this order.

VIII.

It is further ordered, That respondents Lifestyle Fascination, Inc., a corporation, its successors and assigns, and its officers, Eli Zabare, individually and as an officer of said corporation, and Simon Pantierer, individually, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, promotion, offering for sale, sale or distribution of any product represented, directly or by implication, or intended to have any effect on health or the structure or function of the human body, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing that any endorsement (as "endorsement" is defined in 16 CFR 255.0(b)) of any such product represents the typical or ordinary experience of members of the public who use such product, unless such is the fact.

IX.

It is further ordered, That respondents Lifestyle Fascination, Inc., a corporation, its successors and assigns, and its officers, Eli Zabare, individually and as an officer of said corporation, and Simon Pantierer, individually, and respondents' agents, representatives and employees, shall, for three (3) years from the date of the last dissemination of each representation which is subject to this order, maintain and upon reasonable request make available to the Federal Trade Commission for inspection and copying:

A. All materials that were relied upon by respondent(s) in disseminating any representation covered by this order; and

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

X.

It is further ordered, That respondent Lifestyle Fascination, Inc., or 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 principals, officers, directors, and managers, and to all personnel, agents, and/or 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 respondents Eli Zabare and Simon Pantierer, for a period of ten (10) 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 which involves the sale of consumer products. 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.

XII.

It is further ordered, That respondents Lifestyle Fascination, Inc., its successors and assigns, and its officers, Eli Zabare, individually and as an officer of said corporation, and Simon Pantierer, individually, shall notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in the corporate respondent, 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, or any other change in the corporation which may affect compliance obligations arising under this order.

XIII.

It is further ordered, That respondents Lifestyle Fascination, Inc., its successors and assigns, and its officers, Eli Zabare, individually and as an officer of said corporation, and Simon Pantierer, individually, 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.

IN THE MATTER OF

AMOCO CHEMICAL COMPANY, ET AL.

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

Docket C-3514. Complaint, Aug. 9, 1994--Decision, Aug. 9, 1994

This consent order prohibits, among other things, two Delaware corporations from misrepresenting the extent to which any polystyrene cup, plate, and other food service product or packaging material is capable of being recycled or the extent to which recycling collection programs are available, and from representing that such products offer any environmental benefit unless the respondents possess competent and reliable scientific evidence that substantiates the claim.

Appearances

For the Commission: *C. Steven Baker* and *Timothy T. Hughes*.

For the respondents: *Pro se*.

COMPLAINT

The Federal Trade Commission, having reason to believe that Amoco Chemical Company, a corporation, and Amoco Foam Products Company, a corporation, ("respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondents are Delaware corporations. Amoco Chemical Company dominates and controls the acts and practices of its wholly-owned subsidiary, Amoco Foam Products Company. Amoco Chemical Company has its principal offices or place of business at 200 East Randolph Drive, Chicago, Illinois. Amoco Foam Products Company has its principal offices or place of business at 400 Northridge Road, Atlanta, Georgia.

PAR. 2. Respondents have manufactured, advertised, labeled, offered for sale, sold, and distributed polystyrene products, including plates, cups, and other food service polystyrene products to the public under the trade name "Snacker," and under private labels. Respondents have also manufactured, advertised, labeled, offered for

sale, sold, and distributed polystyrene food service products to caterers, cafeterias, restaurants and other institutional buyers.

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.

PAR. 4. Respondents have disseminated or have caused to be disseminated product advertising, labeling, packaging and other promotional materials, for Amoco's "Snacker," and other polystyrene food service products, including but not necessarily limited to the attached Exhibits A through C.

The aforesaid Amoco polystyrene product (Exhibit A) sold under private label includes the following statement on each cup:



PS

RECYCLABLE

The aforesaid "Snacker" product packaging (Exhibit B) includes the following statement:

RECYCLABLE

The aforesaid Amoco polystyrene product (Exhibit C) includes the following statement on the front of the packaging:

100% RECYCLABLE
FOAM
PLATES

PAR. 5. Through the use of the statements contained in the advertising, packaging and labeling referred to in paragraph four, including but not necessarily limited to the packaging and labeling attached as Exhibits A through C, respondents have represented, directly or by implication, that their polystyrene products are recyclable.

PAR. 6. In truth and in fact, while polystyrene food service products are capable of being recycled, the vast majority of consumers cannot recycle them because there are only a few collection facilities nationwide that will accept them for recycling.

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

PAR. 7. Through the use of the statements contained in the advertising, packaging and labeling referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits A-C, respondents have represented, directly or by implication, that at the time they made the representations set forth in paragraph five, respondents possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 8. In truth and in fact, at the time they made the representations set forth in paragraph five, respondents did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation set forth in paragraph seven was, and is, false and misleading.

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

Complaint

EXHIBIT A



EXHIBIT B

Snacker



DOUBLE LAMINATED
THREE SECTION PLATES

8 7/8 INCH

Snacker

EXHIBIT B



- SOAK-PROOF
- CUT-RESISTANT
- ALL PLASTIC
- RIGID
- DOUBLE LAMINATED
- RECYCLABLE

USAGE TIP

Extremely hot foods taken directly from grill or frying pan may cause plate distortion. Please allow food to cool momentarily before placing on plate.

MICROWAVE OVEN USAGE

Suitable only for limited microwave use in reheating foods.



CAUTION:
 PLASTIC BARS CAN CAUSE SUFFOCATION.
 PLEASE KEEP THIS PRODUCT AND ALL PLASTIC BAGS OUT OF THE REACH OF CHILDREN. DO NOT PERMIT CHILDREN TO PLAY WITH THEM AND DO NOT USE THEM IN CRIBS, PLAYPENS OR CARRIAGES.



**CAUTION
KEEP AWAY FROM
OPEN FLAME.**

Amoco Foam Products Company
Atlanta, GA 30350



118 F.T.C.

Complaint

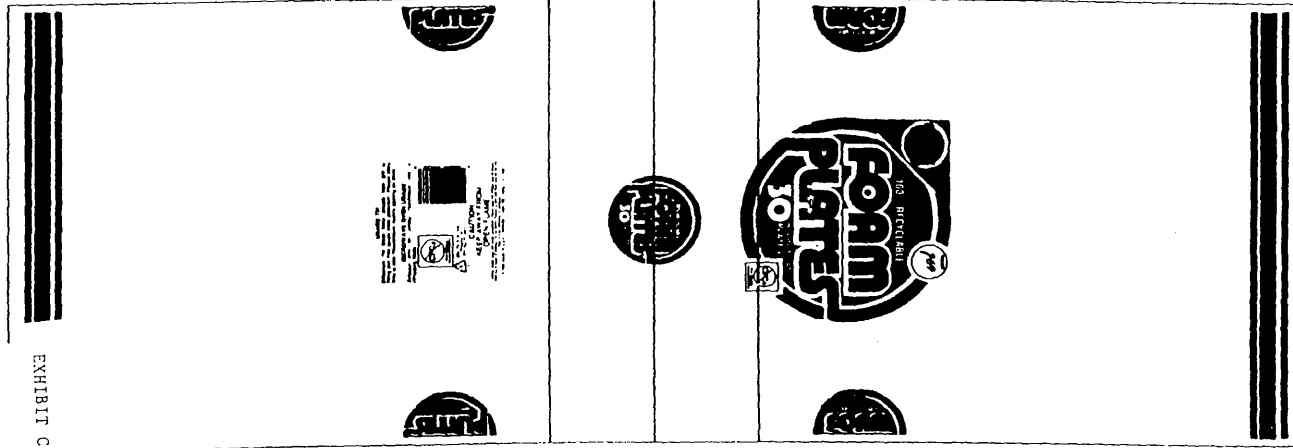
EXHIBIT C



Amoco Foam Products Company
Allanta, Georgia 30350

PRODUCT NO. 002-491MC
DATE OF ISSUE: _____
BAG OR FILM SIZE: 14 1/4 (W) x 15 1/2 (L) x 6 1/2 (G)

COLORS: 1ST WHITE
2ND 116 YELLOW
3RD 021 ORANGE
4TH 052 RED
5TH 286 BLUE
6TH BLACK
CONVERTER: STANDARD FLEX



INK AND PAPER COLORS USED IN PRODUCING THIS SHEET ARE FOR INDICATION ONLY AND SHOULD NOT BE USED AS COLOR GUIDE. USE SEPARATE INK SPECIFICATIONS OUR LIABILITY WITH RESPECT TO DEFECTIVE PRODUCTS AND PRODUCTS WHICH FAIL TO MEET THE WRITTEN SPECIFICATIONS ACCEPTED BY US IS LIMITED AS SET FORTH ON OUR ORDERING SLIP AND ENCLOSED WITH SHIPMENT OF PLATES



Matthews International Corporation
Graphic Systems Division
3001 Kingston Ct.
Marietta, GA 30067
Phone (404) 984-9610

Matthews

REF. NO. 14-5323
DATE: 8-12-92

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 Chicago Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; 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 complaints a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, 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. Respondents Amoco Chemical Company and Amoco Foam Products Company are corporations organized, existing and doing business under and by virtue of the laws of the State of Delaware. Amoco Chemical Company dominates and controls the acts and practices of its wholly-owned subsidiary, Amoco Foam Products Company.

Respondent Amoco Chemical Company has its principal offices or place of business at 200 East Randolph Drive, Chicago, Illinois. Respondent Amoco Foam Products Company has its principal offices or place of business at 400 Northridge Road, Atlanta, Georgia.

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

ORDER

DEFINITIONS

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

The term “*competent and reliable scientific evidence*” means 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.

The term “*product or packaging material*” means any product or packaging material that is offered for sale, sold or distributed to the public by respondents, their successors and assigns, under any brand name of respondents, their successors and assigns; and also means any product or packaging material sold or distributed to the public by third parties under private labeling agreements with respondents, their successors and assigns.

I.

It is ordered, That respondents, Amoco Chemical Company, a corporation, and Amoco Foam Products Company, a corporation, their successors and assigns, and their officers, representatives, agents, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, labeling, promotion, offering for sale, sale, or distribution of any polystyrene food service product or polystyrene packaging material 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 extent to which:

- (1) Any such product or packaging material is capable of being recycled; or,
- (2) Recycling collection programs for such product or packaging material are available.

II.

It is further ordered, That respondents, Amoco Chemical Company, a corporation, and Amoco Foam Products Company, a corporation, their successors and assigns, and their officers, representatives, agents, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, labeling, promotion, offering for sale, sale, or distribution of any plastic food service product or plastic packaging material 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 any such product or packaging material offers any environmental benefit, 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 for five (5) years after the last date of dissemination of any representation covered by this order, respondents, or their successors and assigns, shall maintain and upon request make available to the Federal Trade Commission for inspection and copying:

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

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

IV.

It is further ordered, That respondents shall distribute a copy of this order to each of their operating divisions and to each of their officers, agents, representatives, or employees engaged in the preparation and placement of advertisements, promotional materials, product labels or other such sales materials covered by this order.

V.

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

VI.

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

IN THE MATTER OF

HAWTHORNE COMMUNICATIONS, INC.

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

Docket 9264. Complaint, Nov. 16, 1993--Decision, Aug. 9, 1994

This consent order prohibits, among other things, an Iowa corporation from making any representations about the performance, benefits, efficacy, or success rate of any product or service concerning business opportunities unless the respondent possesses competent and reliable evidence that substantiates such representations. In addition, the consent order prohibits the respondent from using any testimonial or endorsement unless it reflects the typical or ordinary experience of consumers who use the product.

Appearances

For the Commission: *Jeffery T. Dahnke.*

For the respondent: *Edward F. Glynn, Jr., Venable, Baetjer, Howard & Civiletti, Washington, D.C.*

COMPLAINT

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

PARAGRAPH 1. Respondent is an Iowa corporation, with its principal office and place of business at 300 N. 16th Street, Fairfield, Iowa.

PAR. 2. Respondent, at all times relevant to this complaint, was an advertising agency of Tronsoft, Inc., and has directed, participated in, and assisted others in the creation and dissemination to the public of advertisements that offer for sale Tronsoft's Home Business Starter Kit ("Starter Kit").

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

PAR. 4. Respondent promoted the sale of Tronsoft's Starter Kit by scripting and producing a 30-minute television commercial identified as "Freedom Now," which was broadcast in various areas throughout the United States. The "Freedom Now" commercial contains the following statements and depictions:

(a) Announcer: "A revolutionary, easy to use tool for starting ten new high profit businesses and earning up to six figures a year, without leaving your home. No matter what your age, education or occupation, Ron Way's Home Business Starter Kit can help you put cash in your pockets immediately and it's easy."

(b) Announcer: "Make big money at home in your spare time with an amazing new secret. Introducing Freedom Now with self-made millionaire Ronald Way, a nationally acclaimed computer software expert who's come up with an astonishing new business concept. A new way to make money that you, no matter what your age, background, or occupation can use to earn hundreds, thousands, even millions of dollars, starting tomorrow working right out of your own home." MESSAGE SUPERIMPOSED ON SCREEN: Anyone Can Do It

(c) Ron Way: "[T]hink about it. No matter what your age, occupation, or education is, man or woman, you can make yourself rich providing this lucrative service right out of your own home. No more boss. No more traffic. No more late nights away from your family. Be there while your children are growing up. We're calling it Tronsoft's Freedom Now Plan and it can change your life."

(d) Announcer: "Ron explains how easy his ten different home based business gold mines are - businesses using his powerful analysis reports like the Real Estate Investment Report, Franchise Matching and the Mortgage Reduction Report, a report that over 50 million homeowners could buy from you at a 200% profit or more."

(e) Announcer: "When you order Ron's Home Business Starter Kit, you'll also get these money making tools. Ron Way's 300 page information-packed manual showing you the step-by-step proven system that Ron used to go from being \$40,000 in debt to earning nearly a million dollars a year - in just three years."

(f) Endorser: "I don't have to punch a time clock any more. I don't have to meet a deadline any more. I'm my own boss. I'm my own person. I am self made and I'm growing." MESSAGE SUPERIMPOSED ON SCREEN: "Thanks To Tronsoft, Sending Children To College"

(g) Endorser: "I have the freedom in my life that I've always wanted and never could achieve working for someone else. [I] needed the tools and I needed the advisors to be on my own and be successful on my own and Tronsoft is really the advisor company." MESSAGE SUPERIMPOSED ON SCREEN: "Thanks to Tronsoft, She Owns Her Own Business"

(h) Endorser: "This is just one deal. Twelve grand, actually \$12,383. And I thought I've never seen that much money in one lump and that's not a lot. But I had never seen that kind of money in one lump sum in my life. And there it was. And we sat down - what we did is we got financially free as they say. I took Ron's advice. I paid off all the bills. I still had enough left for Christmas." MESSAGE SUPERIMPOSED ON SCREEN: "Thanks to Tronsoft: Earning Thousands, Working Just Four Days A Week"

(i) Endorser: "I can do \$50, \$95 deals. You know, a couple times a day and I'm making, you know, twice as much as an executive in a large corporation . . . MESSAGE SUPERIMPOSED ON SCREEN: "Earned \$4,000 in one month working only one day a week."

(j) Ron Way: "Right now, I'm going to introduce you to two guests that have made a killing using the Tronsoft secret, and they've done it in two different ways . . . Both of these gentlemen have incredible stories to tell, but before we get started I just wanted to point out that David has used the reports to build his own business and since made himself into a millionaire while Andre Brady on the other hand sells the reports and services and has done incredibly well."

(k) Ron Way: "You actually went from selling water heaters to owning a multimillion dollar company, and operating right out of your own home with the assistance of Tronsoft analysis reports. Is that right?"

Endorser: "That's right. I was able to use one of your reports to help me get a new business idea off the ground." MESSAGE SUPERIMPOSED ON SCREEN: Created His Own Multi-Million Dollar Business

(l) Ron Way: "Folks, you've just seen a couple of examples of how you can make money if you have the advantage if you've got the secret. It's called Freedom Now and here's your chance to put it to work for you."

(m) Ron Way: "[A]nd you can do the same thing. I'm talking about \$20,000 in two months. Earning \$400 for maybe a half day's work on a Saturday morning. Earning six figures a year and never ever leaving your home."

(n) On Screen: Stay Tuned To Find Out How You Can Earn Hundreds Of Dollars A Week At Home In Your Spare Time

(o) Endorser: "In one month, I made about \$25,000 in profit, because I was using Tronsoft."

PAR. 5. Through the use of the statements and depictions contained in the "Freedom Now" commercial referred to in paragraph four, respondent has represented, directly or by implication, that:

(a) Consumers who use the Starter Kit typically readily succeed in starting and operating successful businesses out of their own homes;

(b) Consumers who use the Starter Kit typically earn substantial income;

(c) Endorsements appearing in the "Freedom Now" commercial reflect the endorser's actual experience of starting a business with the aid of Tronsoft's products or services;

(d) Endorsements appearing in the "Freedom Now" commercial reflect the typical or ordinary experience of members of the public who have used Tronsoft's products or services.

PAR. 6. In truth and in fact:

(a) Consumers who use the Starter Kit do not typically readily succeed in starting and operating successful businesses out of their own homes;

(b) Consumers who use the Starter Kit do not typically earn substantial income;

(c) Endorsements appearing in the "Freedom Now" commercial do not reflect the endorser's actual experience of starting a business with the aid of Tronsoft's products or services;

(d) Endorsements appearing in the "Freedom Now" commercial do not reflect the typical or ordinary experience of members of the public who have used Tronsoft's products or services.

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 "Freedom Now" commercial referred to in paragraph four, respondent has represented, directly or by implication, that at the time it made the representations set forth in paragraph five, respondent possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 8. In truth and in fact, at the time it made the representations set forth in paragraph five, respondent did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation set forth in paragraph seven was, and is, false and misleading.

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

DECISION AND ORDER

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

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth

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

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

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

1. Respondent Hawthorne Communications, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Iowa, with its office and principal place of business located at 300 N. 16th Street, in the City of Fairfield, State of Iowa.

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

ORDER

As used in this order, the term "business opportunity" means an activity engaged in for the purpose of making a profit.

I.

It is ordered, That respondent, Hawthorne Communications, Inc., a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of any Tronsoft product or service, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from selling, broadcasting, disseminating, or assisting or

encouraging others to sell, broadcast or disseminate the “Freedom Now” commercial described in the complaint.

II.

It is further ordered, That respondent, Hawthorne Communications, Inc., a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of Tronsoft’s Home Business Starter Kit (“Starter Kit”) or any substantially similar product, in or affecting commerce, as “commerce” is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting, in any manner, directly or by implication, that:

- A. Consumers who use such product readily succeed in starting and operating successful businesses out of their own homes.
- B. Consumers who use such product earn substantial income.

For purposes of this provision, “substantially similar product” means any product or material containing substantially similar information or techniques as the Starter Kit and that purports to instruct consumers how to start and operate a computer-based consulting business at home.

III.

It is further ordered, That respondent, Hawthorne Communications, Inc., a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of the Starter Kit or any other product or service concerning business opportunities, in or affecting commerce, as “commerce” is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, the performance, benefits, efficacy or success rate of any such product or service, unless, at the time of making the representation, respondent possesses and relies upon competent and reliable evidence, which when

appropriate must be 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.

IV.

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

A. Using, publishing, or referring to any endorsement (as "endorsement" is defined in Section 255(b), Part 255, Title 16, Code of Federal Regulations) unless respondent has good reason to believe that at the time of such use, publication, or reference, the endorsement reflects the honest opinions, findings, beliefs, or experience of the endorser and contains no express or implied representations which would be deceptive or unsubstantiated if made directly by respondent.

B. Representing, directly or by implication, that any endorsement of the product or service represents the typical or ordinary experience of members of the public who use the product or service unless such is the case.

V.

It is further ordered, That respondent shall distribute a copy of this order to each of its operating divisions and to each officer, agent and personnel responsible for the preparation, review or placement of advertising, or other materials covered by this order, and shall

secure from each such person a signed statement acknowledging receipt of this order.

VI.

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

VII.

It is further ordered, That respondent, and its successors and assigns, shall, for five (5) years after the date of the last dissemination to which they pertain, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All materials that were relied upon by respondent in disseminating any representation covered by this order; and

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

VIII.

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

IN THE MATTER OF

BEVERLY HILLS WEIGHT LOSS CLINICS
INTERNATIONAL, INC.

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

Docket C-3515. Complaint, Aug. 11, 1994--Decision, Aug. 11, 1994

This consent order prohibits, among other things, a commercial diet program company from misrepresenting the performance or safety of any diet program it offers in the future, and requires the respondent to possess competent and reliable scientific evidence to substantiate any future claims it makes about weight loss, weight loss maintenance, or rate of weight loss; to make a number of disclosures regarding maintenance success claims; and to disclose all mandatory fees.

Appearances

For the Commission: *Gary S. Cooper, Charles La Due and Richard F. Kelly.*

For the respondent: *Gary Buchman, Hassman & Rachstein, Boston, MA.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Beverly Hills Weight Loss Clinics International, Inc., a corporation (“respondent”), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent Beverly Hills Weight Loss Clinics International, Inc. (“Beverly Hills”), is a Virginia corporation, with its principal office or place of business at 200 Highpoint Avenue, Suite B-5, Portsmouth, Rhode Island.

PAR. 2. Respondent advertises, offers for sale, sells, and otherwise promotes throughout much of the eastern United States weight loss and weight maintenance services and products, and makes them available to consumers at numerous “Beverly Hills

Weight Loss Clinics” in many states. These products include “food” within the meaning of Sections 12 and 15 of the Federal Trade Commission Act. Through clinics owned by Beverly Hills, franchised by Beverly Hills, and licensed by Beverly Hills to use the Beverly Hills trademark and the Beverly Hills weight loss and weight maintenance services and products, respondent is engaged, and has been engaged, in the sale and offering for sale of low calorie diet (LCD) weight loss programs and weight maintenance programs to consumers.

PAR. 3. In the course and conduct of its business, respondent has disseminated or caused to be disseminated advertisements for weight loss and weight maintenance services and products. Respondent has placed, or has authorized the placement of, these advertisements with numerous newspapers, radio stations, and television stations for the purpose of inducing consumers to purchase its products and services. Respondent further advertises the Beverly Hills weight loss programs through the use of promotional materials, including pamphlets and brochures, given to customers and prospective customers at individual Beverly Hills Weight Loss Clinic locations.

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

PAR. 5. Respondent’s advertisements and promotional materials include, but are not necessarily limited to, the advertisements and promotional materials attached hereto as Exhibits A-X.

PAR. 6. The advertisements and promotional materials referred to in paragraph five, including but not necessarily limited to the attached Exhibits A-I, contain the following statements:

- (a) RESULTS!
BEVERLY HILLS GUARANTEES THEM.
Safe, fast, effective
Guaranteed results
[Exhibit A]
- (b) RESULTS
BEVERLY HILLS GUARANTEES THEM.
Lose Up To 7 Pounds And A Full Dress Size In One Week!
Weight Loss Guaranteed* for Life.
[Exhibit B]
- (c) FUN
BEVERLY HILLS MAKES WEIGHT LOSS FUN

- “And I Have Only 5 Pounds to Go.”
 Weight Loss Guaranteed* for Life.
 [Exhibit C]
- (d) It’s Real Food, Real Results!
 At Beverly Hills, you eat the same food you serve your family. And you will lose 2 to 5 pounds each week. Our program helps you reach your goal weight and keep it off. Put your trust in the people who know--our clients. They’ve had proven results.
 Kimberly Wiggins ... 44 ½ lbs. 57 ½ inches
 [Exhibit D]
- (e) Laura L. Porter... lost 24 ¾ lbs. & 28 ½"
 Although this is a true story, it is not an unusual story. It is something our counselors hear everyday. Why not let us help you get a new lease on life?
 LOSING WEIGHT DOESN’T MAKE SENSE UNLESS YOU KEEP IT OFF!!!
 BEVERLY HILLS *Weight Loss Clinics*
 “Where Temporary Loss Is No Success”
 [Exhibit E]
- (f) Beverly Hills says put your trust in the claims of people who know - our clients. They’ve had proven results. After all, aren’t they the ones you can really trust...
 Steve Gaddy...100 Lbs. 68"
 Beverly Kuch...46 Lbs. 41 ½"
 [Exhibit F]
- (g) Some weight loss companies claim to be the best, based on a comparison test that everyone seems to be refuting. Others claim they’re best, based on a newspaper reporter’s opinion.
 Beverly Hills says put your trust in the claims of people who know - our clients. They’ve had proven results. After all, aren’t they the ones you can really trust?
 Francis Foster Lost 33 lbs.
 Kathy Cooper Lost 68 lbs.
 Debbie Rogers Lost 35 lbs.
 Winnie Sutton Lost 42 ½ lbs.
 [Exhibit G]
- (h) DREAMS DO COME TRUE
 “I Lost 30 Pounds and I Feel Great.”
 ... Guaranteed. Lose 3-7 Pounds Per Week
 [Exhibit H]
- (i) REVOLUTIONARY PROGRAM SHEDS THOUSANDS OF POUNDS.
 “Beverly Hills Gave Me The Willpower.”
 ... Guaranteed. Lose 3-7 Pounds Per Week
 [Exhibit I]

PAR. 7. Through the use of the statements set forth in paragraph six, and others in advertisements and promotional

materials not specifically set forth herein, respondent represents and has represented, directly or by implication, that Beverly Hills customers typically are successful in reaching their weight loss goals under the Beverly Hills weight loss programs.

PAR. 8. Through the use of the statements set forth in paragraph six, and others not specifically set forth herein, respondent represents and has represented, directly or by implication, that at the time it made the representation set forth in paragraph seven, respondent possessed and relied upon a reasonable basis that substantiated such representation.

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

PAR. 10. The advertisements and promotional materials referred to in paragraph five, including but not necessarily limited to the attached Exhibits J-P, contain the following statements:

- (a) THE FINAL SOLUTION To Your Weight Problem
LOSE WEIGHT FOREVER....
We do not consider weight loss successful unless its permanent. There is a reason why our method works to keep weight off where others fail. Come to the nearest clinic for a consultation and let us demonstrate our famous method of easy permanent weight control.
[Exhibit J]
- (b) GUARANTEED* WEIGHT LOSS FOR LIFE
... Beverly Hills guarantees weight loss forever! Not just for this year but for all the years to come
[Exhibit K]
- (c) LOSE WEIGHT QUICKLY & SAFELY
LET BEVERLY HILLS SHOW YOU THE WAY
BEVERLY HILLS *Weight Loss Clinics*
"Where Temporary Loss Is No Success"
[Exhibit L]
- (d) 8 DRESS SIZES & GAINED BACK NOTHING BUT SELF-ESTEEM
... I'm ELATED after going from a size 12 to a 4!! The best part though is I have kept my eight off now for 15 months ...
Debbie Jones 30 Lbs.
[Exhibit M]

- (e) We Have a Secret!
The secret to slimming down and staying slim....
It's called Guaranteed* Weight Loss For Life
"I have stayed slim for more than 1 ½ years"!
30 lbs. Denise Gillispie
[Exhibit N]
- (f) Carol Telly
Lost 22 lbs. & 25 inches three years ago. Still maintaining.
[Exhibit O]
- (g) "Since I became a Beverly Hills woman, I've lost 20 pounds, and I'll never gain them back!" - Jackie C.
Weight Loss Guaranteed for Life.*
[Exhibit P]

PAR. 11. Through the use of the statements set forth in paragraph ten, and others in advertisements and promotional materials not specifically set forth herein, respondent represents and has represented, directly or by implication, that:

(a) Beverly Hills customers typically are successful in reaching their weight loss goals and maintaining their weight loss either long-term or permanently; and

(b) Beverly Hills customers typically are successful in maintaining their weight loss achieved under the Beverly Hills weight loss programs.

PAR. 12. Through the use of the statements set forth in paragraph ten, and others not specifically set forth herein, respondent represents and has represented, directly or by implication, that at the time it made the representations set forth in paragraph eleven, respondent possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 13. In truth and in fact, at the time it made the representations set forth in paragraph eleven, respondent did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation set forth in paragraph twelve was, and is, false and misleading.

PAR. 14. The advertisements and promotional materials referred to in paragraph five, including but not necessarily limited to the attached Exhibits D, E, H, I and L, contain the following statements:

- (a) And you will lose 2 to 5 pounds each week.
[Exhibit D]
- (b) LOSE 3-7 LBS. PER WEEK
[Exhibits E and L]
- (c) Guaranteed. Lose 3-7 Pounds Per Week.
[Exhibits H and I]

PAR. 15. Through the use of the statements set forth in paragraph fourteen, and others in advertisements and promotional materials not specifically set forth herein, respondent represents and has represented, directly or by implication, that customers on the Beverly Hills weight loss programs typically lose weight at an average rate of two to five or three to seven pounds per week.

PAR. 16. Through the use of the statements set forth in paragraph fourteen, and others not specifically set forth herein, respondent represents and has represented, directly or by implication, that at the time it made the representations set forth in paragraph fifteen, respondent possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 17. In truth and in fact, at the time it made the representations set forth in paragraph fifteen, respondent 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. In the routine course and conduct of its business, respondent states during initial sales presentations that consumers will typically reach their desired weight loss goals within the time frames computed for their programs by Beverly Hills Weight Loss Clinics' personnel.

PAR. 19. Through the use of the statements set forth in paragraph eighteen, and others not specifically set forth herein, respondent represents and has represented, directly or by implication, that at the time it made the representation set forth in paragraph

eighteen, respondent possessed and relied upon a reasonable basis that substantiated such representation.

PAR. 20. In truth and in fact, at the time it made the representation set forth in paragraph eighteen, respondent did not possess and rely upon a reasonable basis that substantiated such representation. Therefore, the representation set forth in paragraph nineteen was, and is, false and misleading.

PAR. 21. The advertisements and promotional materials referred to in paragraph five, including but not necessarily limited to the attached Exhibits Q and R, contain the following statements:

- (a) Only Beverly Hills Has A Totally Safe Weight Loss Program.
Our Diet Plan Is Complete.
We are the first major weight loss clinic to recognize the importance of adding Essential Fatty Acids as a dietary supplement. We call this wonderful product BEV-EFA. You'll call it miraculous. And only Beverly Hills offers it.
[Exhibit Q]
- (b) SCIENTIFIC ADVANCEMENT
BEV-EFA Makes Our Weight Loss Plan Complete.
This Beverly Hills supplement will help you prevent the problems that patients in other weight loss programs could experience.
Weight loss without Essential Fatty Acids supplementation may lead to such symptoms as: hair loss, skin changes, diarrhea, as well as possible metabolic effects. There is experimental evidence from animal studies that EFA deficiency may contribute to the development of cholesterol gallstones. By adding BEV-EFA to our weight loss supplement plan, you will be protecting yourself against the negative characteristics associated with weight loss. And ONLY Beverly Hills offers this marvelous dietary supplement.
[Exhibit R]

PAR. 22. Through the use of the statements set forth in paragraph twenty-one, and others in advertisements and promotional materials not specifically set forth herein, respondent represents and has represented, directly or by implication, that the Beverly Hills weight loss programs are safer than other weight loss programs that do not include essential fatty acid supplementation.

PAR. 23. Through the use of the statements set forth in paragraph twenty-one, and others not specifically set forth herein,

respondent represents and has represented, directly or by implication, that at the time it made the representation set forth in paragraph twenty-two, respondent possessed and relied upon a reasonable basis that substantiated such representation.

PAR. 24. In truth and in fact, at the time it made the representation set forth in paragraph twenty-two, respondent did not possess and rely upon a reasonable basis that substantiated such representation. Therefore, the representation set forth in paragraph twenty-three was, and is, false and misleading.

PAR. 25. In the course and conduct of its business, respondent provides its customers with diet instructions that require said customers, *inter alia*, to come in to one of respondent's weight loss clinics three times a week for monitoring of their progress, including weighing in. In the course of regularly ascertaining its customers' weight loss progress, respondent, in some instances, is presented with weight loss results indicating that customers are losing weight significantly in excess of their projected goals, which is an indication that they may not be consuming all of the food prescribed by their diet instructions. Such conduct could, if not corrected promptly, result in health complications.

PAR. 26. When presented with the weight loss results described in paragraph twenty-five, respondent on many occasions has not disclosed to the customers that failing to follow the diet instructions and consume all of the food prescribed could result in health complications. This fact would be material to consumers in their purchase and use decisions regarding respondent's weight loss programs. In light of respondent's practice of monitoring people on the programs, said failure to disclose was, and is, a deceptive practice.

PAR. 27. The advertisements referred to in paragraph five, including but not necessarily limited to the attached Exhibits D, F, K, M, N, O, R, S and T, contain the following statements:

- (a) Special 6 Weeks For \$69
 - lab included • 6 week minimum[Exhibit D]

- (b) Final Week!
 Limited Special
 \$10.00 per week
 - Lab included
 - Eat grocery store foods
 - 6 week minimum
 [Exhibit F]
- (c) 4 WEEKS ONLY \$49
 [Exhibit K]
- (d) 8 WEEKS ONLY
 \$99⁰⁰
 Plus Pay Only \$1.00 For Complete Lab Test
 [Exhibit M]
- (e) Get 5 weeks of weight loss for only \$59⁰⁰
 [Exhibit N]
- (f) \$10 a week
 medical fee included
 6 week minimum
 [Exhibit O]
- (g) 8 WEEKS OF WEIGHT LOSS
 ONLY \$99⁰⁰ plus
 Pay only \$1 for complete lab test
 (First Time Visit Bonus)
 [Exhibit R]
- (h) ONE LOW PRICE \$5⁰⁴
 Program average weekly cost
 [Exhibit S]
- (i) ONE LOW PRICE!
 30 lb. Program Will Average
 \$4³⁰ Per Week
 [Exhibit T]

PAR. 28. Through the use of the statements set forth in paragraph twenty-seven, and others in advertisements not specifically set forth herein, respondent represents and has represented, directly or by implication, that the advertised price is the only cost associated with losing weight on the Beverly Hills weight loss programs.

PAR. 29. In truth and in fact, the advertised price is not the only cost associated with losing weight on the Beverly Hills weight loss

programs. There are substantial additional mandatory expenses associated with losing weight on the Beverly Hills weight loss programs that far exceed the advertised price. Therefore, the representation set forth in paragraph twenty-eight was, and is, false and misleading.

PAR. 30. In its advertising and sale of the Beverly Hills weight loss programs, respondent has represented that the advertised price is the only cost associated with losing weight on the Beverly Hills weight loss programs. Respondent has failed to disclose adequately to consumers the existence and amount of all mandatory expenses associated with participation in the Beverly Hills programs. This fact would be material to consumers in their purchase decisions regarding the programs. The failure to disclose this fact, in light of the representation made, was, and is, a deceptive practice.

PAR. 31. The advertisements referred to in paragraph five, including but not necessarily limited to the attached Exhibits U-X, contain the following statements:

- (a) 1st TIME PATIENTS ONLY
2 WEEKS FREE
[Exhibit U]
- (b) 2 FREE WEEKS
Call For An Appointment
First time members only. Must be 30 lbs. or more overweight.
[Exhibit V]
- (c) FREE! FREE! FREE!
FREE - 4 WEEK WEIGHT LOSS PROGRAM
[Exhibit W]
- (d) WANTED
20 persons to participate in a FREE WEIGHT LOSS PROGRAM. Must need to lose 30 pounds or more. In return, you will authorize BEVERLY HILLS to use photos and testimonials for advertising purposes. Complete details available in person only....
[Exhibit X]

PAR. 32. Through the use of the statements set forth in paragraph thirty-one, and others in advertisements not specifically set forth herein, respondent represents and has represented, directly or by

implication, that respondent's weight loss programs are being offered to consumers at no cost.

PAR. 33. In truth and in fact, the receipt of free weight loss services is contingent upon the purchase, at substantial expense to the consumer, of other goods or services that are mandatory for participation in the Beverly Hills weight loss programs. Therefore, the representation set forth in paragraph thirty-two was, and is, false and misleading.

PAR. 34. In advertising the free offer of weight loss services under the Beverly Hills weight loss programs, respondent represents and has represented that its weight loss programs are being offered to consumers at no cost. Respondent has failed to disclose adequately to consumers that the receipt of free weight loss services is contingent upon the purchase, at substantial expense to the consumer, of other goods or services that are mandatory for participation in the Beverly Hills weight loss programs. This fact would be material to consumers in their purchase decisions regarding the programs. The failure to disclose this fact, in light of the representation made, was, and is, a deceptive practice.

PAR. 35. In providing advertisements and promotional materials referred to in paragraph five to its individual franchised or licensed clinics for the purpose of inducing consumers to purchase its weight loss and weight maintenance services and products, respondent has furnished the means and instrumentalities to those clinics to engage in the acts and practices alleged in paragraphs five through thirty-four.

PAR. 36. The acts and practices of respondent as alleged in this complaint constitute 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.

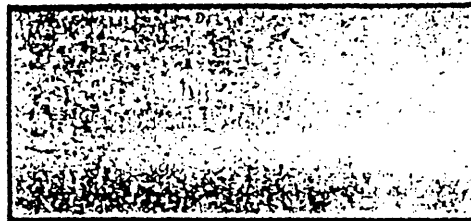
Commissioner Owen was recorded as voting in the affirmative, but dissenting as to the exception requiring full numerical disclosures involving quantitative weight loss maintenance claims in short radio and TV ads.

EXHIBIT A

Beverly Hills 3x7 7/22/1 p-324 coop

RESULTS!

**BEVERLY HILLS
GUARANTEES THEM.**



- Medically supervised
- Safe, fast, effective
- Long term maintenance
- Individual counseling
- Guaranteed results

Hurry Before Summer Ends!


BEVERLY HILLS
Weight Loss Clinics

CALL NOW

SALEM	389-1200
VINTON	981-9200
ROANOKE	362-7100
BLACKSBURG	951-2400
WYTHEVILLE	228-9111

*Offer does not include protein supplements.

RESULTS

**BEVERLY HILLS
GUARANTEES THEM.**

**Lose Up To 7 Pounds And A Full Dress Size In
One Week! Weight Loss Guaranteed* for Life.**


(OFFER GOES HERE)

- 4 weeks of weight loss • 6 weeks of stabilization
- 52 weeks of maintenance • Labwork & medical fees included • 1 week of nutritional supplements

*Beverly Hills Weight Loss Clinics Are Medically Supervised!
Our Dietary Foods Comply With FDA Requirements!*

*Program details and requirements available at each clinic
Each clinic independently owned and operated.

(CLINIC LOCATION AND PHONE NUMBER)



BEVERLY HILLS *Weight Loss Clinics*

You're going to love it from the very first minute.




EXHIBIT C

FUN

**BEVERLY HILLS
MAKES WEIGHT
LOSS FUN.**

**"And I Have Only
5 Pounds To Go."**

**Weight Loss Guaranteed*
for Life.**

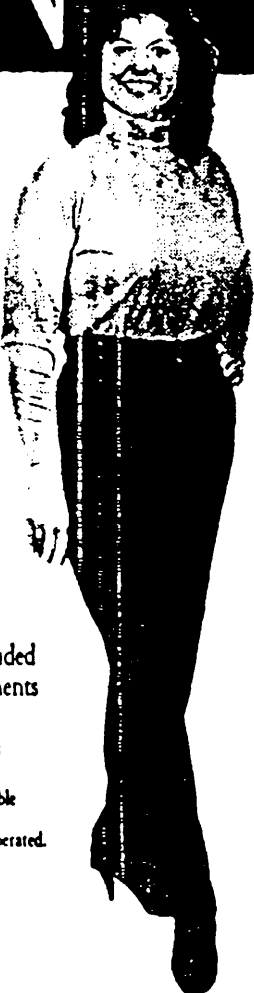
(OFFER GOES HERE)


- 4 weeks of weight loss
- 6 weeks of stabilization
- 52 weeks of maintenance
- Labwork & medical fees included
- 1 week of nutritional supplements

*Beverly Hills Weight Loss Clinics Are
Medically Supervised! Our Dietary Foods
Comply With FDA Requirements!*

*Program details and requirements available
at each clinic.
Each clinic independently owned and operated.

(CLINIC LOCATION
AND PHONE NUMBER)





BEVERLY HILLS *Weight Loss
Clinics*

You're going to love it from the very first minute.

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Complaint

EXHIBIT D

RECORD OF ADVERTISING

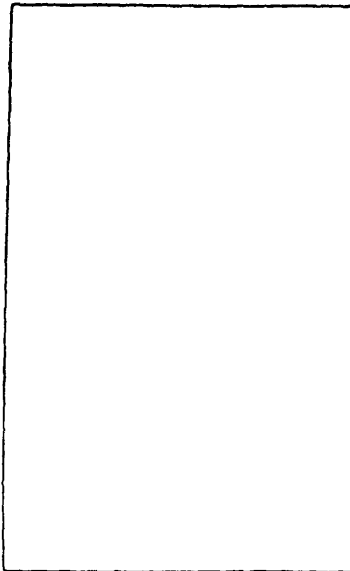
00611

CLINIC _____

DATE/DAY 2-16-92
(Ad appeared in paper)

DIRECTOR _____

WEATHER CONDITIONS _____



AT BEVERLY HILLS

*It's Real Food,
Real Results!*

At Beverly Hills, you eat the same food you serve your family. And you will lose 2 to 5 pounds each week. Our program helps you reach your goal weight and keep it off.

Special
6 Weeks **\$69**
For

* lab included * 6 week minimum

Put your trust in the people who know our clients. They've had proven results.

349 Jonestown Rd.
Winston-Salem

659-1364

BEVERLY HILLS *Weight Loss Clinics*

You're going to love it from the very first minute. Product not included. An individual may fit into weight loss.

NEWSPAPER _____

CALLS _____

APPTS _____

SHOWS _____

COMMENTS: _____



Complaint

EXHIBIT E



Dr. Euble FIT

LIKE AN ELEVATOR
THAT'S NOT WEIGHT
CONTROL!

I had always been overweight. I tried "just cutting down" diets on my own with no success. I finally gave in when my husband was going to buy me a \$70 dress and the largest size in the store didn't fit. That's when I came to BHWC. The staff gave me the support and encouragement I needed to stick with a diet. Now I know how to eat sensibly and how to cut down when I need or want more. It's a great feeling to have people compliment me on how I look and to try on a size 10 pair of pants and have them fit a little loose!!!
Thanks BHWC!



Laura L. Porter of Ellettsville, Ky.
lost 24 3/4 lbs. & 2 1/2"

Signed *Laura L. Porter*

ALTHOUGH THIS IS A TRUE STORY, IT IS NOT AN UNUSUAL STORY. IT IS SOMETHING OUR COUNSELORS HEAR EVERYDAY. WHY NOT LET US HELP YOU GET A NEW LEASE ON LIFE?

**LOSING WEIGHT DOESN'T
MAKE SENSE UNLESS
YOU KEEP IT OFF!!!**

**CELEBRATION OF SUMMER
50% OFF Weight Loss Program**
This Offer Expires 6/23/89

- MEDICALLY SUPERVISED
- NO SHOTS. NO PILLS. NO EXERCISE
- EAT REGULAR, NUTRITIONALLY BALANCED MEALS
- LOSE 3-7 LBS. PER WEEK

PHONE TODAY
737-3511

Towne Centre
(Next to Goody's)
Elizabethtown, Ky.



"Where Temporary Loss is No Success"

BEVERLY HILLS WEIGHT LOSS CLINICS INTERNATIONAL 229

213

Complaint

EXHIBIT F

CLINIC W.S.

DATE/DAY 9-22-91 ^{11:05 AM} + 9-23-91
(Ad appeared in paper)

DIRECTOR Georgia

WEATHER CONDITIONS

WINSTON-SALEM JOURNAL Sunday, September 22, 1991 PAGE A17

BEVERLY HILLS SAYS

Trust what our customers know!

Beverly Hills says put your trust in the claims of people who know — our clients. They've had proven results. After all, aren't they the ones you can really trust?

Final Week! Limited Special \$1000 per week
 • Low overhead
 • Low priority care
 • Small group

Steve Gaskdy W.S., NC 100 Lbs. 68"	Beverly Koch Clemmons, NC 48 Lbs. 41"
---	--

BEVERLY HILLS Weight Loss Clinics

349 Jonestown Rd.
Winston-Salem
659-1364

Product not included
 An individualized
 very low carb
 weight loss

You're going to love it from the very first minute!

NEWSPAPER _____

CALLS _____

APPTS _____

SHOWS _____

COMMENTS: _____



EXHIBIT G

Trust what our customers know!

Some weight loss companies claim to be the best, based on a comparison test that everyone seems to be refusing. Others claim they're best, based on a newspaper reporter's opinion.

Beverly Hills says put your trust in the claims of people who know — our clients. They've had proven results. After all, aren't they the ones you can really trust?

Francis Foster
Lost 33 lbs.

Kathy Cooper
Lost 68 lbs.

Debbie Rogers
Lost 35 lbs.

Winnie Sutton
Lost 42 1/2 lbs.

Call Now For
FREE CONSULTATION

BEVERLY HILLS *Weight Loss Clinics*

TOWNE CENTRE
ELIZABETH TOWN
(NEXT TO GOODY'S)
737-3511

BARDSTOWN
127 REARDON ROAD
348-1797

00625

Penny Lane 9/91

003005

REVOLUTIONARY PROGRAM SHEDS THOUSANDS OF POUNDS.

"Beverly Hills Gave Me The Willpower."

Gale Sawa



- Revolutionary FLEX-LITE Five Phase System
- Medically Supervised & Approved
- Guaranteed. Lose 3-7 Pounds Per Week
- Private One-One Counseling & Support
- Eat Nutritionally Balanced Meals
- Lifestyle Maintenance Program

Each Clinic
Independently
Owned &
Operated


BEVERLY HILLS

Call Now For
Details

Weight Loss Clinics


(CLINIC LOCATION
AND
PHONE NUMBER)

OWN YOUR OWN FRANCHISE FOR INFORMATION 1-800-476-6996

EXHIBIT I

003003

DREAMS DO COME TRUE



"I Lost 30 Pounds and I Feel Great."

Lisa Boudley

- Revolutionary FLEX-LITE Five Phase System
- Medically Supervised & Approved
- Guaranteed. Lose 3-7 Pounds Per Week
- Private One-One Counseling & Support
- Eat Nutritionally Balanced Meals
- Lifestyle Maintenance Program

Each Clinic Independently Owned & Operated

BEVERLY HILLS

Weight Loss Clinics

(CLINIC LOCATION AND PHONE NUMBER)

Call Now For Details

OWN YOUR OWN FRANCHISE FOR INFORMATION 1-800-476-6996

THE FINAL SOLUTION To Your Weight Problem

0061

LOSE WEIGHT FOREVER! Most people with a chronic weight problem are discouraged or soon will be. The discouragement comes from the numerous attempts to control their weight only to fail. After weeks and weeks of dieting and depriving themselves of food they enjoy, the dieting stops, the weight is regained and usually even more. This is called the Yo-Yo syndrome; who can blame a person for not wanting to try one more time.

BUT THERE IS AN ANSWER-IT'S BEVERLY HILLS WEIGHT LOSS CLINIC. We have enjoyed success time and time again with people who had all but given up hope. The reason is simple; all programs are not alike. We do not consider weight loss successful unless it's permanent. There is a reason why our method works to keep weight off where others fail. Come to the nearest clinic for a consultation and let us demonstrate our famous method of easy permanent weight control.



"I went from a size 12 to a size 6 in just 6 weeks!"
Denise Gillespie

**Lose Up To 7 Pounds
And A Full Dress
Size In Only 1 Week!**

737-3511
Towne Centre
(next to Goody's)
Elizabeth town



- *FREE Consultation
- *FREE Medical Analysis
- *FREE 6 Weeks Stabilization
- *FREE 1 Year Maintenance
- *\$395 Value FREE with purchase
- Expires Friday 10/25/80

EXHIBIT K

003009

Guaranteed

WEIGHT LOSS FOR LIFE

**THIS YEAR I RESOLVE
TO MOVE TO BEVERLY HILLS.**

Losing weight can be a dream come true with Beverly Hills. How do I know? Because many of my friends have lost weight the Beverly Hills way and they had a blast doing it! They've convinced me that Beverly Hills is the **only** program that has really worked. And, do you know what — Beverly Hills **guarantees** weight loss forever! Not just for this year but for all the years to come. You simply can't go wrong. I'm joining Beverly Hills today. You should, too! I can't wait to become the person I was meant to be.



Weight Loss Clinics

Breezewood 898-1773
Stafford 659-0455

* Program Details and Requirements Available at Your Local Clinic.
Each Clinic Independently Owned & Operated

© IN YOUR OWN FRANCHISE —
FCR INFORMATION 1-800-476-6996

4 WEEKS ONLY ^S49

Exhibit K

003007

LOSE WEIGHT QUICKLY & SAFELY

*"Insert testimonial here:
skcm cmdkvc mckd
mxmckd m,cndjkdmc
cxmxkds dkvc kc c,dkv v,ckl
cmxkxsmc.."*

LET BEVERLY HILLS SHOW YOU THE WAY

Insert Photo Here

Mary Smith of City, State
lost 56 lbs and 111"



The Height a Person
Can Reach is Limited
Only By His Vision.

Dr. Eubie Pitt

- MEDICALLY SUPERVISED
- LOSE 3-7 LBS, PER WEEK
- NO SHOTS, NO PILLS, NO EXERCISE
- EAT REGULAR, NUTRITIONALLY BALANCED MEALS

CALL TODAY
000-0000
0000 Street City State



EACH CLINIC INDEPENDENTLY OWNED & OPERATED
"Where Temporary Loss Is No Success "



insert expiration date of SPECIAL here

EXHIBIT M

8 DRESS SIZES & GAINED BACK NOTHING BUT SELF-ESTEEM!"

"After my doctor told me to lose weight or walk with a cane in 10 years, I went straight to Beverly Hills Weight Loss Clinic! I couldn't believe it. I was losing weight without powders, pills or shots & I'm **ELATED** after going from a size 12 to a 4!!

The best part though is I have kept my weight off now for 15 months & even after all this time, I can still count on the staff at Beverly Hills for counseling & support!"



Debbie Jones
30 Lbs.

Call Today
737-3511
Towne Centre
(Next to
Goody's)
Elizabethtown


Weight Loss Clinics

8 WEEKS ONLY
\$99⁰⁰



LIMITED TIME OFFER. FIRST TIME VISIT ONLY.

006183

We Have a Secret!

*The secret to slimming down
and staying slim....*

It's called

Guaranteed*

WEIGHT LOSS FOR LIFE



Get 5 weeks of
weight loss for only **\$59⁰⁰**
LIMITED TIME ONLY

There is no better time than **NOW** to start the Beverly Hills Weight Loss Program. You get 5 weeks of weight loss for only \$59.00. That's right! And in 5 weeks you can lose up to 35 lbs. and 5 dress sizes.

*"I have stayed
slim for more
than 1 1/2
years!"
30 lbs.*

*Denise
Gillespie*

LOSE WEIGHT NOW

The Safest and Most Effective
Way Available!

737-3511



BEVERLY HILLS

Weight Loss Clinics

TOWNE CENTRE
Elizabethtown

*Program Details and Requirements at your local clinic.

For the best in local Sports Coverage read The News-Enterprise

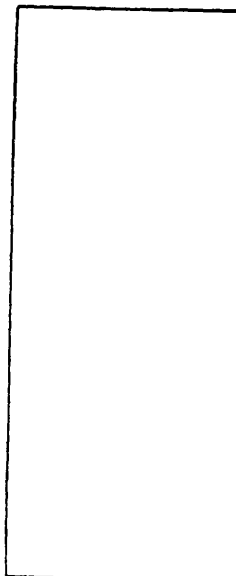
EXHIBIT O

CLINIC _____

DATE/DAY _____
(Ad appeared in paper)

DIRECTOR _____

WEATHER CONDITIONS _____



NEWSPAPER _____

Beverly Hills Says:

Weigh Your Options

- Real Grocery Store Foods
- Travel, Dine-Out
- Nurse on Staff
- Private Counseling
- Locally Owned

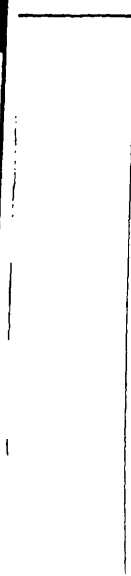
\$10 a week
medical fee included
6 week minimum

FINAL WEEK

BEVERLY HILLS *Weight Loss Clinics*

Call Today
659-1364

*Product not included; as individuals vary, so does weight loss.



CALLS _____

6-9-92

APPTS _____

SHOWS _____

COMMENTS: _____



EXHIBIT P

BEVERLY HILLS WOMEN

Look Great!


“Since I became a Beverly Hills woman, I’ve lost 20 pounds, and I’ll never gain them back!”
- Jackie C.

Take it from Jackie C. She lost 20 pounds and she looks as great as she feels. You can be a Beverly Hills woman and look great, too.

Our clinics are medically supervised. The program is safe, fast, and our dietary foods comply with FDA requirements.

Lose from 3 to 7 pounds and a full dress size in one week.

Weight Loss Guaranteed for Life.*



Join today and enjoy these great benefits:

- 4 weeks of weight loss • 6 weeks of stabilization • 52 weeks of maintenance
- Labwork & medical fees included
- 1 week of nutritional supplements

*Call for Details and Requirements. Lifetime applies to Lifetime of Practice.
*Each clinic independently owned and operated.

BEVERLY HILLS™ Weight Loss Clinics

(CLINIC LOCATION AND PHONE NUMBER)

You're going to love it from the very first minute.

EXHIBIT Q

**Only Beverly Hills
Has A Totally Safe
Weight Loss Program.**

Our Diet Plan Is Complete.

We are the first major weight loss clinic to recognize the importance of adding Essential Fatty Acids as a dietary supplement. We call this wonderful product BEV-EFA. You'll call it miraculous. And only Beverly Hills offers it.

Our weight loss plan is medically supervised, and you can lose 2 to 5 pounds per week. There are no shots, and you eat regular, nutritionally balanced meals.

So join the weight loss program that's the best.

Call for this **Towne Centre**
week's special **Elizabethtown**
737-3511



You're going to love it from the very first minute.



00020

NOV. 10, 1990

EXHIBIT R

SCIENTIFIC ADVANCEMENT

BEV-EFA
Makes Our Weight Loss Plan
Complete.

Beverly Hills is the first major weight loss clinic to recognize the importance of adding Essential Fatty Acids as a dietary supplement. We call this wonderful product BEV-EFA. You'll call it miraculous.

EFA -- Essential Fatty Acids supplementation is now a key feature of our weight loss program. And, like the entire Beverly Hills program, use of BEV-EFA will be under our medical supervision. This Beverly Hills supplement will help you prevent the problems that patients in other weight loss programs could experience.



Why you need BEV-EFA.

There is scientific and medical evidence that most reduced calorie diets do not contain adequate amounts of EFA, and

patients on low calorie diets risk EFA deficiency. Adequate intakes of essential fatty acids of the omega-6 and omega-3 families are a necessity for good health, and suggested levels of EFA intake have been recommended by the WORLD HEALTH ORGANIZATION.

Weight loss without Essential Fatty Acids supplementation may lead to such symptoms as: hair loss, skin changes, diarrhea, as well as possible metabolic effects. There is experimental evidence from animal studies that EFA deficiency may contribute to the development of cholesterol gallstones.

By adding BEV-EFA to our weight loss supplement plan, you will be protecting yourself against the negative characteristics associated with weight loss. And ONLY Beverly Hills offers this marvelous dietary supplement.

Our complete weight loss program is medically supervised, and now, with BEV-EFA you can lose 3 to 7 pounds per week safely and easily. There are no shots and you eat regular, nutritionally balanced meals.

The Beverly Hills Weight Loss Clinic program, now with BEV-EFA, can help you to enjoy the brand new you. That is our personal guarantee of your success!

COUPON

8 WEEKS OF WEIGHT LOSS

ONLY \$99.00 plus

Pay only \$1 for complete lab test
 (First Time Visit Bonus)

LIMITED TIME OFFER

Once again Beverly Hills Weight Loss Clinic is the LEADER in the weight loss industry.



CALL Today

37-3511
 OWNE CENTRE
 BARTSTOWN

348-1797
 127 REARDON BLVD.
 BARTSTOWN

Exhibit

Complaint

118 F.T.C.

EXHIBIT S

WEEK OF FEBRUARY 24, 1992
The News Enterprise

1102011

CORPULENT • FLESHY • GROSS • HEAVY
OVERBLOWN • OVERWEIGHT • PORCINE • ROTUND
BEEFY • BULKY • CHUNKY • DUMPY
FULLBODIED • HEAVYSET • SQUAT • STOCKY
STUBBY • THICK • THICKSET • PAUNCHY
POTBELLED • BRAUNY • BURLY • HUSKY

SLIM • SLENDER • LEAN • SHAPELY
ALLURING • LIVELY • ATTRACTIVE
TANTALIZING

If you would like to be described in the second group, shouldn't you be joining our group?

ONE LOW PRICE
 Program average \$5.04 weekly cost

CALL NOW!
 737-3511

22 REVERLY HILLS
 Weight Loss Clinics
 Towne Centre, E town

Program includes: Weight loss, medical analysis, stabilization, maintenance. Supplements not included. (If Affordable)



BEVERLY HILLS WEIGHT LOSS CLINICS INTERNATIONAL 243

213

Complaint

EXHIBIT T

006138

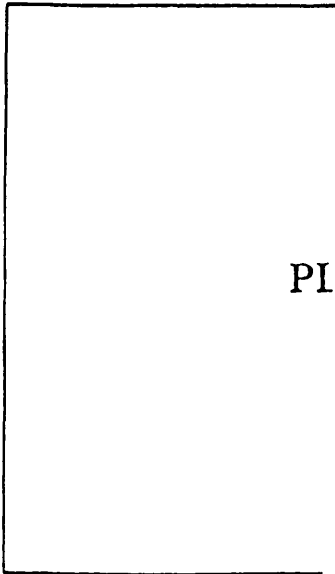
CLINIC _____

DATE/DAY _____
(Ad appeared in paper)

DIRECTOR _____

WEATHER CONDITIONS _____

entzen Inc. in Greensboro



PI

ONE LOW PRICE!
30 lb. Program Will Average

\$430 Per Week

- All Weight Loss
- 6 Weeks Stabilization
- 1 Year of Maintenance
- Medical Fees
- Starter Kit

BEVERLY HILLS
Weight Loss Clinics

349 Jonestown Road
659-1364

June Tompkins lost 80% lbs. and 114 inches

After

Before

Additional Product Not Included. At Individual Vary. 30 Does Weight Loss.

NEWSPAPER _____

6-28-92

CALLS _____

APPTS _____

SHOWS _____

COMMENTS: _____



EXHIBIT U

**BEVERLY HILLS
UNDERSTANDS**


"Insert Testimonial here. add and address of individual, hospital and Dr. Eubie Pitt at Beverly Hills. your personal emphatic description"

Insert Photo Here

Mary Smith of City, State
last 30 the end 1977

**LOSING
WEIGHT
IS MORE
THAN JUST A MATTER
OF WILLPOWER**

Many of our staff are former patients. They reflect the extra measure of care and understanding which comes only from first-hand knowledge. At Beverly Hills we believe this can and does make all the difference.



For a free brochure —
put in your response on
this card

Dr. Eubie Pitt

- MEDICALLY SUPERVISED
- LOSE 3-7 LBS PER WEEK
- NO PILLS
- NO SHOTS
- NUTRITIONALLY BALANCED MEALS
- NO EXERCISE

CALL
000-0000
0000 ADDRESS
CITY, STATE

For that
FURNISH ONLY
2 WEEKS
FREE

* SEE BY TERMS AND EXPIRATION DATE

BEVERLY HILLS
Weight Loss Clinics

EACH CLINIC
INDEPENDENTLY
OWNED AND
OPERATED

-Where Temporary Loss Is No Success®

213

Complaint

EXHIBIT V

006235

Which Seat Would You Rather See Disappear?



Start losing weight now at Beverly Hills, and you'll be sitting pretty down the road. Just head for The Hills — Beverly Hills — for a free consultation and complete details. Or, you can sit this one out.

<p>COUPON</p> <p>2 FREE WEEKS</p> <p>Call For An Appointment</p> <p>First time members only. Must be 30 lbs. or more overweight.</p> <p>Expires 5/92</p> <p>COUPON</p>	<p>COUPON</p> <p>Summer Shape-Up Plan</p> <p>Lose all the weight you want through 1st day of summer. Free lab.</p> <p>\$199⁰⁰</p> <p>Expires 5/92</p>
<p>"The Works" One Low Price</p> <p>Expires 5/92</p>	<p>BEVERLY HILLS <i>Weight Loss Clinics</i></p> <p>737-3511</p> <p>ELIZABETHTOWN Towne Center Mall (Next to Goody's)</p> <p><small>Some items not included.</small></p>



EXHIBIT W



PRESENT THIS COUPON AND RECEIVE

- * FREE CONSULTATION
- * FREE - 4 WEEK WEIGHT LOSS PROGRAM

Lose 3-7 pounds per week with our medically supervised program

- Eat regular foods
- No shots
- No Pills

GOOD AT STAFFORD LOCATION ONLY
CALL TODAY
703-659-0455

Lab fees and nutritional supplements not included in this offer.

EXPIRES JANUARY 10, 1990

213

Complaint

EXHIBIT X

WANTED

20 persons to participate in a **FREE WEIGHT LOSS PROGRAM**. Must need to lose 30 pounds or more. In return, you will authorize **BEVERLY HILLS** to use photos and testimonials for advertising purposes. Complete details available in person only at **BEVERLY HILLS WEIGHT LOSS CLINIC**

 **Kroger Shopping Center**
Scottsville Road
Call for Appointment
842-4095

DECISION AND ORDER

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

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

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

1. Respondent Beverly Hills Weight Loss Clinics International, Inc. ("Beverly Hills"), is a Virginia corporation, with its office and principal place of business located at 200 Highpoint Avenue, Suite B-5, Portsmouth, Rhode Island.

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

ORDER

DEFINITIONS

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

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

B. "*Weight loss program*" shall mean any program designed to aid consumers in weight loss or weight maintenance;

C. A "*broadcast medium*" shall mean any radio or television broadcast, cablecast, home video or theatrical release;

D. For any order-required disclosure in a print medium to be made "clearly and prominently" or in a "clear and prominent" manner, it must be given both in the same type style and in: (1) twelve point type where the representation that triggers the disclosure is given in twelve point or larger type; or (2) the same type size as the representation that triggers the disclosure where that representation is given in a type size that is smaller than twelve point type. For any order-required disclosure given orally in a broadcast medium to be made "clearly and prominently" or in a "clear and prominent" manner, the disclosure must be given at the same volume and in the same cadence as the representation that triggers the disclosure.

E. A "*short broadcast advertisement*" shall mean any advertisement of thirty seconds or less duration made in a broadcast medium.

I.

It is ordered, That respondent, Beverly Hills Weight Loss Clinics International, Inc., a corporation, its successors and assigns, and its officers, and respondent's agents, representatives and employees, directly or through any corporation, subsidiary, division or other

device, including franchisees or licensees, in connection with the advertising, promotion, offering for sale, or sale of any weight loss program in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Making any representation, directly or by implication, about the success of participants on any weight loss program in achieving or maintaining weight loss or weight control unless, at the time of making any such representation, respondent possesses and relies upon competent and reliable scientific evidence substantiating the representation, provided, further, that for any representation that:

(1) Any weight loss achieved or maintained through the weight loss program is typical or representative of all or any subset of participants using the program, said evidence shall, at a minimum, be based on a representative sample of:

(a) All participants who have entered the program, where the representation relates to such persons; provided, however, that the required sample may exclude those participants who dropped out of the program within two weeks of their entrance, or who were unable to complete the program due to illness, pregnancy, or change of residence; or

(b) All participants who have completed a particular phase of the program or the entire program, where the representation only relates to such persons;

(2) Any weight loss is maintained long-term, said evidence shall, at a minimum, be based upon the experience of participants who were followed for a period of at least two years from their completion of the active maintenance phase of respondent's program or earlier termination, as applicable; and

(3) Any weight loss is maintained permanently, said evidence shall, at a minimum, be based upon the experience of participants who were followed for a period of time after completing the program that is either:

(a) Generally recognized by experts in the field of treating obesity as being of sufficient length for predicting that weight loss will be permanent, or

(b) Demonstrated by competent and reliable survey evidence as being of sufficient duration to permit such a prediction.

B. Representing, directly or by implication, except through endorsements or testimonials referred to in paragraph I.E. herein, that participants of any weight loss program have successfully maintained weight loss, unless respondent discloses, clearly and prominently, and in close proximity to such representation, the statement: "For many dieters, weight loss is temporary."; provided, further, that respondent shall not represent, directly or by implication, that the above-quoted statement does not apply to dieters in respondent's weight loss program; provided, however, that a mere statement about the existence, design, or content of a maintenance program shall not, without more, be considered a representation that participants of any weight loss program have successfully maintained weight loss.

C. Representing, directly or by implication, except through short broadcast advertisements referred to in paragraph I.D. herein, and except through endorsements or testimonials referred to in paragraph I.E. herein, that participants of any weight loss program have successfully maintained weight loss, unless respondent discloses, clearly and prominently, and in close proximity to such representation, the following information:

(1) The average percentage of weight loss maintained by those participants;

(2) The duration over which the weight loss was maintained, measured from the date that participants ended the active weight loss phase of the program, provided, further, that if any portion of the time period covered includes participation in a maintenance program(s) that follows active weight loss, such fact must also be disclosed; and

(3) If the participant population referred to is not representative of the general participant population for respondent's programs:

(a) The proportion of the total participant population in respondent's programs that those participants represent, expressed in terms of a percentage or actual numbers of participants, or

(b) The statement: "Beverly Hills makes no claim that this [these] result[s] is [are] representative of all participants in the Beverly Hills program.";

provided, further, that compliance with the obligations of this paragraph I.C. in no way relieves respondent of the requirement under paragraph I.A. of this order to substantiate any representation about the success of participants on any weight loss program in maintaining weight loss.

D. Representing, directly or by implication, in short broadcast advertisements, that participants of any weight loss program have successfully maintained weight loss, unless respondent:

(1) Includes, clearly and prominently, and in immediate conjunction with such representation, the statement: "Check at our clinics for details about our maintenance record.";

(2) For a period of time beginning with the date of the first broadcast of any such advertisement and ending no sooner than thirty days after the last broadcast of such advertisement, complies with the following procedures upon the first presentation of any form asking for information from a potential client, but in any event before such person has entered into any agreement with respondent:

(a) Give to each potential client a separate document entitled "Maintenance Information," which shall include all the information required by paragraph I.B. and subparagraphs I.C.(1)-(3) of this order and shall be formatted in the exact type size and style as the example form below, and shall include the heading (Helvetica 14 pt. bold), lead-in (Times Roman 12 pt.), disclosures (Helvetica 14 pt. bold), acknowledgment language (Times Roman 12 pt.) and signature block therein; provided, further, that no information in addition to that required to be included in the document required by this subparagraph I.D.(2) shall be included therein:

MAINTENANCE INFORMATION

You may have seen our recent ad about maintenance success. Here's some additional information about our maintenance record.

[Disclosure of maintenance statistics goes hereXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXX] For many dieters, weight loss is temporary.

I have read this notice. _____ (Client Signature) (Date)

- (b) Require each potential client to sign such document; and (c) Give each client a copy of such document; and

provided, however, that if any potential participant who does not then participate in the program refuses to sign or accept a copy of such document, respondent shall so indicate on such document and shall not, for that reason alone, be found in breach of this subparagraph I.D.(2); and

(3) Retain in each client file a copy of the signed maintenance notice required by this paragraph; provided, further, that:

(i) Compliance with the obligations of this paragraph I.D. in no way relieves respondent of the requirement under paragraph I.A. of this order to substantiate any representation about the success of participants on any weight loss program in maintaining weight loss; and

(ii) Respondent must comply with both paragraph I.D. and paragraph I.C. of this order if respondent includes in any such short broadcast advertisement a representation about maintenance success that states a number or percentage, or uses descriptive terms that convey a quantitative measure such as "most of our customers maintain their weight loss long-term"; and

provided, however, that the provisions of paragraph I.D. shall not apply to endorsements or testimonials referred to in paragraph I.E. herein.

E. Using any advertisement containing an endorsement or testimonial about weight loss success or weight loss maintenance success by a participant or participants of respondent's weight loss programs

if the weight loss success or weight loss maintenance success depicted in the advertisement is not representative of what participants in respondent's weight loss programs generally achieve, unless respondent discloses, clearly and prominently, and in close proximity to the endorser's statement of his or her weight loss success or weight loss maintenance success:

(1) What the generally expected success would be for Beverly Hills customers in losing weight or maintaining achieved weight loss; provided, however, that in determining the generally expected success for Beverly Hills customers respondent may exclude those customers who dropped out of the program within two weeks of their entrance or who were unable to complete the program due to illness, pregnancy, or change of residence; or

(2) One of the following statements:

- (a) "You should not expect to experience these results."
- (b) "This result is not typical. You may not do as well."
- (c) "This result is not typical. You may be less successful."
- (d) "_____ 's success is not typical. You may not do as well."
- (e) "_____ 's experience is not typical. You may achieve less."
- (f) "Results not typical."
- (g) "Results not typical of program participants.";

provided, further, that if the endorsements or testimonials covered by this paragraph are made in a broadcast medium, any disclosure required by this paragraph must be communicated in a clear and prominent manner and in immediate conjunction with the representation that triggers the disclosure; and

provided, however, that:

(i) For endorsements or testimonials about weight loss success, respondent can satisfy the requirements of subparagraph I.E.(1) by accurately disclosing the generally expected success in the following phrase: "Beverly Hills clients lose an average of ___ pounds over an average ___ - week treatment period"; and

(ii) If the weight loss success or weight loss maintenance success depicted in the advertisement is representative of what participants of a group or subset clearly defined in the advertisement generally

achieve, then, in lieu of the disclosures required in either subparagraph I.E.(1) or (2) herein, respondent may substitute a clear and prominent disclosure of the percentage of all of respondent's customers that the group or subset defined in the advertisement represents.

F. Representing, directly or by implication, that the price at which any weight loss program can be purchased is the only cost associated with losing weight on that program, unless such is the case.

G. Representing, directly or by implication, the price at which any weight loss program can be purchased, unless respondent discloses, clearly and prominently, either:

(1) In close proximity to such representation, the existence and amount of all mandatory costs or fees associated with the program offered; or

(2) In immediate conjunction with such representation, one of the following statements:

(a) "Plus the cost of [list of products or services that participants must purchase at additional cost]."

(b) "Purchase of [list of products or services that participants must purchase at additional cost] required.";

provided, further, that in broadcast media, if the representation that triggers any disclosure required by this paragraph is oral, the required disclosure must also be made orally.

H. Representing, directly or by implication, that any weight loss program or service can be obtained for free, unless respondent discloses, clearly and prominently, either (1) in close proximity to such representation, the existence and amount of all mandatory fees associated with the free offer; or (2) in immediate conjunction with such representation, the following statement: "You must pay for [list of products or services that participants must purchase at additional cost] to take advantage of this free offer."; provided, further, that in broadcast media, if the representation that triggers the disclosure is oral, the disclosures required by either (1) or (2) of this paragraph must also be made orally.

I. Failing to disclose over the telephone, for a period of time beginning with the date of any advertisement of the price at which any weight loss program can be purchased and ending no sooner than 180 days after the last dissemination of any such advertisement, to consumers who inquire about the cost of any weight loss program, or are told about the cost of any weight loss program, the existence and amount of any mandatory costs or fees associated with participation in the program; provided, however, that respondent may satisfy this requirement by directing its weight loss centers to disclose the information, by providing the center personnel with suggested language to be used when responding to telephone inquiries and by making its best efforts to ensure compliance with its directive to disclose price information over the telephone.

J. Representing, directly or by implication, the average or typical rate or speed at which participants or prospective participants in any weight loss program have lost or will lose weight, unless at the time of making such representation, respondent possesses and relies upon competent and reliable scientific evidence substantiating the representation.

K. Representing, directly or by implication, that participants or prospective participants in respondent's weight loss programs have reached or will reach a specified weight within a specified time period, unless at the time of making such representation, respondent possesses and relies upon competent and reliable scientific evidence substantiating the representation.

L. Making comparisons between the efficacy of respondent's weight loss program(s) and the efficacy of any other weight loss and/or diet program(s), unless at the time of making such representation, respondent possesses and relies upon a competent and reliable scientific study or survey substantiating the representation.

M. Making comparisons between the safety of respondent's weight loss program(s) and the safety of any other weight loss and/or diet program(s), unless at the time of making such representation, respondent possesses and relies upon competent and reliable scientific evidence substantiating the representation.

N. Failing to disclose, clearly and prominently, either (1) to each participant who, after the first two weeks on the program, is experiencing average weekly weight loss that exceeds two percent (2%) of said participant's initial body weight, or three pounds, whichever is less, for at least two consecutive weeks, or (2) in writing

to all participants, when they enter the program, that failure to follow the diet instructions and consume the total caloric intake recommended may involve the risk of developing serious health complications.

O. Misrepresenting, directly or by implication, the existence, contents, validity, results, conclusions, or interpretations of any test or study.

P. Misrepresenting, directly or by implication, the performance, efficacy, or safety of any weight loss program or weight loss product.

II.

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

III.

It is further ordered, That for three (3) years after the last date of dissemination of any representation covered by this order, respondent, or its successors and assigns, shall maintain and upon request make available to the Federal Trade Commission for inspection and copying:

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

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

IV.

It is further ordered, That respondent shall distribute a copy of this order to each of its officers, agents, representatives, independent contractors and employees, who is involved in the preparation and

placement of advertisements or promotional materials or in communication with customers or prospective customers or who have any responsibilities with respect to the subject matter of this order; and, for a period of five (5) years from the date of entry of this order, distribute same to all future such officers, agents, representatives, independent contractors and employees.

V.

It is further ordered, That:

A. Respondent shall distribute a copy of this order to each of its franchisees and licensees and shall contractually bind them to comply with the prohibitions and affirmative requirements of this order; respondent may satisfy this contractual requirement by incorporating such order requirements into its current Operations Manual; and

B. Respondent shall further make reasonable efforts to monitor its franchisees' and licensees' compliance with the order provisions; respondent may satisfy this requirement by: (1) taking reasonable steps to notify promptly any franchisee or licensee that respondent determines is failing materially or repeatedly to comply with any order provision; (2) providing the Federal Trade Commission with the name and address of the franchisee or licensee and the nature of the noncompliance if the franchisee or licensee fails to comply promptly with the relevant order provision after being so notified; and (3) in cases where that franchisee's or licensee's conduct constitutes a material or repeated violation of the order, diligently pursuing reasonable and appropriate remedies available under its franchise or license agreement and applicable state law to bring about a cessation of that conduct by the franchisee or licensee.

VI.

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

IN THE MATTER OF

DOCTORS MEDICAL WEIGHT LOSS CENTERS, INC., ET AL.

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

Docket C-3516. Complaint, Aug. 11, 1994--Decision, Aug. 11, 1994

This consent order prohibits, among other things, the Florida commercial diet program companies and their officer from misrepresenting the performance or safety of any diet program they offer in the future, and requires the respondents to possess competent and reliable scientific evidence to substantiate any future claims they make about weight loss, weight loss maintenance, or rate of weight loss; to make a number of disclosures regarding maintenance success claims; and to disclose all mandatory fees.

Appearances

For the Commission: *Eric Bash, Matthew Daynard and Richard F. Kelly.*

For the respondents: *Gabriel Imperato, Broad & Cassell, Fort Lauderdale, FL.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Doctors Medical Weight Loss Centers, Inc. ("DMWLC"), Doctors Weight Loss Centers, Inc. ("DWLC"), and Joyce A. Schuman, individually and as an officer of said corporations (hereinafter, collectively, "respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. (a) Respondents DMWLC and DWLC are Florida corporations, formerly doing business, with their principal offices and places of business located at 5479 A North Federal Highway, Fort Lauderdale, Florida.

(b) Respondent Joyce A. Schuman is an officer of the corporate respondents. Individually or in concert with others, she formulates, directs, and controls the acts or practices of the corporate

respondents, including the acts or practices alleged in this complaint. Her principal residence is located at 2730 Sea Island Drive, Fort Lauderdale, Florida.

(c) Respondents have cooperated and acted together in carrying out the acts and practices alleged in this complaint.

PAR. 2. Respondents have advertised or otherwise promoted, offered for sale, and sold, weight reduction and weight control programs and products, and have made them available to consumers at their weight loss centers. Respondents have offered for sale and sold diet programs of 800 to 1500 calories per day, that include food, as "food" is defined in Section 15 of the Federal Trade Commission Act.

PAR. 3. In the course and conduct of their business, respondents have disseminated or have caused to be disseminated advertisements for weight reduction and weight control programs and products. Respondents have placed these advertisements with various media for the purpose of inducing consumers to purchase their programs and products. Respondents have further advertised their weight loss programs through the use of promotional materials, including pamphlets and brochures, given to customers and prospective customers at individual weight loss center locations.

PAR. 4. 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.

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

PAR. 6. The advertisements and promotional materials referred to in paragraph five, attached hereto as Exhibits A-J, contain the following statements:

- (a) "Permanent Weight Loss" (Exhibit A)
- (b) "Lose 3-8 pounds per week, safely, economically, and permanently with professional supervision." (Exhibit B)
- (c) "WHAT MAKES A WEIGHT LOSS PROGRAM GREAT? ... Results should be long lasting & offer a lifetime solution to a weight problem ... GUESS WHAT! ... We just described the DOCTORS WEIGHT LOSS PROGRAM." (Exhibits C-E)
- (d) "Doctors Weight Loss Advantage You Keep The Weight Off" (Exhibit F)
- (e) "The best way to lose weight and keep it off" (Exhibit G)
- (f) "TAKE IT OFF ... AND KEEP IT OFF!" (Exhibit H)

(g) "WHAT MAKES OUR PROGRAM THE BEST? ... LONG-LASTING RESULTS ... '3 years later and I'm still slim, trim, healthy. It's no problem staying a size 5'" (Exhibit I)

(h) "I reached my goal and lost 30 lbs. in just 10 weeks." (Exhibit J)

PAR. 7. Through the use of the statements contained in the advertisements referred to in paragraph six, and others in advertisements or promotional materials not specifically set forth herein, respondents have represented, directly or by implication, that:

(a) DMWLC/DWLC customers typically are successful in reaching their weight loss goals and maintaining their weight loss either long-term or permanently;

(b) DMWLC/DWLC customers typically are successful in maintaining their weight loss achieved under the DMWLC/DWLC diet program; and

(c) DMWLC/DWLC customers typically are successful in reaching their weight loss goals.

PAR. 8. Through the use of the statements contained in the advertisements referred to in paragraph six, and others in advertisements or promotional materials not specifically set forth herein, respondents have represented, directly or by implication, that at the time they made the representations set forth in paragraph seven, respondents possessed and relied upon a reasonable basis that substantiated such representations.

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

PAR. 10. The advertisements referred to in paragraph five, attached hereto as Exhibits A, C, D-F, and J-N contain the following statements:

(a) "\$11 PER WEEK" (Exhibits A, F, J, L-N)

(b) "\$15 PER WEEK" (Exhibit C)

(c) "\$8 PER WEEK" (Exhibits D and E)

(d) "\$9 PER WEEK" (Exhibit K)

PAR. 11. Through the use of the statements contained in the advertisements referred to in paragraph ten, and others in advertisements or promotional materials not specifically set forth herein, respondents have represented, directly or by implication, that the advertised price is the only cost associated with losing weight on the DMWLC/DWLC weight loss program.

PAR. 12. In truth and in fact, the advertised price is not the only cost associated with losing weight on the DMWLC/DWLC weight loss program. There are substantial, additional mandatory expenses associated with participation in the DMWLC/DWLC weight loss program. Therefore, respondents' representation as set forth in paragraph eleven was and is false and misleading.

PAR. 13. In advertising the price of the DMWLC/DWLC weight loss program, respondents have failed to disclose to consumers the existence and amount of all mandatory expenses associated with participation in the DMWLC/DWLC weight loss program. This fact would be material to consumers in their purchase or use decisions regarding the weight loss program. In light of respondents' representation as set forth in paragraph eleven that the quoted price represents the only cost associated with the DMWLC/DWLC weight loss program, said failure to disclose was and is a deceptive practice.

PAR. 14. The advertisements referred to in paragraph five, attached hereto as Exhibits B, L, M, and N, contain the following statements:

- (a) "Lose 3-8 pounds per week, safely, economically, and permanently with professional supervision." (Exhibit B)
- (b) "START TODAY BE 30 LBS. LIGHTER IN 30 DAYS!" (Exhibit L)
- (c) "LOSE 3 TO 7 LBS. A Week" (Exhibit M)
- (d) "LOSE 3-6 LBS. A WEEK" (Exhibit N)

PAR. 15. Through the use of the statements contained in the advertisements referred to in paragraph fourteen, and others in advertisements or promotional materials not specifically set forth herein, respondents have represented, directly or by implication, that consumers following the DMWLC/DWLC weight loss program typically lose weight at an average rate of:

- (a) Thirty pounds in thirty days; and
- (b) Three to eight pounds per week.

PAR. 16. The advertisements referred to in paragraph five, attached hereto as Exhibits C-E and N contain the following statements:

- (a) "LOSE UP TO 7 LBS PER WEEK" (Exhibits C, D)
- (b) "LOSE UP TO 6 LBS. PER WEEK" (Exhibit E)
- (c) "Up to 6 lbs. per week weight loss" (Exhibit N)

PAR. 17. Through the use of the statements contained in the advertisements referred to in paragraph sixteen, and others in advertisements or promotional materials not specifically set forth herein, respondents have represented, directly or by implication, that an appreciable number of consumers following the DMWLC/DWLC weight loss program typically lose weight at an average rate of six to seven pounds per week.

PAR. 18. Through the use of the statements contained in the advertisements referred to in paragraphs fourteen and sixteen, and others in advertisements or promotional materials not specifically set forth herein, respondents have represented, directly or by implication, that at the time they made the representations set forth in paragraphs fifteen and seventeen, respondents possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 19. In truth and in fact, at the time respondents made the representations set forth in paragraphs fifteen and seventeen, they did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, respondents' representation as set forth in paragraph eighteen was and is false and misleading.

PAR. 20. In the routine course and conduct of their business, respondents have provided their customers with diet protocols that required said customers, *inter alia*, to come in to one of respondents' weight loss centers three to six times a week for monitoring of their progress, including weighing in. In the course of regularly ascertaining weight loss progress, respondents, in some instances, have been presented with weight loss results indicating that customers have been losing weight significantly in excess of their projected goals, which is an indication that they may not have been consuming all of the food prescribed by their diet protocol. Such conduct could, if not corrected promptly, result in health complications.

PAR. 21. When presented with the weight loss results described in paragraph twenty, respondents, on many occasions, have not

disclosed to the customers that failing to follow the diet protocol and consume all of the calories prescribed could result in health complications. This fact would be material to customers in their purchase or use decisions regarding the weight loss program. In light of respondents' practice of monitoring customers, said failure to disclose was and is a deceptive practice.


PAR. 22. The acts and practices of respondents as alleged in this complaint constitute 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.

Commissioner Owen was recorded as voting in the affirmative, but dissenting as to the exception requiring full numerical disclosures involving quantitative weight loss maintenance claims in short radio and TV ads.

EXHIBIT A

BRO MONDAY, JUNE 18, 1990. THE MIAMI HERALD 3C


**"FOR THE FIRST TIME EVER!
I WEAR A SIZE 8 AFTER
LOSING 56 LBS."** Believe it!



**Before
178
Lbs.**

"And my doctor is amazed! At last I'm off all blood pressure medication and my cholesterol improved. I spent enormous amounts of money on every other weight loss program but to no avail. At D.Q.W.L. I learned how to eat right, lose weight and keep it off. Everyone comments on the New me!"

**Lila Nikla
Homestead**
*Fast! Safe!
Permanent Weight Loss*



**After
122
Lbs.**

The Doctors NEW Weight Loss Program Easier Simpler & Faster Than Ever! Learn how to lose weight and keep it off living in today's "Real World", eating Real Food, even Fast Food from McDonalds, Wendys and lots more. Lose weight more easily than you ever thought possible.

Lose weight while eating real food that you buy at the supermarket and prepare yourself. For your convenience — delicious fresh frozen meals at low supermarket prices. One on One Personal Supervision thru out. Learn what to eat & how to order while eating at McDonald's, Denny's, Red Lobster, etc... and still lose weight & stay thin for life.

ONLY \$11* per week
6 wk. minimum

**Permanent Weight Loss Tapes
Now Available. Open To The Public.
CALL TO SEE HOW EASY IT IS!**

DOCTORS WEIGHT LOSS CENTERS

DADE	BROWARD	PALM BEACH
• Kendall 271-8110	• Weston/Pembroke Pines 432-9247	• Boca Raton 479-4446
• Westchester/Tamiami 551-1121	• Pompano/Deerfield 426-9773	• Delray/Boca 272-5454
• Cutler Ridge 255-0008	• Ft. Lauderdale 563-4699	• North Palm Beach 863-5337
• North Miami Beach 653-5227	• Coral Springs 753-5000	• West Palm Beach 478-1446
• Hialeah 557-4993	• Plantation 749-0995	• Lake Worth 969-2221
• Brickell 372-0057	• Hollywood 961-5033	• Stuart 287-0066
• Aventura 535-0286		
• Homestead 245-4227		

*Weight Loss Varies With The Individual
*Excludes Medical Fees/Supplements. New clients only
WEEKDAYS 8 AM-8 PM — SAT. TILL 1 PM
Major credit cards accepted

Complaint

118 F.T.C.

EXHIBIT B

**Small Business Owners
UNLOCK YOUR BUSINESS POTENTIAL!!**

With over 20 years experience operating & managing small businesses, I am available on a Full/Part Time basis to assist you in the following areas:

- * Accounting
- * Marketing
- * Controlling Inventory
- * Solving Problems
- * Computerizing
- * Planning
- * Managing Scheduling
- * Purchasing
- * Training

Invest in a call to Dan at TMCS, Inc., 792-4698, to discuss unlocking your business potential.

DO YOU KNOW...**Being Overweight is Hazardous To Your...
WEALTH?**

You know that being overweight hurts your health. Did you know it hurts your wealth as well? Heavy people are hired less, fired more, paid and promoted less - all because of stereotypes and appearance.

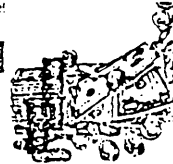
With today's economy, you can't afford not to look your best. Lose 3-8 pounds per week, safely, economically, and permanently with professional supervision. Don't let an expanding waistline cut into your bottom line!

Call now for free consultation

DOCTORS WEIGHT LOSS CENTERS!

Fl. Laud. 563-4699	Pompano 426-9773
Hollywood... 961-5053	Cr. Spg. 753-5000
Plantation... 749-0995	Weston 432-9247
Boca Raton... 479-4446	Delray Beach .. 272-5454

For other locations, call 1-800-940-SLIM

**6% DISCOUNT**

**On All Travel including
Amtrak - SR. Citizen Coupon Booklets
Cruises - Tours - Hotels Etc.**

Not applicable to airline tickets - and special promotional offers

**Investors
convert
to bonds**

**Federal Reserve cuts
interest rates to 5**

Money

Stendly sliding interest rates, cut another point to 5½ percent week by the Federal Reserve, have persuaded income-oriented small investors to shift billions of dollars to low-yielding money-market to bond mutual funds paying cent or more, according to gathered for Money magazine Small Investor Index.

Since mid-December, the Federal Reserve has cut the discount rate — which it charges on to banks — three times. By that period, money funds had shrunk from an average 7.4 percent to 5.9 percent. Most analysts expect yields to drop another half-point during the six weeks.

While some of the cash out of money funds has gone to stocks, income-oriented small investors have rushed into the funds that still pay 8 percent or more. In March, for instance, Investment Company Institute reports that investors redeemed net \$973 million from money funds and added a net \$4.4 billion to the

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Complaint

EXHIBIT C

6E Sun-Sentinel, Wednesday, September 19, 1990

WHAT MAKES A WEIGHT LOSS PROGRAM GREAT?*



"I LOST 43 LBS. IN JUST 15 WEEKS"

"I needed HELP! I couldn't do it on my own. It was easy to follow and I wasn't hungry. The nice part was I could eat regular food & still lose!"

...JEAN HALL

LOSE UP TO 7 LBS PER WEEK

BEFORE 167 LBS. **AFTER 124 LBS.**

- * Must be safe, easy and no special foods to buy
- * Must be flexible in all situations such as eating out in fast food outlets & restaurants
- * Results should be long lasting & offer a life time solution to a weight problem.
- * Must be affordable & Drug Free

GUESS WHAT!... We just described the DOCTORS WEIGHT LOSS PROGRAM. Call now for your FREE consultation.

LAST CHANCE ! FINAL DAYS !

\$15 PER WEEK*
EXP. 9/22/90
New Programs Only

DOCTORS WEIGHT LOSS CENTERS

DADE	BROWARD	PALM BEACH
• Cutler Ridge 255-0008	• Weston/Pembroke Pines 432-8247	• Boca Raton 478-4448
• N. Miami Bch 453-8227	• Pompano/Lighthouse Pt. 426-8773	• Delray Beach 272-4464
• Malabar 557-4993	• Ft. Lauderdale 543-4699	• N. Palm Beach 963-8337
• Brickell 373-0087	• Coral Springs 733-9000	• W. Palm Beach 478-1448
• Kendall 271-8118	• Plantation 748-9995	• Lake Worth 968-8221
• Westchester/Tamiami 581-1121	• Hollywood 961-6033	• Stuart 287-8088

*EXCLUDES MEDICAL FEES/SUPPLEMENTS. (6 wk. min.)

Se Habla Espanol TOLL FREE - 1-800-940-SLIM

Major Credit Cards Accepted HOURS: MON.-FRI. 9 A.M.-7 P.M. SAT. 'TIL 1 P.M.

C

EXHIBIT D

...this money with interest. This money will be spent without creating a new single job." It recognized that some countries at nationalized their mines had in into difficulties. The copper mining industry in ambia, where the ANC leadership pent many years in exile, nearly collapsed after nationalization. The paper went on to say that nationalization could stampede skilled whites into emigrating and hat there would be "serious prob-

**OVERWEIGHT MEN, WOMEN AND TEENS
I LOST 82 LBS.
...IT WAS EASY**

ONLY \$8 PER WEEK*



WHAT MAKES A WEIGHT LOSS PROGRAM GREAT?*

- Must be safe, easy and no special foods to buy
- Must be flexible in all situations such as eating out in fast food outlets & restaurants
- Results should be long lasting & offer a life time solution to a weight problem.
- Must be affordable & Drug Free

GUESS WHAT!...

We just described the **DOCTORS WEIGHT LOSS PROGRAM**. Call now for you **FREE** consultation.

LOSE UP TO 7 LBS. PER WEEK

DOCTORS WEIGHT LOSS CENTER

- Cuthbert Ridge 755-0208
- Weston/Panorama Pkwy. 632-9247
- Boca Raton 479-4448
- Hialeah 551-4953
- Hollywood 961-5033
- Oakley Beach 772-5454
- Brickell 773-0057
- Ft. Lauderdale 563-4699
- W. Palm Beach 478-1448
- Coral Gables 771-8110
- Coral Springs 753-5030
- Lake Worth 969-2221
- Westchester Lakeside 561-1121
- Pompano 748-9995
- Fort Lauderdale 327-4036
- North Miami Beach 652-3227
- Pompano/Lighthouse Pt. 628-8773
- Stuart 237-4036

Wt. Loss Varies On Individual Based on purchase of 1 yr. Membership Or Flexible Expired Major Credit Cards Accepted

Camie's
1 LB. MAINE LOBSTER
Mon. & Tues.
\$7.99

MIAMI 869 S.W. 107th Ave. 227-2722
S. MIAMI 6272 S. Dixie Hwy. 665-1288

FOR LOCATIONS IN BROWARD CALL 748-8404

Specials not available for take-out - MC/VISA

ABSOLUTE AUGIEON

BY ORDER OF DEVELOPER
**TWO NEW LUXURY HOMES
SIX LAKEFRONT LOTS**

THE HUNT
Lake Worth, FL

11:00 A.M. Sat. March 16th

*All six lots to be sold to the highest bidder without minimums or reserves.

Call for detailed brochure

NATIONAL AUCTION SALES COMPANY

ADVISORS & BROKERS & CONSULTANTS

152 SOUTH COMMERCE AVE. SUITE 200
BOYDTON BEACH, FLORIDA 33435

C. Buchanan (407) 364-7004

OFF SEASON SALE!

Add Beautiful Living Space.

- Highly Insulated
- Available in Different Colors
- Wood Paneling Inside

Awnings, Shutters, Accordion Screen Enclosures, Roofs, Roll Up Panama Shutters

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Complaint

EXHIBIT E

is aren't

■ The acoustics: "The acoustics are good, the production is fabulous, the theater is fabulous. It's just that it's freezing and there are no bathrooms." — Maxine Adler of Palm Beach.

■ The bathrooms: "Awful. They should have one or two extra ones in here. We've been in this line for a long time and we're not even moving." — Sylvia Feiner of Boca Raton.

(Theater designers had vowed that there would be enough restrooms and that there would be little or no waiting time.)

■ Getting to the theater and parking: "It was no problem," said Valentina Sosa, who is here on vacation from Caracas, Venezuela.

sales tax in 1982.

So, Mayhue and supporters went after money from sources that did not hinge on public approval. They persuaded state, county, city, and downtown officials to kick in \$27 million cash, plus \$5 million worth of land. The rest of the money is coming from private donations and a \$6 million loan.

Even so, the arts center stands \$9 million in the red, thanks to overruns and a \$3.2 million shortage in fund-raising.

Staff Writer Tao Woolfe contributed to this report.

OVERWEIGHT MEN, WOMEN AND TEENS
I LOST 82 LBS.
...IT WAS EASY

FINAL DAYS!
ONLY \$8 PER WEEK

WHAT MAKES A WEIGHT LOSS PROGRAM GREAT?*

- * Must be safe, easy and no special foods to buy
- * Must be flexible in all situations such as eating out in fast food outlets & restaurants
- * Results should be long lasting & offer a life time solution to a weight problem
- * Must be affordable & Drug Free

GUESS WHAT!...
 We just described the **DOCTORS WEIGHT LOSS PROGRAM**. Call now for your **FREE CONSULTATION**

LOSE UP TO 6 LBS. PER WEEK

DOCTORS WEIGHT LOSS CENTERS

• Cutler Ridge _____ 255-0008	• Weston/Pembroke Pines 432-9247	• Boca Raton _____ 478-4446
• Hialeah _____ 557-4993	• Hollywood _____ 961-5033	• Delray Beach _____ 272-5454
• Brickell _____ 374-0057	• Ft. Lauderdale _____ 563-4699	• W. Palm Beach _____ 478-1446
• Kendall _____ 274-8110	• Coral Springs _____ 753-5000	• Lake Worth _____ 969-2221
• Westchester/Tamiami 551-1121	• Plantation _____ 749-0995	• Stuart _____ 287-0066
• North Miami Beach _____ 653-5227	• Pompano/Lighthouse PL 426-9773	

Major Credit Cards Accepted • *Based On Purchase of 1 Year Membership • Weight Loss Varies With Individual

AL WINTER CLEARANCE

through Sunday, March 3rd

nal

Exhibit E

Complaint

118 F.T.C.

EXHIBIT F

"NOW AVAILABLE" CHOOSE YOUR OWN WEIGHT LOSS PROGRAM


TIRE D OF BUYING EXPENSIVE DIET FOOD AT JENNY CRAIG & NUTRI SYSTEM?

PROGRAM #1

- No special Food To Buy
- Eat Real Restaurant & Supermarket food
- One On One Personal Supervision Throughout

PROGRAM #2

For Your Convenience Doctors Weight loss Approved Delicious Fresh Frozen Meals Are Now Available At Low, Low Supermarket Prices! So Why Buy Expensive diet Meals At Other Weight Loss Centers?



I came to D.W.L.C. when I had been all hours not losing the weight on my own. I started a mild program based on your food with special doses of good nutritional guidance. The care I received exceeded all my expectations. The results have been amazing. My friends, relatives and the doctor don't believe it. (It has even been told to have the picture on my Doctor's license remain because the doctor wouldn't believe it's real)

Jan Miller

Doctors Weight Loss Advantage

You Keep The Weight Off!

Any Weight Loss Is Bound To Fail Unless you Learn To Live And Eat In Today's Real World, Eating Fast Food Like McDonalds, Wendys And At Restaurants Like Dennys, Red Lobster, Etc.....

\$11 Per Week*

New Program Only *Excludes \$7.27-90



DOCTORS WEIGHT LOSS CENTERS Call Or Drop In For Free Consultation

FLORIDA		BROWARD		Plantation 749-8895
•Coral Ridge 255-0008	•Bricell 372-8057	•Pompano/Light. Pt. 426-9773	•Halland 941-5033	118
•N. Miami Beach 533-3227	•Kendall 271-8110	•Ft. Lauderdale 563-6699	•Weston/Pembroke Pines 432-9247	
•Hialeah 557-4995	•Weechee/Tamiami 551-1121	•Coral Springs 753-5000		

*Excludes Medical Fees/Supplements & Week Min.
Se Habla Espanol • 18 Locations

Weekdays 9 AM-7 PM, Sat. Till 1 PM

MAJOR CREDIT CARDS ACCEPTED **OPEN EVENINGS & SATURDAY**
TOLL-FREE 1-800-940-SLIM

259

Complaint

EXHIBIT G



Margy Masbaum, left, with bachelor/Fort Lauderdale Commissioner Cary Keno and Tara Cannon.



Chris Doone visits with bachelor Chuck Schmidt at the recent fund-raiser held at Stan's.

END OF SUMMER CLEARANCE
 TAKE AN **ADDITIONAL 25% OFF**
 Sale Ends Oct. 19
 already reduced sale items now 30% to 50% OFF

tree house
 or children's boutique
 4721 N. Ocean Drive
 Sea Ranch Center
 Ft. Lauderdale

SPECIAL SALE RACK
 \$5, \$10, \$15, \$20
 Values to \$88

HRS: MON.-SAT.
 9:30-5:30
 (305) 781-0181

CRUI
 ABOVE
 FLOP
 INSPECT

ALL NEW!
HERBAL BALANCE Weight Control Program NOW AVAILABLE
 Lose weight with us or at home!

LOSE WEIGHT NO EXPENSIVE FOOD TO BUY!
 Eat at any restaurant you choose... share home cooked meals with your family while losing all the weight you want. The best way to lose weight and keep it off with no expensive prepackaged foods to buy.

DOCTORS WEIGHT LOSS CENTERS
Free Consultation and Evaluation

50% OFF NEW PROGRAMS
 Supplements/Herbalbalance Formula:Extra

Call or Drop In For A Free Consultation

FT. LAUDERDALE ... 563-4699 HOLLYWOOD ... 961-5033
 PLANTATION 749-0995 BOCA RATON ... 779-4446
 CORAL SP. 753-3000 DELRAY 272-5454

DADE/PALM BCH. CALL TOLL FREE 1-800-940-SLIM
 MAJOR CREDIT CARDS ACCEPTED • PEOPLE PROVEN

Sherry Bishop
 "I'm maintaining my figure with HERBAL BALANCE"

Inter
 Design
 by
Bc
 COMM
 115
 Ft. L.

Special Advertising Section
 Society Eds., Friday, Oct. 11, 1991

EXHIBIT H

200 S. Andrews Ave.

Mention Ad For Free Beverage w/Lunch

525-7656

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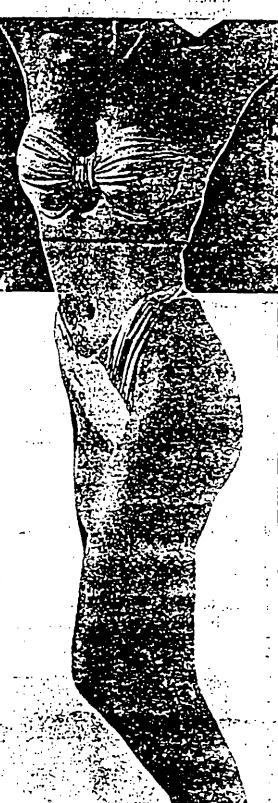
TAKE IT OFF . . . AND KEEP IT OFF!

Introducing The New Fast Track Program

SPRING SPECIAL

2 FOR 1

BRING A FRIEND AND SAVE
OR COME ALONE AND SAVE 50%



Discover the easy, fast, one-to-one approach to weight loss!

At Doctors Weight Loss Centers we offer an alternative to those group meetings that may cause you embarrassment and make you feel uncomfortable. When you're trying to lose weight, the last thing you need is an audience.

In our private one-on-one consultation you will receive the support and guidance you need from our staff.

CALL FOR FREE INFORMATION AND BROCHURE

DOCTORS WEIGHT LOSS CENTERS

- | | | |
|--|-------------------------------------|--------------------------------------|
| • Hollywood 961-5033 | • Boca Raton 479-4446 | • Cutler Ridge 255-0058 |
| • Plantation 749-0995 | • Delray Beach 272-5454 | • N. Miami Bch 653-5227 |
| • Weston/Pembroke 432-3247 | • W. Palm Beach 478-1446 | • Hialeah 557-4993 |
| • Pompano/Lighthouse Pl. 426-9773 | • Lake Worth 969-2221 | • Bncell 372-0057 |
| • Ft. Lauderdale 563-4699 | • Stuart 287-0066 | • Kendall 271-8110 |
| • Coral Springs 753-5000 | *Weight Lose Varies With Individual | • Westchester/Tamiami 551-1121 |

*Major Credit Cards Accepted

4

EXHIBIT I

890 TUESDAY, NOVEMBER 6, 1990, THE MIAMI HERALD D17A

FREE WEIGHT LOSS!

Purchase any program by Nov. 30 and receive a gift certificate for the same program FREE! Offer limited to first 25 enrollments this week.

BEFORE	AFTER	LATER (3 YRS.)
		
167 LBS.	117 LBS.	116 LBS.

WHAT MAKES OUR PROGRAM THE BEST?

<ul style="list-style-type: none"> • EFFECTIVE • SAFE • LONG LASTING RESULTS • EASY 	<ul style="list-style-type: none"> • PRIVATE COUNSELING • INEXPENSIVE - NO PRE-PACKAGED FOODS TO BUY 	<ul style="list-style-type: none"> • FLEXIBLE - EAT-IN RESTAURANTS, FAST FOOD OUTLETS OR AT HOME • DOCTOR APPROVED • PEOPLE PROVEN
---	--	---

"3 yrs. later and I'm still slim, trim, & healthy. It's no problem staying a size 5 ... Wendy Manning, Hollywood"

CALL OR DROP IN FOR FREE CONSULTATION

DOCTORS WEIGHT LOSS CENTERS

DADE	BROWARD	PALM BEACH
<ul style="list-style-type: none"> • Cutler Ridge 255-0008 • North Miami Beach 653-6227 • Hialeah 557-4993 • Brickell 372-0057 • Kendall 271-8110 • Westchester/Tamiami 551-1121 	<ul style="list-style-type: none"> • Weston/Pembroke Pines 432-9247 • Pompano/Lighthouse Pt. 426-9773 • Ft. Lauderdale 563-4899 • Coral Springs 733-8000 • Plantation 749-0995 • Hollywood 961-6033 	<ul style="list-style-type: none"> • Boca Raton 478-4446 • Delray Beach 272-5464 • W. Palm Beach 478-1446 • Lake Worth 969-2221 • Stuart 287-0066

SE HABLA ESPAÑOL Major Credit Cards Accepted HOURS: MON-FRI: 9 A.M.-7 P.M. SAT: 11 A.M.-5 P.M.

Exhibit I

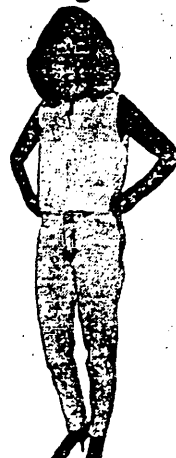
EXHIBIT J

SUNDAY, JUNE 24, 1990, THE MIAMI HERALD 11A

**"I WAS NEVER HUNGRY
It Really Works. I'm Living Proof!"**



143 Lbs.



113 Lbs.

I didn't know if I could do it, but I had nothing to worry about. I never felt hungry or deprived, I only felt encouraged, especially when I reached my goal and lost 30 lbs. in just 10 weeks. **Kim M. Young**

Miami

Any weight loss is bound to fail unless you learn to eat at fast food outlets and today's restaurants.

DOCTORS WEIGHT LOSS CENTERS "NEW" 4 PART PROGRAM

1. Lose weight while eating real food that you buy at the supermarket and prepare yourself.
2. Learn what to eat & how to order while eating at McDonald's, Denny's, Red Lobster, etc... and still lose weight & stay thin for life.
3. For your convenience - delicious fresh frozen meals at low, supermarket prices.
4. One on One Personal Supervision thru out.

EASE INTO SUMMER
with a brand new figure
Permanent Weight Loss Tapes
Now Available To The Public.
Call To See HOW EASY IT IS!



DADE	BROWARD	PALM BEACH
• Coral Gables 253-0028	• Boca Raton 432-8747	• Boca Raton 475-4446
• Ft. Lauderdale 552-3227	• Pompano Beach 436-1171	• Delray Beach 375-5654
• Hialeah 551-4993	• Ft. Lauderdale 563-4699	• Ft. Palm Beach 863-5333
• Inwood 372-0057	• Coral Springs 753-5000	• Ft. Palm Beach 415-1446
• Lighthouse Point 271-4118	• Plantation 763-9975	• Lake Worth 943-2271
• North Miami 561-1121	• Hollywood 941-5033	• Stuart 237-0264

Major Credit Cards Accepted
911 (24 HRS) 9 AM-7 PM
*18 week minimum exclusive medical supervision

* 20 lbs loss

259

Complaint

EXHIBIT K

The News Monday, July 8, 1991 A7

Designer Labels
 • Joan Vass • Bettina Riedel
 • Cece Ewing/Bis • Nancy Heller
 • Nicole Miller

50% OFF
 entire inventory
 (excluding dress dresses)

ALEXANDRIAS
 Harbor Bay Plaza, Stuart • 786-5042

Sail the Incomparable "SAGAFJORD"
 at Our **UNBEATABLE** Prices

Caribbean Cruise - 13 Days
 Oct. 17 - Oct. 30 Roundtrip Ft. Lauderdale

Call **TERRY - 286-0777**

ADVENTURES UNLIMITED TRAVEL
 Monterey Shopping Plaza • Stuart

"Lost 55 Lbs."

"I LOST WEIGHT SO FAST AND I WASN'T HUNGRY"

People now say "You look 20 years younger. How did you do it? Answer: DOCTORS WEIGHT LOSS CENTERS Regia Alvarez • No. Miami

~~\$14~~ **\$9.** PER WEEK
 on program basis EXPIRES SATURDAY

Call For Free Information & Evaluation

DOCTORS WEIGHT LOSS CENTERS

- STUART 287-0066
- BOCA RATON 479-4446
- DELRAY/BOCA 672-5454
- WEST PALM BEACH 478-1446
- LAKE WORTH 969-2221

17 LOCATIONS
 WEIGHT LOSS VARIES WITH INDIVIDUAL

Credit Cards Accepted • Doctor Approved • People Proven

STORM SHUTTERS
 Family Owned & Operated
 Serving The Treasure Coast Since 1979

HURRICANE STORM PANELS

- Strong
- Economical
- Easy Installation
- Easy Storage
- Custom Colors
- Available in Additional Colors

Reg. \$189⁰⁰

"DO IT YOURSELFERS" SPECIALS
 PANELS - 2.32' (12" wide)
 TOP HEADER - 2.48'
 ANGLE - 2.90'

BAHAMA SHUTTERS

- Folds & Locks
- Allow Privacy
- Attractive New Look For Your Home
- Many Colors

WINDOW	REG.	SALE
37x39	\$228 ⁰⁰	\$190 ⁰⁰
74x51	\$493 ⁰⁰	\$411 ⁰⁰

ALUMINUM FOLD-DOWN SHUTTERS

Exhibit K

EXHIBIT L

10A Sun-Sentinel, Monday, June 11, 1990

ATTENTION OVERWEIGHT MEN & WOMEN

HOW TO LOSE WEIGHT AND STAY THIN IN TODAY'S REAL WORLD!

LEARN HOW TO EAT AT McDONALD'S, WENDY'S, PIZZA HUT, DENNY'S RED LOBSTER, ETC....

ONLY \$11* PER WEEK

Minimum 6 wk. Program

START TODAY BE 30 LBS. LIGHTER IN 30 DAYS!

Before: 136 1/2 Lbs. After Weight Loss: 114 Lbs. Lost 24 lbs.

Any weight loss is bound to fail unless you learn to eat at fast food outlets and today's restaurants.

DOCTORS WEIGHT LOSS CENTERS HAVE A 4 PART PROGRAM

1. Lose weight while eating real food that you buy at the supermarket and prepare yourself
2. Learn what to eat & how to order while eating at McDonald's, Denny's, Red Lobster, etc... and still lose weight & stay thin for life.
3. For your convenience - delicious fresh frozen meals at low supermarket prices.
4. One on One Personal Supervision thru out

"My husband keeps telling me how good I look. I had low blood sugar before I started DOCTORS WEIGHT LOSS CENTERS. But now I feel great!"

Jolanta Gawlik
Riviera Beach, FL

CALL TODAY FOR YOUR FREE CONSULTATION

DOCTORS WEIGHT LOSS CENTERS

DADE	BROWARD	PALM BEACH
• Aventura _____ 535-0286	• Pembroke Pines/Davie ... 432-8247	• Boca Raton _____ 479-4448
• Homestead _____ 245-4227	• Pompano/Deerfield _____ 426-8773	• Delray Beach _____ 272-5454
• Cutler Ridge _____ 255-0008	• Ft. Lauderdale _____ 563-4699	• N. Palm Beach _____ 963-6337
• N. Miami Bch. _____ 653-5227	• Coral Springs _____ 753-5000	• W. Palm Beach _____ 478-1446
• Hialeah _____ 557-4993	• Plantation _____ 749-0995	• Lake Worth _____ 969-2221
• Brickell _____ 372-0057	• Hollywood _____ 961-5033	• Stuart _____ 237-0086
• Kendall _____ 271-8110	Major Credit Cards Accepted	Se Habla Espanol
• Westchester/Tamiami _____ 551-1121		

20 CONVENIENT LOCATIONS **CALL FREE 1-800-940-SLIM**

MON-FRI 9 AM - 7 PM SAT - TIL 1 PM

EXHIBIT M

PRO MONDAY, AUGUST 6, 1990, THE MIAMI HERALD 3C

LOST 3 up to 7 lbs. A WEEK for Only \$11* Per WEEK

LOST 25 LBS. IN 8 WEEKS!

"I feel better about myself & physically feel wonderful."
...Kathy Goehi



LOSE 3-7* LBS. A Week
for only
\$11 per WEEK*

*Limited Offer For New Programs Only
Exp. 8/11/90

Lose all the weight you want while learning to live and eat in today's modern world of fast food outlets, Denny's, Red Lobster, Pizza Hut, restaurants, convenience stores, etc.

PROGRAMS FOR MEN, WOMEN, AND TEENS
CALL or DROP-IN for FREE CONSULTATION

DOCTORS WEIGHT LOSS CENTERS

DADE	BROWARD	PALM BEACH
• Cutler Ridge 255-0008	• Weston/Pembroke Pines 432-8247	• Boca Raton 479-4446
• North Miami Beach 653-5227	• Pompano/Lighthouse Pt. 476-9773	• Delray Beach 272-5454
• Hialeah 557-4993	• Ft. Lauderdale 563-4699	• K. Palm Beach 863-5337
• Brickell 372-0057	• Coral Springs 753-5000	• W. Palm Beach 478-1446
• Kendall 271-8110	• Plantation 749-9555	• Lake Worth 959-2221
• Westchester/Tamiami 551-1121	• Hollywood 961-5033	• Stuart 287-4056

EXCLUDES MEDICAL FEES/SUPPLEMENTS \$3 week minimum

Hable Español **TOLL FREE 1-800-940-SLIM**


MAINTENANCE Fee Accepted **HOURS: MON-FRI. 9 A.M. - 7 P.M. SAT. 10 A.M. - 1 P.M.**

EXHIBIT N

Sun-Sentinel, Tuesday, July 31, 1990 9E

NO MORE EXPENSIVE DIET FOOD TO BUY!

BEFORE



REVOLUTIONARY NEW WAY TO LOSE WEIGHT YOU DO IT YOUR WAY!

AFTER



PROGRAM #1
No special foods to buy. You eat restaurant food or supermarket food you prepare at home. One on one personal supervision throughout. Up to 6 lbs. per week weight loss.

PROGRAM #2
For your convenience, now available, at your supermarket delicious money saving, fresh frozen meals 100% compatible with the Doctors Weight Loss Program. There's no need to buy expensive diet meals at other weight loss centers ever again!

LOSE 3-6* LBS. A WEEK for only \$11 PER WEEK*

*Limited Offer for New Program only Expires 8/4/90

DOCTORS WEIGHT LOSS ADVANTAGE:
Lose the weight you want, inexpensively, and do it your way. You'll take the weight off and learn to keep it off while learning to live and eat in today's modern world eating at fast food outlets, convenience stores, and restaurants.

When I started I had high blood pressure and my cholesterol was 269. In just two months my cholesterol had dropped to 173 and my blood pressure is very good.

Luella Holmes

DOCTORS WEIGHT LOSS CENTERS

DADE	BROWARD	PALM BEACH
● Cutler Ridge _____ 253-0008	● Weston/Pembroke Pines _____ 432-8247	● Boca Raton _____ 479-4448
● N. Miami Bch _____ 653-8227	● Pompano/Lighthouse Pt _____ 426-8773	● Delray Beach _____ 272-5434
● Hialeah _____ 357-4993	● Ft. Lauderdale _____ 563-6899	● N. Palm Beach _____ 983-6337
● Brickell _____ 372-8057	● Coral Springs _____ 753-5006	● W. Palm Beach _____ 479-1448
● Kendall _____ 271-5116	● Plantation _____ 749-0995	● Lake Worth _____ 989-2221
● Westchester/Tamiami _____ 551-1121	● Hollywood _____ 961-8033	● Shuart _____ 287-0028

EXCLUDES MEDICAL FEES/SUPPLEMENTS (G.W.K.H.I.N.) Weight loss results vary individually.

TOLL FREE 1-800-940-SLEIM

HOURS: MON-FRI 9A.M. - 7P.M. SAT 10A.M. - 5P.M.

Exhibit N

DECISION AND ORDER

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

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents had 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. Respondents DMWLC and DWLC are corporations organized, existing and formerly doing business under and by virtue of the laws of the State of Florida, with their offices and principal place of business located at 5479 A North Federal Highway, Fort Lauderdale, Florida.

2. Respondent Joyce A. Schuman is an individual with her principal residence located at 2730 Sea Island Drive, Fort Lauderdale, Florida.

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

ORDER

DEFINITIONS

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

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

B. “*Weight loss program*” shall mean any program designed to aid consumers in weight loss or weight maintenance;

C. A “*broadcast medium*” shall mean any radio or television broadcast, cablecast, home video, or theatrical release;

D. For any order-required disclosure in print media to be made “clearly and prominently,” or in a “clear and prominent manner,” it must be given both in the same type style and in: (1) twelve point type where the representation that triggers the disclosure is given in twelve point or larger type; or (2) the same type size as the representation that triggers the disclosure where that representation is given in a type size that is smaller than twelve point type. For any order-required disclosure given orally in a broadcast medium to be made “clearly and prominently,” or in a “clear and prominent manner,” the disclosure must be given at the same volume and in the same cadence as the representation that triggers the disclosure;

E. A “*short broadcast advertisement*” shall mean any advertisement of thirty seconds or less duration made in a broadcast medium.

I.

It is ordered, That respondents DMWLC, a corporation, DWLC, a corporation, their successors and assigns, and their officers, and Joyce A. Schuman, individually and as an officer of said corporations, and respondents, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, promotion, offering for sale, or sale of any weight loss program, in or affecting commerce, as

“commerce” is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Making any representation, directly or by implication, about the success of participants on any weight loss program in achieving or maintaining weight loss or weight control unless, at the time of making any such representation, respondents possess and rely upon competent and reliable scientific evidence substantiating the representation, provided, further, that for any representation that:

(1) Any weight loss achieved or maintained through the weight loss program is typical or representative of all or any subset of participants of respondents’ program, said evidence shall, at a minimum, be based on a representative sample of:

(a) All participants who have entered the program, where the representation relates to such persons; provided, however, that the required sample may exclude those participants who dropped out of the program within two weeks of their entrance, or who were unable to complete the program due to illness, pregnancy, or change of residence; or

(b) All participants who have completed a particular phase of the program or the entire program, where the representation only relates to such persons;

(2) Any weight loss is maintained long-term, said evidence shall, at a minimum, be based upon the experience of participants who were followed for a period of at least two years from their completion of the active maintenance phase of respondents, program or earlier termination, as applicable; and

(3) Any weight loss is maintained permanently, said evidence shall, at a minimum, be based upon the experience of participants who were followed for a period of time after completing the program that is either:

(a) Generally recognized by experts in the field of treating obesity as being of sufficient length for predicting that weight loss will be permanent, or

(b) Demonstrated by competent and reliable survey evidence as being of sufficient duration to permit such a prediction.

B. Representing, directly or by implication, except through endorsements or testimonials referred to in paragraph I.E. herein, that participants of any weight loss program have successfully maintained weight loss, unless respondents disclose, clearly and prominently, and in close proximity to such representation, the statement: "For many dieters, weight loss is temporary"; provided, further, that respondents shall not represent, directly or by implication, that the above-quoted statement does not apply to dieters in respondents' weight loss program; provided, however, that a mere statement about the existence, design or content of a maintenance program shall not, without more, be considered a representation that participants of any weight loss program have successfully maintained weight loss.

C. Representing, directly or by implication, except through short broadcast advertisements referred to in paragraph I.D. herein, and except through endorsements or testimonials referred to in paragraph I.E. herein, that participants on any weight loss program have successfully maintained weight loss, unless respondents disclose, clearly and prominently, and in close proximity to such representation, the following information:

(1) The average percentage of weight loss maintained by those participants;

(2) The duration over which the weight loss was maintained, measured from the date that participants ended the active weight loss phase of the program, provided, further, that if any portion of the time period covered includes participation in a maintenance program(s) that follows active weight loss, such fact must also be disclosed; and

(3) If the participant population referred to is not representative of the general participant population for respondents' programs:

(a) The proportion of the total participant population in respondents' programs that those participants represent, expressed in terms of a percentage or actual numbers of participants, or

(b) The statement: "[Doctors Medical Weight Loss Centers/Doctors Weight Loss Centers] makes no claim that this [these] result[s] is [are] representative of all participants in the [Doctors Medical Weight Loss Centers/Doctors Weight Loss Centers] program."

provided, further, that compliance with the obligations of this paragraph I.C. in no way relieves respondents of the requirement under paragraph I.A. of this order to substantiate any representation about the success of participants on any weight loss program in maintaining weight loss.

D. Representing, directly or by implication, in short broadcast advertisements, that participants of any weight loss program have successfully maintained weight loss, unless respondents:

(1) Include, clearly and prominently, and in immediate conjunction with such representation, the statement: "Check at our centers for details about our maintenance record";

(2) For a period of time beginning with the date of the first broadcast of any such advertisement and ending no sooner than thirty days after the last broadcast of such advertisement, comply with the following procedures upon the first presentation of any form asking for information from a potential client, but in any event before such person has entered into any agreement with respondents:

(a) Give to each potential client a separate document entitled "Maintenance Information," which shall include all the information required by paragraph I.E. and subparagraphs I.C. (1)-(3) of this order and shall be formatted in the exact type size and style as the example form below, and shall include the heading (Helvetica 14 point bold), lead-in (Times Roman 12 point), disclosures (Helvetica 14 point bold), acknowledgment language (Times Roman 12 point), and signature block therein; provided, further, that no information in addition to that required to be included in the document required by this subparagraph I.D (2) shall be included therein;

MAINTENANCE INFORMATION

You may have seen our recent ad about maintenance success. Here's some additional information about our maintenance record.

[Disclosure of maintenance statistics goes
hereXXXXXXXXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXXXXXXXXXXX]
For many dieters, weight loss is temporary.

I have read this notice. _____
(Client Signature) (Date)

- (b) Require each potential client to sign such document; and
- (c) Give each client a copy of such document; and

(3) Retain in each client file a copy of the signed maintenance notice required by this paragraph; provided, further, that:

(i) Compliance with the obligations of this paragraph I.D. in no way relieves respondents of the requirement under paragraph I.A. of this order to substantiate any representation about the success of participants on any weight loss program in maintaining weight loss;

(ii) Respondents must comply with both paragraph I.D. and paragraph I.C. of this order if respondents include in any such short broadcast advertisement a representation about maintenance success that states a number or percentage, or uses descriptive terms that convey a quantitative measure such as "most of our customers maintain their weight loss long-term";

provided, however, that the provisions of paragraph I.D. shall not apply to endorsements or testimonials referred to in paragraph I.E. herein.

E. Using any advertisement containing an endorsement or testimonial about weight loss success or weight loss maintenance success by a participant or participants of respondents' weight loss programs if the weight loss success or weight loss maintenance success depicted in the advertisement is not representative of what participants of respondents' weight loss programs generally achieve, unless respondents disclose, clearly and prominently, and in close

proximity to the endorser's statement of his or her weight loss success or weight loss maintenance success:

(1) What the generally expected success would be for DMWLC/DWLC customers in losing weight or maintaining achieved weight loss; provided, however, that the generally expected success for DMWLC/DWLC customers may exclude those customers who dropped out of the program within two weeks of their entrance, or who were unable to complete the program due to illness, pregnancy, or change of residence; or

(2) One of the following statements:

- (a) "You should not expect to experience these results."
- (b) "This result is not typical. You may not do as well."
- (c) "This result is not typical. You may be less successful."
- (d) "_____ 's success is not typical. You may not do as well."
- (e) "_____ 's experience is not typical. You may achieve less."
- (f) "Results not typical."
- (g) "Results not typical of program participants."

provided, further, that if the endorsements or testimonials covered by this paragraph are made in a broadcast medium, any disclosure required by this paragraph must be communicated in a clear and prominent manner, and in immediate conjunction with the representation that triggers the disclosure;

provided, however, that:

(i) For endorsements or testimonials about weight loss success, respondents can satisfy the requirements of subparagraph I.E. (1) by accurately disclosing the generally expected success in the following phrase: "Doctors Medical Weight Loss Centers, Inc./Doctors Weight Loss Centers, Inc., participants lose an average of ___ pounds over an average ___ - week treatment period"; and

(ii) If the weight loss success or weight loss maintenance success depicted in the advertisement is representative of what participants of a group or subset clearly defined in the advertisement generally achieve, then, in lieu of the disclosures required in either subparagraphs I.E. (1) or (2) herein, respondents may substitute a clear and prominent disclosure of the percentage of all of respondents,

customers that the group or subset defined in the advertisement represents.

F. Representing, directly or by implication, that the price at which any weight loss program can be purchased is the only cost associated with losing weight on that program, unless such is the case.

G. Representing, directly or by implication, the price at which any weight loss program can be purchased, unless respondents disclose, clearly and prominently, either:

(1) In close proximity to such representation, the existence and amount of all mandatory fees associated with the program offered; or

(2) In immediate conjunction with such representation, one of the following statements:

(a) "Plus the cost of [list of products or services that participants must purchase at additional cost]"; or

(b) "Purchase of [list of products or services that participants must purchase at additional cost] required";

provided, further, that in broadcast media, if the representation that triggers any disclosure required by this paragraph is oral, the required disclosure must also be made orally.

H. Failing to disclose over the telephone, for a period beginning with the date of any advertisement of the price at which any weight loss program can be purchased and ending no sooner than 180 days after the last dissemination of such advertisement, to consumers who inquire about the cost of any weight loss program, or are told about the cost of any weight loss program, the existence and amount of any and all mandatory costs or fees associated with participation in the program; provided, however, that respondents may satisfy this requirement by directing their weight loss centers to disclose the information, by providing the center personnel with suggested language to be used when responding to phone inquiries and by making their best efforts to ensure compliance with their directive to disclose price information over the telephone.

I. Representing, directly or by implication, that prospective participants in respondents' weight loss programs will reach a specified weight within a specified time period, unless at the time of

making such representation, respondents possess and rely upon competent and reliable scientific evidence substantiating the representation.

J. Representing, directly or by implication, the average or typical rate or speed at which any participant on any weight loss program has lost or will lose weight, unless at the time of making any such representation, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

K. Failing to disclose, clearly and prominently, either (1) to each participant who, after the first two weeks on the program, is experiencing average weekly weight loss that exceeds two percent (2%) of said participant's initial body weight, or three pounds, whichever is less, for at least two consecutive weeks, or (2) in writing to all participants when they enter the program, that failure to follow the program protocol and eat all of the food recommended may involve the risk of developing serious health complications.

L. Misrepresenting, directly or by implication, the performance, efficacy, or safety of any weight loss program.

II.

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

III.

It is further ordered, That respondent Joyce A. Schuman shall promptly notify the Commission of the discontinuance of her present business or employment and of her affiliation with a new business or employment. In addition, for a period of three (3) years from the service date of this order, the individual respondent shall promptly notify the Commission of each affiliation with a new business or employment whose activities relate to the advertising, promotion, offering for sale, or sale of any weight loss program. When so required under this paragraph, each such notice shall include the

individual respondent's new business address and a statement of the nature of the business or employment in which the individual respondent is newly engaged, as well as a description of the individual respondent's duties and responsibilities in connection with the business or employment. The expiration of the notice provision of this paragraph shall not affect any other obligation arising under this order.

IV.

It is further ordered, That for three (3) years after the last date of dissemination of any representation covered by this order, respondents, or their successors and assigns, shall maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All materials possessed and relied upon to substantiate any 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.

V.

It is further ordered, That respondents shall distribute a copy of this order to each of their officers, agents, representatives, independent contractors and employees who are involved in the preparation and placement of advertisements or promotional materials or in communication with customers or prospective customers or who have any responsibilities with respect to the subject matter of this order; and, for a period of three (3) years from the date of entry of this order, distribute same to all future such officers, agents, representatives, independent contractors and employees.

VI.

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

IN THE MATTER OF

QUICK WEIGHT LOSS CENTERS, INC., ET AL. (TEXAS)

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

Docket C-3517. Complaint, Aug. 11, 1994--Decision, Aug. 11, 1994

This consent order prohibits, among other things, the Texas commercial diet program company and its officers from misrepresenting the performance or safety of any diet program they offer in the future, and requires the respondents to possess competent and reliable scientific evidence to substantiate any future claims they make about weight loss, weight loss maintenance, or rate of weight loss; to make a number of disclosures regarding maintenance success claims; and to disclose all mandatory fees.

Appearances

For the Commission: *Eric Bash, Matthew Daynard and Richard F. Kelly.*

For the respondents: *Gabriel Imperato, Broad & Cassell, Fort Lauderdale, FL.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Quick Weight Loss Centers, Inc., a Texas corporation (hereinafter, "QWLC-Tex."), Don K. Gearheart, individually and as an officer of said corporation, and Joyce A. Schuman, individually and as an officer of said corporation (hereinafter, collectively, "respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. (a) Respondent QWLC-Tex. is a Texas corporation, formerly doing business, with its principal office and place of business located at 2900 Gateway, Suite 605, Irving, Texas.

(b) Respondent Don K. Gearheart is an officer of the corporate respondent. Individually or in concert with others, he formulates, directs, and controls the acts or practices of the corporate respondent, including the acts or practices alleged in this complaint. His principal

residence is located at 9520 East Pinnacle Pear Road, Scottsdale, Arizona.

(c) Respondent Joyce A. Schuman is an officer of the corporate respondent. Individually or in concert with others, she formulates, directs, and controls the acts or practices of the corporate respondent, including the acts or practices alleged in this complaint. Her principal residence is located at 2730 Sea Island Drive, Fort Lauderdale, Florida.

(d) Respondents have cooperated and acted together in carrying out the acts and practices alleged in this complaint.

PAR. 2. Respondents have advertised or otherwise promoted, offered for sale, and sold weight reduction and weight control programs and products, and have made them available to consumers at their weight loss centers. Respondents have offered for sale and sold diet programs of 800 to 1500 calories per day that include food, as "food" is defined in Section 15 of the Federal Trade Commission Act.

PAR. 3. In the course and conduct of their business, respondents have disseminated or have caused to be disseminated advertisements for weight reduction and weight control programs and products. Respondents have placed these advertisements with various media for the purpose of inducing consumers to purchase their programs and products. Respondents have further advertised their weight loss programs through the use of promotional materials, including pamphlets and brochures, given to customers and prospective customers at individual weight loss center locations.

PAR. 4. 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.

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

PAR. 6. The advertisements and promotional materials referred to in paragraph five, attached hereto as Exhibits A-F, contain the following statements:

- (a) "LOSE WEIGHT, KEEP IT OFF THE EASY WAY" (Exhibit A)
- (b) "WHAT MAKES A WEIGHT LOSS PROGRAM GREAT? ... Results should be long lasting & offer a lifetime solution to a weight problem ... GUESS WHAT ... We just described the QUICK WEIGHT LOSS PROGRAM." (Exhibit B)

- (c) "Keeping the weight off has been no problem' ... LONG * LASTING RESULTS" (Exhibit C)
- (d) "I lost 60 lbs. and have learned to keep it off. It's been over 3 years now and I still look and feel great." (Exhibit D)
- (e) "Reaching my goal was the greatest day of my life." (Exhibit E)
- (f) "Now that I have reached my goal I will be able to maintain my weight because I have learned to prepare great dietary meals and how to order in restaurants." (Exhibit F)

PAR. 7. Through the use of the statements contained in the advertisements referred to in paragraph six, and others in advertisements or promotional materials not specifically set forth herein, respondents have represented, directly or by implication, that:

- (a) QWLC-Tex. customers typically are successful in reaching their weight loss goals and maintaining their weight loss either long-term or permanently;
- (b) QWLC-Tex. customers typically are successful in maintaining their weight loss achieved under the QWLC-Tex. diet program; and
- (c) QWLC-Tex. customers typically are successful in reaching their weight loss goals.

PAR. 8. Through the use of the statements contained in the advertisements referred to in paragraph six, and others in advertisements or promotional materials not specifically set forth herein, respondents have represented, directly or by implication, that at the time they made the representations set forth in paragraph seven, respondents possessed and relied upon a reasonable basis that substantiated such representations.

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

PAR. 10. The advertisements referred to in paragraph five, attached hereto as Exhibits B-D and G-L contain the following statements:

- (a) "6 WEEKS FOR \$66" (Exhibits B, G)
- (b) "\$11.00 per week" (Exhibits C, D, H, I, J)
- (c) "FOR ONLY \$11" (Exhibit K)

(d) "COMPLETE WEIGHT LOSS PROGRAM FOR LESS THAN \$9 PER WEEK" (Exhibit L)

PAR. 11. Through the use of the statements contained in the advertisements referred to in paragraph ten, and others in advertisements or promotional materials not specifically set forth herein, respondents have represented, directly or by implication, that the advertised price is the only cost associated with losing weight on the QWLC-Tex. weight loss program.

PAR. 12. In truth and in fact, the advertised price is not the only cost associated with losing weight on the QWLC-Tex. weight loss program. There are substantial, additional mandatory expenses associated with participation in the QWLC-Tex. weight loss program. Therefore, respondents' representation as set forth in paragraph eleven was and is false and misleading.

PAR. 13. In advertising the price of the QWLC-Tex. weight loss program, respondents have failed to disclose to consumers the existence and amount of all mandatory expenses associated with participation in the QWLC-Tex. weight loss program. This fact would be material to consumers in their purchase or use decisions regarding the weight loss program. In light of respondents' representation as set forth in paragraph eleven that the quoted price represents the only cost associated with the QWLC-Tex. weight loss program, said failure to disclose was and is a deceptive practice.

PAR. 14. The advertisements referred to in paragraph five, attached hereto as Exhibits A, G-J, and M, contain the following statements:

- (a) "Lose 3-8 pounds a week" (Exhibits A, G)
- (b) "LOSE 30 LBS. IN 30 DAYS" (Exhibit G)
- (c) "LOSE 3-7 LBS. A WEEK ..." (Exhibit H)
- (d) "NOW YOU CAN LOSE 3-6 LBS. A WEEK ..." (Exhibits I, J)
- (e) "CALL, COME IN AND START TODAY ... BE 7 LBS. LIGHTER BY NEXT WEEK!" (Exhibit M)

PAR. 15. Through the use of the statements contained in the advertisements referred to in paragraph fourteen, and others in advertisements or promotional materials not specifically set forth herein, respondents have represented, directly or by implication, that consumers following the QWLC-Tex. weight loss program typically lose weight at an average rate of:

- i) Thirty pounds in thirty days; and
- ii) Three to eight pounds per week.

PAR. 16. The advertisements referred to in paragraph five, attached hereto as Exhibits B and K, contain the following statements:

- (a) "LOSE UP TO 7 LBS. PER WEEK" (Exhibit B)
- (b) "LOSE UP TO 6 lbs Per Week" (Exhibit K)

PAR. 17. Through the use of the statements contained in the advertisements referred to in paragraph sixteen, and others in advertisements or promotional materials not specifically set forth herein, respondents have represented, directly or by implication, that an appreciable number of consumers following the QWLC-Tex. weight loss program typically lose weight at an average rate of six to seven pounds per week.

PAR. 18. Through the use of the statements contained in the advertisements referred to in paragraphs fourteen and sixteen, and others in advertisements or promotional materials not specifically set forth herein, respondents have represented, directly or by implication, that at the time they made the representations set forth in paragraphs fifteen and seventeen, respondents possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 19. In truth and in fact, at the time respondents made the representations set forth in paragraphs fifteen and seventeen, they did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, respondents' representation as set forth in paragraph eighteen was and is false and misleading.

PAR. 20. In the course and conduct of their business, respondents have provided their customers with diet protocols that required said customers, *inter alia*, to come in to one of respondents' weight loss centers three to six times a week for monitoring of their progress, including weighing in. In the course of regularly ascertaining weight loss progress, respondents, in some instances, have been presented with weight loss results indicating that customers have been losing weight significantly in excess of their projected goals, which is an indication that they may not have been consuming all of the food prescribed by their diet protocol. Such conduct could, if not corrected promptly, result in health complications.

PAR. 21. When presented with the weight loss results described in paragraph twenty, respondents, on many occasions, have not disclosed to the customers that failing to follow the diet protocol and consume all of the calories prescribed could result in health complications. This fact would be material to customers in their purchase or use decisions regarding the weight loss program. In light of respondents' practice of monitoring customers, said failure to disclose was and is a deceptive practice.

PAR. 22. The advertisements and promotional materials referred to in paragraph five, attached hereto as Exhibit G, contain the following statements:

- (a) "Medically supervised by weight loss specialists" (Exhibit G)

PAR. 23. Through the use of the statements referred to in paragraph twenty-two, and others in advertisements or promotional materials not specifically set forth herein, respondents have represented, directly or by implication, that customers who participate in QWLC-Tex. diet programs are monitored by health professionals.

PAR. 24. In truth and in fact, customers who participate in QWLC-Tex. diet programs are not monitored by health professionals. Therefore, respondents' representation as set forth in paragraph twenty-three was and is false and misleading.

PAR. 25. The acts and practices of respondents as alleged in this complaint constitute 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.

Commissioner Owen was recorded as voting in the affirmative, but dissenting as to the exception requiring full numerical disclosures involving quantitative weight loss maintenance claims in short radio and TV ads.

EXHIBIT A

OVERWEIGHT MEN, WOMEN AND TEENS

NEW YEAR'S RESOLUTION:

LOSE WEIGHT, KEEP IT OFF THE EASY WAY

"69 Lbs. in only 23 weeks...
It was easy &
I was never hungry!"
L.Lianne DeGrasse

Call, Come In, or Sign up today and receive one MONTH FREE!

NO HUNGER • NO EXERCISE
Eat regular everyday food and lose 3-8 pounds a week. "It's safe, it's sensible and it's fast."
SAVE \$300 a month by not having to buy expensive pre-packaged foods.

Discover 24 Secrets to Get & Stay Slim • FREE CONSULTATION

PRESTON 739-8077	CALL	S. ARLINGTON 483-5061
RICHARDSON 880-1896	DALLAS FT. WORTH	MULEN 348-1987
IRVING 859-1300	239-SLIM 277-SLIM	CAMP BOWE 783-8585
CARROLLTON 323-9211	for location nearest you	MURST 294-2216
GRAND PRAIRIE 622-0577	<small>*Weight Loss comes with the consultation</small>	ARLINGTON 548-1111
ME SQUIE 813-5833		BEDFORD 354-8685
DUNCANVILLE 331-1700		MOCKINGBIRD 823-2017
PLANO 424-4121		

15 Convenient Locations
HOURS: MON. thru FRI. 9 a.m.-8 p.m. • SAT. 9 a.m.-1 p.m.
MAJOR CREDIT CARDS ACCEPTED

EXHIBIT A

000682

Dallas Morning News 2-6-77 Tuesday

EXHIBIT B

**LOSE WEIGHT
EATING 3 GOOD MEALS A DAY!**

**CALL, COME IN
START TODAY**

RECEIVE
6 WEEKS **\$66⁰⁰**
FOR ONLY

**WHAT MAKES A
WEIGHT
LOSS PROGRAM
GREAT?***

- * Must be safe, easy and no special foods to buy
- * Must be flexible in all situations such as eating out in fast food outlets & restaurants
- * Results should be long lasting & offer a life time solution to a weight problem.
- * Must be affordable & Drug Free

GUESS WHAT... We just described the QUICK WEIGHT LOSS PROGRAM. Call now for your FREE consultation.

**LOSE UP TO 7
LBS. PER WEEK**

**QUICK
WEIGHT
LOSS
CENTERS**

BEFORE: 184 LBS. **AFTER: 128 LBS.**



REMEMBER,
RESULTS LIKE THIS
CAN ONLY START
WHEN YOU DO!



**TAMI CUNNINGHAM LOST 56 LBS. & 8
DRESS SIZES & WAS NEVER HUNGRY
WHILE EATING 3 GREAT MEALS A DAY**

PRESTON _____ 739-8077	MESQUITE _____ 613-9833	CAMP BOWIE _____ 763-8585
RICHARDSON _____ 680-1696	DUNCANVILLE _____ 331-1700	HURST _____ 284-2216
IRVING _____ 659-1300	PLANO _____ 424-4121	ARLINGTON _____ 548-1111
CARROLLTON _____ 323-9211	S. ARLINGTON _____ 483-5081	BEDFORD _____ 354-8665
GRAND PRAIRIE _____ 602-9077	MULEN _____ 346-1887	MOCKINGBIRD _____ 623-2017

18 LOCATIONS
*EXCLUDES PROFILING FEES & SUPPLEMENTS TOLL FREE **1-800-366-LOSE**
* Min. 6 wk. Program HOURS: MON-FRI. 9 AM-7 PM SAT. -TIL 1 PM
Master Charge Cards Accepted RECEIVE 4 WEEKS OF THE WEIGHT LOSS PORTION OF THE PROGRAM

Oct 10

EXHIBIT B

October 10, 1990

000718

Complaint

118 F.T.C.

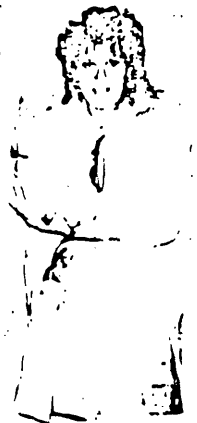

EXHIBIT C

May 5, 1991

JOIN THIS WEEK

LOSE UP TO 3-6 LBS. PER WEEK

ONLY
\$11.00*
Service Fee

BEFORE	AFTER	CONSULTATION
		
167 LBS.	117 LBS.	116 LBS.

*Keeping the weight off has been no problem, I love wearing size 5" ...Wendy Manning
In our opinion this is the *safest, easiest and least expensive* weight loss program
available in all of Texas. -Management...Q.W.L.C.

EFFECTIVE • SAFE • LONG • LASTING RESULTS • EASY • PRIVATE COUNSELING •
INEXPENSIVE • NO PRE-PACKED FOODS TO BUY • FLEXIBLE • EAT-IN RESTAURANTS,
FAST FOOD OUTLETS OR AT HOME • PEOPLE PROVEN

- CALL OR DROP IN YOUR FREE CONSULTATION -

QUICK WEIGHT LOSS CENTERS

HULEN _____ 346-1987	S. ARLINGTON _____ 483-5081	CARROLLTON _____ 723-9211
CAMP BOWIE _____ 763-8585	GRAND PRAIRIE _____ 602-0077	DUNCANVILLE _____ 331-1700
HURST _____ 284-2218	IRVING _____ 639-1300	PLANO _____ 324-4121
BEDFORD _____ 354-8665	PRESTON _____ 739-8077	MESQUITE _____ 613-5833
ARLINGTON _____ 548-1111	MOCKINGBIRD _____ 823-2017	RICHARDSON _____ 680-1696

* Excludes of Profiling and Assessments
* Wash Stations & Measurements Available

• WEIGHT LOSS VARIES WITH INDIVIDUALS

OPEN EVENINGS & SATURDAY 10pm - Fri. 9-7pm, Sat. 11-1 PM Major Credit Cards Accepted

IBIT C

000142

290

Complaint

EXHIBIT D

Tuesday, July 2, 1991 A-5

PERSONAL SUPERVISION

**"I TRIED THEM ALL!
AND NOTHING WORKED UNTIL QWLC.
I lost 60lbs and have learned to keep it off.
It's been over 3 years now and I still look and feel great."**

LEZIA PETRIZIO, Dallas, TX

ONLY \$1100
ON PROGRAM BASIS

Call For Free Information

QUICK WEIGHT LOSS CENTERS

HULEN..... 346-1987	S. ARLINGTON... 483-5081	CARROLLTON... 323-9211
CAMP BOWIE... 763-8585	GRAND PRAIRIE 602-0077	DUNCANVILLE... 331-1700
HURST..... 284-2216	IRVING..... 659-1300	PLANO..... 424-4121
BEDFORD..... 354-8665	PRESTON..... 739-8077	MESQUITE..... 613-5833
ARLINGTON..... 548-1111	MOCKINGBIRD.. 823-2017	RICHARDSON... 680-1696

Weight loss varies with individual
Exercise of dieting and System.

MAJOR CREDIT CARDS ACCEPTED - MON-FRI-SAT & SUN - PEOPLE PROVEN

EXHIBIT D

000139

EXHIBIT E

1/11/90

LOST 86 LBS & WENT FROM A SIZE 16 TO A SIZE 2

Announcing the 10 Day Program*

JOIN THIS WEEK FINAL WEEK!
Expires 4/21/90

10 DAY ONLY \$19

"I encourage everyone to start working on a new you! Today! What an improvement on my self-image. Reaching my goal was the greatest day of my life. I have never felt healthier. OWLC really works, and it's safe. Maria C. Barnes R.N. Garland, TX

**No Hunger • No Exercise
No Pre-Packaged
Food To Buy
FAST • SAFE • EASY
Call Today For Your FREE
Consultation
REMEMBER, RESULTS START
WHEN YOU DO!**

QUICK WEIGHT LOSS CENTERS

PRESTON.....	739-8077	S. ARLINGTON.....	483-5081
RICHARDSON.....	680-1696	HULEN.....	346-1987
IRVING.....	659-1300	CAMP BOWIE.....	763-8585
CARROLLTON.....	323-9211	HURST.....	284-2216
GRAND PRAIRIE.....	602-0077	ARLINGTON.....	548-1111
MESQUITE.....	613-5833	BEDFORD.....	354-8665
DUNCANVILLE.....	331-1700	MOCKINGBIRD.....	823-2017
PLANO.....	424-4121		

*Weight loss varies with the individual

Major Credit Cards Accepted
WEEKDAYS 9 AM-8PM, SAT. TIL 1 PM

OPEN EVENINGS & SATURDAY
Toll Free **1-800-366LOSE**

EXHIBIT F

Tuesday, April 30, 1991 The Dallas Morning News

WEIGHT LOSS THAT WORKS

BETTY STRATTON

LOST 30 LBS.

This program provides...
GUIDANCE
ATTENTION
RESULTS

MAJOR CREDIT CARDS ACCEPTED
HOURS:
MON.-FRI. 9a.m.-7p.m.
SAT. 9a.m.-1p.m.

ENROLL NOW
Receive
ONE MONTH FREE*

Must Have 30 lbs. to lose

"Now that I have reached my goal I will be able to maintain my weight because I have learned to prepare great dietary meals and how to order in restaurants."

QUICK WEIGHT LOSS CENTERS

PRESTON	739-8077
GARLAND	680-1696
IRVING	659-1300
CARROLLTON.....	323-9211
GRAND PRAIRIE	602-0077
MESQUITE.....	613-5633
DUNCANVILLE.....	331-1700
PLANO.....	424-4121
S. ARLINGTON.....	483-5081
HULEN.....	346-1987
CAMP BOWIE.....	763-8585
HURST.....	284-2216
ARLINGTON.....	548-1111
BEDFORD.....	354-8665
MOCKINGBIRD.....	823-2017

CALL FOR A FREE CONSULTATION

Exclusive of Supplements.

EXHIBIT F

000111

EXHIBIT G

LOSING 43 POUNDS CHANGED MY LIFE!



LOSE 30 LBS. IN 30 DAYS
Call or Come In Today

**ENROLL NOW
SIX WEEKS
FOR
\$66**

Enroll now and receive 6 weeks of the weight loss portion of OWLC's Program for \$66.

Before 174 lbs. AFTER 131 lbs.



"Before coming to OWLC, I was unhappy with myself and had no self esteem. My husband was unhappy because of how I felt about myself. Now, after losing 43 lbs., I feel great and my husband says it's much easier to live with me. I've changed my eating habits and have much more energy and feel healthier. Losing the weight was easy... no hunger, no exercise. The people at OWLC are very supportive and I couldn't have done it without them."

-DEBRA REMER

LOSE 3 TO 8 LBS. PER WEEK

- Medically supervised by weight loss specialists
- No hunger or exercising
- No pills or injections
- Special programs for kids
- Guaranteed results

FOR MEN, WOMEN AND CHILDREN

Call Today for Your FREE Consultation
QUICK WEIGHT LOSS CENTERS

Fourteen Convenient Metroplex Locations

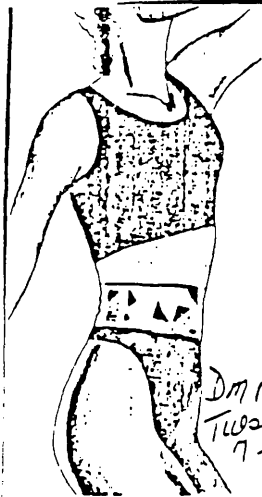
<p>DALLAS</p> <p>PRESTON RICHARDSON IRVING CARROLTON MESQUITE DUNCANVILLE PLANO MOCKINGBIRD/ARRAMS</p>	<p>CALL</p> <p>Dallas Ft. Worth</p> <p>239-SLIM or 277-SLIM for location nearest you</p>	<p>FORT WORTH</p> <p>HULEN CAMP BOWIE HURST ARLINGTON BEDFORD SOUTH ARLINGTON</p>
---	---	--

*RECEIVE BY PHONE AND SUPPLEMENTS MAJOR CREDIT CARDS ACCEPTED - Hours: Mon. thru Fri. 9am-7pm, Sat. 9am-5pm **Weight loss is not 100% guaranteed

EXHIBIT G

Tuesday A.M., June 27, 1989 / Fort Worth Star-Telegram / Section 4, Page 3

000315



LOSE
3-7 LBS. A WEEK

\$11

PER WEEK*
*NEW PROGRAMS ONLY
6 WEEK MINIMUM PROGRAM
People Proven
Since 1979

**LOSE
WEIGHT
THE SAFE
HEALTHY
WAY**

*DMN
Tues
7-1750*

*Weight Loss Varies with Individual

Lose 3 to 7 Lbs.* Per Week While Eating Lots of Low Fat High Fiber Foods, Which Recent Medical Studies Indicate May Have A Preventative Effect On Major Health Problems . . .

SAFE • EASY • NO HUNGER

SLIMPER WEEK

CALL TODAY FOR YOUR FREE CONSULTATION

QUICK WEIGHT LOSS CENTER

PRESTON	739-8077	8 ARLINGTON	483-6081
RICHARDSON	680-1698	HULEN	348-1887
IRVING	659-1300	CAMP BOWIE	763-8585
CARROLLTON	323-8211	MURST	284-2216
GRAND PRAIRIE	602-0077	ARLINGTON	848-1111
MESQUITE	613-5833	BEDFORD	354-8665
DUNCANVILLE	331-1700	MCKINNEY	823-2017
PLANO	424-4121		

WEEKDAYS 9 TO 7:00
SATURDAY TILL 1:00 P.M.

Toll Free **1-800-366-LOSE**

* Stabilization & Maintenance Optional
* Excludes of Protein & Supplements

000661

Complaint

118 F.T.C.

EXHIBIT I


9/30/90
PSC

**NOW YOU CAN
LOSE 3-6 LBS.
A WEEK FOR ONLY**

\$11 per week

*Limited offer. New programs only. 6 week minimum program. Exclusive profiling & supplements.

LAST 4 DAYS!



HOURS:
MON-FRI
9 AM-7 PM
SAT
9 AM-1 PM

Major Credit Cards Accepted

QUICKWEIGHT LOSS CENTER

Remember, Results Start When You Do.

PRESTON	738-8077	S. ARLINGTON	483-5081
RICHARDSON	660-1696	HULEN	346-1987
IRVING	658-1300	CAMP BOWIE	763-8585
CARROLLTON	323-8211	HURST	284-2216
GRAND PRAIRIE	602-0077	ARLINGTON	548-1111
MESQUITE	613-5833	BEDFORD	354-8665
DUNCANVILLE	321-1700	MOCKINGBIRD	823-2017
PLANO	424-4121		

*Exclusive of supplements & profiling

TOLL FREE 1-800-366-LOSE

*September
October 30, 1990*

EXHIBIT I

000630

EXHIBIT J

**NOW YOU CAN LOSE
3-6* LBS. A WEEK
ONLY \$11 PER WEEK***

New Programs 6 Week Minimum

DTH



Before: 179 Lbs.



After: 109 Lbs.

145 lbs 2/19/90

*My 15 Year Old Clothes Fit Again! After losing 70 lbs. my back problems improved. I was tired of being fat. A friend recommended OWLC and the best thing I did was eat! I lost 70 lbs. with plenty to eat and learned how to eat right so I'll never gain weight again eating regular food, not prepackaged meals. On other weight loss programs I'd lose 20 lbs. but gain it back, stupid! But not with OWLC. Thanks to them I'm shopping for size 14's instead of 20's. It has been 17 years since I could get into a size 14. Thanks to OWLC.

Sherry Agrella

PERSONAL TOUCH COUNSELING

Receive one-to-one Personal Counseling from our own weight loss specialist. Behavior Education and Nutritional Guidance Teaches you to keep the Weight Off.

QUICK WEIGHT LOSS CENTERS

PRESTON.....	739-8077	S. ARLINGTON.....	483-5081
RICHARDSON.....	880-1898	HULEN.....	346-1987
IRVING.....	659-1300	CAMP BOWIE.....	763-8585
CARROLLTON.....	323-9211	HURST.....	284-2216
GRAND PRAIRIE.....	602-0077	ARLINGTON.....	546-1111
MESQUITE.....	613-5833	BEDFORD.....	354-8665
DUNCANVILLE.....	331-1700	MOCKINGBIRD.....	823-2017
PLANO.....	424-4121		

Call for **FREE** Consultation **1-800-366-LOSE**

* Weight Loss Varies With Individuals Open Evenings & Saturday Mon.-Fri. 9-7 pm Sat. 10-11
* Excludes of Printing & Supplements Major Credit Cards Accepted

000657

EXHIBIT K

LOSE UP TO 6 lbs Per Week*

**FOR ONLY
\$11**

FINAL WEEK

BEFORE 264.5 lbs

AFTER 181.5 lbs

"I hate to diet, but this plan is fantastic! The staff is extremely supportive and they never pointed a finger or criticized me. I lost 83 lbs and 33 inches. My blood pressure is normal I feel like a million!"

Olin R. Heifner
Garland, Texas

No Hunger • No Exercise
No Pre-Packaged
Meals To Buy
FAST • SAFE • EASY

*Dr. H. Sunday
Aug 26, 1990.*

Call Today For Your FREE Consultation Remember, Results start when you do.

QUICK WEIGHT LOSS FOR GENTLEMEN

PRESTON	739-8077	S. ARLINGTON	483-5081
RICHARDSON	680-1696	HULEN	346-1987
IRVING	659-1300	CAMP BOWIE	763-8585
CARROLLTON	323-9211	HURST	284-2216
GRAND PRAIRIE	602-0077	ARLINGTON	548-1111
MESQUITE	613-5833	BEDFORD	354-8665
DUNCANVILLE	331-1700	MOCKINGBIRD	823-2017
PLANO	424-4121		

Major Credit Cards Accepted Excludes of Equipments & Profiling
WEEKDAYS 9 AM-7 PM, SAT. TIL 1 PM

OPEN EVENINGS & SATURDAY
1-800-366-LOSE

Tuesday, April 2, 1991

Star Dallas Morning News

COMPLETE WEIGHT LOSS PROGRAM

FOR LESS THAN \$9* PER WEEK

FINAL WEEK HELD OVER BY POPULAR DEMAND!


* Includes AT NO ADDITIONAL COST:

- Personalized Program
- Enrollment
- Unlimited Weight Loss as Fast or Slow as you want
- Unlimited Office Visits
- Professional Supervision
- Stabilization
- Maintenance
- Private One-on-One Counseling

"I lost 68 lbs. in 21 weeks. My daughters are physicians & they recommend this program."

Carmen Flores

* Based on 1 year membership



CALL & DROP-IN FOR FREE CONSULTATION

QUICK WEIGHT LOSS CENTERS

PRESTON.....739-8077	DUNCANVILLE.....331-1700	ARLINGTON.....548-1111
RICHARDSON.....680-1696	PLANO.....424-4121	BEDFORD.....354-8665
IRVING.....659-1300	S. ARLINGTON.....483-5081	MOCKINGBIRD.....823-2017
CARROLLTON.....323-9211	HULEN.....346-1987	
GRAND PRAIRIE.....602-0077	CAMP BOWIE.....763-8585	
MESQUITE.....613-5833	HURST.....284-2216	

EXHIBIT M

The Dallas Morning News Monday, January 23, 1989

I LOST HALF MY WAIST

I used to be 227 lbs. and a size 32 dress. I dropped 73 lbs. and 10 dress sizes.

Sharon Somerville

BEFORE
227 LBS.
SIZE 32

AFTER
154 LBS.
SIZE 12

ONE %
FREE*
MONTH

*If of normal weight and retains one-third of weight, clients have 30 or more lbs. to lose. Also special savings for year-round clients.

- Guaranteed results
- No Hunger Pangs or Exercise
- Supervised by Nurse & Weight Loss Specialists
- No Pills or Injections
- No tasteless pre-packaged meals

CALL, COME IN AND START TODAY...BE 7 LBS. LIGHTER BY NEXT WEEK!

QUICK WEIGHT LOSS CENTERS

DALLAS		FORT WORTH	
PRESTON	779-8077	MULEN	348-1987
RICHARDSON	840-1896	CAMP BOWIE	783-8885
IRVING	858-1300	HURST	294-2218
CARROLLTON	323-8211	ARLINGTON	848-1111
MESQUITE	813-8833	BEDFORD	354-8865
DUNCANVILLE	331-1700	SOUTH ARLINGTON	483-8081
PLANO	424-4121		
MOCKINGBIRD/ABRAMS 823-2017			

At Major Chain Car & Accessories
Hours: 9-7 Mon to Fri, 9-12 Sat.
Hours vary, so check weight loss
HOURS: MON-FRI 8 a.m.-7 p.m., SAT. 9:00 a.m.-1:00 p.m.

DECISION AND ORDER

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

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents had 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 QWLC-Tex. is a corporation organized, existing and formerly doing business under and by virtue of the laws of the State of Texas, with its offices and principal place of business located at 2900 Gateway, Suite 605, Irving, Texas.

2. Respondent Don Gearheart is an individual with his principal residence located at 9520 East Pinnacle Pear Road, Scottsdale, Arizona.

3. Respondent Joyce A. Schuman is an individual with her principal residence located at 2730 Sea Island Drive, Fort Lauderdale, Florida.

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

ORDER

DEFINITIONS

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

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

B. "*Weight loss program*" shall mean any program designed to aid consumers in weight loss or weight maintenance;

C. A "*broadcast medium*" shall mean any radio or television broadcast, cablecast, home video, or theatrical release;

D. For any order-required disclosure in print media to be made "clearly and prominently," or in a "clear and prominent manner," it must be given both in the same type style and in: (1) twelve point type where the representation that triggers the disclosure is given in twelve point or larger type; or (2) the same type size as the representation that triggers the disclosure where that representation is given in a type size that is smaller than twelve point type. For any order-required disclosure given orally in a broadcast medium to be made "clearly and prominently," or in a "clear and prominent manner," the disclosure must be given at the same volume and in the same cadence as the representation that triggers the disclosure;

E. A "*short broadcast advertisement*" shall mean any advertisement of thirty seconds or less duration made in a broadcast medium.

I.

It is ordered, That respondents QWLC-Tex., a corporation, its successors and assigns, and its officers, and Don K. Gearheart, individually and as an officer of said corporation, and Joyce A. Schuman, 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 advertising, promotion, offering for sale, or sale

of any weight loss program, in or affecting commerce, as “commerce” is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Making any representation, directly or by implication, about the success of participants on any weight loss program in achieving or maintaining weight loss or weight control unless, at the time of making any such representation, respondents possess and rely upon competent and reliable scientific evidence substantiating the representation, provided, further, that for any representation that:

(1) Any weight loss achieved or maintained through the weight loss program is typical or representative of all or any subset of participants of respondents’ program, said evidence shall, at a minimum, be based on a representative sample of:

(a) All participants who have entered the program, where the representation relates to such persons; provided, however, that the required sample may exclude those participants who dropped out of the program within two weeks of their entrance, or who were unable to complete the program due to illness, pregnancy, or change of residence; or

(b) All participants who have completed a particular phase of the program or the entire program, where the representation only relates to such persons;

(2) Any weight loss is maintained long-term, said evidence shall, at a minimum, be based upon the experience of participants who were followed for a period of at least two years from their completion of the active maintenance phase of respondents’ program or earlier termination, as applicable; and

(3) Any weight loss is maintained permanently, said evidence shall, at a minimum, be based upon the experience of participants who were followed for a period of time after completing the program that is either:

(a) Generally recognized by experts in the field of treating obesity as being of sufficient length for predicting that weight loss will be permanent, or

(b) Demonstrated by competent and reliable survey evidence as being of sufficient duration to permit such a prediction.

B. Representing, directly or by implication, except through endorsements or testimonials referred to in paragraph I.E. herein, that participants of any weight loss program have successfully maintained weight loss, unless respondents disclose, clearly and prominently, and in close proximity to such representation, the statement: “For many dieters, weight loss is temporary”; provided, further, that respondents shall not represent, directly or by implication, that the above-quoted statement does not apply to dieters in respondents’ weight loss program; provided, however, that a mere statement about the existence, design, or content of a maintenance program shall not, without more, be considered a representation that participants of any weight loss program have successfully maintained weight loss.

C. Representing, directly or by implication, except through short broadcast advertisements referred to in paragraph I.D. herein, and except through endorsements or testimonials referred to in paragraph I.E. herein, that participants on any weight loss program have successfully maintained weight loss, unless respondents disclose, clearly and prominently, and in close proximity to such representation, the following information:

(1) The average percentage of weight loss maintained by those participants;

(2) The duration over which the weight loss was maintained, measured from the date that participants ended the active weight loss phase of the program, provided, further, that if any portion of the time period covered includes participation in a maintenance program(s) that follows active weight loss, such fact must also be disclosed; and

(3) If the participant population referred to is not representative of the general participant population for respondents’ programs:

(a) The proportion of the total participant population in respondents’ programs that those participants represent, expressed in terms of a percentage or actual numbers of participants, or

(b) The statement: “[Quick Weight Loss Centers] makes no claim that this [these] result[s] is [are] representative of all participants in the [Quick Weight Loss Centers] program.”

provided, further, that compliance with the obligations of this paragraph I.C. in no way relieves respondents of the requirement under paragraph I.A. of this order to substantiate any representation about the success of participants on any weight loss program in maintaining weight loss.

D. Representing, directly or by implication, in short broadcast advertisements, that participants of any weight loss program have successfully maintained weight loss, unless respondents:

(1) Include, clearly and prominently, and in immediate conjunction with such representation, the statement: "Check at our centers for details about our maintenance record";

(2) For a period of time beginning with the date of the first broadcast of any such advertisement and ending no sooner than thirty days after the last broadcast of such advertisement, comply with the following procedures upon the first presentation of any form asking for information from a potential client, but in any event before such person has entered into any agreement with respondents:

(a) Give to each potential client a separate document entitled "Maintenance Information," which shall include all the information required by paragraph I.B. and subparagraphs I.C. (1)-(3) of this order and shall be formatted in the exact type size and style as the example form below, and shall include the heading (Helvetica 14 point bold), lead-in (Times Roman 12 point), disclosures (Helvetica 14 point bold), acknowledgment language (Times Roman 12 point), and signature block therein; provided, further, that no information in addition to that required to be included in the document required by this subparagraph I.D (2) shall be included therein;

MAINTENANCE INFORMATION

You may have seen our recent ad about maintenance success. Here's some additional information about our maintenance record..

(Disclosure of maintenance statistics goes
hereXXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXX
For many dieters, weight loss is temporary.)

I have read this notice. _____
(Client Signature) (Date)

- (b) Require each potential client to sign such document; and
- (c) Give each client a copy of such document; and

(3) Retain in each client file a copy of the signed maintenance notice required by this paragraph; provided, further, that:

- (i) Compliance with the obligations of this paragraph I.D. in no way relieves respondents of the requirement under paragraph I.A. of this order to substantiate any representation about the success of participants on any weight loss program in maintaining weight loss;
- (ii) Respondents must comply with both paragraph I.D. and paragraph I.C. of this order if respondents include in any such short broadcast advertisement a representation about maintenance success that states a number or percentage, or uses descriptive terms that convey a quantitative measure such as "most of our customers maintain their weight loss long-term";

provided, however, that the provisions of paragraph I.D. shall not apply to endorsements or testimonials referred to in paragraph I.E. herein.

E. Using any advertisement containing an endorsement or testimonial about weight loss success or weight loss maintenance success by a participant or participants of respondents' weight loss programs if the weight loss success or weight loss maintenance success depicted in the advertisement is not representative of what participants of respondents' weight loss programs generally achieve, unless respondents disclose, clearly and prominently, and in close

proximity to the endorser's statement of his or her weight loss success or weight loss maintenance success:

(1) What the generally expected success would be for QWLC-Tex. customers in losing weight or maintaining achieved weight loss; provided, however, that the generally expected success for QWLC-Tex. customers may exclude those customers who dropped out of the program within two weeks of their entrance, or who were unable to complete the program due to illness, pregnancy, or change of residence; or

(2) One of the following statements:

- (a) "You should not expect to experience these results."
- (b) "This result is not typical. You may not do as well."
- (c) "This result is not typical. You may be less successful."
- (d) "_____ 's success is not typical. You may not do as well."
- (e) "_____ 's experience is not typical. You may achieve less."
- (f) "Results not typical."
- (g) "Results not typical of program participants."

provided, further, that if the endorsements or testimonials covered by this paragraph are made in a broadcast medium, any disclosure required by this paragraph must be communicated in a clear and prominent manner, and in immediate conjunction with the representation that triggers the disclosure;

provided, however, that:

(i) For endorsements or testimonials about weight loss success, respondents can satisfy the requirements of subparagraph I.E. (1) by accurately disclosing the generally expected success in the following phrase: "Quick Weight Loss Centers, Inc. participants lose an average of ___ pounds over an average ___ - week treatment period"; and

(ii) If the weight loss success or weight loss maintenance success depicted in the advertisement is representative of what participants of a group or subset clearly defined in the advertisement generally achieve, then, in lieu of the disclosures required in either subparagraphs I.E. (1) or (2) herein, respondents may substitute a clear and prominent disclosure of the percentage of all of respondents'

customers that the group or subset defined in the advertisement represents.

F. Representing, directly or by implication, that the price at which any weight loss program can be purchased is the only cost associated with losing weight on that program, unless such is the case.

G. Representing, directly or by implication, the price at which any weight loss program can be purchased, unless respondents disclose, clearly and prominently, either:

(1) In close proximity to such representation, the existence and amount of all mandatory fees associated with the program offered; or

(2) In immediate conjunction with such representation, one of the following statements:

(a) “Plus the cost of [list of products or services that participants must purchase at additional cost]”; or

(b) “Purchase of [list of products or services that participants must purchase at additional cost] required”;

provided, further, that in broadcast media, if the representation that triggers any disclosure required by this paragraph is oral, the required disclosure must also be made orally.

H. Failing to disclose over the telephone, for a period beginning with the date of any advertisement of the price at which any weight loss program can be purchased and ending no sooner than 180 days after the last dissemination of such advertisement, to consumers who inquire about the cost of any weight loss program, or are told about the cost of any weight loss program, the existence and amount of any and all mandatory costs or fees associated with participation in the program; provided, however, that respondents may satisfy this requirement by directing their weight loss centers to disclose the information, by providing the center personnel with suggested language to be used when responding to phone inquiries and by making their best efforts to ensure compliance with their directive to disclose price information over the telephone.

I. Representing, directly or by implication, that prospective participants in respondents, weight loss programs will reach a specified weight within a specified time period, unless at the time of

making such representation, respondents possess and rely upon competent and reliable scientific evidence substantiating the representation.

J. Representing, directly or by implication, the average or typical rate or speed at which any participant on any weight loss program has lost or will lose weight, unless at the time of making any such representation, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

K. Failing to disclose, clearly and prominently, either (1) to each participant who, after the first two weeks on the program, is experiencing average weekly weight loss that exceeds two percent (2%) of said participant's initial body weight, or three pounds, whichever is less, for at least two consecutive weeks, or (2) in writing to all participants when they enter the program, that failure to follow the program protocol and eat all of the food recommended may involve the risk of developing serious health complications.

L. Representing, directly or by implication, that any weight loss program is supervised or monitored by health care professionals, unless such is the case, or otherwise misrepresenting, directly or by implication, the extent to which any weight loss program is supervised or monitored by health care professionals.

M. Misrepresenting, directly or by implication, the performance, efficacy, or safety of any weight loss program.

II.

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

III.

It is further ordered, That respondents Don K. Gearheart and Joyce A. Schuman shall promptly notify the Commission of the discontinuance of their present business or employment and of their affiliation with a new business or employment. In addition, for a

period of three (3) years from the service date of this order, the individual respondents shall promptly notify the Commission of each affiliation with a new business or employment whose activities relate to the advertising, promotion, offering for sale, or sale of any weight loss program. When so required under this paragraph, each such notice shall include the individual respondent's new business address and a statement of the nature of the business or employment in which the individual respondent is newly engaged, as well as a description of the individual respondent's duties and responsibilities in connection with the business or employment. The expiration of the notice provision of this paragraph shall not affect any other obligation arising under this order.

IV.

It is further ordered, That for three (3) years after the last date of dissemination of any representation covered by this order, respondents, or their successors and assigns, shall maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All materials possessed and relied upon to substantiate any 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.

V.

It is further ordered, That respondents shall distribute a copy of this order to each of their officers, agents, representatives, independent contractors and employees who are involved in the preparation and placement of advertisements or promotional materials or in communication with customers or prospective customers or who have any responsibilities with respect to the subject matter of this order; and, for a period of three (3) years from the date of entry of this order, distribute same to all future such officers, agents, representatives, independent contractors and employees.

VI.

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

Complaint

118 F.T.C.

IN THE MATTER OF

QUICK WEIGHT LOSS CENTERS, INC., ET AL. (GEORGIA)

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3518. Complaint, Aug. 11, 1994--Decision, Aug. 11, 1994*

This consent order prohibits, among other things, the Georgia commercial diet program company and its officer from misrepresenting the performance or safety of any diet program they offer in the future, and requires the respondents to possess competent and reliable scientific evidence to substantiate any future claims they make about weight loss, weight loss maintenance, or rate of weight loss; to make a number of disclosures regarding maintenance success claims; and to disclose all mandatory fees.

Appearances

For the Commission: *Eric Bash, Matthew Daynard and Richard F. Kelly.*

For the respondents: *Gabriel Imperato, Broad & Cassell, Fort Lauderdale, FL.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Quick Weight Loss Centers, Inc., a Georgia corporation (hereinafter, "QWLC-Ga."), and Don K. Gearheart, individually and as an officer of said corporation, (hereinafter, collectively, "respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. (a) Respondent QWLC-GA. is a Georgia corporation, formerly doing business, with its principal office and place of business located at 1401 Johnson Ferry Road, Suite 276, Marietta, Georgia.

(b) Respondent Don K. Gearheart is an officer of the corporate respondent. Individually or in concert with others, he formulates, directs, and controls the acts or practices of the corporate respondent, including the acts or practices alleged in this complaint. His principal

residence is located at 9520 East Pinnacle Pear Road, Scottsdale, Arizona.

(c) Respondents have cooperated and acted together in carrying out the acts and practices alleged in this complaint.

PAR. 2. Respondents have advertised or otherwise promoted, offered for sale, and sold weight reduction and weight control programs and products, and have made them available to consumers at their weight loss centers. Respondents have offered for sale and sold diet programs of 800 to 1500 calories per day that include food, as “food” is defined in Section 15 of the Federal Trade Commission Act.

PAR. 3. In the course and conduct of their business, respondents have disseminated or have caused to be disseminated advertisements for weight reduction and weight control programs and products. Respondents have placed these advertisements with various media for the purpose of inducing consumers to purchase their programs and products. Respondents have further advertised their weight loss programs through the use of promotional materials, including pamphlets and brochures, given to customers and prospective customers at individual weight loss center locations.

PAR. 4. 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.

PAR. 5. Respondents’ advertisements and promotional materials include, but are not necessarily limited to, the advertisements and promotional materials attached hereto as Exhibits A-E.

PAR. 6. The advertisements and promotional materials referred to in paragraph five, attached hereto as Exhibits A-C, contain the following statements:

- (a) “The only way to lose weight and keep it off.” (Exhibit A)
- (b) “WHAT MAKES A WEIGHT LOSS PROGRAM GREAT? ... Results should be long lasting & offer a lifetime solution to a weight problem ... GUESS WHAT! ... We just described the QUICK WEIGHT LOSS PROGRAM.” (Exhibit B)
- (c) “Now that I have reached my goal I will be able to maintain my weight....” (Exhibit C)

PAR. 7. Through the use of the statements contained in the advertisements referred to in paragraph six, and others in advertise-

ments or promotional materials not specifically set forth herein, respondents have represented, directly or by implication, that:

(a) QWLC-GA. customers typically are successful in reaching their weight loss goals and maintaining their weight loss either long-term or permanently;

(b) QWLC-GA. customers typically are successful in maintaining their weight loss achieved under the QWLC-GA. diet program; and

(c) QWLC-GA. customers typically are successful in reaching their weight loss goals.

PAR. 8. Through the use of the statements contained in the advertisements referred to in paragraph six, and others in advertisements or promotional materials not specifically set forth herein, respondents have represented, directly or by implication, that at the time they made the representations set forth in paragraph seven, respondents possessed and relied upon a reasonable basis that substantiated such representations.

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

PAR. 10. The advertisements referred to in paragraph five, attached hereto as Exhibits B-E, contain the following statements:

- (a) "SIX WEEKS \$66" (Exhibit B)
- (b) "\$12 PER WEEK" (Exhibits C, D)
- (c) "ONLY \$11 PER WEEK" (Exhibits E)

PAR. 11. Through the use of the statements contained in the advertisements referred to in paragraph ten, and others in advertisements or promotional materials not specifically set forth herein, respondents have represented, directly or by implication, that the advertised price is the only cost associated with losing weight on the QWLC-GA. weight loss program.

PAR. 12. In truth and in fact, the advertised price is not the only cost associated with losing weight on the weight loss program. There are substantial, additional mandatory expenses associated with participation in the QWLC-GA. weight loss program. Therefore,

respondents' representation as set forth in paragraph eleven was and is false and misleading.

PAR. 13. In advertising the price of the QWLC-GA. weight loss program, respondents have failed to disclose to consumers the existence and amount of all mandatory expenses associated with participation in the QWLC-GA. weight loss program. This fact would be material to consumers in their purchase or use decisions regarding the weight loss program. In light of respondents' representation as set forth in paragraph eleven that the quoted price represents the only cost associated with the QWLC-GA. weight loss program, said failure to disclose was and is a deceptive practice.

PAR. 14. The advertisement referred to in paragraph five, attached hereto as Exhibit B, contains the following statements:

(a) **"LOSE UP TO 6 LBS PER WEEK"**

PAR. 15. Through the use of the statements contained in the advertisements referred to in paragraph fourteen, and others in advertisements or promotional materials not specifically set forth herein, respondents have represented, directly or by implication, that an appreciable number of consumers following the QWLC-GA. weight loss program typically lose weight at an average rate of six pounds per week.

PAR. 16. Through the use of the statements contained in the advertisements referred to in paragraph fourteen, and others in advertisements or promotional materials not specifically set forth herein, respondents have represented, directly or by implication, that at the time they made the representation set forth in paragraph fifteen, respondents possessed and relied upon a reasonable basis that substantiated such representation.

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

PAR. 18. In the routine course and conduct of their business, respondents have provided their customers with diet protocols that required said customers, *inter alia*, to come in to one of respondents' weight loss centers three to six times a week for monitoring of their progress, including weighing in. In the course of regularly

ascertaining weight loss progress, respondents, in some instances, have been presented with weight loss results indicating that customers have been losing weight significantly in excess of their projected goals, which is an indication that they may not have been consuming all of the food prescribed by their diet protocol. Such conduct could, if not corrected promptly, result in health complications.

PAR. 19. When presented with the weight loss results described in paragraph eighteen, respondents, on many occasions, have not disclosed to the customers that failing to follow the diet protocol and consume all of the calories prescribed could result in health complications. This fact would be material to customers in their purchase or use decisions regarding the weight loss program. In light of respondents' practice of monitoring customers, said failure to disclose was and is a deceptive practice.

PAR. 20. The acts and practices of respondents as alleged in this complaint constitute deceptive acts or practices, and the making of false advertisements, in or affecting commerce in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

EXHIBIT A

1-20-91
Sunday

SPECIAL OFFER
ENROLL NOW
RECEIVE
ONE MONTH
FREE
MUST HAVE 20 LBS. TO LOSE
OTHER SAVINGS
FOR SMALLER LOSSES

NO GIMMICKS!

WEIGHT LOSS
Eat at any restaurant you choose
share home cooked meals
with your family
while losing all
the weight you want
the only way to
lose weight and
keep it off

QUICK WEIGHT LOSS CENTERS

CAROL LYLES
Lost 90 lbs.
and 14 Dress
Sizes

Before
Size 24
Now
Size 10

BUCKHEAD/MIDTOWN 322-3227
SANDY SPRINGS 236-7877
DUNWOODY 988-8300
EAST COBB 988-8300
SOUTHLAKE 988-8388
ROSWELL 988-8381
STONE MOUNTAIN 230-7349
MARIETTA 688-0131
LILBURN/GWINNETT 278-1331

CALL FOR A FREE CONSULTATION

MAJOR CREDIT CARDS ACCEPTED
FAX: 678-420-1111
SAT 9:00 AM - 1:00 PM

Complaint

118 F.T.C.

EXHIBIT B

WHAT MAKES A WEIGHT LOSS PROGRAM GREAT?*

10/01/90

"I LOST 43 LBS. IN JUST 15 WEEKS"

"I needed HELP! I couldn't do it on my own. It was easy to follow and I wasn't hungry. The nice part was I could eat regular food & still lose!"

...JEAN HALL

LOSE UP TO 6 LBS PER WEEK

BEFORE 167 LBS.

AFTER 124 LBS.

- * Must be safe, easy and no special foods to buy
- * Must be flexible in all situations such as eating out in fast food outlets & restaurants
- * Results should be long lasting & offer a life time solution to a weight problem.
- * Must be affordable & Drug Free

GUESS WHAT! . . . We just described the QUICK WEIGHT LOSS PROGRAM. Call now for your FREE consultation.

START TODAY SIX WEEKS \$66*

QUICK WEIGHT LOSS CENTERS

BUCKHEAD/MIDTOWN	355-3627	ROSWELL	998-6851
SANDY SPRINGS	256-7877	STONE MOUNTAIN	299-7349
DUNWOODY	988-9300	MARIETTA	858-0131
EAST COBB	988-9300	LILBURN/GWINNETT	279-1331
SOUTHLAKE	988-9286		

Hours: 9 a.m.-7 p.m. Daily, Sat. 9 a.m.-1 p.m.

*New Enrollments Only Exclusive Of Profiling & Supplements

2 10-3-90

Tues 5-29-91

Roswell Weight

Roswell Weight 5-29-91

WEIGHT LOSS THAT WORKS

LOW, LOW SERVICE FEES \$12 PER WEEK* on a program basis

BETTY STRATTON
Tipton, GA

LOST 30 LBS.



"Now that I have reached my goal I will be able to maintain my weight because I have learned to prepare great dietary meals and how to order in restaurants."

This program provides...

GUIDANCE ATTENTION RESULTS

QUICK WEIGHT LOSS CENTERS

Roswell 998-5851
Sandy Springs 258-7877
Buckhead/Midtown 355-3627
Marietta 859-0131

For Other Locations

Call 509-8400

MAJOR CREDIT CARDS ACCEPTED
HOURS:
MON.-FRI. 9a.m.-7p.m.
SAT. 9a.m.-1p.m.

CALL FOR A FREE CONSULTATION

*New Clients Only, Not Valid With Other Offer. Excludes of Supplements and Prescriptions.

EXHIBIT D

LOSING WEIGHT MAKES SENSE WHEN YOU KEEP IT OFF.
Mother & Daughter
Lost 99 Lbs in 15 Weeks
 "This weight loss program has changed our eating habits."



LOSE ALL THE WEIGHT YOU CAN
Low, Low Service Fees
Only \$12* Per Week.
 On a program basis
 Call for a **FREE** consultation
QUICK WEIGHT LOSS CENTERS

Sandy Springs 256-7877
 5920 Roswell Rd.
 Parkside Center

Buckhead 355-3627
 2221 Peachtree Rd.

Roswell 998-5851
 1355 Old Alabama Road

February 1991
ATLANTA JEWISH TIMES

I lost 56 lbs. & now weigh 128 lbs. ...Tami Cunningham, daughter

I lost 43 lbs. & now weigh 124 lbs. ...Jean Hall, mother

*Exclusive of supplements and profiling

Holiday Inn
BUCKHEAD
 231-1234 3340 Peachtree Rd. N.E. Atlanta

We're Kosher

Recycle this paper, please!

Exhibit D

PRESENT COUPON AT TIME OF SITTING

LOSE WEIGHT

ONLY
\$11* *12-26-90*
PER WEEK



FINAL DAYS

Tammie Cunningham
BEFORE 184 LBS.

- NO GIMMICKS
- FABULOUS RESULTS
- ONE TO ONE SUPERVISION
- NO FASTING OR LIQUID PROTEIN PROGRAMS
- NO STRENUOUS EXERCISE
- FAST! SAFE! WEIGHT LOSS!

CALL FOR FREE CONSULTATION



Tammie Cunningham
AFTER 128 LBS.

QUICK WEIGHT LOSS CENTERS

BUCKHEAD/MIDTOWN 355-3627	ROSWELL 998-5851
SANDY SPRINGS 256-7877	STONE MOUNTAIN 290-7349
DUNWOODY 988-8300	MARIETTA 858-0131
EAST COBB 988-9300	LILBURN/GWINNETT 279-1331
SOUTHLAKE 968-8266	

Hours: 9am-7pm Daily Sat. 9am-1pm.

*New Enrollments only, 6 week minimum. Exclusive of protelling & supplements.

DECISION AND ORDER

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

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents had 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 QWLC-GA. is a corporation organized, existing and formerly doing business under and by virtue of the laws of the State of Georgia, with its offices and principal place of business located at 1401 Johnson Ferry Road, Suite 276, Marietta, Georgia.

2. Respondent Don Gearheart is an individual with his principal residence located at 9520 East Pinnacle Pear Road, Scottsdale, Arizona.

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

ORDER

DEFINITIONS

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

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

B. “*Weight loss program*” shall mean any program designed to aid consumers in weight loss or weight maintenance;

C. A “*broadcast medium*” shall mean any radio or television broadcast, cablecast, home video, or theatrical release;

D. For any order-required disclosure in print media to be made “clearly and prominently,” or in a “clear and prominent manner,” it must be given both in the same type style and in: (1) twelve point type where the representation that triggers the disclosure is given in twelve point or larger type; or (2) the same type size as the representation that triggers the disclosure where that representation is given in a type size that is smaller than twelve point type. For any order-required disclosure given orally in a broadcast medium to be made “clearly and prominently,” or in a “clear and prominent manner,” the disclosure must be given at the same volume and in the same cadence as the representation that triggers the disclosure;

E. A “*short broadcast advertisement*” shall mean any advertisement of thirty seconds or less duration made in a broadcast medium.

I.

It is ordered, That respondents QWLC-Ga., a corporation, its successors and assigns, and its officers, and Don K. Gearheart, 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 advertising, promotion, offering for sale, or sale of any weight loss program, in or affecting commerce, as “commerce” is defined in

the Federal Trade Commission Act, do forthwith cease and desist from:

A. Making any representation, directly or by implication, about the success of participants on any weight loss program in achieving or maintaining weight loss or weight control unless, at the time of making any such representation, respondents possess and rely upon competent and reliable scientific evidence substantiating the representation, provided, further, that for any representation that:

(1) Any weight loss achieved or maintained through the weight loss program is typical or representative of all or any subset of participants of respondents' program, said evidence shall, at a minimum, be based on a representative sample of:

(a) All participants who have entered the program, where the representation relates to such persons; provided, however, that the required sample may exclude those participants who dropped out of the program within two weeks of their entrance, or who were unable to complete the program due to illness, pregnancy, or change of residence; or

(b) All participants who have completed a particular phase of the program or the entire program, where the representation only relates to such persons;

(2) Any weight loss is maintained long-term, said evidence shall, at a minimum, be based upon the experience of participants who were followed for a period of at least two years from their completion of the active maintenance phase of respondents' program or earlier termination, as applicable; and

(3) Any weight loss is maintained permanently, said evidence shall, at a minimum, be based upon the experience of participants who were followed for a period of time after completing the program that is either:

(a) Generally recognized by experts in the field of treating obesity as being of sufficient length for predicting that weight loss will be permanent, or

(b) Demonstrated by competent and reliable survey evidence as being of sufficient duration to permit such a prediction.

B. Representing, directly or by implication, except through endorsements or testimonials referred to in paragraph I.E. herein, that participants of any weight loss program have successfully maintained weight loss, unless respondents disclose, clearly and prominently, and in close proximity to such representation, the statement: “For many dieters, weight loss is temporary”; provided, further, that respondents shall not represent, directly or by implication, that the above-quoted statement does not apply to dieters in respondents’ weight loss program; provided, however, that a mere statement about the existence, design, or content of a maintenance program shall not, without more, be considered a representation that participants of any weight loss program have successfully maintained weight loss.

C. Representing, directly or by implication, except through short broadcast advertisements referred to in paragraph I.D. herein, and except through endorsements or testimonials referred to in paragraph I.E. herein, that participants on any weight loss program have successfully maintained weight loss, unless respondents disclose, clearly and prominently, and in close proximity to such representation, the following information:

(1) The average percentage of weight loss maintained by those participants;

(2) The duration over which the weight loss was maintained, measured from the date that participants ended the active weight loss phase of the program, provided, further, that if any portion of the time period covered includes participation in a maintenance program(s) that follows active weight loss, such fact must also be disclosed; and

(3) If the participant population referred to is not representative of the general participant population for respondents’ programs:

(a) The proportion of the total participant population in respondents’ programs that those participants represent, expressed in terms of a percentage or actual numbers of participants, or

(b) The statement: “[Quick Weight Loss Centers] makes no claim that this [these] result[s] is [are] representative of all participants in the [Quick Weight Loss Centers] program.”

provided, further, that compliance with the obligations of this paragraph I.C. in no way relieves respondents of the requirement under paragraph I.A. of this order to substantiate any representation

about the success of participants on any weight loss program in maintaining weight loss.

D. Representing, directly or by implication, in short broadcast advertisements, that participants of any weight loss program have successfully maintained weight loss, unless respondents:

(1) Include, clearly and prominently, and in immediate conjunction with such representation, the statement: "Check at our centers for details about our maintenance record";

(2) For a period of time beginning with the date of the first broadcast of any such advertisement and ending no sooner than thirty days after the last broadcast of such advertisement, comply with the following procedures upon the first presentation of any form asking for information from a potential client, but in any event before such person has entered into any agreement with respondents:

(a) Give to each potential client a separate document entitled "Maintenance Information," which shall include all the information required by paragraph I.B. and subparagraphs I.C. (1)-(3) of this order and shall be formatted in the exact type size and style as the example form below, and shall include the heading (Helvetica 14 point bold), lead-in (Times Roman 12 point), disclosures (Helvetica 14 point bold), acknowledgment language (Times Roman 12 point), and signature block therein; provided, further, that no information in addition to that required to be included in the document required by this subparagraph I.D (2) shall be included therein;

MAINTENANCE INFORMATION

You may have seen our recent ad about maintenance success. Here's some additional information about our maintenance record.

[Disclosure of maintenance statistics goes
hereXXXXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXXX]
For many dieters, weight loss is temporary.

I have read this notice. _____
(Client Signature) (Date)

- (b) Require each potential client to sign such document; and
(c) Give each client a copy of such document; and

(3) Retain in each client file a copy of the signed maintenance notice required by this paragraph; provided, further, that:

(i) Compliance with the obligations of this paragraph I.D. in no way relieves respondents of the requirement under paragraph I.A. of this order to substantiate any representation about the success, of participants on any weight loss program in maintaining weight loss;

(ii) Respondents must comply with both paragraph I.D. and paragraph I.C. of this order if respondents include in any such short broadcast advertisement a representation about maintenance success that states a number or percentage, or uses descriptive terms that convey a quantitative measure such as “most of our customers maintain their weight loss long-term”;

provided, however, that the provisions of paragraph I.D. shall not apply to endorsements or testimonials referred to in paragraph I.E. herein.

E. Using any advertisement containing an endorsement or testimonial about weight loss success or weight loss maintenance success by a participant or participants of respondents' weight loss programs if the weight loss success or weight loss maintenance success depicted in the advertisement is not representative of what participants of respondents' weight loss programs generally achieve, unless respondents disclose, clearly and prominently, and in close proximity to the endorser's statement of his or her weight loss success or weight loss maintenance success:

(1) What the generally expected success would be for QWLC-Ga. customers in losing weight or maintaining achieved weight loss; provided, however, that the generally expected success for QWLC-GA. customers may exclude those customers who dropped out of the program within two weeks of their entrance, or who were unable to complete the program due to illness, pregnancy, or change of residence; or

(2) One of the following statements:

(a) “You should not expect to experience these results.”

(b) “This result is not typical. You may not do as well.”

(c) “This result is not typical. You may be less successful.”

(d) “_____’s success is not typical. You may not do as well.”

- (e) “ _____’s experience is not typical. You may achieve less.”
- (f) “Results not typical.”
- (g) “Results not typical of program participants.”

provided, further, that if the endorsements or testimonials covered by this paragraph are made in a broadcast medium, any disclosure required by this paragraph must be communicated in a clear and prominent manner, and in immediate conjunction with the representation that triggers the disclosure;

provided, however, that:

(i) For endorsements or testimonials about weight loss success, respondents can satisfy the requirements of subparagraph I.E. (1) by accurately disclosing the generally expected success in the following phrase: “Quick Weight Loss Centers, Inc. participants lose an average of ___ pounds over an average ___ - week treatment period”; and

(ii) If the weight loss success or weight loss maintenance success depicted in the advertisement is representative of what participants of a group or subset clearly defined in the advertisement generally achieve, then, in lieu of the disclosures required in either subparagraphs I.E. (1) or (2) herein, respondents may substitute a clear and prominent disclosure of the percentage of all of respondents’ customers that the group or subset defined in the advertisement represents.

F. Representing, directly or by implication, that the price at which any weight loss program can be purchased is the only cost associated with losing weight on that program, unless such is the case.

G. Representing, directly or by implication, the price at which any weight loss program can be purchased, unless respondents disclose, clearly and prominently, either:

- (1) In close proximity to such representation, the existence and amount of all mandatory fees associated with the program offered; or
- (2) In immediate conjunction with such representation, one of the following statements:

(a) “Plus the cost of [list of products or services that participants must purchase at additional cost]”; or

(b) “Purchase of [list of products or services that participants must purchase at additional cost] required”;

provided, further, that in broadcast media, if the representation that triggers any disclosure required by this paragraph is oral, the required disclosure must also be made orally.

H. Failing to disclose over the telephone, for a period beginning with the date of any advertisement of the price at which any weight loss program can be purchased and ending no sooner than 180 days after the last dissemination of such advertisement, to consumers who inquire about the cost of any weight loss program, or are told about the cost of any weight loss program, the existence and amount of any and all mandatory costs or fees associated with participation in the program; provided, however, that respondents may satisfy this requirement by directing their weight loss centers to disclose the information, by providing the center personnel with suggested language to be used when responding to phone inquiries and by making their best efforts to ensure compliance with their directive to disclose price information over the telephone.

I. Representing, directly or by implication, that prospective participants in respondents’ weight loss programs will reach a specified weight within a specified time period, unless at the time of making such representation, respondents possess and rely upon competent and reliable scientific evidence substantiating the representation.

J. Representing, directly or by implication, the average or typical rate or speed at which any participant on any weight loss program has lost or will lose weight, unless at the time of making any such representation, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

K. Failing to disclose, clearly and prominently, either (1) to each participant who, after the first two weeks on the program, is experiencing average weekly weight loss that exceeds two percent (2%) of said participant’s initial body weight, or three pounds, whichever is less, for at least two consecutive weeks, or (2) in writing to all participants when they enter the program, that failure to follow the program protocol and eat all of the food recommended may involve the risk of developing serious health complications.

L. Misrepresenting, directly or by implication, the performance, efficacy, or safety of any weight loss program.

II.

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

III.

It is further ordered, That respondent Don K. Gearheart shall promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. In addition, for a period of three (3) years from the service date of this order, the individual respondent shall promptly notify the Commission of each affiliation with a new business or employment whose activities relate to the advertising, promotion, offering for sale, or sale of any weight loss program. When so required under this paragraph, each such notice shall include the individual respondent's new business address and a statement of the nature of the business or employment in which the individual respondent is newly engaged, as well as a description of the individual respondent's duties and responsibilities in connection with the business or employment. The expiration of the notice provision of this paragraph shall not affect any other obligation arising under this order.

IV.

It is further ordered, That for three (3) years after the last date of dissemination of any representation covered by this order, respondents, or their successors and assigns, shall maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All materials possessed and relied upon to substantiate any 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.

V.

It is further ordered, That respondents shall distribute a copy of this order to each of their officers, agents, representatives, independent contractors and employees who are involved in the preparation and placement of advertisements or promotional materials or in communication with customers or prospective customers or who have any responsibilities with respect to the subject matter of this order; and, for a period of three (3) years from the date of entry of this order, distribute same to all future such officers, agents, representatives, independent contractors and employees.

VI.

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

Commissioner Owen was recorded as voting in the affirmative, but dissenting as to the exception requiring full numerical disclosures involving quantitative weight loss maintenance claims in short radio and TV ads.

IN THE MATTER OF

EGGLAND'S BEST, INC.

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

Docket C-3520. Complaint, Aug. 15, 1994--Decision, Aug. 15, 1994

This consent order prohibits, among other things, a Pennsylvania company from misrepresenting the amount of nutrients or other ingredients, such as cholesterol and fat, that is in its eggs or foods containing egg yolks, and requires the respondent to have competent and reliable scientific evidence to substantiate future health-benefit claims for such foods and, for one year, to label certain egg packages with a corrective notice stating that no studies show Egglan's eggs are different from other eggs in their effect on serum cholesterol.

Appearances

For the Commission: *Michelle K. Rusk, Anne V. Maher and Beth M. Grossman.*

For the respondent: *Eugene I. Lambert, Covington & Burling, Washington, D.C.*

COMPLAINT

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

PARAGRAPH 1. Respondent is a Pennsylvania corporation with its offices and principal place of business at 842 First Street, King of Prussia, Pennsylvania.

PAR. 2. Respondent has advertised, labeled, offered for sale, sold, and distributed Egglan's Best eggs and other egg products to consumers. These products are "foods" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

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

PAR. 4. Respondent has disseminated or has caused to be disseminated advertisements for Eggland's Best eggs, including but not necessarily limited to the attached Exhibits A-E. These advertisements contain the following statements:

- A. **Eggland's Best. Eggs that won't increase your serum cholesterol.** Imagine! Fresh, delicious, 100% real eggs that won't increase your serum cholesterol. You read it right.
In recent clinical tests as part of a low-fat diet, even a dozen Eggland's Best eggs a week caused no increase in serum cholesterol even though they contain about as much cholesterol as other eggs.
Know what that means? Now you can eat real eggs again.
So go ahead, enjoy! Cut out the coupon below and save 35¢ on real eggs that won't increase your serum cholesterol.
Eggland's Best. Now you can eat real eggs again.
[Exhibit A (Print: "Eggs That Won't Increase Your Serum Cholesterol")]
- B. You can eat eggs again . . . and not increase your serum cholesterol.
Introducing Eggland's Best. They're fresh, real eggs. And in clinical tests in a low-fat diet even twelve a week caused no increase in serum cholesterol They're special eggs from specially fed hens. . . .
Eggland's Best. Now, you can eat real eggs again.
[Exhibit B (TV: "Egg Dishes," Ver. 3)]
- C. Do you remember eating eggs every day? Then there was all this cholesterol business. Well, now we can eat eggs again without worrying about raising our cholesterol.
New Eggland's Best eggs are fresh, real eggs that won't increase serum cholesterol . . . even though they contain about as much cholesterol as other eggs. In recent clinical tests, as part of a low-fat diet, people ate as many as twelve Eggland's Best eggs a week . . . and didn't increase their serum cholesterol.
Eggland's Best eggs come from very specially fed hens, you see.
Hens that eat no animal fat. Just healthy grains, extra Vitamin E and a special all-natural supplement that's rich in minerals. Plus canola oil, the oil lowest in saturated fat. So now there's a delicious, honest-to-goodness fresh egg that we can enjoy without worrying about cholesterol.
Now we can eat real eggs again!
[Exhibit C (Radio: "Hattie," Rev. 3)]
- D. If you love eggs, but cholesterol has put you on a lowfat diet, here's a way to turn that diet sunny side up.
Introducing Eggland's Best, eggs from specially fed hens.
Like ordinary eggs, they contain cholesterol. Yet in clinical tests, people ate twelve Eggland's Best eggs a week as part of a low-fat diet and showed no increase in their serum cholesterol.
Try Eggland's Best. Your cholesterol-conscious diet can now have a sunny side. [Exhibit D (TV: "Put Back On," 93 Rev.)]
- E. **It's simple. When the hens eat better, you eat better, too.**
Introducing Eggland's Best. Premium eggs from hens fed a premium diet.

Unlike ordinary eggs, Egglan's Best are laid by hens that eat no animal fat. Just lots of healthy grains, extra Vitamin E and a little canola oil -- the oil lowest in saturated fat.
[Exhibit E (Print: "It's Simple")]

PAR. 5. Through the use of the statements contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits A-D, respondent has represented, directly or by implication, that:

- A. Eating Egglan's Best eggs will not increase serum cholesterol.
- B. Eating Egglan's Best eggs will not increase serum cholesterol as much as eating ordinary eggs.

PAR. 6. Through the use of the statements contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits A-D, respondent has represented, directly or by implication, that at the time it made the representations set forth in paragraph five, respondent possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 7. In truth and in fact, at the time it made the representations set forth in paragraph five, respondent did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation set forth in paragraph six was, and is, false and misleading.

PAR. 8. Through the use of the statements contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits A-D, respondent has represented, directly or by implication, that clinical studies have proven that adding twelve Egglan's Best eggs per week to a low-fat diet does not increase serum cholesterol.

PAR. 9. In truth and in fact, clinical studies have not proven that adding twelve Egglan's Best eggs per week to a low-fat diet does not increase serum cholesterol. Therefore, the representation set forth in paragraph eight was, and is, false and misleading.

PAR. 10. Through the use of the statements contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits C and E, respondent has represented, directly or by implication, that:

- A. Eggland's Best eggs are low in saturated fat.
- B. Eggland's Best eggs are lower in saturated fat than ordinary eggs.

PAR. 11. In truth and in fact:

- A. Eggland's Best eggs are not low in saturated fat.
- B. Eggland's Best eggs are not lower in saturated fat than ordinary eggs.

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

PAR. 12. The acts and practices of respondent 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.

Commissioner Owen dissenting.

Egg-land's Best. Eggs that won't increase your serum cholesterol.

Imagine! Fresh, delicious, 100% real eggs that won't increase your serum cholesterol. You read it right.

In recent clinical tests as part of a low-fat diet, even a dozen Egg-land's Best eggs a week caused no increase in serum cholesterol even though they contain about as much cholesterol as other eggs.

Know what that means? Now you can eat real eggs again. So go ahead, enjoy! Cut out the coupon below and save 35¢ on real eggs that won't increase your serum cholesterol.

**Egg-land's Best.
Now you can eat
real eggs again.**



© 1980 Egg-land's Best

**Save 35¢ on one dozen
Egg-land's Best Eggs**

For manufacturer's coupon to be valid, it must be attached to a purchase of one dozen Egg-land's Best Eggs. This coupon is not valid for cash back or other offers. See store for details. Exp. 12/31/80.

35¢

00051
MANUFACTURER'S COUPON

35¢

EXHIBIT B

Ayer

NW Ayer Incorporated
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019-7498
212-474-5000
Fax: 212-474-5400

EXHIBIT B

CLIENT EGGLAND'S BEST

PRODUCT Eggs

TITLE "Egg Dishes Vers. 3"

NUMBER ZAYA 2021 ***AS PRODUCED***

PROGRAM

FACILITIES TV

DATE 7/27/92

LENGTH :30

VIDEO

AUDIO

(MUSIC THROUGHOUT)

OPEN ON CU OF MAN TALKING TO HIMSELF

MAN OC: "Two eggs over easy."

CUT TO CU L/R PAN OF TWO EGGS IN PAN

AVO: You can eat eggs again.

CUT TO QUICK PAN OF MAN TALKING

MAN OC: "No wait...poached!"

CUT TO CU OF POACHED EGG BEING LIFTED
OUT OF BOILING WATER

AVO: and not increase your serum cholesterol.

CUT TO L/R PAN OF EGGLAND CARTON

Introducing Eggland's Best.

CUT TO CU OF WHOLE EGGS FALLING INTO
BOILING WATER

They're fresh,

CUT TO ECU OF HARD-BOILED EGG BEING
PEELED

real eggs.

CUT TO PLATE OF EGGS AND POTATOES

And in

CUT TO HARD-BOILED EGG BEING SLICED

clinical tests in a

CUT TO L/R PAN OF FULL EGG CARTON

lowfat diet even twelve a week

CUT TO CU OF SCRAMBLED EGGS BEING PUT
ON MUFFIN

caused no increase in serum cholesterol.

CUT TO CU OF MAN TALKING

MAN OC: "An omelet."

CUT TO RAW EGGS BEING MIXED IN BOWL

AVO: They're special eggs

CUT TO MUSHROOMS BEING PUT IN OMELET

from specially

CUT TO CU OF MAN

fed hens.

MAN OC "Sunnyside...that's it!"

CUT TO ECU OF EGGLAND LOGO ON EGGS

Eggland's Best.

CUT TO SHOT OF EGGLAND'S BEST CARTON.
SUPER: NOW YOU CAN EAT REAL EGGS AGAIN.

Now, you can eat real eggs again

EXHIBIT B

EXHIBIT B - p. 2








 <p>CUT TO HAND HOLDING EGG CRACKING OVER PAN.</p> <p>VOICE: CRACKING THE EGG.</p> <p>MAN: THE EGG'S GOING AWAY.</p>	 <p>CUT TO FRYING EGGS BEING FLIPPED.</p> <p>VOICE: THE EGG'S ARE BEING FLIPPED.</p>	 <p>CUT BACK TO MAN AS HE CRACKS THE EGG.</p> <p>MAN: BE CAREFUL! FRYING!</p>
 <p>CUT TO HAND HOLDING EGG BEING LIFTED OUT OF THE BOILING WATER.</p> <p>VOICE: THE EGG'S ARE BEING LIFTED OUT OF THE BOILING WATER.</p>	 <p>CAMERA PANS OVER TOP OF EGGLAND'S BEST CARTON.</p> <p>VOICE: INTRODUCING EGGLAND'S BEST.</p>	 <p>CUT TO TWO EGGLAND'S BEST EGGS FALLING THROUGH BOILING WATER.</p> <p>VOICE: THEY'RE FRESH. FRESH EGGS...</p>
 <p>CUT TO HAND HOLDING EGGLAND'S BEST EGG BEING CRACKED.</p> <p>VOICE: THE EGG'S ARE BEING CRACKED.</p>	 <p>CUT TO A DISH OF BAKED EGGS BEING SLID OFF TO PLATE.</p> <p>VOICE: BAKED EGGS...</p>	 <p>CUT TO A HARD-BOILED EGG BEING SLICED.</p> <p>VOICE: THE EGG'S ARE BEING SLICED.</p>
 <p>CUT TO 12 EGGLAND'S BEST EGGS IN AN OPEN CARTON.</p> <p>VOICE: 12 EGGLAND'S BEST EGGS IN AN OPEN CARTON.</p>	 <p>CUT TO SCRAMBLED EGGS BEING SLID OFF A PLATE INTO AN ENGLISH MUFFIN.</p> <p>VOICE: SCRAMBLED EGGS BEING SLID OFF A PLATE INTO AN ENGLISH MUFFIN.</p>	 <p>CUT BACK TO MAN AS HE CRACKS THE EGG. HE'S CRACKING THE EGG THE WRONG WAY.</p> <p>MAN: BE CAREFUL!</p>

EXHIBIT B

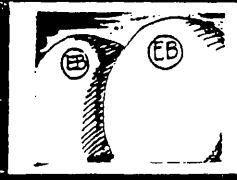
C.E. BOSS/EGGLAND'S BEST BOSS/EGG STRIKES!

CUT TO BOSS BEING FLIPPED IN A KILLING BOA.
They're special eggs

CUT TO AN OMELETTE BEING FLIPPED.
...from especially for home.

CUT BACK TO BOSS IS KILL KITCHEN.
BOSS: ...and now have a sunny side.
BOSS: ...anyway! That's it.




KEEP PULLING BACK TO REVEAL STEEL SHILLARLY BAKED BOSS.
Eggland's Best.

CUT TO BEAUTY BOSS OF EGGLAND'S BEST PACKAGE.
How you can eat steel eggs again!

Complaint

118 F.T.C.

EXHIBIT C

EXHIBIT C

STRACHAN-McMILLAN
~~WORLDWIDE PLAZA~~

WORLDWIDE PLAZA
 210 EIGHTH AVENUE, 3RD FLOOR
 NEW YORK, N.Y. 10011-7498
 (212) 474-5000 (212) 474-5299
 FAX (212) 474-5005

CLIENT EGGLAND BEST EGGS

PROGRAM

PRODUCT SAME

FACILITIES RADIO

TITLE HATTIE

DATE August 24, 1992

NUMBER 08-0792 AS PRODUCED

LENGTH :60

Track #7

HATTIE: Hi, this is Hattie Winston. Do you remember eating eggs every day? Then there was all this cholesterol business. Well, now we can eat eggs again without worrying about raising our cholesterol.

New Eggland's Best eggs are fresh, real eggs that won't increase serum cholesterol...even though they contain about as much cholesterol as other eggs. In recent clinical tests, as part of a low-fat diet, people ate as many as twelve Eggland's Best eggs a week...and didn't increase their serum cholesterol.

Eggland's Best eggs come from very specially fed hens, you see.

Hens that eat no animal fat. Just healthy grains, extra vitamin E and a special all-natural supplement that's rich in minerals. Plus canola oil, the oil lowest in saturated fat. So now there's a delicious, honest-to-goodness fresh egg that we can enjoy without worrying about cholesterol.

Now we can eat real eggs again!

ANNCR: Look for the initials "EB" on every Eggland's Best egg.

APPROVED

EXHIBIT D

EGGLAND'S BEST
:30 TV
"PUT BACK ON"
1/15/93
AS PRODUCED

EXHIBIT D

Pulp White ZAYA 3004

MUSIC:

UNDER THROUGHOUT

V.O.:

If you love eggs, but
cholesterol has put you on a low-fat diet...
here's a way to turn that diet sunny side up.

Introducing Egglard's Best, eggs from
specially fed hens.

Like ordinary eggs, they contain cholesterol.
Yet, in clinical tests, people ate 12 Egglard's
Best eggs a week as part of a low-fat diet
and showed no increase in their serum
cholesterol.

Try Egglard's Best.
Your cholesterol-conscious diet can now have a
sunny side.

EXHIBIT D

EXHIBIT D - p. 2

EGGLAND'S BEST
"PUT BACK ON"
1993

OPEN ON ECU EGG IN SILHOUETTE.
MUSIC UNDER THROUGHOUT.
Annex to: If you love eggs...

EGG ROTATES TO REVEAL "EB" LOGO.
but cholesterol has put you on a low-fat diet...

CUT TO HAND CRACKING EGG IN SLOW-MOTION.
here's a way to turn that diet...

CUT TO SUNNY SIDE UP IN PAN.
sunny side up...

CUT TO L/R PAN EGGLAND WHITE EGG CARTON.
Introducing Eggland's Best.

CUT TO ECU OF HARD-BOILED WHITE EGG BEING PEELED.
eggs from specially fed hens.

CUT TO CU POACHED EGG BEING LIFTED FROM BOILING WATER.
Like ordinary eggs, they contain cholesterol.

CUT TO L/R PAN OF EGGS IN CARTON.
Yes, in clinical tests, people ate 12 Eggland's Best eggs a week.

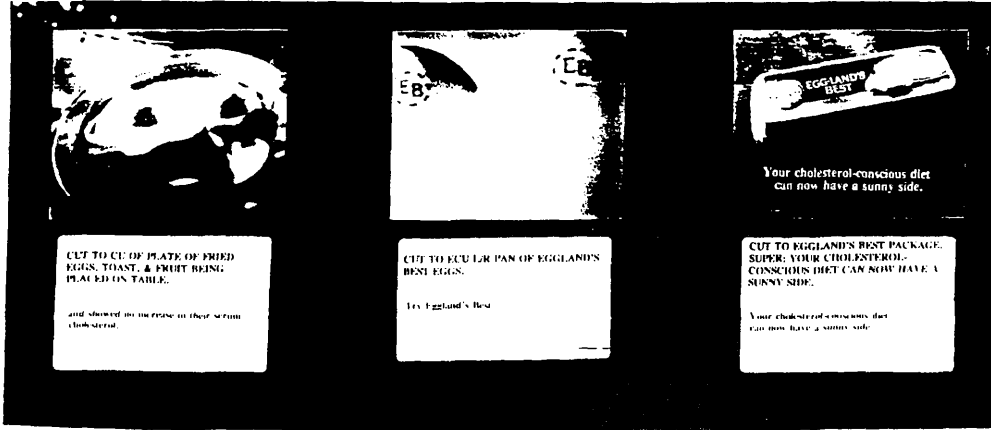
CUT TO SPANISH OMELET IN PAN.
as part of a low-fat diet

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Complaint

EXHIBIT D

EXHIBIT D - p. 3

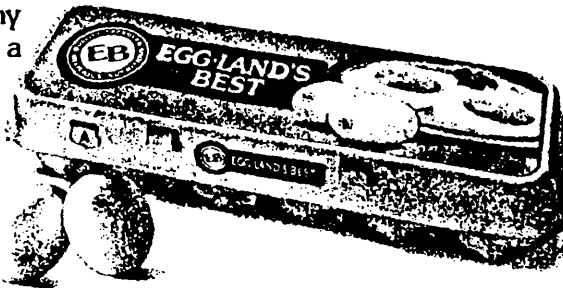


It's simple. When the hens eat better, you eat better, too.

Introducing Egg-land's Best® Premium eggs from hens fed a premium diet.

Unlike ordinary eggs, Egg-land's Best are laid by hens that eat no animal fat. Just lots of healthy grains, extra Vitamin E and a little canola oil—the oil lowest in saturated fat.

Ask for them at one of the fine restaurants listed in this book. And find out just how good an egg can be.



Introducing Egg-land's Best.

©1992 C.R. Egg, Inc.

UTAH MENU GUIDE AD -- RAN JULY 1992

CR NAT-P20005
8" x 5"
Utah Menu Directory—July 1992

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FEDERAL TRADE COMMISSION DECISIONS

Complaint

EXHIBIT E

118 F.T.C.

EXHIBIT E

DECISION AND ORDER

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

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

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

1. Respondent Egglan's Best, Inc. is a corporation organized, existing and doing business under and by the virtue of the laws of the State of Pennsylvania, with its offices and principal place of business located at 842 First Street, King of Prussia, Pennsylvania.

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

ORDER

DEFINITION

For purposes of this order, the phrase "food containing egg yolk" shall not include "medical foods" as defined by 21 U.S.C. 360ee (b)(3) as currently in effect as of the date of this order.

I.

It is ordered, That respondent Egglan's Best, Inc., a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of eggs or any food containing egg yolk in or affecting commerce, as "food" and "commerce" are defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting, in any manner, directly or by implication, through numerical or descriptive terms or any other means, the absolute or comparative amount of cholesterol, total fat, saturated fat or any other nutrient or ingredient in such food.

II.

It is further ordered, That respondent Egglan's Best, Inc., a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of eggs or any food containing egg yolk in or affecting commerce, as "food" and "commerce" are defined in the Federal Trade Commission Act, do forthwith cease and desist from making any representation, in any manner, directly or by implication, about the absolute or comparative effect of such food on serum cholesterol, whether or not such food is consumed as part of an unrestricted diet or as part of any specific dietary regimen, unless at the time of making the representation, respondent possesses and relies upon competent and reliable scientific evidence substantiating such representation; provided, however, that any such representation that is specifically permitted in labeling for such food by regulations promulgated by the Food and

Drug Administration pursuant to the Nutrition Labeling and Education Act of 1990 will be deemed to be substantiated as required by this paragraph. 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.

III.

It is further ordered, That respondent Egglan's Best, Inc., a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of eggs or any food containing egg yolk in or affecting commerce, as "food" and "commerce" are defined in the Federal Trade Commission Act, do forthwith cease and desist from making any representation, in any manner, directly or by implication, about the absolute or comparative health benefits of such food, including but not limited to its effect on heart disease, unless at the time of making the representation, respondent possesses and relies upon competent and reliable scientific evidence substantiating such representation; provided, however, that any such representation that is specifically permitted in labeling for such food by regulations promulgated by the Food and Drug Administration pursuant to the Nutrition Labeling and Education Act of 1990 will be deemed to be substantiated as required by this paragraph.

IV.

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

existence, contents, validity, results, conclusions or interpretations of any test or study.

V.

It is further ordered, That respondent Egglan's Best, Inc., a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of eggs or any food containing egg yolk in or affecting commerce, as "food" and "commerce" are defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Failing to disclose clearly and prominently in any advertisement or promotional material that refers, directly or by implication, to the absolute or comparative amount of cholesterol, fat or saturated fat in such food, the average cholesterol content of such food expressed in the following terms:

1. The number of milligrams; and
2. The percentage of "Maximum Daily Value."

The statements required by subparagraphs A.1 and A.2 of this Part shall appear in close proximity. For purposes of this Part, the term "Maximum Daily Value" shall mean: (1) the daily reference value or other daily intake limit for cholesterol established in an effective final regulation of the Food and Drug Administration; or (2) in the absence of such a regulation, the daily intake limit of cholesterol advised by any one of the following three organizations: the National Academy of Sciences, the Surgeon General of the Public Health Service, or the American Heart Association. In the event that the Food and Drug Administration does not have a final effective regulation and none of the three named organizations advises that daily cholesterol intake be limited to a specific maximum amount, subparagraph A.2 of this Part shall not apply. Provided, however, that this Part will not be deemed to apply to any representation that is specifically permitted in labeling for such food product by regulations promulgated by the Food and Drug Administration pursuant to the Nutrition Labeling and Education Act of 1990.

B. For a time period of one year, beginning no later than forty-five (45) days from the date this order becomes final, offering for sale, selling, or distributing eggs unless the package label for such eggs clearly and prominently states, in the exact language that follows, that: "There are no studies showing that these eggs are different from other eggs in their effect on serum cholesterol." Provided, however, that this requirement shall apply only in those geographic areas where respondent has disseminated or caused to be disseminated advertising or promotional materials containing any representation, directly or by implication, about the effect of Eggland's Best eggs or other eggs on serum cholesterol over a period of 12 weeks or more, or at any time between January 1, 1993 and the date of the acceptance of this order by the Commission for public comment, including but not limited to those geographic areas listed in Attachment A to this order.

For purposes of this order, "clearly and prominently" shall mean as follows:

1. In a television or videotape advertisement, the disclosure shall be presented simultaneously in both the audio and video portions of the advertisement. The audio disclosure shall be delivered in a volume and cadence and for a duration sufficient for an ordinary consumer to hear and comprehend it. The 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;

2. In a print advertisement, the disclosure shall be in type size which is at least the same size as that in which the principal portion of the text of the advertisement appears, shall be located in close proximity to the statement or other reference requiring the disclosure and shall be of a color or shade that readily contrasts with the background of the advertisement;

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

4. On a package label, the disclosure shall be in a conspicuous and prominent place on the package, in a conspicuous format, and in conspicuous and legible type in contrast by typography, layout, or color with all other printed material on the package. Provided, however, that if the disclosure is displayed on the top or front panel of a standard twelve-egg carton or on the top, front or side panel of

a standard six-egg carton, is in at least ten (10) point type and is either on a separate label or enclosed within a border, and both the type and the border are of a color or shade that readily contrasts with the background of the carton, the disclosure shall be deemed to have been made clearly and prominently for purposes of this order.

VI.

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

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

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

VII.

It is further ordered, That respondent Egglan's Best, Inc. shall, within thirty (30) days after service upon it of this order, distribute a copy of the order to each of its operating divisions, to each of its franchisees, to each of its managerial employees, and to each of its officers, agents, representatives or employees engaged in the preparation or placement of advertising or other materials covered by this order and shall secure from each such person a signed statement acknowledging receipt of this order.

VIII.

It is further ordered, That respondent Egglan's Best, Inc. shall notify the 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, or any other corporate change that may affect compliance obligations arising out of this order.

IX.

It is further ordered, That respondent Egglan's Best, Inc. 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 it has complied with this order.

Commissioner Owen dissenting.

ATTACHMENT A

GEOGRAPHIC AREAS WITH CHOLESTEROL-RELATED
ADVERTISING OR PROMOTION PURSUANT TO
PARAGRAPH V.B. OF AGREEMENT CONTAINING CONSENT ORDER

1. Iowa
2. Maine
3. Rhode Island
4. Western and Central Pennsylvania
5. Virginia
6. Maryland
7. Washington, D.C.
8. Georgia
9. South Carolina
10. Alabama
11. Mississippi
12. Louisiana
13. Arkansas
14. California
15. Nevada
16. Idaho
17. Michigan
18. Colorado
19. South Dakota
20. Washington
21. Montana
22. Alaska
23. Wyoming
24. Missouri
25. Oklahoma
26. Salt Lake City, Utah
27. Raleigh-Durham, North Carolina
28. Southern Illinois (St. Louis Market)

SEPARATE STATEMENT OF COMMISSIONER MARY L. AZCUENAGA
CONCURRING IN PART AND DISSENTING IN PART

The Commission today issues a final consent order settling complaint allegations that Egglan's Best, Inc., made deceptive advertising claims about its eggs. I join the Commission in finding reason to believe that Egglan's claims are deceptive and join in approving the order except for paragraph V.B. I do not agree that the corrective notice provision contained in paragraph V.B. is warranted, and I dissent from the order to that extent.

In imposing a corrective notice remedy, the Commission must consider whether an advertisement has played a substantial role in creating in the public's mind a false belief about a product that will linger on after the false advertisement ceases. *Warner-Lambert Co. v. FTC*, 562 F.2d 749, 762 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 950 (1978). A corrective notice provision is intended to dissipate the lingering effects of a deceptive advertisement so that future advertisements do not become part of a continuing deception of the public. *Id.* at 769.

Here, there is no direct evidence, such as the consumer surveys and expert testimony in Warner Lambert Co., that Egglan's Best's advertisements created a lingering false impression about the effects on serum cholesterol of its eggs. It is unlikely that such an impression was created. Egglan's Best's advertisements ran for a relatively short period of time, and the claims are contrary to general information about the relationship between the consumption of eggs and serum cholesterol that is available to consumers in significant quantity from a variety of other sources. Without a stronger showing of the need for corrective advertising under the Warner-Lambert test, I cannot support the corrective notice provision in the order.

During the period for comment on the order, the issue was raised whether the required corrective notice is unduly broad and in itself could be misleading. Although this appears to be a reasonable question, given the available evidence, I do not reach this issue, because I would not impose a corrective notice requirement at all.

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

I concur in the Commission's decision to issue a complaint, and to accept a consent agreement in this matter, except as to Section V.B. of the order. With respect to that Section, which requires corrective advertising, I dissent.

The seminal case on corrective advertising is the Listerine case, *Warner-Lambert Company*, 86 FTC 1398 (1975), where the Commission opined:

[I]f a deceptive advertisement has played a substantial role in creating or reinforcing in the public's mind a false and material belief which lives on after the false advertising ceases, there is clear and continuing injury to competition and to the consuming public as consumers continue to make purchasing decisions based on the false belief. Since this injury cannot be avoided by merely requiring respondent to cease disseminating the advertisement, we may appropriately order respondent to take affirmative action designed to terminate the otherwise continuing ill effects of the advertisement.

86 FTC at 1499-1500.

As the complaint alleges, Egglund's ads, in my judgment, certainly create an impression that its eggs will not increase serum cholesterol, or, comparatively, increase cholesterol as much as ordinary eggs. However, we must also find that the beliefs created by the challenged ads are likely to linger after the advertising ceases. As to that likelihood, it seems to me important to compare and contrast the facts in Warner-Lambert to the situation here.

In Warner-Lambert, decided in 1975, the Commission noted that the challenged advertising claims had been made directly to the consuming public since 1921, and involved expenditures of large sums in print and television media. 86 FTC at 1501. The Commission cited to the ALJ's Findings of Fact, which noted that Listerine had made the contested representations since the product went on the market almost a century before; that cold and sore throat claims had been made continuously on its labeling since prior to 1938; and that over the ten years preceding the decision, Listerine had spent several million dollars on its colds advertising, the vast majority occurring on network and spot television, covering all parts of the day and evening and particularly in network prime time. *Id.* at 1468 (IDFF 219-220); *see also id.* at 1407-1408 (IDFF 5-8). The Commission pointed to record testimony indicating the high

percentage of consumers taking such claims that would remain as long as five years after the ads ended. It concluded: "The record demonstrates that long after Listerine cold efficacy advertising ceased, a substantial proportion of the public would continue to believe in Listerine's efficacy for the treatment and prevention of colds and sore throats." *Id.* at 1503 (emphasis supplied).

If we contrast the length in time, and the magnitude of Listerine's advertising to the instant case, Egglan's advertising would hardly appear to rise to even a two-digit percentage thereof. We have no evidence that Egglan's campaign was so similarly saturated and extended that long after it ceases, a substantial portion of the public will continue to believe the challenged claims in the absence of the corrective advertising that the Commission has accepted.

One significant factor is in evidence here that was not present in the Listerine case: the barrage of contrary information to which the public is exposed. While the public received little, if any, information from sources other than the advertiser about the true effect of Listerine on colds and sore throats, the vast majority of information available to consumers challenges the Egglan claims, and links egg consumption with increased serum cholesterol. Articles in the popular press, television and radio programs, and many cookbooks recommend that consumers lower their consumption of eggs. Doctors and the American Heart Association advise people to limit their egg consumption for health reasons. The general ambient information and perception is that eggs are unhealthy, and this climate is highly relevant in determining whether the false beliefs created by Egglan's Best advertisements will likely linger. Egglan's Best advertisements attempted to counteract the common wisdom, but ran for only a short time. Because the information that eating eggs is likely to increase serum cholesterol will continue to be widely disseminated to consumers through media sources, it is unlikely that the beliefs regarding the effects of Egglan's Best eggs on serum cholesterol, or their comparative benefits to other eggs, will be maintained. In sum, the half-life of Egglan's advertising campaign is probably very short.

During the public comment period, eighteen comments were received. Two of these comments supported the Commission's position with respect to the corrective labeling notice, and the remaining sixteen comments either disagreed with the Commission's position or were silent on this issue. Comments from the American

Advertising Federation and the American Association of Advertising Agencies focused on the lack of a factual record indicating that Egglund's advertising has caused the type of injury that needs to be redressed by corrective advertising, and stressed the quantum difference in factual record between Egglunds and Warner-Lambert. Members of the egg industry and academics were also critical of the corrective labeling provision. In addition to echoing the concerns regarding evidence of lingering harm, these commentators believe that the incentive to innovate will be reduced, and that the required language of the corrective label is itself misleading.

In contrast, both the Massachusetts Office of the Attorney General and the Center for Science in the Public Interest (CSPI) believe that corrective advertising is appropriate in this case. Further, both request that the Commission expand the scope of the requirement. The Massachusetts AG's Office recommends including Massachusetts in the area where corrective labeling is required, and the CSPI urges the Commission to require that the corrective statement be made in advertising as well as on the carton label. The Commission has chosen to refrain from altering the scope of the corrective advertising based on these comments, and I believe that the weight of the public comment reinforces my earlier opinion in opposition to corrective advertising.¹

My dissent on the use of corrective advertising in this case is not to suggest, however, that corrective advertising is only appropriate where the ad campaign is decades-old and swamps the public. A classic opportunity for appropriately imposing the remedy was the Sun Company case two years ago. File No. 902-3268. There, the Commission challenged claims linking octane and automobile engine performance made by a company that was previously under a Commission order for earlier false performance and uniqueness claims for its gasoline. *Sun Oil Co.*, 84 FTC 247 (1974). Nonetheless, the Commission agreed to merely a cease-and-desist order, despite the fact that the challenged claims took advantage of, and further contributed to, widespread consumer misperception about the relationship between octane and performance. The contrast between the Commission's decision there, and here, suggests that the Commission's current posture on corrective advertising may be more

¹ Moreover, it should be noted that nothing in the Commission's action precludes Massachusetts from seeking its own relief and, indeed, Massachusetts has filed a law suit against Egglund's Best.

a function of respondents' willingness to agree to the remedy, rather than of a well defined and implemented policy.

Finally, a comment on the remedy itself. The corrective advertising is ordered to be placed on Egglan's Best carton label. Due to other legal limitations, Egglan's Best has not made serum cholesterol or heart health claims on the carton. Thus, while the attempt to limit the breadth of the remedy may be well-intentioned, I find it highly ironic that corrective advertising has been mandated in a medium where the original deceptive claims were never made.

STATEMENT OF ROSCOE B. STAREK, III

I support the corrective advertising provision in this order. Under the appeals court decision in Warner-Lambert Co., corrective advertising may be ordered if the challenged ads substantially contributed to the development and maintenance of a false and material belief, and a substantial portion of consumers will continue to hold the false belief.¹ The Warner-Lambert court suggested that the purpose of advertising is to create enduring beliefs in consumers' minds, such that the FTC might well presume in some cases that the standard for imposing corrective advertising had been met.² The Warner-Lambert decision accords the Commission substantial discretion in applying a corrective advertising remedy. The Commission must take care, however, to exercise such broad discretion judiciously. The question I had to answer in this case was whether corrective advertising is appropriate in the absence of an extended period of deceptive advertising or extrinsic evidence demonstrating that the false impressions will persist in consumers' minds after the ads cease.³

I have determined that a limited corrective advertising requirement is an appropriate remedy here. First, I have reason to believe that the Egglan's ads have created in consumers, minds enduring

¹ *Warner-Lambert Co. v. FTC*, 562 F.2d 749 (D.C. Cir. 1977), *modifying and enforcing* 86 FTC 1398 (1975), *cert. denied*, 435 U.S. 950 (1978).

² The court stated that it need not rely upon such a presumption in its case, however, because the record contained evidence that the Listerine ads in question had created, in the minds of consumers exposed to the advertising, false beliefs that would persist after the ads ended. *Id.*, 562 F.2d at 762-63; *see* 86 FTC at 1471 n.23 (data relied upon was a survey of "consumers who have seen or heard a lot of advertising for Listerine").

³ It is certainly unrealistic to think that we will have this data when the respondents enter into a consent agreement before a complaint is filed.

false impressions about these eggs. Because Egglan's is able to charge for its eggs about 200% of the typical price per dozen, we have strong evidence that the company's ads have been successful in creating in the minds of its consumers a belief that its eggs are meaningfully superior to other eggs. Second, the superiority touted by Egglan's ads -- including ads disseminated during the public comment period -- pertains to their effect on serum cholesterol. Common sense tells me that this belief, which relates to the principal attribute purportedly distinguishing Egglan's eggs from other eggs is not going to disappear overnight, simply because advertising making that claim ceases. Third, consumers who continued to believe that Egglan's had a demonstrated superiority over typical eggs would suffer an identifiable injury, again due to the price differential. Further, if the ads lead consumers to increase their egg consumption significantly, some consumers may increase their serum cholesterol levels and thus potentially harm their health. A corrective notice placed on the egg package would enable consumers to avoid further injury.

Finally, I am persuaded by the careful crafting of the corrective remedy. The instant notice is designed to reach consumers likely to have been misled by Egglan's ads (those who are preparing to purchase the product), rather than the population at large. It has a limited dissemination schedule and will not be unreasonably costly. Moreover, the notice itself is a statement of fact that is neither derogatory of Egglan's eggs nor implies criticism of other companies' products.

Thus, although I think corrective advertising is a remedy that should be used sparingly, I support its inclusion in this order.

STATEMENT OF COMMISSIONER DENNIS A. YAO

I voted to accept the consent agreement in this matter. Although I support the terms of the consent agreement, I would have preferred that the complaint include an implied heart disease allegation.

The Commission alleges in its complaint that, among other things, Egglan's Best falsely represented that it had a reasonable basis for claims that eating its eggs will not increase serum cholesterol in an absolute sense and that eating its eggs will not increase serum cholesterol as much as eating ordinary eggs. I believe that reasonable consumers would interpret the express claim that

- Eggland's eggs will not increase serum cholesterol to imply that those eggs would therefore not increase the risk of heart disease -- especially when the express claim was made for eggs, a product notoriously well known for its negative impact on heart health.
- Although the order does include a requirement that health claims, including claims about heart disease, be substantiated by competent and reliable scientific evidence, I believe that industry and the public would best be served if the Commission communicated its belief that an implied health claim has been made here.¹

¹ I would note that the complaint also alleges that Eggland's Best falsely represented that its eggs are low in saturated fat in an absolute sense, and are lower in saturated fat than ordinary eggs. Although I agree that the implied saturated fat claims challenged in the complaint were made, in my view this claim is further down the spectrum of implied claims towards those needing extrinsic evidence than the implied heart disease claim I discuss here. I thus can discern no reason for excluding the implied heart disease claim from the complaint while including the saturated fat claims.

IN THE MATTER OF

TCH CORPORATION, ET AL.

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

Docket C-3519. Complaint, Aug. 16, 1994--Decision, Aug. 16, 1994

This consent order requires, among other things, two California-based corporations to divest, within one year, to a Commission-approved buyer, the pharmacy business in either the PayLess or the Thrifty or Bi-Mart stores in six designated areas, requires the respondents to ensure that the assets to be divested remain viable and marketable, and for ten years requires that the respondents obtain Commission approval prior to acquiring any stock or other interest in any entity engaged in the business of selling prescription drugs at retail stores in the six areas designated.

Appearances

For the Commission: *Laura Wilkinson, Ann B. Malester, Claudia R. Higgins, Melissa K. Heydenreich, Meribeth Petrizzi and Jacqueline K. Mendal.*

For the respondents: *Harvey I. Saferstein, George S. Cary, Aimee H. Goldstein and Stephanie Kaufman, Irell & Mannella, Newport Beach, CA.*

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that respondents, TCH Corporation ("TCH"), a Delaware corporation, and Green Equity Investors, L.P. ("GEI"), a Delaware investment limited partnership (collectively, "respondents"), subject to the jurisdiction of the Federal Trade Commission, have agreed to acquire certain assets of Kmart Corporation, a corporation subject to the jurisdiction of the Federal Trade Commission, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. 45; and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. DEFINITIONS

For the purposes of this complaint the following definitions apply:

1. “*TCH*” or “*Thrifty*” means TCH Corporation, a corporation organized, existing, and doing business under and by the virtue of the laws of Delaware, its directors, officers, agents and representatives, its domestic and foreign parents, successors, assigns, divisions, subsidiaries, affiliates, partnerships and joint ventures, and the directors, officers, agents and representatives of its domestic and foreign successors, assigns, divisions, subsidiaries, affiliates, partnerships and joint ventures. The words “subsidiary,” “affiliate” and “joint venture” refer to any firm in which there is partial (10 percent or more) or total ownership or control between corporations or partnerships.

2. “*GEP*” means Green Equity Investors, L.P., an investment limited partnership organized, existing, and doing business under and by the virtue of the laws of Delaware, its general partners, directors, officers, agents and representatives, its domestic and foreign parents, successors, assigns, divisions, subsidiaries, affiliates, partnerships and joint ventures, and the directors, officers, agents and representatives of its domestic and foreign successors, assigns, divisions, subsidiaries, affiliates, partnerships and joint ventures. The words “subsidiary,” “affiliate” and “joint venture” refer to any firm in which there is partial (10 percent or more) or total ownership or control between corporations or partnerships.

3. “*Kmart*” means Kmart Corporation, a corporation organized, existing, and doing business under and by virtue of the laws of Michigan, its directors, officers, employees, agents and representatives, its domestic and foreign parents, predecessors, successors, assigns, divisions, subsidiaries, affiliates, partnerships and joint ventures, and the directors, officers, employees, agents and representatives of its domestic and foreign predecessors, successors, assigns, divisions, subsidiaries, affiliates, partnerships and joint ventures.

II. RESPONDENTS

4. Respondent TCH is a corporation organized and existing under the laws of Delaware, with its principal place of business at 3424 Wilshire Boulevard, Los Angeles, CA.

5. Respondent GEI is an investment limited partnership organized and existing under the laws of Delaware, with its principal place of business at 333 South Grand Avenue, Suite 5400, Los Angeles, CA. GEI controls TCH.

6. For purposes of this proceeding, respondents are, and at all times relevant herein have been, engaged in commerce as commerce is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and are either corporations, or partnerships whose business or practices are in or affecting commerce as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

III. ACQUIRED COMPANY

7. Kmart is a corporation organized and existing under the laws of the State of Michigan, with its headquarters at 3100 West Big Beaver Road, Troy, Michigan.

8. Kmart is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

IV. THE ACQUISITION

9. On or about December 1, 1993, TCH and Kmart agreed to enter into an agreement whereby GEI, through TCH, will acquire from Kmart Corporation all of the stock of PayLess Drug Stores Northwest, Inc., a wholly-owned subsidiary of Kmart, for consideration totaling approximately \$1.162 billion ("Acquisition").

V. THE RELEVANT MARKETS

10. For purposes of this complaint, the relevant line of commerce in which to analyze the effects of the Acquisition is the sale of prescription drugs in retail stores.

11. For purposes of this complaint, the relevant sections of the country in which to analyze the effects of the Acquisition are: Bishop, California; Fort Bragg/Mendocino, California; Mt. Shasta, California; Taft, California; Florence, Oregon; and Ellensburg, Washington.

12. The relevant markets set forth in paragraphs ten and eleven are highly concentrated, whether measured by Herfindahl-Hirschmann Indices ("HHI") or two-firm and four-firm concentration ratios.

13. Entry into the relevant markets is difficult or unlikely.

14. TCH and Kmart are actual competitors in the relevant markets.

VI. EFFECTS OF THE ACQUISITION

15. The effect of the Acquisition may be substantially to lessen competition and to tend to create a monopoly in the relevant markets in violation of Section 7 of the Clayton Act 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, in the following ways, among others:

- a. By eliminating direct actual competition between TCH and Kmart;
- b. By increasing the likelihood that TCH will unilaterally exercise market power; or
- c. By increasing the likelihood of collusion in the relevant markets.

16. All of the above increase the likelihood that firms in the relevant markets will increase prices and restrict output both in the near future and in the long term.

VII. VIOLATIONS CHARGED

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

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

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of respondents' proposed acquisition of certain voting securities and

assets of PayLess Drug Stores Northwest, Inc., a wholly-owned subsidiary of Kmart Corporation, and the respondents having been furnished thereafter with a copy of a draft of complaint that the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and

The respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondents of all the jurisdictional facts set forth in the aforesaid draft of the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, 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 Acts, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comment filed thereafter by an interested person pursuant to Section 2.34, 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 TCH Corporation ("TCH" or "Thrifty") is a corporation organized and existing under the laws of Delaware with its office and principal place of business at 3424 Wilshire Boulevard, Los Angeles, CA.

2. Respondent Green Equity Investors, L.P. ("GEI") is a Delaware investment limited partnership organized and existing under the laws of Delaware with its office and principal place of business at 333 South Grand Avenue, Suite 5400, Los Angeles, CA.

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

ORDER

I.

It is ordered, That, as used in this order, the following definitions shall apply:

A. “*TCH*” or “*Thrifty*” means TCH Corporation, a corporation organized, existing, and doing business under and by the virtue of the laws of Delaware, its subsidiaries, divisions, and groups controlled by TCH, and their respective directors, officers, agents, representatives, and their respective successors and assigns.

B. “*GEI*” means Green Equity Investors, L.P., an investment limited partnership organized, existing, and doing business under and by the virtue of the laws of Delaware, its general partners, subsidiaries, divisions, and groups controlled by GEI, and their respective directors, officers, agents, representatives, and their respective successors and assigns.

C. “*Respondents*” means TCH and GEI.

D. “*Commission*” means the Federal Trade Commission.

E. “*Acquisition*” means the acquisition of the voting stock of PayLess Drug Stores Northwest, Inc., a wholly-owned subsidiary of Kmart Corporation, by respondents TCH and GEI.

F. “*Acquirer*” means the party or parties to whom respondents TCH and GEI divest the assets herein ordered to be divested.

G. “*Prescription drugs*” means ethical drugs available at retail only by prescription.

H. “*PayLess Pharmacy Business*” means PayLess’s business of selling prescription drugs at retail stores located in any of the cities or towns listed in paragraph I.L. of this order, but does not include PayLess’s business of selling other products in those retail stores.

I. “*PayLess Pharmacy Assets*” means all assets constituting the PayLess Pharmacy Business, excluding those assets pertaining to the PayLess trade name, trade dress, trade marks and service marks, and including but not limited to:

1. Leases and properties, at the acquirer’s option;
2. Zoning approvals and registrations, at the acquirer’s option;
3. Books, records, reports, dockets and lists relating to the PayLess Pharmacy Business;

4. Lists of stock keeping units (“SKUs”), *i.e.*, all forms, package sizes and other units in which prescription drugs are sold and which are used in records of sales and inventories;

5. Lists of all customers, including but not limited to third party insurers, including all files of names, addresses, and telephone numbers of the individual customer contacts, and the unit and dollar amounts of sales, by product, to each customer;

6. All names of prescription drug manufacturers and distributors under contract with PayLess;

7. All price lists for prescription drugs, operating manuals, and advertising and promotional materials, at the acquirer’s option, but only if the divestiture is to an acquirer that does not already operate a pharmacy in any location; and

8. Goodwill, tangible and intangible, utilized in the sale of prescription drugs.

J. “*Thrifty and Bi-Mart Pharmacy Business*” means Thrifty’s business of selling prescription drugs at retail stores located in any of the cities or towns listed in paragraph I.L. of this order, but does not include Thrifty’s business of selling other products in those retail stores.

K. “*Thrifty and Bi-Mart Pharmacy Assets*” means all assets constituting the Thrifty and Bi-Mart Pharmacy Business, excluding those assets pertaining to the Thrifty and Bi-Mart trade names, trade dress, trade marks and service marks, and including but not limited to:

1. Leases and properties, at the acquirer’s option;
2. Zoning approvals and registrations, at the acquirer’s option;
3. Books, records, manuals, dockets and lists, relating to the Thrifty and Bi-Mart Pharmacy Business;

4. Lists of SKUs, *i.e.*, all forms, package sizes and other units in which prescription drugs are sold and which are used in records of sales and inventories;

5. Lists of all customers, including but not limited to third party insurers, including all files of names, addresses, and telephone numbers of the individual customer contacts, and the unit and dollar amounts of sales, by product, to each customer;

6. All names of prescription drug manufacturers and distributors under contract with Thrifty;

7. All price lists for prescription drugs, operating manuals, and advertising and promotional materials, at the acquirer's option, but only if the divestiture is to an acquirer that does not already operate a pharmacy in any location; and

8. Goodwill, tangible and intangible, utilized in the sale of prescription drugs.

L. "*Assets To Be Divested*" means either the PayLess Pharmacy Assets or the Thrifty and Bi-Mart Pharmacy Assets located in the following cities or towns:

1. Bishop, California;
2. Fort Bragg/Mendocino, California;
3. Mt. Shasta, California;
4. Taft, California;
5. Florence, Oregon; and
6. Ellensburg, Washington.

II.

It is further ordered, That:

A. Respondents shall divest, absolutely and in good faith, within one (1) year of the date this order becomes final, the Assets To Be Divested.

B. Divestiture of the Assets To Be Divested by respondents shall be made only to an acquirer or acquirers that receive the prior approval of the Commission and only in a manner that receives the prior approval of the Commission. The purpose of the divestiture of the Assets To Be Divested is to ensure the continuation of the Assets To Be Divested as ongoing viable pharmacies engaged in the same businesses in which the Assets To Be Divested are presently employed and to remedy the lessening of competition resulting from the acquisition as alleged in the Commission's complaint.

C. Pending final divestiture of the Assets To Be Divested, respondents shall take such action as is necessary to maintain the viability and marketability of the Assets To Be Divested and shall not cause or permit the destruction, removal, wasting, deterioration, or impairment of any Assets To Be Divested except in the ordinary course of business and except for ordinary wear and tear.

D. If a divestiture includes a lease of physical space, and if pursuant to that lease a respondent through default of the lease or otherwise regains possession of the space, respondents must notify the Commission of such repossession within thirty (30) days and must redinvest such assets or interest pursuant to paragraph II of this order within six (6) months of such repossession.

III.

It is further ordered, That:

A. If respondents have not divested, absolutely and in good faith and with the Commission's prior approval, the Assets To Be Divested within one (1) year of the date this order becomes final, respondents shall consent to the appointment by the Commission of a trustee to divest the Assets To Be Divested. Provided, however, that if the Commission has not approved or disapproved a proposed divestiture within 120 days of the date the application for such divestiture has been put on the public record, the running of the divestiture period shall be tolled until the Commission approves or disapproves the divestiture. In the event the Commission or the Attorney General brings an action pursuant to Section 5(l) of the Federal Trade Commission Act, 15 U.S.C. 45(l), or any other statute enforced by the Commission, respondents shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it for any failure by respondents to comply with this order.

B. If a trustee is appointed by the Commission or a court pursuant to paragraph III.A. of this order, respondents shall consent to the following terms and conditions regarding the trustee's powers, duties, authorities, and responsibilities:

1. The Commission shall select the trustee, subject to the consent of respondents, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures. If respondents have not opposed, in writing, the selection of any proposed trustee within ten (10) days after notice by the staff of the Commission to respondents of the

identity of any proposed trustee, respondents shall be deemed to have consented to the selection of the proposed trustee.

2. The trustee shall, subject to the prior approval of the Commission, have the exclusive power and authority to divest the Assets To Be Divested.

3. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in paragraph III.B.8. of this order to accomplish the divestiture. If, however, at the end of the twelve-month period the trustee has submitted a plan of divestiture or believes that divestiture can be accomplished within a reasonable time, the twelve-month divestiture period may be extended by the Commission, or in the case of a court appointed trustee by the court; provided, however, the Commission may extend the twelve (12) month divestiture period only two (2) times.

4. The trustee shall have full and complete access to the personnel, books, records, and facilities related to the Assets To Be Divested, or to any other relevant information, as the trustee may reasonably request. Respondents shall develop such financial or other information as such trustee may reasonably request and shall cooperate with the trustee. Respondents shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays in divestiture caused by respondents shall extend the time for divestiture under paragraph III.B.3. in an amount equal to the delay, as determined by the Commission or for a court-appointed trustee, by the court.

5. Subject to respondents' absolute and unconditional obligation to divest at no minimum price and the purpose of the divestiture as stated in paragraph II.B., the trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission. The divestiture shall be made in the manner set out in paragraph II of this order. Provided, however, if the trustee receives bona fide offers from more than one acquirer, and if the Commission determines to approve more than one such acquirer, the trustee shall divest to the acquirer selected by respondents from among those approved by the Commission.

6. The trustee shall serve, without bond or other security, at the cost and expense of respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have authority to employ, at the cost and expense of respondents, such consultants, accountants, attorneys, investment

bankers, business brokers, appraisers, and other representatives and assistants as are reasonably necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of respondents and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's divesting the Assets To Be Divested.

7. Respondents shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the trustee's duties including all reasonable fees of counsel and other expenses incurred in connection with the preparations for, or defense of any claim whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.

8. Within ten (10) days after appointment of the trustee, and subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, respondents shall execute a trust agreement that transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestiture required by this order.

9. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in paragraph III.A. of this order.

10. The Commission or, in the case of a court-appointed trustee, the court, may on its own initiative or at the request of the trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this order.

11. The trustee shall have no obligation or authority to operate or maintain the Assets To Be Divested.

12. The trustee shall report in writing to respondents and to the Commission every sixty (60) days concerning the trustee's efforts to accomplish divestiture.

IV.

It is further ordered, That, within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until respondents have fully complied with the provisions of paragraphs II. and III. of this order, respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with those provisions. Respondents shall include in their compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with paragraph II. and III. of the order, including a description of all substantive contacts or negotiations for the divestiture and the identity of all parties contacted. Respondents also shall include in their compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning divestiture.

V.

It is further ordered, That, for a ten (10) year period commencing on the date this order becomes final, respondents shall not, without the prior approval of the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise: (A) Acquire any stock, share capital, equity, leasehold or other interest in any concern, corporate or non-corporate, engaged in the business of selling prescription drugs at retail stores located in any of the cities or towns listed in paragraph I.L. of this order or previously engaged in the business of selling prescription drugs at retail stores located in any of the cities or towns listed in paragraph I.L. of this order within the six-month period prior to such acquisition; or (B) Acquire any assets used for, or previously used for (and still suitable for use for), the business of selling prescription drugs at retail stores located in any of the cities or towns listed in paragraph I.L. of this order. Provided, however, that these prohibitions shall not relate to the construction of new facilities or the acquisition or lease of facilities that have not operated as pharmacies within six months of the date of the offer to acquire or lease. Provided further, that the requirement of prior Commission approval set out in this paragraph shall not apply to a respondent contemplating an acquisition otherwise subject to prior Commission

approval if, at the time of such acquisition, that respondent does not own, directly or indirectly, any interest in the whole or any part of the stock or share capital of, any company that is engaged in the business of selling prescription drugs at retail stores located in any of the cities or towns listed in paragraph I.L. of this order or any asset used or previously used within the previous six-months in (and still suitable for use in) the business of selling prescription drugs at retail stores located in any of the cities or towns listed in paragraph I.L. of this order. Provided, however, that for any such acquisition exempted from the requirements of this paragraph, each acquiring respondent shall provide written notice to the Commission of such acquisition at least ten (10) days prior to such acquisition. Notwithstanding the foregoing, respondent GEI may acquire, for investment purposes only, an interest of not more than five (5) percent of the stock or share capital of any concern. One year from the date this order becomes final, annually thereafter for the next nine (9) years on the anniversary of the date this order became final, and at such other times as the Commission may require, respondents shall file with the Commission a verified written report setting forth in detail the manner and form in which they have complied and are complying with paragraph V. of this order.

VI.

It is further ordered, That, for the purpose of determining or securing compliance with this order, and subject to any legally recognized privilege, upon written request and on reasonable notice to respondents, respondents shall permit any duly authorized representatives 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 respondents relating to any matters contained in this consent order; and

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

VII.

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

Commissioner Owen dissenting.

STATEMENT OF COMMISSIONER DEBORAH K. OWEN

I find reason to believe that the proposed acquisition of certain assets of Kmart Corporation by TCH Corporation and Green Equity Investors, L.P. may violate Section 5 of the FTC Act by substantially lessening competition with respect to acute care prescription drugs sold to cash customers in three California markets: Bishop, Mt. Shasta, and Fort Bragg/Mendocino.¹ In the absence of further investigation, I cannot find reason to believe that the Act has been violated with respect to the remaining geographic markets alleged in the Commission's complaint.² I therefore dissent with respect to those allegations, and with respect to any provisions in the order that are unnecessary to remedy the alleged anticompetitive effects in the product and geographic markets that I have supported.

¹ I define acute care prescription drugs as those drugs which are prescribed to fill an immediate need and are rarely refilled, such as antibiotics. Maintenance drugs, by contrast, are those prescribed on an on-going basis and are regularly refilled, such as blood pressure medicine. The latter are more susceptible to competition from mail-order firms. I define cash customers to mean persons whose prescription drug purchases are not covered by managed care or other third-party payors. Such customers are less able to resist a price increase.

² The rationale underlying my unwillingness to support a complaint and consent agreement where, due to insufficient investigation, the record does not establish reason to believe that the law has been violated, is detailed in my dissenting statement in the matter of QVC Network, Inc./Paramount Communications, Inc. (File No. 941- 0008).

IN THE MATTER OF

DOMINICAN SANTA CRUZ HOSPITAL, ET AL.

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

Docket C-3521. Complaint, Aug. 18, 1994--Decision, Aug. 18, 1994

This consent order prohibits, among other things, the California non-profit corporations from acquiring, for ten years, without prior Commission approval, all or any significant part of a general acute care hospital in Santa Cruz County, CA. The consent order also prohibits, for ten years, the respondents from selling or transferring any hospital in the county to a non-respondent prior to the acquirer agreeing to be bound by the Commission's order.

Appearances

For the Commission: *Jeffrey A. Klurfeld, David M. Newman and John P. Wiegand.*

For the respondents: *Toby Singer and Philip Proger, Jones, Day, Reavis & Pogue, Washington, D.C.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Catholic Healthcare West and Dominican Santa Cruz Hospital have acquired AMI-Community Hospital in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C.18, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, pursuant to the provisions of Section 11 of the Clayton Act, as amended, 15 U.S.C. 21, stating its charges as follows:

I. DEFINITIONS

1. For the purposes of this complaint, the following definitions shall apply:

(a) "*General acute care hospital*," herein referred to as "*hospital*," means a health facility, other than a federally owned facility, having a duly organized governing body with overall

administrative and professional responsibility, and an organized medical staff, that provides or is licensed to provide 24-hour inpatient care, as well as outpatient services, and having as a function the provision of inpatient services for medical diagnosis, treatment, and care of physically injured or sick persons with short-term or episodic health problems or infirmities; “hospital” does not include any skilled nursing facility, mental health or psychiatric facility, rehabilitation facility, chemical dependency facility or other chronic care facility.

(b) To “*operate a hospital*” means to own, lease, manage, or otherwise control or direct the operations of a hospital, directly or indirectly.

II. THE RESPONDENTS

2. Respondent Catholic Healthcare West (“CHW”) is a non-profit religious corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business and mailing address at 1700 Montgomery Street, Suite 300, San Francisco, California. CHW is a person subject to the jurisdiction of the Commission pursuant to Section 11 of the Clayton Act, as amended, 15 U.S.C. 21.

3. CHW is primarily engaged in the establishment, management, and maintenance of acute care hospitals in the western United States. It and its affiliated corporations own and operate hospitals in California, Nevada, and Arizona.

4. Respondent Dominican Santa Cruz Hospital (“Dominican”) is a non-profit religious corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office, principal place of business and mailing address at 1555 Soquel Drive, Santa Cruz, California. Dominican operates a hospital facility also called Dominican Santa Cruz Hospital (“DSCH”). Dominican is a person subject to the jurisdiction of the Commission pursuant to Section 11 of the Clayton Act, as amended, 15 U.S.C. 21.

5. CHW is the sole corporate member of Dominican. Through this affiliation, CHW controls Dominican.

6. At all times relevant herein, respondents have been and are now engaging in or affecting commerce within the meaning of Section 1 of the Clayton Act, as amended, 15 U.S.C. 12. CHW does

business in a number of states. CHW and Dominican, through their hospitals, among other things, have:

- (a) Purchased substantial amounts of supplies, equipment and medicines from sources outside of the State of California;
- (b) Received substantial revenues from private and governmental insurers located outside of the State of California; and
- (c) Treated some patients who travel from or reside outside of the State of California.

7. Until the acquisition described in Section III below, respondents owned or operated one general acute care hospital, DSCH, in Santa Cruz County, California.

III. THE ACQUISITION

8. AMI-Community is a wholly-owned subsidiary of American Medical International (“AMI”), a corporation organized and existing under and by virtue of the laws of the State of Delaware, with its executive offices in Beverly Hills, California. The sole shareholder of AMI-Community is AMI. Until the acquisition described below, AMI-Community owned and operated a general acute care hospital in Santa Cruz County, California, the AMI-Community Hospital of Santa Cruz (hereinafter “Community Hospital”). At the time of the acquisition, AMI owned and operated over 49 acute care hospitals in 14 states, including Community Hospital.

9. At all times relevant herein, AMI and AMI-Community have been engaging in or affecting commerce within the meaning of Section 1 of the Clayton Act, as amended, 15 U.S.C. 12. AMI does business in a number of states. AMI and AMI-Community, through their hospitals, among other things, have:

- (a) Purchased substantial amounts of supplies, equipment and medicines from sources outside of the State of California;
- (b) Received substantial revenues from private and governmental insurers located outside of the State of California; and
- (c) Treated some patients who travel from or reside outside of the State of California.

10. On or about March 8, 1990, Dominican entered into an agreement with AMI for Dominican to purchase substantially all of the assets of AMI-Community, including Community Hospital and associated real property, inventories, tangible personal property, and all transferable licenses. In consideration thereof, the agreement provided that Dominican would pay AMI approximately \$11.25 million.

11. On or about March 8, 1990, Dominican and CHW, through its control of, and affiliation with, Dominican, acquired Community Hospital pursuant to the agreement described in paragraph ten, above.

IV. TRADE AND COMMERCE

12. For purposes of this complaint, the relevant line of commerce is general acute care hospital services.

13. For purposes of this complaint, the relevant sections of the country are Santa Cruz County, California, and/or portions of Santa Cruz County.

14. Prior to the acquisition described above, the relevant markets were highly concentrated, with no more than three firms doing business in the markets. The only hospital in Santa Cruz County, other than DSCH and Community Hospital, was Watsonville Community Hospital in Watsonville, California. In 1989, DSCH had a market share, measured by patient-days, of 62% or more, and, measured by available beds, of 50% or more; Community Hospital had a market share, measured by patient-days, of 14% or more, and measured by available beds, of 23% or more.

15. Entry into the relevant markets is difficult, due to the following factors, among others:

- (a) Substantial lead times required to establish a new hospital, including but not limited to lead times for obtaining regulatory clearance for construction of hospital facilities; and
- (b) Sunk costs that are large relative to the total cost for *de novo* entry.

V. THE EFFECTS OF THE ACQUISITION

16. The acquisition of Community Hospital by CHW and Dominican increased the market share of CHW and Dominican, the

largest provider of acute care hospital services in the Santa Cruz County area, from approximately 62% to approximately 76%, measured by patient-days, and from approximately 50% to approximately 73% measured by available beds, and increased the two-firm concentration ratio from approximately 86%, measured by patient-days, and 77%, measured by available beds, to approximately 100%. As a result of the acquisition, the Herfindahl-Hirschmann Index increased by over 1700 points, from approximately 4620 points to approximately 6350 points, measured by patient-days, and increased by over 2300 points, from approximately 3770 points to approximately 6090, measured by available beds.

17. Through their acquisition of Community Hospital, CHW and Dominican acquired a direct and actual competitor in the relevant markets.

18. The effect of the acquisition of Community Hospital by CHW and Dominican may be substantially to lessen competition or tend to create a monopoly in the relevant markets in the following ways, among others:

- (a) Actual and potential competition in the relevant markets has been substantially reduced;
- (b) CHW and Dominican have obtained a dominant position in the relevant markets;
- (c) The likelihood of collusion in the relevant markets has been substantially increased; and
- (d) Patients, physicians, and purchasers of health care coverage may be denied the benefits of free and open competition based on price, quality, and service.

VI. VIOLATION CHARGED

19. The acquisition of Community Hospital and other assets from AMI-Community by CHW and Dominican violates Section 7 of the Clayton Act, as amended, 15 U.S.C. 18.

Commissioner Azcuenaga and Commissioner Yao dissenting.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation into the acquisition of substantially all of the assets of AMI-Community Hospital of Santa Cruz by Dominican Santa Cruz Hospital ("Dominican") and Catholic Healthcare West ("CHW") (hereinafter collectively known as "respondents"), and the respondents having been furnished with a copy of a draft of complaint which the San Francisco Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Clayton Act; and

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

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

1. Respondent Dominican is a non-profit corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office, principal place of business and mailing address at 1555 Soquel Avenue, Santa Cruz, California.

Respondent CHW is a non-profit corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office, principal place of business and mailing address at 1700 Montgomery Street, San Francisco, California.

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

ORDER

I.

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

A. “*Dominican*” means Dominican Santa Cruz Hospital (a California corporation), its directors, trustees, officers, agents, employees, and representatives, and its subsidiaries, divisions, affiliates, successors and assigns.

B. “*CHW*” means Catholic Healthcare West (a California corporation), its directors, trustees, officers, agents, employees, and representatives, and its subsidiaries, divisions, affiliates, successors and assigns.

C. “*General acute care hospital,*” herein referred to as “*hospital,*” means a health facility, other than a federally owned facility, having a duly organized governing body with overall administrative and professional responsibility, and an organized medical staff, that provides or is licensed to provide 24-hour inpatient care, as well as outpatient services, and having as a function the provision of inpatient services for medical diagnosis, treatment, and care of physically injured or sick persons with short-term or episodic health problems or infirmities; “*hospital*” does not include any skilled nursing facility, mental health or psychiatric facility, rehabilitation facility, chemical dependency facility or other chronic care facility.

D. To “*acquire a hospital*” means to directly or indirectly acquire the whole or any part of the stock, share capital, equity or other interest in or any assets of any hospital, or enter into any arrangement to obtain direct or indirect ownership, management or control of any hospital or any part thereof, including but not limited to the lease of or management contract for a hospital, or the acquisition of the right to designate directly or indirectly the directors or trustees of a hospital. To “*acquire a hospital*” excludes entering into any arrangement to construct a new hospital if a construction permit for such hospital has not been issued by the California Office

of Statewide Health Planning and Development at the time such an arrangement is entered into.

E. “*Affiliate*” means any entity whose management and policies are controlled or directed in any way, directly or indirectly, by the entity of which it is an affiliate.

II.

It is ordered, That, for a period of ten (10) years from the date this order becomes final, neither Dominican nor CHW shall, without the prior approval of the Federal Trade Commission, acquire any hospital in Santa Cruz County, California; and

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, neither Dominican nor CHW shall permit all or any substantial part of any hospital owned or operated by either Dominican or CHW in Santa Cruz County, California, to be acquired by any other person unless the acquiring person files with the Federal Trade Commission, a written agreement to be bound by the provisions of this order, which agreement shall be a condition precedent to the acquisition;

Provided, however, that no acquisition shall be subject to this paragraph II of this order if the fair market value of (or, in the case of a purchase acquisition, the consideration to be paid for) the hospital or part thereof to be acquired does not exceed two million dollars (\$2,000,000).

III.

It is further ordered, That respondents, Dominican and CHW, upon written request of the staff of the Federal Trade Commission, made to Dominican or CHW, for the purpose of determining or securing compliance with this order, and subject to any legally recognized privilege, shall permit duly authorized representatives of the Commission:

A. Reasonable access during Dominican’s or CHW’s office hours, in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda, reports, and other records and documents in Dominican’s or CHW’s possession or control that relate to any matter contained in this order; and

B. An opportunity, subject to Dominican's and CHW's reasonable convenience, to interview officers or employees of Dominican or CHW, who may have counsel present, regarding such matters; and

It is further ordered, That annually beginning on the first anniversary of the date this order becomes final and continuing for nine (9) years thereafter, Dominican shall submit a verified report demonstrating the manner in which it has complied and is complying with this order.

IV.

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

STATEMENT OF CHAIRMAN JANET D. STEIGER
IN SUPPORT OF FINAL ISSUANCE OF CONSENT ORDER

Respondent Dominican Santa Cruz Hospital acquired the assets of its principal competitor, AMI-Community Hospital, in March, 1990, in what I have reason to believe was a violation of Section 7 of the Clayton Act. The Commission has voted to resolve this matter by issuing a consent order that requires Dominican and its parent, Catholic Healthcare West, to seek prior approval of any further hospital acquisitions in the Santa Cruz County, California, market.

The facts of this case provide sufficient reason to believe that this acquisition violates Section 7 of the Clayton Act. Ordinarily, such facts would lead the Commission to seek a preliminary injunction in federal district court. However, the acquisition was not reportable under the Hart-Scott-Rodino Act, and was consummated before Commission staff was able to open an investigation to explore the competitive effects of the acquisition consequently, the Commission never had the opportunity to consider seeking a preliminary injunction under Section 13(b) of the FTC Act to prevent the acquisition from being consummated.

Under these circumstances, the Commission is left with less effective or more costly remedial options.¹ Divestiture of the acquired hospital is not an appealing remedy. The acquired hospital has been converted to a skilled nursing/rehabilitative care facility -- it no longer operates as a hospital -- and the costs of conversion back to a hospital would, even under the best of circumstances, be substantial, with no guarantee of success. In addition, subsequent to the acquisition, Sutter Health, a major Northern California hospital chain, announced plans to construct an acute care hospital in Santa Cruz, which would restore a third hospital competitor in the market.² The very real prospect that Sutter will enter this market, before a divestiture decree could be obtained through litigation and a willing buyer found, is an additional factor weighing against pursuit of a divestiture order.³ Thus, although divestiture may be an appropriate remedy in many cases where the Commission is unable to obtain a pre-consummation injunction, the facts of this case suggest that the Commission's resources would not be well spent on pursuing divestiture here.

Respondents have agreed to accept an order that requires them to seek prior approval of hospital acquisitions in the Santa Cruz County market. The order includes within the definition of "hospital" any facility for which the State of California's Office of Statewide Healthcare Planning and Development has issued a building permit, even if the hospital has not been completed. Thus, it will prevent respondents from acquiring Sutter's interest in its proposed site once Sutter has obtained permission from the State of California to begin construction.

As a practical matter, this very unusual case presents the Commission with three choices: to close a case in which there is

¹ These, of course, are the circumstances that Congress sought to obviate through the Hart-Scott-Rodino Act.

² Sutter's planned 30-bed hospital, while smaller than AMI-Community, is expected to be a state-of-the-art facility that may pose a competitive check on a unilateral exercise of market power by Dominican or on the possibility of coordination between Dominican and Watsonville Community Hospital, which currently is Dominican's only competitor in the relevant market.

³ While Sutter's plans are not so far advanced that its entry is inevitable, several factors suggest that Sutter is likely to enter. First, it has committed substantial funds by acquiring a site for its proposed hospital. Second, Sutter has obtained all necessary land use and zoning approvals from the City and County of Santa Cruz. Third, Sutter's experience as a hospital company in Northern California enhances the likelihood that it will be able to enter the market successfully.

reason to believe that the law has been violated; to issue an administrative complaint under Part III of the Commission's Rules; or to issue the negotiated consent order. The first choice, ignoring an apparent violation of law, clearly is unacceptable. The second choice, issuing a complaint, does not appear to be in the public interest under the specific circumstances of this case. Because divestiture is problematic here, it is entirely possible that the Commission would obtain nothing more than the relief contained in this consent order after expending scarce enforcement resources in protracted litigation. The third choice, issuing the consent order, makes the clear statement that the Commission will not ignore what it has reason to believe are violations of law, and imposes a reasonable remedy given the specific circumstances presented.

DISSENTING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

I have reason to believe that Dominican Santa Cruz Hospital's acquisition of AMI-Community Hospital was anticompetitive, and I would have supported an action under Section 7 of the Clayton Act to enjoin the transaction before it was consummated in March 1990. In light of the competitive situation in this market, I share Commissioner Yao's concern that the consent order does not provide an adequate remedy, and on that ground I dissent.

DISSENTING STATEMENT OF COMMISSIONER DENNIS A. YAO

I agree with the majority that Dominican Santa Cruz Hospital's acquisition of AMI-Community Hospital is likely to be anti-competitive. I do not believe that this anticompetitive problem can be solved with the relief the Commission is today giving final approval to, and I have reason to believe that issuance of an administrative complaint would be appropriate in this matter. Because I believe that something more than a requirement that Dominican obtain prior approval of future acquisitions is needed here, I dissent from the Commission's decision.

This merger, consummated in March 1990, combines two major acute care hospitals in Santa Cruz County, California, and leaves Dominican as the dominant hospital, with more than 70% of a clearly defined geographic market (bounded by mountains and ocean). Only one competitor remains in the market, Watsonville Hospital, located

in a more rural area approximately 14 miles south of Santa Cruz. There is considerable evidence that suggests that this merger may be anticompetitive. Dominican has argued for efficiencies from converting Community into a skilled nursing/rehabilitative care facility. However, neither hospital's physical plant was so small as to raise concerns that either was operating pre-merger below minimum efficient scale and, in my view, the asserted efficiencies are clearly insufficient to offset the likely anticompetitive effects.

Other activities detailed in comments received since the Commission's acceptance of the proposed consent raise concerns of possible collusion. Santa Cruz Medical Clinic's comment presents evidence which it suggests shows that Dominican and Watsonville may have colluded with respect to the provision of home health services through a joint venture-like relationship.

An argument supporting possible restoration of competition in Santa Cruz County is based on the publicly announced plans of Sutter Health Systems to open a 30-bed hospital specializing in baby deliveries and non-acute surgeries by 1995. However, the limited scope of procedures that Sutter plans to perform at the center may make its presence in the market, should it ever actually enter,¹ insufficient to defeat a collusive price increase by Dominican and Watsonville in acute care services.

Admittedly complicating the possibility of obtaining greater relief here is that Dominican, shortly after the merger, converted Community into a skilled nursing/rehabilitative care facility. That conversion is now largely complete and presents the Commission with a problem. At the time the proposed consent was accepted for public comment, I had suggested that a stronger consent order, short of a full divestiture order, could be crafted that might reduce the prospects that the merger will be anticompetitive. For example, I suggested that prior approval or prior notification requirements could be placed on potentially anticompetitive joint ventures.² Also, restrictions could be placed on conduct by Dominican that might make entry of Sutter more difficult (*e.g.*, if Dominican sought to bar doctors at its hospitals from attending patients at Sutter), without

¹ Although Sutter has apparently finally obtained all local permits, Sutter has not cleared all necessary regulatory hurdles in order to commence construction.

² In *University Health, Inc.*, Docket No. 9246 (Sept. 9, 1992) (final consent order), the Commission required that the respondent give the Commission prior notification of certain joint ventures.

impinging on activity that would be protected under the Noerr-Pennington immunity doctrine. Unfortunately, a majority of the Commission is not prepared at this time to seek to obtain stronger relief.

In sum, because I believe that something more than a prior approval requirement for future acquisitions is needed here, I respectfully dissent.

IN THE MATTER OF

AMERICAN INSTITUTE OF HABIT CONTROL, INC., ET AL.

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

Docket C-3522. Complaint, Aug. 23, 1994--Decision, Aug. 23, 1994

This consent order prohibits, among other things, a Florida-based company and its president from making any representation about the relative or absolute performance or efficacy of any smoking cessation or weight loss program, unless they possess and rely upon competent and reliable scientific evidence to substantiate the representation, and from representing that the Surgeon General's 1989 report states that the hypnosis method used by the respondents is one of the most effective ways to stop smoking.

Appearances

For the Commission: *Matthew Daynard.*

For the respondents: *David A. Clanton, Baker & McKenzie,*
Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that American Institute of Habit Control, Inc., a corporation, and Steven Present, individually and as an officer of said corporation ("respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent American Institute of Habit Control, Inc., is a Florida corporation, with its principal office or place of business at 9655 South Dixie Highway, Miami, Florida.

Respondent Steven Present is the sole officer, director and shareholder of the corporate respondent. Individually or in concert with others, he formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices alleged in this complaint. His principal office or place of business is the same as that of the corporate respondent.

PAR. 2. Respondents have advertised, offered for sale, and sold The Present Seminar for smoking cessation and weight loss, and other stop-smoking and weight-loss seminars to consumers. The Present Seminar is a single, group hypnosis session, two-and-one-half hours in length, provided to consumers by respondent Steven Present at various hotel locales in various cities.

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.

PAR. 4. Respondents have disseminated or have caused to be disseminated advertisements for The Present Seminar for smoking cessation, including but not necessarily limited to the attached Exhibits A-C. These advertisements contain the following statements:

A. "STOP SMOKING IN 2-1/2 HOURS! . . . 97% proven success rate. ATTEND STEVEN PRESENT'S GROUP HYPNOSIS SEMINAR AND STOP SMOKING-QUICKLY, EASILY AND PERMANENTLY! At last, a major breakthrough now makes it much easier to stop smoking. Steven Present's stop smoking methods, perfected over the past 10 years, were TOP RATED IN THE 1989 U.S. SURGEON GENERAL'S SMOKING REPORT . . . YOU WILL BECOME A NON-SMOKER IN JUST ONE NIGHT! . . . Is it hard to believe that after years of smoking, after trying to quit so many times before, that the answer is just a few days away? . . . Even smokers with 30, 40, and 50 year habits will crush their cigarettes and throw them away - FOR GOOD! 97% of those who attend, that's right, 97% WILL COMPLETELY STOP SMOKING BEFORE THE SEMINAR'S OVER! NOW YOU TOO WILL BREAK FREE FROM CIGARETTES! . . . LOSE WEIGHT FREE! . . . With Steven Present's hypnosis, you can lose weight without dieting, by eliminating your desire for fattening foods and sweets. After just one session of Steven Present's hypnosis, you can eat less and still feel full! That's how you can lose weight and finally keep it off!" (Exhibit A).

B. "THE PRESENT SEMINAR - FIRST IN RESULTS! STOP SMOKING IN 2-1/2 HOURS-GUARANTEED! . . . DON'T MISS THIS CHANCE TO STOP SMOKING FOREVER. ATTEND STEVEN PRESENT'S GROUP HYPNOSIS SEMINAR. Steven Present, M.S., Dir., is nationally known for his success in changing hard core smokers into ex-smokers. After his seminar, 97% of his clients lose their desire to smoke, throw away their cigarettes, and stop smoking. Now you can too. . . During Steven Present's Seminar, his proven system will completely break the control that nicotine and cigarettes have over you. If you are like the thousands throughout the country who attend his seminar, you too will stop smoking without withdrawal, stress, or weight gain. In JUST ONE NIGHT! If this sounds too good to be true, here's the proof. The 1989 U.S. SURGEON GENERAL'S SMOKING REPORT STATED THAT GROUP HYPNOSIS IS ONE OF THE MOST EFFECTIVE WAYS TO STOP SMOKING." (Exhibit B)

C. "STOP SMOKING IN 2-1/2 HOURS! 97% PROVEN SUCCESS RATE! Even if you've tried other methods. . . no matter how long you've been smoking or

how many packs a day you smoke. . .with Steven Present's unique method of hypnosis, you will stop smoking. . .in just 2-1/2 hours-Guaranteed. Without withdrawal, anxiety, or weight gain. . .YOU WON'T CRAVE CIGARETTES. . .Steven Present's method is different from other systems because it doesn't depend on willpower. Instead, it uses the power of hypnosis to eliminate your craving for cigarettes in every situation. . .45 specific hypnotic suggestions eliminate your craving for cigarettes at all times, including: Driving your car. . .after a meal. . .drinking coffee. . .talking on the phone. . .while having a drink. . .waking up in the morning, and when around others who are smoking. It happens automatically, effortlessly . . .97% of those who attend will throw away their cigarettes and completely stop smoking before the seminar is over. . .LOSE WEIGHT - FREE. . .With Steven Present's hypnosis, you can lose weight without dieting, by eliminating your desire for fattening foods and sweets. After just one session of Steven Present's hypnosis, you can eat less and still feel full! That's how you can lose weight and finally keep it off!" (Exhibit C)

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

A. Ninety-seven percent of the participants in respondents' smoking cessation seminars permanently abstain from smoking after attending those seminars.

B. The U.S. Surgeon General, in the 1989 U.S. Surgeon General's Report on Smoking, Reducing the Health Consequences of Smoking: 25 Years of Progress, states that the group hypnosis method used by respondents is one of the most effective ways to stop smoking.

PAR. 6. In truth and in fact:

A. Ninety-seven percent of the participants who attend respondents' smoking cessation seminars do not permanently abstain from smoking after those seminars.

B. The U.S. Surgeon General, in the 1989 U.S. Surgeon General's Report on Smoking, Reducing the Health Consequences of Smoking: 25 Years of Progress, does not state that the group hypnosis method used by respondents is one of the most effective ways to stop smoking.

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

PAR. 7. Through the use of the statements in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits A-C, respondents have represented, directly or by implication, that:

A. Participants who attend respondents' single-session group hypnosis seminar are cured of smoking addiction and permanently abstain from smoking cigarettes.

B. Respondents' single-session, group hypnosis seminar is more efficacious for smoking cessation than other smoking cessation methods.

C. Participants who attend respondents' single-session group hypnosis seminar are cured of smoking addiction without experiencing withdrawal, stress or weight gain.

D. Participants who attend respondents' single-session group hypnosis seminar achieve and maintain weight loss.

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

PAR. 9. In truth and in fact, at the time that they made the representations set forth in paragraphs five 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. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

Commissioner Owen recused and Commissioner Yao not participating.

THE STEVEN PRESENT SEMINAR - AMERICA'S BEST - GUARANTEES YOU'LL...

STOP SMOKING



Steven Present, M.S.

IN 2 1/2 HOURS!

- ✓ NO WITHDRAWAL
- ✓ NO WEIGHT GAIN
- ✓ 97% PROVEN SUCCESS RATE
- ✓ 10-YEAR WRITTEN GUARANTEE!

MAJOR BREAKTHROUGH!
Top Rated Methods -
according to Surgeon
General's Report



ATTEND STEVEN PRESENT'S GROUP HYPNOSIS SEMINAR AND STOP SMOKING - QUICKLY, EASILY AND PERMANENTLY!

At last, a major breakthrough now makes it much easier to stop smoking. Steven Present's stop smoking methods, perfected over the past 10 years, were **TOP RATED IN THE 1989 U.S. SURGEON GENERAL'S SMOKING REPORT.** After his seminar, you won't crave cigarettes - no matter how long or how much you have smoked. Imagine, talking on the phone, or driving your car - **NEVER AGAIN HAVING THE URGE TO SMOKE!** And with Steven Present's proven system, **YOU WON'T EVEN GAIN A SINGLE POUND - GUARANTEED!**

You won't experience withdrawal, or become irritable. With Steven Present's advanced system of hypnosis, everyone in the group will be hypnotized - without any sleep. You'll feel relaxed, alert, and in complete control. **YOU WILL BECOME A**

NON-SMOKER - IN JUST ONE NIGHT!

Is it hard to believe that after years of smoking, after trying to quit so many times before, that the answer is just a few days away? Please join us and *see for yourself.* Even smokers with 30, 40, and 50 year habits will *crush* their cigarettes and throw them away - **FOR GOOD!** 97% of those who attend, that's right, **97% WILL COMPLETELY STOP SMOKING BEFORE THE SEMINAR'S OVER!** NOW, **YOU TOO WILL BREAK FREE FROM CIGARETTES!**

You'll also receive a written 10-year guarantee. If you even think about lighting up within the next 10 years, you can return to a Steven Present seminar - **FOR FREE!** And that's not all - If you'd like to lose weight, attend our weight loss seminar on the same evening, or at another time in the future - **IT'S ABSOLUTELY FREE TO YOU!**

LOSE WEIGHT - FREE!

If you would like to lose weight, or want to prevent weight gain as a non-smoker, here's how. With Steven Present's hypnosis, you can lose weight without dieting, by eliminating your desire for fattening foods and sweets. After just one session of Steven Present's hypnosis, you can eat less, and still feel full! That's how you can lose weight and finally keep it off! Steven Present's weight loss seminar is included **free** for those attending the stop smoking seminar. If you are attending only to lose weight, the fee for this guaranteed program is only \$39.99. If you bring a group of friends, each of you will get a discount. **REGISTER AT THE DOOR FROM 6:00 TO 7:00 PM!**

CUT OUT & SAVE - BRING AD FOR SPECIAL BONUS!

SOUTH MIAMI
WED., JULY 17 - 7-9:30 pm
Dadeland Marriott Hotel
3990 S. Dadeland Boulevard
(S Dixie Hwy. (US1) to Dadeland Blvd.)
turn north, to 1st traffic light, turn left
Register at the hotel door 6-7:00 p.m.

NORTH MIAMI BEACH
THURS., JULY 18 - 7-9:30 pm
Howard Johnson Hotel/Golden Glades
16500 N.W. 2nd Avenue
(I-95 or Fla. Turnpike to B26 East to Beaches)
1st traffic light, turn right
Register at the hotel door 6-7:00 p.m.

SEMINAR FEE IS ONLY \$39.99
CASH CHECKS VISA & MASTERCARD ACCEPTED

The Present Institute for Smoking Cessation 1981
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Unauthorized reproduction will result in legal action.

BRING A GROUP OF FRIENDS. EACH OF YOU WILL GET A DISCOUNT! BRING THIS AD FOR A BONUS.




THE PRESENT SEMINAR — FIRST IN RESULTS!

STOP SMOKING

**IN 2½ HOURS - GUARANTEED!
OR DOUBLE YOUR MONEY BACK.**

- NO WITHDRAWAL
- NO STRESS
- NO WEIGHT GAIN

\$29.99 COMPLETE



STEVEN PRESENT, M.S., DIR.

DON'T MISS THIS CHANCE TO STOP SMOKING FOREVER. ATTEND STEVEN PRESENT'S GROUP HYPNOSIS SEMINAR. Steven Present, M.S., Dir., is nationally known for his success in changing hard core smokers into ex-smokers. After his seminar, 97% of his clients lose their desire to smoke, throw away their cigarettes, and stop smoking. Now you can too.

During Steven Present's seminar, his proven system will completely break the control that nicotine and cigarettes have over you. If you are like the thousands throughout the country who attend his seminar, you too will stop smoking without withdrawal, stress, or weight gain. **IN JUST ONE NIGHT!**

If this sounds almost too good to be true, here's the proof. The 1989 U.S. SURGEON GENERAL'S SMOKING REPORT STATED THAT **GROUP HYPNOSIS IS ONE OF THE MOST EFFECTIVE WAYS TO STOP SMOKING.** And with Steven Present's hypnosis, you will not be asleep. You won't lose control. You will walk out feeling alert, clear and refreshed. **MOST IMPORTANT, YOU WILL WALK OUT A NON-SMOKER!**

When you attend this seminar, you will receive Steven Present's double guarantee. If you are not completely satisfied, he will refund double your money during the session, on the spot. But that's not all - You also receive a lifetime guarantee. If you ever want extra help, you can repeat the seminar - **FOR FREE!**

Stop wasting over \$500 a year on cigarettes. For about the price of 2 weeks worth of cigarettes you will be smoke free, at last! All it takes is 2½ hours. Make a decision you and your family can live with. **ATTEND THIS SEMINAR! YOU'LL BE GLAD YOU DID!**

SOUTH MIAMI
WED., JAN. 30 - 7-9:30 pm
Dadeland Marriott Hotel
9090 S. Dadeland Boulevard
Register at the hotel door 6-7:00 p.m.

NORTH MIAMI
THURS., JAN. 31 - 7-9:30 pm
Howard Johnsons/Golden Glades
16500 N.W. 2nd Avenue
Register at the hotel door 6-7:00 p.m.

SEMINAR FEE IS ONLY \$29.99
CASH CHECKS VISA & MASTERCARD ACCEPTED
**BRING AS MANY FRIENDS AS POSSIBLE.
EACH OF YOU WILL GET A DISCOUNT.
BRING THIS AD FOR A BONUS.**
The Present Seminar

WEIGHT LOSS/STRESS REDUCTION INCLUDED FREE!

CUT OUT & SAVE BRING AD FOR BONUS

STOP SMOKING



Steven Present, M.S.

IN 2 1/2 HOURS!

- ✓ NO WITHDRAWAL!
- ✓ NO WEIGHT GAIN!
- ✓ 97% PROVEN SUCCESS RATE!
- ✓ WRITTEN MONEY BACK GUARANTEE!

FOR ONLY
\$ **39**⁹⁹ Complete!

Even if you've tried other methods... no matter how long you've been smoking or how many packs a day you smoke... with Steven Present's unique method of hypnosis, you will stop smoking... in just 2 1/2 hours - Guaranteed. Without withdrawal, anxiety, or weight gain.

START THE SEMINAR AT 7:00 PM - AND STOP SMOKING BY 9:30 PM

As powerful as this statement sounds, it's absolutely true. Steven Present is the founder of the United States, developed over the past 12 years. His method has been used with over 11,500 smokers to stop smoking in just this past year alone... Now, it's your turn.

The key to his method is to put the power of hypnosis to work for you. You won't have to go through cold turkey withdrawal, or chew any bad tasting irritating nicotine gum. You won't gain any weight. You will become a non-smoker - in just one night!

YOU WON'T CRAVE CIGARETTES
Steven Present's method is different from other systems because it doesn't depend on willpower. Instead, it uses the power of hypnosis to eliminate your craving for cigarettes in every situation. It works in all the day to day situations that make you want to smoke, even when you are under stress.

45 specific hypnotic suggestions eliminate your craving for cigarettes at all times, including: Driving your car... after a meal... drinking coffee... talking on

the phone... while having a drink... waking up in the morning, and when around others who are smoking. It happens automatically, effortlessly. You will see and feel results, immediately. On your drive home, or drinking coffee after the seminar, you will notice one major change. You simply won't want to smoke. Period.

YOU WILL BE AWAKE AND AWARE AT ALL TIMES

With Steven Present's hypnosis, everyone in the group will be hypnotized, without any sleep. You'll be awake and in control at all times. After the seminar, you'll leave feeling alert and refreshed.

It is hard to believe that after years of smoking, after trying to quit so many times before, that the answer is just a few days away? Please join us and see for yourself. You won't have to take anyone's word for it. 97% of those who attend will throw away their cigarettes and completely stop smoking before the seminar is over.

YOUR SUCCESS IS GUARANTEED - IN WRITING
We are so sure that you will become a non smoker that we offer you the following written money back guarantee. If for any reason you are not completely satisfied, your entire fee will be refunded on the evening of the seminar, on the spot. No questions asked. You'll also receive a written 10 year guarantee. If you even think about lighting up within the next ten years, you may return to a Steven Present seminar - for free.

LOSE WEIGHT - FREE!

If you would like to lose weight, or want to prevent weight gain as a non smoker, here's how. With Steven Present's hypnosis, you can lose weight without dieting, by eliminating your desire for fattening foods and sweets.

After just one session of Steven Present's hypnosis, you can eat less, and still feel full! That's how you can lose weight and finally keep it off! Steven Present's weight loss seminar is included free for those attending the stop smoking

Bring this ad for your bonus worth \$20.00 - a gift from the Steven Present seminar. When you bring a group of co-workers or friends, each of you will save money. The seminar fee is only \$39.99. Remember to bring a group to qualify for your group discount.

BRING THIS AD FOR A
FREE BONUS WORTH \$20.00

MON., AUGUST 17 - 7-9:30 p.m.

Best Western Escalante Inn
5700 Pacific Highway East
1510 Pleasureland Drive, Bournemouth
10 Pacific Hwy, Bournemouth
Register at the hotel door 6-7:00 p.m.

TUES., AUGUST 18 - 7-9:30 p.m.

The Red Lion - Seattle
18740 Pacific Highway South
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EXHIBIT C

DECISION AND ORDER

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

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

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

1. Respondent American Institute of Habit Control, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the state of Florida, with its offices and principal place of business at 9655 South Dixie Highway, Miami, Florida.

Respondent Steven Present is the sole officer, director and shareholder of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent, and his principal office and place of business is the same as that of the corporate respondent.

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

ORDER

DEFINITION

For the purposes of this order, “*competent and reliable scientific evidence*” shall mean those 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.

I.

It is ordered, That respondents American Institute of Habit Control, Inc., a corporation, its successors and assigns, and its officers, and Steven Present, individually and as an officer and director of said corporation, and respondents’ agents, representatives and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, promotion, offering for sale, or sale of any smoking cessation program or weight loss program, including any such program that uses hypnosis, in or affecting commerce, as “commerce” is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Representing, directly or by implication, that the U.S. Surgeon General, in the 1989 U.S. Surgeon General’s Report on Smoking, Reducing the Health Consequences of Smoking: 25 Years of Progress, states that the group hypnosis method used by respondents is one of the most effective ways to stop smoking.

B. Representing, directly or by implication, that ninety-seven percent of the participants who attend respondents’ stop smoking seminars permanently abstain from smoking after those seminars, unless such is the case.

C. Making any representation, directly or by implication, about the relative or absolute performance or efficacy of any smoking

cessation program or weight loss program, unless, at the time of making any such representation, respondents possess and rely upon competent and reliable scientific evidence substantiating the representation.

D. Misrepresenting, directly or by implication, the existence, contents, validity, results, conclusions, or interpretations of any test, study, survey or report.

E. Misrepresenting, directly or by implication, the performance or efficacy of any smoking cessation program or weight loss program.

II.

It is further ordered, That for three (3) years after the last date of dissemination of any representation covered by this order, respondents, or their successors and assigns, shall maintain and upon request make available to the Federal Trade Commission for inspection and copying:

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

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

III.

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

IV.

It is further ordered, That the individual respondent named herein shall promptly notify the Commission of the discontinuance of his

present business or of his affiliation with the corporate respondent. In addition, for a period of three (3) years from the date of service of this order, the respondent shall promptly notify the Commission of each affiliation with a new business or employment that involves a smoking cessation program or a weight loss program. Each such notice shall include the respondent's new business address and a statement of the nature of the business or employment in which the respondent is newly engaged as well as a description of the respondent's duties and responsibilities in connection with the business or employment. The expiration of the notice provision of this paragraph shall not affect any other obligation arising under this order.

V.

It is further ordered, That respondents shall distribute a copy of this order to each of their officers, agents, representatives, independent contractors and employees who are involved in the preparation and placement of advertisements or promotional materials; and, for a period of three (3) years from the date of entry of this order, distribute same to all future such officers, agents, representatives, independent contractors and employees.

VI.

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

Commissioner Owen recused and Commissioner Yao not participating.

IN THE MATTER OF

KIWI BRANDS INC., ET AL.

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

Docket C-3523. Complaint, Aug. 24, 1994--Decision, Aug. 24, 1994

This consent order requires, among other things, Kiwi Brands Inc., a subsidiary of Sara Lee Corporation, to divest its Esquire and Griffin brands of shoe care products and related assets: to Hickory Industries, within one month of the date the order becomes final; or to a Commission approved acquirer, within twelve months of the date the order becomes final. If the sale is not accomplished within the specified time, the Commission would be entitled to appoint a trustee to sell the assets to a Commission approved acquirer in a manner approved by the Commission. In addition, for a period of ten years, the respondents are required to obtain prior Commission approval before acquiring any stocks or assets of any entity engaged in chemical shoe care products.

Appearances

For the Commission: *Howard Morse* and *Naomi Licker*.

For the respondents: *Louis Keilor* and *Gary Senner*, *Sonnenschein, Math & Rosenthal*, Chicago, IL.

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that respondent, Kiwi Brands Inc., a subsidiary of respondent Sara Lee Corporation, and Sara Lee Corporation have acquired assets of Knomark, Inc., a wholly-owned subsidiary of Papercraft Corporation, and assets of Reckitt & Colman plc in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

ALLEGATIONS OF FACT

I. THE RESPONDENTS

1. Respondent Kiwi Brands Inc., a subsidiary of Sara Lee Corporation, is a Delaware corporation with its office and principal place of business at 447 Old Swede Road, Douglassville, Pennsylvania,

2. Respondent Sara Lee Corporation is a Maryland corporation with its office and principal place of business at 3 First National Plaza, Chicago, Illinois.

3. Respondent Sara Lee Corporation, through respondent Kiwi Brands Inc., manufactures, distributes, and sells chemical shoe care products through grocery stores, drug stores, and mass merchandisers.

4. Respondents Sara Lee Corporation and Kiwi Brands Inc. (hereinafter collectively "Sara Lee") at all times relevant herein have been and are now engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and each is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

II. THE ACQUISITIONS

5. On or about November 27, 1987, Sara Lee entered into agreements with Knomark, Inc. ("Knomark"), a wholly-owned subsidiary of Papercraft Corporation, and Papercraft Corporation, pursuant to which Sara Lee agreed to acquire and did acquire certain assets of Knomark (hereinafter referred to as the "Knomark acquisition"). As a result of the Knomark acquisition, Sara Lee acquired the "Esquire" brand of chemical shoe care products.

6. On or about October 4, 1991, Sara Lee entered into an agreement with Reckitt & Colman plc ("Reckitt & Colman"), pursuant to which Sara Lee agreed to acquire and did acquire certain assets of Reckitt & Colman (hereinafter referred to as the "Reckitt & Colman acquisition"). As a result of the Reckitt & Colman acquisition, Sara Lee acquired the "Griffin" brand of chemical shoe care products.

7. Sara Lee did not report either the Knomark acquisition or the Reckitt & Colman acquisition to the Federal Trade Commission or

the Department of Justice pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. 18a.

III. THE RELEVANT MARKET

8. The relevant line of commerce in which to analyze the effects of the Knomark acquisition and of the Reckitt & Colman acquisition is the sale of chemical shoe care products used in the maintenance, cleaning, and protection of shoes, including but not limited to aerosol, liquid, wax, and cream products, through grocery stores, drug stores, and mass merchandisers, sometimes referred to as the mass market channel. The relevant line of commerce does not include sales of chemical shoe care products through shoe repair shops, independent and chain retailers, sporting goods retailers, and department stores, sometimes referred to as the specialty channel.

9. The relevant section of the country or geographic area in which to analyze the effects of the Knomark acquisition and of the Reckitt & Colman acquisition is the United States.

IV. MARKET STRUCTURE

10. Prior to the Knomark acquisition, Sara Lee produced, distributed, and sold chemical shoe care products through the mass market channel under the "Kiwi" brand that competed with those produced, distributed, and sold by Knomark under the "Esquire" brand.

11. Prior to the Reckitt & Colman acquisition, Sara Lee produced, distributed, and sold chemical shoe care products through the mass market channel under the "Kiwi" and "Esquire" brands that competed with those produced, distributed, and sold by Reckitt & Colman under the "Griffin" brand.

12. The relevant market alleged in paragraphs eight and nine was, prior to the Knomark acquisition and prior to the Reckitt & Colman acquisition, and is very highly concentrated, measured by the Herfindahl-Hirschmann Index. Prior to the Knomark acquisition, Sara Lee's share of sales in the relevant market was approximately 90%. At the time of the Knomark acquisition, Knomark's share of sales in the relevant market was about 2.5%. At the time of the Reckitt & Colman acquisition, Reckitt & Colman's share of sales in the relevant market was about 2%.

13. Sara Lee possesses unilateral market power, or has a dangerous probability of obtaining such market power, in the relevant market alleged in paragraphs eight and nine.

V. ENTRY CONDITIONS

14. Entry into the relevant market alleged in paragraphs eight and nine is difficult, unlikely, and would not be timely, because of the need to develop a brand name and the time and sunk costs involved in obtaining access to shelf space.

VI. EFFECTS OF THE ACQUISITIONS

15. The effect of the Knomark acquisition and of the Reckitt & Colman acquisition has been and may be substantially to lessen competition and to tend to create a monopoly in the relevant market alleged in paragraphs eight and nine in the following ways, among others:

- a. By eliminating actual competition between Sara Lee and Knomark and between Sara Lee and Reckitt & Colman;
- b. By significantly enhancing the likelihood that Sara Lee will unilaterally exercise market power;
- c. By significantly enhancing the likelihood that Sara Lee will exercise market power in coordination with other competitors; and
- d. By increasing barriers to entry into the relevant market.

16. Sara Lee undertook the Knomark acquisition and the Reckitt & Colman acquisition with the willful intention and effect of restraining, lessening, or eliminating competition, or acquiring or maintaining market power in the relevant market alleged in paragraphs eight and nine.

VIOLATIONS CHARGED

17. The Knomark acquisition violates Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

18. The Reckitt & Colman acquisition violates Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

19. Sara Lee, in making the Knomark acquisition and the Reckitt & Colman acquisition, monopolized or attempted to monopolize the relevant market alleged in paragraphs eight and nine in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission (“the Commission”) having initiated an investigation of the acquisition by Kiwi Brands Inc. (“Kiwi”), a wholly-owned subsidiary of Sara Lee Corporation (“Sara Lee”), of certain assets of Knomark, Inc., at the time of the acquisition a wholly-owned subsidiary of Papercraft Corporation, and of certain assets of Reckitt and Colman plc, 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 the respondents with violation of the Federal Trade Commission Act; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) 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 Kiwi is a corporation, organized, existing, and doing business under and by virtue of the laws of the State of

Delaware, with its office and principal place of business located at 447 Old Swede Road, Douglassville, Pennsylvania.

2. Respondent Sara Lee is a corporation, organized, existing, and doing business under and by virtue of the laws of the State of Maryland, with its office and principal place of business located at 3 First National Plaza, Chicago, Illinois.

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

ORDER

I.

It is ordered, That, as used in this order, the following definitions shall apply:

A. “*Kiwi*” means Kiwi Brands Inc., its predecessors, subsidiaries, divisions, groups and affiliates controlled by Kiwi, and their respective directors, officers, employees, agents, representatives, and their respective successors and assigns.

B. “*Sara Lee*” means Sara Lee Corporation, its predecessors, subsidiaries, divisions, groups and affiliates controlled by Sara Lee, and their respective directors, officers, employees, agents, representatives, and their respective successors and assigns.

C. “*Respondents*” means Kiwi Brands Inc. and Sara Lee Corporation.

D. “*Chemical shoe care products*” means all chemical products used in the maintenance, cleaning, and protection of shoes, including, but not limited to, aerosol, liquid, wax, and cream products.

E. “*Sales through the mass market*” means all sales through grocery stores, drug stores, and mass merchandisers.

F. “*Knomark acquisition*” means the 1987 acquisition in which Sara Lee acquired the “Esquire” brand of chemical shoe care products, among other assets, from Knomark, Inc., a wholly-owned subsidiary of Papercraft Corporation.

G. “*Reckitt and Colman acquisition*” means the 1991 acquisition in which Sara Lee acquired the “Griffin” brand of chemical shoe care products, among other assets, from Reckitt and Colman plc.

H. “*Commission*” means the Federal Trade Commission.

I. “*Griffin and Esquire assets*” means all assets, tangible or intangible, acquired by Sara Lee in the Knomark acquisition and owned by Sara Lee as of January 1, 1994, relating to the production or sale of chemical shoe care products in North and South America, and all assets, tangible or intangible, acquired by Sara Lee in the Reckitt & Colman acquisition and owned by Sara Lee as of January 1, 1994, relating to the production or sale of chemical shoe care products in North and South America under the “Griffin” brand name; provided, however, that “Griffin and Esquire assets” exclude equipment and formulas used in the production of chemical shoe care products under the “Kiwi” brand. The Griffin and Esquire assets include, but are not limited to, registered and unregistered trademarks; formulas and other trade secrets; raw materials, finished goods, packaging materials, and other inventories (excluding inventories of raw materials and packaging materials for any products to be manufactured by Kiwi for Hickory Industries, Inc., after the divestiture); customer lists; and business and financial records, relating to the “Griffin” or “Esquire” brands.

II.

It is further ordered, That respondents shall divest, absolutely and in good faith, the Griffin and Esquire assets. The Griffin and Esquire assets shall be divested either:

(1) Within one (1) month of the date this order becomes final, to Hickory Industries, Inc. (“Hickory”), pursuant to the November 30, 1993, Asset Purchase Agreement between Kiwi and Hickory, as amended by Amendment One to November 30, 1993, Asset Purchase Agreement, dated March 8, 1994, attached hereto as a Confidential Appendix; or

(2) Within twelve (12) months of the date the order becomes final, to an acquirer or acquirers that receive the prior approval of the Commission and only in a manner that receives the prior approval of the Commission.

The purpose of the divestiture is to assure the continuing use of the Griffin and Esquire assets in an ongoing, independent, viable operation engaged in the sale of chemical shoe care products in the United States, and to remedy the lessening of competition resulting

from the Knomark acquisition and the Reckitt and Colman acquisition as alleged in the Commission's complaint. Provided, however, that if respondents divest pursuant to paragraph II (1) of this order, in no event shall respondents' enforcement of any security interest contained in the Asset Purchase Agreement referred to in paragraph II (1) of this order be construed to not require the Commission's prior approval, pursuant to paragraph V of this order, if such approval would otherwise be required.

III.

It is further ordered, That:

A. If respondents have not divested, absolutely and in good faith and with the Commission's prior approval, the Griffin and Esquire assets within twelve months of the date this order becomes final, the Commission may appoint a trustee to divest the Griffin and Esquire assets. In the event that the Commission or the Attorney General brings an action pursuant to Section 5(1) of the Federal Trade Commission Act, 15 U.S.C. 45(1), or any other statute enforced by the Commission, respondents shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it for any failure by respondents to comply with this order.

B. If a trustee is appointed by the Commission or a court pursuant to paragraph III A. of this order, respondents shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:

1. The Commission shall select the trustee, subject to the consent of respondents, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures. If respondents have not opposed, in writing, the selection of any proposed trustee within ten (10) days after notice by the staff of the Commission to respondents of the identity of any proposed trustee, respondents shall be deemed to have consented to the selection of the proposed trustee.

2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest the Griffin and Esquire assets.

3. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in paragraph III B. 8. to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve-month period, the trustee has submitted a plan of divestiture or believes that divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or, in the case of a court-appointed trustee, by the court.

4. The trustee shall have full and complete access to the personnel, books, records and facilities related to the Griffin and Esquire assets, or to any other relevant information, as the trustee may reasonably request. Respondents shall develop such financial or other information as such trustee may reasonably request and shall cooperate with the trustee. Respondents shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays in divestiture caused by respondents shall extend the time for divestiture under this paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed trustee, by the court.

5. The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to respondents' absolute and unconditional obligation to divest at no minimum price. The divestiture shall be made in the manner and to the acquirer or acquirers as set out in paragraph II of this order; provided, however, if the trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest to the acquiring entity or entities selected by respondents from among those approved by the Commission.

6. The trustee shall serve, without bond or other security, at the cost and expense of respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have the authority to employ, at the cost and expense of respondents, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are reasonably necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived

from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of respondents, and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's divesting the Griffin and Esquire assets.

7. Respondents shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of any claim, whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.

8. Within ten (10) days after appointment of the trustee, and subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, respondents shall execute a trust agreement that transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestiture required by this order.

9. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in paragraph III A. of this order.

10. The Commission or, in the case of a court-appointed trustee, the court, may on its own initiative or at the request of the trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this order.

11. The trustee shall report in writing to respondents and the Commission every sixty (60) days concerning the trustee's efforts to accomplish divestiture.

IV.

It is further ordered, That pending divestiture of the Griffin and Esquire assets, respondents shall maintain the viability and marketability of the Griffin and Esquire assets and shall not cause or permit the destruction, removal, wasting, deterioration or impairment of the Griffin and Esquire assets.

V.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, respondents shall not, directly or indirectly, through subsidiaries, partnerships, or otherwise, without the prior approval of the Commission:

A. Acquire any stock, share capital, equity or other interest in any concern, corporate or non-corporate, presently engaged in or within the two years preceding such acquisition engaged in the manufacture of chemical shoe care products in the United States, or the distribution or sale of chemical shoe care products through the mass market in the United States; provided, however, that an acquisition will be exempt from the requirements of this paragraph if it is solely for the purpose of investment and respondents will hold no more than one percent of the shares of any class of security traded on a national securities exchange or authorized to be quoted in an interdealer quotation system of a national securities association registered with the United States Securities and Exchange Commission; or

B. Acquire any assets used for, or previously used for (and still suitable for use for) the manufacture of chemical shoe care products in the United States, or the distribution or sale of chemical shoe care products through the mass market in the United States (including, but not limited to, brand or trade names), except in the ordinary course of business, from any concern, corporate or non-corporate, presently engaged in, or within the two years preceding such acquisition engaged in the manufacture of chemical shoe care products in the United States, or the distribution or sale of chemical shoe care products through the mass market in the United States; provided, however, that an acquisition of assets will be exempt from the requirements of this paragraph if the purchase price of the assets-to-be-acquired is less than \$100,000, and the purchase price of all assets used for, or previously used for (and still suitable for use for) the manufacture of chemical shoe care products in the United States, or the distribution or sale of chemical shoe care products through the mass market in the United States that respondents have acquired from the same person (as that term is defined in the premerger notification rules, 16 CFR 801.1(a)(1)) in the twelve-month period preceding the

proposed acquisition, when aggregated with the purchase price of the to-be-acquired assets, does not exceed \$100,000.

VI.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, unless respondents are required to seek prior approval from the Commission pursuant to paragraph V, respondents shall not, without providing advance written notification to the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise:

A. Acquire any stock, share capital, equity or other interest in any concern, corporate or non-corporate, presently engaged in, or within the two years preceding such acquisition engaged in the manufacture, distribution, or sale of chemical shoe care products in the United States; provided, however, that an acquisition will be exempt from the requirements of this paragraph if it is solely for the purpose of investment and respondents will hold no more than one percent of the shares of any class of security traded on a national securities exchange or authorized to be quoted in an interdealer quotation system of a national securities association registered with the United States Securities and Exchange Commission; or

B. Acquire any assets used or previously used (and still suitable for use) in the manufacture, distribution, or sale of chemical shoe care products, except in the ordinary course of business, from any concern, corporate or non-corporate, presently engaged in, or within the two years preceding such acquisition engaged in the manufacture, distribution, or sale of chemical shoe care products in the United States.

Said notification shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (hereinafter referred to as "the Notification"). Respondents shall provide to the Commission at least thirty days prior to acquiring any such interest (hereinafter referred to as the "first waiting period"), both the Notification and supplemental information either in respondents' possession or reasonably available to respondents. Such supplemental information shall include a copy of the proposed acquisition agreement; the names of

the principal representatives of each respondent and of the firm respondents desire to acquire who negotiated the acquisition agreement; and any management or strategic plans discussing the proposed acquisition. If, within the first waiting period, representatives of the Commission make a written request for additional information, respondents shall not consummate the acquisition until twenty days after submitting such additional information. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted in the same manner as is applicable under the requirements and provisions of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. 18a.

VII.

It is further ordered, That:

A. Within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until respondents have fully complied with the provisions of paragraph II or III of this order, respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with paragraphs II and III of this order. Respondents shall include in their compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with paragraphs II and III of the order, including a description of all substantive contacts or negotiations for the divestiture and the identity of all parties contacted. Respondents shall include in their compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning divestiture. Provided, however, that if, prior to the date the first report required by this paragraph is due, respondents have consummated the acquisition described in paragraph II (1) of this order, respondents shall, in lieu of the report or reports and documentary attachments required by this paragraph, submit to the Commission, within thirty (30) days of consummation of the acquisition, a verified statement that respondents have complied with paragraph II of this order, including the date of consummation.

B. One (1) year from the date this order becomes final, annually for the next nine (9) years on the anniversary of the date this order

becomes final, and at such other times as the Commission may require, respondents shall file a verified written report with the Commission setting forth in detail the manner and form in which they have complied and are complying with paragraphs V and VI of this order.

VIII.

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

IX.

It is further ordered, That, for the purpose of determining or securing compliance with this order, and subject to any legally recognized privilege, upon written request, each of the 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 such respondent relating to any matters contained in this order; and

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

Modifying Order

118 F.T.C.

IN THE MATTER OF

GENERAL RAILWAY SIGNAL CO.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 2(a) OF
THE CLAYTON ACT AND THE FEDERAL TRADE COMMISSION ACT*Docket C-837. Consent Order, Sept. 24, 1964--Modifying Order, Aug. 29, 1994*

This order reopens the proceeding and modifies the Commission's 1964 order (66 FTC 882) by terminating the order consistent with the Commission's new policy that the public interest requires setting aside orders in effect for more than twenty years.

ORDER REOPENING PROCEEDING
AND MODIFYING ORDER

On April 29, 1994, Union Switch & Signal, Inc. ("Union"), filed a Request To Reopen Proceedings and Modify Order ("Request") in this matter, pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Rule 2.51 of the Commission's Rules of Practice, 16 CFR 2.51. Union modified its request by letter dated June 22, 1994. The Request was placed on the public record and elicited no comments.

On July 22, 1994, the Commission issued its 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. In its Statement of Policy, the Commission 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 twenty years." Statement of Policy at 8.

The Commission order in Docket C-837 was issued on September 24, 1964,¹ and has been in effect for almost thirty years. Consistent with the Commission's July 22, 1994, Statement of Policy, the presumption is that the order should be terminated. Nothing to overcome the presumption having been presented,

¹ *General Railway Signal Co.*, 66 FTC 882 (1964), *modified*, 108 FTC 181 (1986) (petition of American Standard, successor to Westinghouse Air Brake Co.); 110 FTC 143 (1987) (petition of General Railway Signal). Petitioner Union is a successor to Westinghouse Air Brake Co., one of the two original respondents.

It is ordered, That the proceeding be, and it hereby is, reopened for the purpose of modifying the order entered therein;

It is further ordered, That the Commission's order in Docket C-837 be, and it hereby is, modified to state that from the date hereof, the order in Docket C-837 shall have expired; and

It is further ordered, That notice hereof shall be provided to the petitioner and to other respondents under the order in Docket C-837.

Commissioner Yao not participating.*

* Prior to leaving the Commission, former Commissioner Deborah K. Owen registered her vote in the affirmative for the order in this matter.

IN THE MATTER OF

THE AMERICAN ASSOCIATION OF
LANGUAGE SPECIALISTSCONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3524. Complaint, Aug. 31, 1994--Decision, Aug. 31, 1994

This consent order prohibits, among other things, the professional association of interpreters, based in Washington, D.C., from fixing or otherwise interfering with any form of price or fee competition among language specialists in the future; from maintaining any agreement or plan to limit or restrict the specialists working time or condition; for ten years, from making statements at an association meeting concerning fees; and, for three years, from compiling and distributing aggregate information concerning fees already charged.

Appearances

For the Commission: *Michael McNeely* and *Kent Cox*.

For the respondent: *Charles D. Ossola, Lowe, Price, LeBlanc & Becker*, Alexandria, VA.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that respondent The American Association of Language Specialists, a corporation, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent The American Association of Language Specialists (hereafter "TAALS") is a corporation organized, existing and doing business under and by virtue of the laws of the District of Columbia, with its principal place of business located at 1000 Connecticut Avenue, N.W., Washington, D.C. TAALS is a voluntary professional association of individuals engaged in confer-

ence interpreting, translating, précis writing, and other language services.

PAR. 2. Conference interpreting is the practice of expressing, in spoken form, ideas in a language different from an original spoken statement made at conferences or other high level business, scientific, humanitarian, cultural, governmental, or intergovernmental meetings.

PAR. 3. Translating is the practice of expressing, in written form, ideas in a language different from an original writing. Précis writing is the practice of expressing, in written form, summaries, minutes, or highlights of conferences or other high level business, scientific, humanitarian, cultural, governmental, or intergovernmental meetings.

PAR. 4. Except to the extent that TAALS has restrained competition as described herein, TAALS members have been and are in competition among themselves and with other interpreters, translators, précis writers, and other language specialists.

PAR. 5. TAALS engages in substantial activities that further its members' pecuniary interests including, among other things:

- A. Advising members on operating translation and interpretation businesses;
- B. Promoting members' interpretation and translation businesses by distributing an annual directory of member translators and interpreters to members and consumers;
- C. Providing referrals of members to consumers seeking language services;
- D. Promulgating work rules and fee schedules; and
- E. Vouching for the qualifications of its members by maintaining rigorous membership requirements including sponsorship by current members.

PAR. 6. By virtue of its purposes and activities, TAALS is a corporation within the meaning of Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

PAR. 7. TAALS' acts and practices, including the acts and practices alleged herein, are in or affect commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 8. The TAALS General Assembly is TAALS' supreme decision making body. It consists of all TAALS members and meets

annually. The General Assembly makes decisions by vote of members at meetings, with absent members voting by proxy.

PAR. 9. TAALS maintains a set of Work Rules contained in the "TAALS Professional Code for Language Specialists," the "Appendix to the Professional Code for Language Specialists," the "Working Conditions for Interpreters," "Working Conditions for Translators," and "Working Conditions for Précis Writers." The TAALS Work Rules are binding on members everywhere and require TAALS members to refuse to work under conditions not in accordance with those laid down by the association. Members sign a pledge to abide by the Work Rules when they join TAALS.

PAR. 10. The TAALS Work Rules were drawn up and adopted by TAALS members at General Assembly meetings.

PAR. 11. TAALS members are required to obtain a waiver from TAALS before deviating from the Work Rules. TAALS members can be expelled from the association for violating the Work Rules absent a waiver.

PAR. 12. TAALS enforces member compliance with the Work Rules through the TAALS "Committee to Ensure Respect for the Code," which investigates alleged infractions of the Work Rules and recommends penalties, including expulsion from TAALS, for such infractions. The General Assembly imposes penalties based on the recommendation of the Committee to Ensure Respect for the Code.

COUNT I

PAR. 13. Each of the allegations in paragraphs one through twelve herein are incorporated in this Count I as though set forth in full.

PAR. 14. Since at least 1973, TAALS has periodically created and distributed fee schedules entitled "Reports of Fees Currently Being Paid in the Americas" (hereafter "Fee Reports"). The TAALS Fee Reports list minimum fees for interpretation and translation services sold to private sector purchasers.

PAR. 15. The private sector interpretation fees listed in the Fee Reports were adopted by vote of the TAALS general membership at General Assembly meetings. TAALS requires its members to refrain from accepting private sector fees below those specified in the Fee Reports.

PAR. 16. The TAALS Work Rules prescribe identical compensation for interpreters working on the same interpretation team and performing the same function regardless of differences in interpreters' experience, skill, or other characteristics.

PAR. 17. The TAALS Work Rules deter members from providing services free of charge by requiring that in such cases members must pay their own travel and subsistence expenses.

PAR. 18. The TAALS Work Rules require members to calculate conference interpretation fees on an indivisible full-day basis, regardless of the duration of the actual assignment during the day.

PAR. 19. The TAALS Work Rules require members to charge an additional fee when they lead an interpretation team.

PAR. 20. The TAALS Work Rules require members to charge 160 percent of the minimum fee when interpreting alone.

PAR. 21. The TAALS Work Rules prescribe mandatory minimum standards for:

- A. Transportation to and from conferences at which members work, including class of air travel and excess baggage allowance for air travel;
- B. The quality of lodging at conferences at which members work;
- C. The amount and type of subsistence expense allowances for conferences at which members work;
- D. The rate of compensation for travel time, briefing time, and other time not worked; and
- E. The amount and applicability of cancellation fees.

The Work Rules prohibit members from accepting engagements on terms inferior to those prescribed.

PAR. 22. TAALS promulgates the Fee Reports and the Work Rules for the purpose and with the intended effect of raising and sustaining the general level of fees and other compensation paid to interpreters, translators, précis writers, and other language specialists in the United States so that interpreters, translators, précis writers, and other language specialists can earn more money and greater profits.

PAR. 23. TAALS members and other interpreters, translators, and précis writers use the Fee Reports and Work Rules when setting their own fees and other compensation.

PAR. 24. Respondent TAALS has been and is acting as a combination of its members or in conspiracy with its members and others, to restrain price competition, to fix or stabilize fees, and to prevent discounting of fees in the provision of interpretation, translation, précis writing, and other language services.

PAR. 25. The combination or conspiracy and TAALS' acts or practices described above constitute price fixing, whose purpose and effects have been and are to restrain competition unreasonably and to injure consumers by, among other ways, depriving consumers of the benefits of competition on fees among interpreters, translators, précis writers, and other language specialists in the provision of interpretation, translation, précis writing, and other language services.

PAR. 26. The acts and practices herein alleged were and are to the prejudice and injury of the public, will continue in the absence of the relief herein requested, and constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

COUNT II

PAR. 27. Each of the allegations in paragraphs one through twelve herein are incorporated in this Count II as though set forth in full.

PAR. 28. The TAALS Work Rules require members to declare a single professional domicile and prohibit members from changing professional domiciles more than twice per year. The TAALS Work Rules also require that travel expenses to a job be charged based on a member's professional domicile, regardless of the member's actual location and even if no travel was actually involved. The Work Rules further require all members to notify TAALS of all professional domicile changes at least sixty days in advance. These domicile restrictions, in conjunction with the minimum standards for travel reimbursement alleged in paragraph twenty-one, reduce price competition on travel charges and deprive consumers of the benefits of reduced charges based on a translator's actual geographic proximity to a job.

PAR. 29. The TAALS Work Rules prescribe mandatory standards for:

- A. The maximum hours worked per day and per shift by interpreters, translators, and précis writers;
- B. The composition of interpreting teams, including the minimum number of interpreters per language spoken at a conference and the designation of a team leader; and
- C. The minimum number of précis writers per conference team.

The Work Rules prohibit members from accepting engagements on terms inferior to those prescribed.

PAR. 30. The TAALS Work Rules prohibit members from engaging in all forms of personal publicity, including advertising.

PAR. 31. TAALS has established rules limiting its members' use of portable electronic simultaneous interpretation equipment.

PAR. 32. By enacting and enforcing the Work Rules, respondent TAALS has been and is acting as a combination of its members or in conspiracy with its members and others, to restrain competition by attempting to control the output and marketing of interpretation, translation, précis writing, and other language services.

PAR. 33. The combination or conspiracy and TAALS' acts or practices described above have had and continue to have the purpose and effect of restraining competition unreasonably and injuring consumers by, among other ways, depriving consumers of the benefits of competition among interpreters, translators, précis writers, and other language specialists in the provision of interpretation, translation, précis writing, and other language services.

PAR. 34. The acts and practices herein alleged were and are to the prejudice and injury of the public, will continue in the absence of the relief herein requested, and constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

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

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

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

1. Respondent TAALS is a corporation organized, existing and doing business under and by virtue of the laws of the District of Columbia, with its offices and principal place of business located at 1000 Connecticut Avenue, N.W., Washington, D.C.

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

ORDER

I.

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

“*Respondent*” or “*TAALS*” mean The American Association of Language Specialists, its directors, trustees, general assemblies, councils, committees, working groups, boards, divisions, chapters, officers, representatives, delegates, agents, employees, successors, and assigns.

“*Fees*” means any cash or non-cash charges, rates, prices, benefits or other compensation received or intended to be received for the rendering of interpretation, translation, or other language services, including but not limited to, salaries, wages, transportation, lodging, meals, allowances (including subsistence and travel allowances), reimbursements for expenses, cancellation fees, compensation for time not worked, compensation for travel time and preparation or study time, cancellation fees, and payments in kind.

“*Cancellation fee*” means any fee intended to compensate for the termination, cancellation or revocation of an understanding, contract, agreement, offer, pledge, assurance, opportunity, or expectation of a job.

“*Interpretation*” means the act of expressing, in oral form, ideas in a language different from the language used in an original spoken statement.

“*Translation*” means the act of expressing, in written form, ideas in a language different from the language used in an original writing.

“*Other language service*” means any service that has as an element the conversion of any form of expression from one language into another or any service incident to or related to interpretation or translation, including briefing or conference preparation, equipment rental, conference organizing, teleconferencing, précis writing, supervision or coordination of interpreters, reviewing or revising translations, or providing recordings of interpretations.

“*Interpreter*” means one who practices interpretation.

“*Translator*” means one who practices translation.

“*Language specialist*” means one who practices interpretation, translation, or any other language service.

“*Unbiased*” means lacking any systematic errors that would result from the selection or encouragement of one outcome or answer over others.

“*Person*” means any individual, partnership, association, company, or corporation, and includes any trustee, receiver, assignee, lessee, or personal representative of any person herein defined.

II.

It is further ordered, That respondent, directly or indirectly, or through any person, corporation, or other device, in or in connection

with its activities in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, cease and desist from:

A. Creating, formulating, compiling, distributing, publishing, recommending, suggesting, encouraging adherence to, endorsing, or authorizing any list or schedule of fees for interpretation, translation, or any other language service, including but not limited to fee guidelines, suggested fees, proposed fees, fee sheets, standard fees, or recommended fees;

B. Entering into, adhering to, or maintaining any contract, agreement, understanding, plan, program, combination, or conspiracy to construct, fix, stabilize, standardize, raise, maintain, or otherwise interfere with or restrict fees for interpretation, translation, or other language services;

C. Suggesting, urging, encouraging, recommending, or attempting to persuade in any way interpreters, translators, or other language specialists to charge, pay, offer, or adhere to any existing or proposed fee, or otherwise to charge or refrain from charging any particular fee;

D. For a period of ten (10) years after the date this order becomes final, continuing a meeting of interpreters, translators, or other language specialists, after 1) any person makes a statement, addressed to or audible to the body of the meeting, concerning the fees charged or proposed to be charged for interpretation, translation, or any other language service and TAALS fails to declare such statement to be out of order, 2) any person makes two such statements and TAALS fails to eject him or her from the meeting, or 3) two people make such statements;

E. Prohibiting, restricting, regulating, impeding, declaring unethical, interfering with, or advising against any form of price competition, including but not limited to offering to do work for less remuneration than a specific competitor, undercutting a competitor's actual fee, offering to work for less than a customer's announced fee, advertising discounted rates, or accepting any particular lodging or travel arrangements;

F. Advising against, restricting, or prohibiting interpreters, translators, or other language specialists from accepting hourly fees, half-day fees, weekly fees, or fees calculated or payable on other than a full-day basis;

G. Advising against, restricting, or prohibiting interpreters, translators, or other language specialists from performing services free of charge or at a discount, or from paying their own travel, lodging, meals, or other expenses; and

H. Prohibiting, restricting, regulating, impeding, declaring unethical, interfering with, or advising against any forms of personal publicity, including but not limited to advertising by interpreters, translators, or other language specialists.

Provided, that nothing contained in this paragraph II shall prohibit respondent from:

1. Compiling or distributing accurate aggregate historical market information concerning past fees actually charged in transactions completed no earlier than three (3) years after the date this order becomes final, provided that such information is compiled and presented in an unbiased and nondeceptive manner that maintains the anonymity of the parties to the transactions;

2. Collecting or publishing accurate and otherwise publicly available fees paid by governmental and intergovernmental agencies, if such publication states the qualifications and requirements to be eligible to receive such fees;

3. Continuing a meeting following statements concerning historical, governmental, or intergovernmental fees that are made in order to undertake the activities permitted in paragraphs II.1 and II.2. of this order; or

4. Formulating, adopting, disseminating to its organizational subdivisions and to its members, and enforcing reasonable ethical guidelines governing the conduct of its members with respect to advertising, including unsubstantiated representations, that respondent reasonably believes would be false or deceptive within the meaning of Section 5 of the Federal Trade Commission Act.

III.

It is further ordered, That, respondent shall clearly and conspicuously state the following in any publication of fees made pursuant to paragraphs II.1 and II.2 of this order:

BY ORDER OF THE FEDERAL TRADE COMMISSION, TAALS IS PROHIBITED FROM RECOMMENDING, SUGGESTING, OR ENFORCING FEES APPLICABLE IN THE UNITED STATES. UNDER UNITED STATES LAW, INTERPRETERS AND OTHER LANGUAGE SPECIALISTS MUST UNILATERALLY AND INDEPENDENTLY DETERMINE THEIR OWN FEES.

IV.

It is further ordered, That respondent, directly or indirectly, or through any person, corporation, or other device, in or in connection with its activities in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, cease and desist from entering into, adhering to, or maintaining any contract, agreement, understanding, plan, program, combination, or conspiracy to:

A. Limit, restrict, or mandate the length of time that interpreters, translators, or other language specialists work in a given period, or for which they are paid for preparation or study;

B. Limit, restrict, or mandate the number of interpreters, translators, or other language specialists used for a given job or type of job;

C. Limit, restrict, or mandate the reimbursement of or payment to interpreters, translators, or other language specialists for travel expenses or time spent traveling, or otherwise prevent consumers from receiving any advantages, based on interpreters', translators', or other language specialists' actual travel arrangements or geographic location, by restricting, requiring declarations of, or regulating the number or duration of residences or domiciles of members or by other means; or

D. Limit, restrict, or mandate the equipment used in performing interpretation, translation, or other language services.

Provided, that nothing contained in paragraph IV of this order shall prohibit respondent from providing information or its nonbinding and noncoercive views concerning interpretation equipment, the hours of work or preparation, or the number of language specialists used for types of jobs.

V.

It is further ordered, That respondent shall, within thirty (30) days after the date this order becomes final, amend its Professional Code For Language Specialists and all appendices to conform to the requirements of paragraphs II and IV of this order and amend its bylaws to require each member, chapter, or other organizational subdivision, to observe the provisions of paragraphs II and IV of this order.

VI.

It is further ordered, That respondent shall:

A. Within thirty (30) days after the date this order becomes final, distribute to each TAALS member, affiliate, chapter, organizational subdivision, or other entity associated directly or indirectly with TAALS, copies of: (1) this order, (2) the accompanying complaint, (3) Appendix A to this order, (4) and any document that TAALS revises pursuant to this order; and

B. For a period of ten years after the date this order becomes final, distribute to all new TAALS officers, directors, and members, and any newly created affiliates, chapters, or other organizational subdivisions, within thirty days of their admission, election, appointment, or creation, a copy of: (1) this order, (2) the accompanying complaint, (3) Appendix A to this order, and (4) any document that TAALS revises pursuant to this order.

VII.

It is further ordered, That respondent shall:

A. Within ninety (90) days after the date this order becomes final, and annually for five (5) years thereafter 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 respondent has complied and is complying with this order, and any instances in which respondent has taken any action within the scope of the provisos in paragraphs II.1, II.2, II.3, or II.4 of this order;

B. For a period of five (5) years after the date this order becomes final, collect, maintain and make available to the Federal Trade Commission for inspection and copying: records adequate to describe in detail any action taken in connection with the activities covered in this order; all minutes, records, reports or tape recordings of meetings of the Council, General Assembly, and all committees, subcommittees, working groups, or any other organizational subdivisions of TAALS; and all TAALS mailings to the TAALS Council or general membership;

C. For a period of five (5) years after the date this order becomes final, provide copies to the Federal Trade Commission, within thirty (30) days of its adoption, of the text of any amendment to the TAALS Bylaws, TAALS Professional Code for Language Specialists or Appendix thereto, Working Conditions for Interpreters, Working Conditions for Translators, Working Conditions for Précis-Writers, and any new rules, regulations or guidelines of respondent; and

D. Notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in respondent, such as dissolution or reorganization of itself or any chapter, division, or of any proposed change resulting in the emergence of a successor corporation or association, or any other change in the corporation or association that may affect compliance obligations arising out of this order.

By the Commission.¹

¹ Prior to leaving the Commission, former Commissioner Owen registered her vote in the affirmative for the Complaint and the Decision and Order in this matter.

APPENDIX A

[DATE]

ANNOUNCEMENT

The American Association of Language Specialists (“TAALS”) has entered into a consent agreement with the Federal Trade Commission. Pursuant to this consent agreement, the Commission issued an order on [DATE] that prohibits TAALS, including its chapters, committees, or organizational subdivisions, from:

(1) Creating, distributing, authorizing, or endorsing any list or schedule of fees or other charges for interpretation, translation, or other language services;

(2) Entering into, or maintaining any agreement, plan, or program, to construct, fix, stabilize, raise, maintain, or otherwise interfere with fees or other charges for interpretation, translation, or other language services;

(3) Suggesting, recommending, or encouraging, in any way, that interpreters, translators, or other language specialists charge, adhere to, or refrain from charging any existing or proposed fee;

(4) For a period of ten (10) years after this order becomes final, continuing a meeting after 1) any person makes any statement to the body of the meeting concerning the fees charged or proposed to be charged for interpretation, translation, or any other language service and TAALS fails to declare such statement to be out of order, 2) any person makes two such statements and TAALS fails to eject him or her from the meeting, or 3) two people make such statements;

(5) Prohibiting, restricting, regulating, or advising against any form of price competition among its members or other interpreters, translators, or other language specialists, including undercutting a competitor’s actual fee or a customer’s announced fee, advertising discounted rates, or accepting any particular lodging or travel arrangements;

(6) Advising against, restricting, or prohibiting interpreters, translators, or other language specialists from accepting hourly fees, weekly fees, or fees calculated or payable on other than a full-day basis;

(7) Advising against, restricting, or prohibiting interpreters, translators, or other language specialists from performing services free of charge or from paying their own travel, lodging, meals, or other expenses; or

(8) Prohibiting, restricting, impeding, declaring unethical, or advising against any forms of personal publicity, including but not limited to advertising by interpreters, translators, or other language specialists.

In addition, the order prohibits TAALS from maintaining any agreement, understanding, plan or program to:

(1) Limit, restrict, or mandate the length of time that interpreters, translators, or other language specialists work in a given period, or for which they are paid for preparation or study;

(2) Limit, restrict, or mandate the number of interpreters, translators, or other language specialists used for a job or type of job;

(3) Limit, restrict, or mandate the payment or reimbursement for travel or the travel time of interpreters, translators, or other language specialists, or otherwise prevent consumers from receiving any advantages, based on travel arrangements or geographic location, by regulating domiciles of members or by other means; or

(4) Limit, restrict, or mandate the equipment used in performing interpretation, translation, or other language services.

Under the order, "fees" are defined to include all cash or non-cash charges, rates, benefits, or other compensation for interpretation, translation or other language services, including but not limited to, lodging, meals, subsistence and travel allowances, reimbursements for expenses, cancellation fees, and compensation for time not worked, travel time or briefing time. "Language specialist" means one who performs "other language services," which are defined to refer to any services that involve the conversion of any form of expression from one language into another or any services incident to or related to interpretation and translation. Consequently, when the order mentions "language specialists," it includes anyone who rents equipment, organizes conferences, performs teleconferencing or précis writing, supervises or coordinates interpreters, reviews or revises translations, or provides recordings of interpretations.

Further, under the order, TAALS must amend its professional code to conform to the requirements of paragraphs II and IV of the attached order, which are summarized above. TAALS must also amend its bylaws to require each member, chapter, and organizational subdivision to observe the requirements of the order. In addition, the order requires TAALS to provide to the Federal Trade Commission the text of each amendment to the TAALS Bylaws, Professional Code or Working Conditions, and the text of any new rules, regulations or guidelines.

We note, however, that the order does not prevent TAALS from adopting and enforcing reasonable ethical guidelines prohibiting advertising that would be false or deceptive within the meaning of Section 5 of the Federal Trade Commission Act. In addition, TAALS will be permitted to compile and distribute accurate aggregate historical market information concerning past fees that were actually charged no earlier than three years after this order becomes final, if presented in an unbiased and nondeceptive manner that maintains the anonymity of the parties to the transactions underlying such reports. Similarly, the order does not prohibit TAALS from collecting and publishing accurate, publicly available information on fees paid by governmental and intergovernmental agencies if such publication states the qualifications and requirements for such fees. With any publication of fees permitted by the order, TAALS must include a statement that it is prohibited from recommending fees applicable in the United States and that interpreters must independently determine their own fees. In addition, the order states that it does not prohibit TAALS from providing information or its nonbinding and non-coercive views concerning interpretation equipment, the hours of work or preparation, or the number of language specialists used for a type of job.

For more specific information, members should refer to the order itself, which is enclosed.

Counsel
American Association of Language Specialists

IN THE MATTER OF

AMERICAN SOCIETY OF INTERPRETERS

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

Docket C-3525. Complaint, Aug. 31, 1994--Decision, Aug. 31, 1994

This consent order prohibits, among other things, the professional association of interpreters, based in Washington, D.C., from fixing or otherwise interfering with any form of price or fee competition among language specialists in the future; from maintaining any agreement or plan to limit or restrict the specialists working time or condition; for ten years, from making statements at an association meeting concerning fees; and, for three years, from compiling and distributing aggregate information concerning fees already charged.

Appearances

For the Commission: *Michael McNeely and Kent Cox.*

For the respondent: *Mario L. Herman, Purvin & Herman,*
Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that respondent American Society of Interpreters ("ASI"), a corporation, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent American Society of Interpreters is a corporation organized, existing and doing business under and by virtue of the laws of the District of Columbia, with its principal place of business located in Washington, D.C. ASI is a voluntary professional association of individuals engaged in the business of conference interpreting.

PAR. 2. Conference interpreting is the practice of expressing, in spoken form, ideas in a language different from an original spoken

statement made at conferences or other high level business, scientific, governmental, or intergovernmental meetings.

PAR. 3. Except to the extent that ASI has restrained competition as described herein, ASI members have been and are in competition among themselves and with other interpreters.

PAR. 4. ASI engages in substantial activities that further its members' pecuniary interests. By virtue of its purposes and activities, ASI is a corporation within the meaning of Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

PAR. 5. ASI's acts and practices, including the acts and practices alleged herein, are in or affect commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 6. ASI decisions are made by the Assembly and the Board of Directors ("ASI Board"). The Assembly consists of all ASI members and meets annually. Assembly decisions are reached by consensus. The ASI Board acts for the Assembly in the interim and makes recommendations to the Assembly, including recommendations on fees. The ASI Board consists of seven ASI members elected at the annual Assembly.

PAR. 7. ASI maintains a set of work rules ("ASI Work Rules") approved by the ASI Board and disseminated to all ASI members. The ASI Work Rules are embodied in the "Code of Professional Standards," the "Professional Guidelines," and on the last page of the annual yearbook.

PAR. 8. The ASI Work Rules are binding on members and forbid members from accepting fees and staffing arrangements inferior to those recommended by ASI. ASI imposes penalties, including expulsion from ASI, on its members for deviating from the ASI Work Rules.

PAR. 9. The ASI Work Rules are a collection of minimum working conditions to be demanded by those providing interpretation services. ASI members have been required to advise the ASI Board before deviating from ASI Work Rules. ASI has encouraged its members to report instances of members and nonmembers undercutting the ASI Work Rules and fees.

PAR. 10. Until 1991, the ASI Yearbook Guidelines included each year's minimum daily fee for conference interpretation services charged to purchasers in the private sector ("Minimum Daily Fee"). ASI members could be expelled from the association for charging

less than the Minimum Daily Fee for conference interpretation services.

COUNT I

PAR. 11. Each of the allegations in paragraphs one through ten herein are incorporated in this Count I as though set forth in full.

PAR. 12. From as early as 1967, ASI annually created and distributed a list of Minimum Daily Fees. ASI has required its members to refrain from accepting fees in the private sector below the specified Minimum Daily Fees. ASI has encouraged its members to report instances of members and nonmembers undercutting the ASI Minimum Daily Fee.

PAR. 13. ASI Work Rules require that members charge at least the ASI Minimum Daily Fee for conference interpretation services. The Minimum Daily Fees were adopted by consensus of the ASI general membership at annual Assembly meetings.

PAR. 14. The ASI Work Rules require identical compensation for members working on the same interpretation team and performing the same function regardless of differences in interpreters' experience, skill, or other characteristics.

PAR. 15. The ASI Work Rules deter members from performing services free of charge except in welfare cases or cases of national or international emergencies.

PAR. 16. The ASI Work Rules require members to calculate conference interpretation fees on an indivisible full-day basis, regardless of the duration of the actual assignment during the day.

PAR. 17. The ASI Work Rules require members to charge 150 percent of the Minimum Daily Fee when interpreting alone.

PAR. 18. The ASI Work Rules prescribe mandatory minimum standards for the: rate of compensation for interpreting legal proceedings in an attorney's office; amount, type, and time of payment of subsistence expense allowances for conferences at which members work; rate of compensation for travel time, briefing time, and other time not worked, such as intervening weekends and holidays; rate of compensation for chief interpreters who coordinate and supervise conference interpretation services; and amount and applicability of cancellation fees. The ASI Work Rules prohibit members from accepting engagements on terms inferior to those prescribed.

PAR. 19. The ASI Board has promulgated a minimum daily rate for members to charge clients for the rental of portable interpretation equipment.

PAR. 20. ASI promulgated the above ASI Work Rules and the Minimum Daily Fees for the purpose and with the intended effect of raising and sustaining the general level of fees and other compensation paid to interpreters in the United States so that interpreters could earn more money and greater profits.

PAR. 21. ASI members have used the ASI Work Rules and the Minimum Daily Fees when setting their own fees and working conditions.

PAR. 22. Respondent ASI has been and is acting as a combination of its members or in conspiracy with some of its members and others, to restrain price competition in the sale of interpretation services, to fix or stabilize fees and other terms, and to prevent discounting of fees in the provision of interpretation services.

PAR. 23. The combination or conspiracy and ASI's acts or practices described above constitute price fixing, whose purpose and effects have been and are to restrain competition unreasonably and to injure consumers by, among other ways, depriving consumers of the benefits of price competition on fees and other terms among interpreters in the provision of interpretation services.

PAR. 24. The acts and practices herein alleged were and are to the prejudice and injury of the public, will continue in the absence of the relief herein requested, and constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

COUNT II

PAR. 25. Each of the allegations in paragraphs one through ten are incorporated in this Count II as though set forth in full.

PAR. 26. The ASI Work Rules prescribe mandatory standards for:

- A. Hours worked per day and per shift by interpreters; and
- B. The number of interpreters per language spoken at a conference.

The ASI Work Rules prohibit members from accepting engagements on terms inferior to those prescribed.

PAR. 27. ASI promulgated the ASI Work Rules alleged in paragraph twenty-six for the purpose and with the intended effect of restraining competition by attempting to control the output and marketing of interpretation services in the United States so that interpreters could earn more money and greater profits.

PAR. 28. By enacting and enforcing the Work Rules, respondent ASI has been and is acting as a combination of its members or in conspiracy with some of its members and others, to restrain competition by attempting to control the output and marketing of interpretation services.

PAR. 29. The combination or conspiracy and ASI's acts or practices described above have had and continue to have the purpose and effects of restraining competition unreasonably and injuring consumers by, among other ways, depriving consumers of the benefits of competition among interpreters in the provision of interpretation services.

PAR. 30. The acts and practices herein alleged were and are to the prejudice and injury of the public, will continue in the absence of the relief herein requested, and constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

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

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

such complaint, and waivers and other provisions as required by the Commission's Rules; and

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

1. Respondent ASI is a corporation organized, existing and doing business under and by virtue of the laws of the District of Columbia, with its offices and principal place of business located at P.O. Box 9603, Washington, D.C.

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

ORDER

I.

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

"Respondent" or *"ASF"* mean American Society of Interpreters, its directors, trustees, general assemblies, councils, committees, working groups, boards, divisions, chapters, officers, representatives, delegates, agents, employees, successors, and assigns.

"Fees" means any cash or non-cash charges, rates, prices, benefits or other compensation received or intended to be received for the rendering of interpretation, translation, or other language services, including but not limited to, salaries, wages, transportation, lodging, meals, allowances, reimbursements for expenses, compensation for time not worked, compensation for travel time and preparation and study time, cancellation fees, and payments in kind.

“Interpretation” means the act of expressing, in oral form, ideas in a language different from an original spoken statement.

“Translation” means the act of expressing, in written form, ideas in a language different from an original writing.

“Other language service” means any service that has as an element the conversion of any form of expression from one language into another or any service incident to or related to interpretation and translation including briefing or conference preparation, equipment rental, conference organizing, teleconferencing, précis writing, supervision or coordination of interpreters, reviewing or revising translations, or providing recordings of interpretations.

“Interpreter” means one who practices interpretation.

“Translator” means one who practices translation.

“Language specialist” means one who practices interpretation, translation, or any other language service.

“Unbiased” means lacking any systematic errors that would result from the selection or encouragement of one outcome or answer over others.

“Person” means any individual, partnership, association, company, or corporation, and includes any trustee, receiver, assignee, lessee, or personal representative of any person herein defined.

II.

It is further ordered, That respondent, directly or indirectly, or through any person, corporation, or other device, in or in connection with its activities in or affecting commerce, as “commerce” is defined in the Federal Trade Commission Act, cease and desist from:

A. Creating, formulating, compiling, distributing, publishing, recommending, suggesting, encouraging adherence to, endorsing, publishing letters or articles supporting, or authorizing any list or schedule of fees for interpretation, translation, or any other language service, including but not limited to fee reports, fee guidelines, suggested fees, proposed fees, fee sheets, standard fees, or recommended fees;

B. Entering into, adhering to, or maintaining any contract, agreement, understanding, plan, program, combination, or conspiracy to construct, fix, stabilize, raise, maintain, or otherwise interfere with

or restrict the fees for interpretation, translation, or other language services;

C. Suggesting, urging, encouraging, recommending, or attempting to persuade in any way interpreters, translators, or other language specialists to charge, pay, file, or adhere to any existing or proposed fee, or otherwise to charge or refrain from charging any particular fee;

D. For a period of ten (10) years after the date this order becomes final, continuing a meeting of interpreters, translators, or other language specialists, after 1) any person makes a statement, addressed to or audible to the body of the meeting, concerning the fees charged or proposed to be charged for interpretation, translation, or any other language service and ASI fails to declare such statement to be out of order, 2) any person makes two such statements and ASI fails to eject him or her from the meeting, or 3) two people make such statements;

E. Prohibiting, restricting, regulating, impeding, declaring unethical, interfering with, or advising against any form of price competition, including but not limited to offering to do work for less remuneration than a specific competitor, undercutting a competitor's actual fee, offering to work for less than a customer's announced fee, advertising discounted rates, or accepting any particular lodging or travel arrangements;

F. Discouraging, restricting, or prohibiting interpreters, translators, or other language specialists from accepting hourly fees, half-day fees, weekly fees, or fees calculated on other than a full-day basis; and

G. Discouraging, restricting, or prohibiting interpreters, translators, or other language specialists from performing services free of charge or at a discount, or from paying their own travel, lodging, meals, or other expenses.

Provided, that nothing contained in this paragraph II shall prohibit respondent from:

1. Compiling or distributing accurate aggregate historical market information concerning past fees actually charged in transactions completed no earlier than three (3) years after the date this order becomes final, provided that such information is compiled and

presented in an unbiased and nondeceptive manner that maintains the anonymity of the parties to the transactions;

2. Collecting or publishing accurate and otherwise publicly available fees paid by governmental and intergovernmental agencies, if such publication states the qualifications and requirements to be eligible to receive such fees; or

3. Continuing a meeting following statements concerning historical, governmental, or intergovernmental fees that are made in order to undertake the activities permitted in paragraphs II.1 and II.2. of this order.

III.

It is further ordered, That respondent shall clearly and conspicuously state the following in any publication of fees made pursuant to paragraphs II.1 and II.2 of this order:

BY ORDER OF THE FEDERAL TRADE COMMISSION, ASI IS PROHIBITED FROM RECOMMENDING, SUGGESTING, OR ENFORCING FEES. UNDER UNITED STATES LAW, INTERPRETERS AND OTHER LANGUAGE SPECIALISTS MUST UNILATERALLY AND INDEPENDENTLY DETERMINE THEIR OWN FEES.

IV.

It is further ordered, That respondent, directly or indirectly, or through any person, corporation, or other device, in or in connection with its activities in or affecting commerce, as “commerce” is defined in the Federal Trade Commission Act, cease and desist from entering into, adhering to, or maintaining any contract, agreement, understanding, plan, program, combination, or conspiracy to:

A. Limit, restrict, or mandate the length of time that interpreters, translators, or other language specialists work in a given period, or for which they are paid for preparation or study; or

B. Limit, restrict, or mandate the number of interpreters, translators, or other language specialists used for a given job or type of job.

Provided, that nothing contained in paragraph IV of this order shall prohibit respondent from providing information or its nonbinding and non-coercive views concerning the hours of work or preparation or the number of language specialists used for types of jobs.

V.

It is further ordered, That respondent shall, within thirty (30) days after the date this order becomes final, amend its Code of Professional Standards and all Professional Guidelines, including those found in the annual Membership List of ASI, and all appendices to conform to the requirements of paragraphs II and IV of this order and amend its bylaws to require each member, chapter, or other subdivision, to observe the provisions of paragraphs II and IV of this order.

VI.

It is further ordered, That respondent shall:

A. Within thirty (30) days after the date this order becomes final, distribute to each ASI member, affiliate, chapter, organizational subdivision, or other entity associated directly or indirectly with ASI, copies of: (1) this order, (2) the accompanying complaint, (3) Appendix A to this order, (4) and any document that ASI revises pursuant to this order, with the exception of the annual Membership List; and

B. Within one-hundred eighty (180) days after the date this order becomes final, distribute copies of the annual Membership List as revised pursuant to this order; and

C. For a period of five (5) years after the date this order becomes final, distribute to all new ASI officers, directors, and members, and any newly created affiliates, chapters, or other organizational subdivisions, within thirty days of their admission, election, appointment, or creation, a copy of: (1) this order, (2) the accompanying complaint, (3) Appendix A to this order, and (4) any document that ASI revises pursuant to this order.

VII.

It is further ordered, That respondent shall:

A. Within ninety (90) days after the date this order becomes final, and annually for three (3) years thereafter 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 respondent has complied and is complying with this order, and any instances in which respondent has taken any action within the scope of the provisos in paragraphs II.1 or II.2 or II.3 of this order:

B. For a period of five (5) years after the date this order becomes final, notify and provide copies to the Federal Trade Commission staff, within thirty (30) days, of any fee reports, fee lists, fee schedules, fee guidelines or similar materials produced by or for any association that come into respondent's possession;

C. For a period of five (5) years after the date this order becomes final, collect, maintain and make available to the Federal Trade Commission staff for inspection and copying: records adequate to describe in detail any action taken in connection with the activities covered in this order; all minutes, records, reports or tape recordings of meetings of the Board General Assembly, and all chapters, committees, subcommittees, working groups, or any other organizational subdivisions of ASI; and all ASI mailings to the ASI Board or general membership;

D. For a period of three (3) years after the date this order becomes final, provide copies to the Federal Trade Commission, within thirty (30) days of its adoption, of the text of any amendment to the ASI Bylaws, ASI Professional Guidelines, ASI Code of Professional Standards, ASI Yearbook Professional Guidelines, and any new rules, regulations or guidelines of respondent; and

E. Notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in respondent, such as dissolution or reorganization of itself or any chapter, division, or of any proposed change resulting in the emergence of a successor corporation or

association, or any other change in the corporation or association that may affect compliance obligations arising out of this order.

By the Commission.¹

APPENDIX A

[DATE]

ANNOUNCEMENT

The American Society of Interpreters (“ASI”) has entered into a consent agreement with the Federal Trade Commission. Pursuant to this consent agreement, the Commission issued an order on [DATE] that prohibits ASI, including its chapters, committees, or organizational subdivisions, from:

(1) Creating, distributing, authorizing, or endorsing any list or schedule of fees or other charges for interpretation, translation, or other language services;

(2) Entering into, or maintaining any agreement, plan, or program, to construct, fix, stabilize, raise, maintain, or otherwise interfere with the fees or other charges for interpretation, translation, or other language services;

(3) Suggesting, recommending, or encouraging, in any way, interpreters, translators, or other language specialists that charge, adhere to, or refrain from charging any existing or proposed fee;

(4) For a period of ten (10) years after the date this order becomes final, continuing a meeting after a) any person makes a statement to the body of the meeting, concerning the fees charged or proposed to be charged for interpretation, translation, or any other language service and ASI fails to declare such statement to be out of order, b) any person makes two such statements and ASI fails to eject him or her from the meeting, or c) two people make such statements;

(5) Prohibiting, restricting, regulating, or advising against any form of price competition among its members or other interpreters, translators, or other language specialists, including undercutting a

¹ Prior to leaving the Commission, former Commissioner Owen registered her vote in the affirmative for the Complaint and the Decision and Order in this matter.

competitor's actual fee or a customer's announced fee, advertising discounted rates or accepting any particular lodging or travel arrangements;

(6) Discouraging, restricting, or prohibiting interpreters, translators, or other language specialists from accepting hourly fees, weekly fees, or fees calculated on other than a full-day basis; and

(7) Discouraging, restricting, or prohibiting interpreters, translators, or other language specialists from performing services free of charge or from paying their own travel, lodging, meals, or other expenses.

In addition, the order prohibits ASI from maintaining any agreement, understanding, plan or program to:

(1) Limit, restrict, or mandate the length of time that interpreters, translators, or other language specialists work in a given period, or for which they are paid for preparation or study; or

(2) Limit, restrict, or mandate the number of interpreters, translators, or other language specialists hired for a job or type of job.

Under the order, "fees" are defined to include all cash or non-cash charges, rates, benefits, or other compensation for interpretation, translation or other language services, including but not limited to, lodging, meals, subsistence and travel allowances, reimbursements for expenses, cancellation fees, and compensation for time not worked, travel time or briefing time. "Language specialist" means one who performs "other language services," which are defined to refer to any services that involve the conversion of any form of expression from one language into another or any services incident to or related to interpretation and translation. Consequently, when the order mentions "language specialists," it includes anyone who rents equipment, organizes conferences, performs teleconferencing or précis writing, supervises or coordinates interpreters, reviews or revises translations, or provides recordings of interpretations.

Further, under the order, ASI must amend its Code of Professional Standards, Professional Guidelines, and Yearbook Professional Guidelines to conform to the requirements of paragraphs II and IV of the attached order, which are summarized above. ASI must also amend its bylaws to require each member, chapter, and organizational subdivision to observe the requirements of the order.

In addition, the order requires ASI to provide to its members and affiliates and to the Federal Trade Commission the text of each amendment to the ASI Bylaws, the ASI Code of Professional Standards, and all ASI Professional Guidelines, including those found in the ASI Membership Lists, and the texts of any new rules, regulations or guidelines. The order also requires that, within thirty days after obtaining them, ASI must provide to the Federal Trade Commission copies of all lists of fees that have been produced by any associations and come into ASI's possession.

We note, however, that ASI will be permitted to compile and distribute accurate aggregate historical market information concerning past fees that were actually charged no earlier than three years after this order becomes final, if presented in an unbiased and nondeceptive manner that maintains the anonymity of the parties to the transactions underlying such reports. Similarly, the order does not prohibit ASI from collecting and publishing accurate publicly available information on fees paid by governmental and intergovernmental agencies if such publication states the qualifications and requirements for such fees. With any publication of fees permitted by the order, ASI must include a statement that it is prohibited from recommending fees and that interpreters must independently determine their own fees. In addition, the order states that it does not prohibit ASI from providing information or its nonbinding and non-coercive views concerning the hours of work or preparation or the number of language specialists used for a type of job.

For more specific information, members should refer to the FTC order itself, which is enclosed.

Counsel
American Society of Interpreters

IN THE MATTER OF
THE COCA-COLA BOTTLING COMPANY
OF THE SOUTHWEST

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

Docket 9215. Complaint, July 29, 1988--Final Order, Aug. 31, 1994*

This final order requires Coca-Cola Bottling Company of the Southwest to divest, within 12 months, the Dr Pepper franchise it acquired from San Antonio Dr Pepper Bottling. If the divestiture is not completed within that period, the Commission may appoint a trustee to complete it. In addition, the order requires the respondent to obtain Commission approval before acquiring any branded carbonated soft drink interests in any area in which it already makes, distributes or sells branded concentrate or syrup, or branded carbonated soft drinks.

Appearances

For the Commission: *James E. Elliott, Thomas B. Carter and Mary Lou Steptoe.*

For the respondent: *Gregory Huffman, Thompson & Knight, Dallas, TX.*

INITIAL DECISION

BY JAMES P. TIMONY, ADMINISTRATIVE LAW JUDGE
JUNE 14, 1991

BACKGROUND

Companies and Persons

1. Respondent Coca-Cola Bottling Company of the Southwest ("CCSW") is a privately-held corporation with headquarters in San Antonio, Texas. (CX 980-R-U; RX 549-A.) Its sales in 1988 were \$145,496,000. (CX 3806-U.)

* Complaint previously published 112 FTC 588 (1989).

2. In 1983 the Biedenharn family consolidated their holdings in Temple, Uvalde and San Antonio Coca-Cola Bottling Companies into CCSW, and established The Biedenharn Corporation to hold the stock of CCSW. (RX 232-A-C.) In December 1986, The Biedenharn Corporation merged with CCBG Merger Corp., a subsidiary of Texas Bottling Group, Inc. ("TBG"), resulting in the sale of the Biedenharn family's interest in CCSW. (CX 3052; RX 549-A, B; R. Hoffman, Tr. 5588.) The Biedenharn family of Vicksburg, Mississippi was the first bottler of Coca-Cola. (Howell, Tr. 4005; RX 232-E.)

3. TBG is the sole shareholder of CCSW. (CX 1372-H; CX 1373-Z-23; RX 572-I.) Affiliates of Prudential Insurance Company of America hold 51% of the stock of TBG and 49% is held by The Coca-Cola Bottling Group (Southwest), Inc. ("CCBG-Texas"), a Texas corporation, which is a wholly-owned subsidiary of The Coca-Cola Bottling Group (Southwest), Inc. ("CCBG-Delaware"), a Delaware corporation. (Hoffman, Tr. 5603; CX 1372-G, H.) All of the voting stock of CCBG-Delaware is held by Edmund M. Hoffman and Robert K. Hoffman (the "Hoffmans"). (RX 572-H; RX 2805-J, K, Z-15.)

4. Edmund M. Hoffman is the majority shareholder of CCBG-Delaware. He is also the Chairman and a member of the Board of Directors of each corporation controlled by CCBG-Delaware including CCSW, and is the father of Robert K. Hoffman. (RX 2805-Z-15; CX 1372-Z-37.)

5. Robert K. Hoffman is the second largest shareholder of CCBG-Delaware, and the only other voting shareholder. (RX 2805-Z-15; CX 1372-Z-37.) Robert Hoffman is the President of CCBG-Delaware and of all of its subsidiaries except CCSW, of which he is Vice-Chairman; he is a Director of all entities in the corporate group. (CX 1373-Z-89.)

6. Southwest Coca-Cola Bottling, Inc. ("SWCC"), a wholly-owned subsidiary of CCBG-Texas, is the Coca-Cola bottler in West Texas, Eastern New Mexico, Western Oklahoma and parts of Colorado and Kansas. (CX 4; CX 2805-Z-3, Z-4.) SWCC is a franchisee of The Coca-Cola Company. (RX 2805-Z-5, Z-6.)

7. Snappy Snack is an operating division of CCSW which provides full-line vending and food service in the San Antonio area. (CX 3211.) Bev-Tex until 1986 was a division of CCSW selling fountain syrup and service, and selling and leasing fountain,

refrigeration and institutional kitchen equipment in the San Antonio area. (CX 28-L; RX 232; CX 2068-A.)

8. E. T. ("Toby") Summers III is President and Chief Operating Officer of CCSW. (Summers, Tr. 6360.) Norborne Cole was President of CCSW from 1982 until January 8, 1988. (RX 2805-Z-14, Z-15.)

9. The Dr Pepper Company was a publicly-held corporation with headquarters in Dallas, Texas until 1984, when Forstmann-Little & Co. acquired it in a leveraged buy out. (CX 614-B; RX 1447-D; RX 990-E, N.) After selling the headquarters building, bottling operations, and other assets, except the Dr Pepper franchise contracts and the syrup manufacturing facilities, Forstmann-Little sold Dr Pepper Company in 1986 to a group of investors led by Hicks & Haas Holdings, Inc. (RX 990-N.)

10. In 1986, a group which included some Dr Pepper Company shareholders and bondholders bought Seven-Up Company and combined the administration for the two companies in Dallas, Texas and the manufacturing for the two companies in St. Louis, Missouri. (Knowles, Tr. 2640.) In 1988, the Dr Pepper Company and the Seven-Up Company were combined into Dr Pepper/Seven-up Companies, Inc., the current franchiser of the Dr Pepper and Seven-Up bottling operations in the United States. (RX 1989, pp. 3-4.) Dr Pepper/Seven-up Companies, Inc. is the owner of the trademark and manufacturer of concentrates for Dr Pepper and Seven-Up brand products. (Clarke, Tr. 4297-99; Knowles, Tr. 2638-41.) The term "DPUSA" is used here to mean Dr Pepper Company and its successor Dr Pepper/Seven-up Companies, Inc.

11. Until 1984, DPUSA owned bottling operations in Dallas/Fort Worth, Waco, Houston, San Antonio, and Corpus Christi, Texas. (RX 1648-Z-29-Z-31; Turner, Tr. 916; Antle, Tr. 3041, 3079.)

12. San Antonio Dr Pepper Bottling Company ("DP-SA") was a wholly-owned subsidiary of DPUSA. (RX 1648-Z-29; Turner, Tr. 917-918; Antle, Tr. 3041.) DP-SA sold its bottling plant to Grant-Lydick, Inc. on October 31, 1984. (RX 2409.)

13. From 1982 until the company-owned bottling plants were sold, DP-SA and the other company-owned plants were overseen by Jim Turner, as executive officer in the DPUSA offices in Dallas, Texas. (Turner, Tr. 914-15, 1035-37; Antle, Tr. 3083-85.)

14. Grant-Lydick Beverage Company ("Grant-Lydick") does business in San Antonio, Austin, Corpus Christi, Victoria and South

Texas; in San Antonio, Grant-Lydick uses the trade name Big Red Bottling Company. (Lydick, Tr. 2992-3008.) Grant-Lydick was formed by Bud Grant and Lee Lydick in April 1984 to get into the soft drink bottling business by purchasing some of the assets of DP-SA. (RX 1648-D.) Emery Bodnar is Executive Vice President, general manager and part owner of Grant-Lydick. (Bodnar, Tr. 1225.)

15. PepsiCo, Inc., with headquarters in Purchase, New York, is in the snack, restaurant and soft drink businesses. (RX 2864-D; RX 1218, pp. PC027073-74; Davis, Tr. 4619-4624.) Its sales in 1988 exceeded \$13 billion. (RX 1218, p. 116.) PepsiCo, Inc. receives one-third of its revenue from soft drinks, the rest coming from its snack and restaurant businesses. (Summers, Tr. 6767-68.)

16. Pepsi-Cola Company ("Pepsi USA") is a division of PepsiCo, Inc. (RX 2864-Z-34.) PepsiCo, Inc. owns the United States trademark, and produces concentrate for Pepsi-Cola and other brands of soft drinks. (Davis, Tr. 4463, 4638.)

17. Pepsi USA owns bottling operations in various parts of the United States, including San Antonio, Houston, Dallas/Fort Worth, and Austin, Texas. (Amrosowicz, Tr. 791-793, 837-838.) These company-owned bottling operations are responsible for 37% of Pepsi USA bottle and can sales. (RX 1218; p. PC027073.)

18. Pepsi USA's operations were known as the Pepsi Bottling Group. (RX 1213; RX 1216.) In 1987 the name was changed to Pepsi COBO (Company-Owned Bottling Operations). (Amrosowicz, Tr. 787.) The term "Pepsi COBO" is used here to refer to Pepsi company-owned bottling entities, before and after 1987.

19. The Seven-Up Company ("7-Up USA") is currently part of DPUSA, with headquarters in Dallas, Texas. (Knowles, Tr. 2639.) Philip Morris, Incorporated bought 7-Up USA in the mid-70's to enter the soft drink business, but sold it on November 12, 1986 to an investor group headed by Hicks & Haas Holdings, Inc. (RX 1990, p. 3; Knowles, Tr. 2685.)

20. 7-Up USA owned 7-Up bottling operations in various parts of the United States. (CX 3941, pp. 263-64; CX 997.) From 1982 to January 1986, 7-UP USA owned the Seven-Up Bottling Company of San Antonio ("SA 7-Up"), which held the 7-Up franchise in the San Antonio area. (RX 2002; Lydick, Tr. 2996-97.) Texas Bottlers, Inc. held the 7-Up franchise from January 1986 until May 1987, when Grant-Lydick purchased the assets of Texas Bottlers, Inc., for \$7,800,000. (Bodnar, Tr. 1334.)

21. RC Cola Company is a subsidiary of DWG, Inc., a conglomerate. (Coyne, Tr. 3495-96; RX 2836-39; RX 2841, p. 3.) RC Cola Company owns the trademark and produces concentrate for RC Cola products. (RX 2841, pp. 9-10.)

22. Texas Beverage Packers ("Texas Beverage") is a family-owned bottling company with headquarters in San Antonio. Texas Beverage contract packs soft drinks and sells its own "Texas" brand private label soft drinks to retailers throughout Texas. (Hixon, Tr. 7269-1, 7271-87, 7332-43.) Steven Hixon is General Manager of Texas Beverage. (Hixon, Tr. 7270.)

23. Shasta Beverages ("Shasta"), with headquarters in Hayward, California, manufactures concentrate and carbonated soft drinks. (RX 1001-A, B; RX 1532.) Shasta operates bottling plants throughout the United States, including Houston, Texas. (Skinner Test., RX 3011, p. 3166.) Shasta makes Shasta soft drinks which it distributes nationwide. (RX 1532.) Shasta also contract packs other soft drinks, such as IBC Root Beer. (Knowles, Tr. 2689, 2810.)

24. Kroger Company owns and operates a chain of grocery stores in various parts of the United States. (Morath, Tr. 7654-7655.) Garland Beverage Company, a soft drink production plant owned by Kroger in Garland, Texas (near Dallas), produces Kroger's own "Big K" private label line of soft drinks for sale in Kroger stores. (Kaiser, Tr. 3254.) Garland Beverage Co. also contract packs for other brands. (RX 1726.)

25. Kroger has a large regional warehouse and administrative office in Houston, Texas which supervises its operations in most of CCSW's territory. (Kaiser, Tr. 3155-57.) Kroger is several times larger than HEB, but has fewer stores than HEB in CCSW's territory. (Summers, Tr. 6617, 6627-28, 6767.)

26. Winn-Dixie, a large grocery chain, operates a bottling plant in Ft. Worth, Texas which produces "Chek" brand private label soft drinks for sale in Winn-Dixie stores. (Hixon, Tr. 7278-79.)

27. Beverage Packers Inc. is a privately-held company which owns and operates a bottling plant in Fort Worth, Texas. (Hixon, Tr. 7274.) Beverage Packers Inc. produces a number of soft drinks, including its own line of warehouse brand soft drinks. (RX 1819.)

28. Philip Espinoza was an employee and part owner of the Royal Crown Bottling Company of San Antonio. (Espinoza, Tr. 4163-65.) Since retiring in 1986, he has worked for a series of companies (the "Espinoza companies") selling soft drinks in and around San Antonio

and the Rio Grande Valley. The Espinoza companies include La Hacienda, Premier Distributing, Apollo Distributing, and Star Distributing. The Espinoza companies have distributed Nehi soft drinks, and other brands, in the San Antonio area since 1986. (Limon, Tr. 4956-57; Espinoza Tr. 4166, 4169-87; Coyne, Tr. 3431.)

29. The Coca-Cola Company has headquarters in Atlanta, Ga. Coca-Cola USA ("CCUSA") is the division of The Coca-Cola Company that manages domestic soft drink operations. (Howell, Tr. 4004.) CCUSA produces the concentrates for Coca-Cola soft drinks.¹ (Atchison, Tr. 5237-38.)

30. Coca-Cola Enterprises ("CCE"), a publicly-held company with headquarters in Atlanta, Georgia, owns Coca-Cola bottling operations in various parts of the United States, including Dallas/Fort Worth, Houston, and Austin, Texas. (Howell, Tr. 4002-07.) The Coca-Cola Company owns 49% of the stock of CCE. (RX 3131-G.)

31. From 1939 to July 1982 the Big Red Bottling Company of San Antonio was an independent bottler which owned and operated a bottling plant in San Antonio selling Big Red and other brands of soft drinks. In July 1982, DP-SA acquired Big Red Bottling Company of San Antonio for stock, and a non-compete agreement, valued at \$6,000,000. (RX 1648-E; CX 3315-Z-4.)

32. From December 1982 to November 1984, DP-SA held the Royal Crown Cola franchise. (RX 3065-A; Bodnar, Tr. 1251-52; Turner, Tr. 1037.) On November 9, 1984, Grant-Lydick became the Royal Crown franchisee. (RX 3105-H-Z-2.)

33. The Huntress family owned a bottling plant which held Pepsi-Cola franchise in San Antonio until 1982, when they sold the operation to Pepsi COBO. (Lauterjung, Tr. 4844.)

34. Oneta Company ("Oneta") owns and operates the Pepsi-Cola bottling plant and franchise in Corpus Christi and Victoria, Texas and surrounding areas. Karl Koch is President and Chairman of the Board. (Koch, Tr. 1801.)

35. Better Beverages, Inc., a closely-held corporation with headquarters in Hallettsville, Texas, owns and operates Dr Pepper, Pepsi, Seven-Up, A&W, Canada Dry, Country Time, Nesbitt's and Hawaiian Punch franchises in southeast Texas between San Antonio and Houston. (Antle, Tr. 3047-48; Campbell, Tr. 1922-23.) Dale

¹ Concentrate companies are "syrup companies" or "parent companies." (Knowles, Tr. 2699-2700.)

Campbell, his mother and his two brothers own Better Beverages. (Campbell, Tr. 1935-36.)

36. The Dr Pepper Bottling Company of Texas (“Turner DP”) owns and operates the former DPUSA company-owned bottling operations in Dallas/Ft. Worth, Waco, and Houston, Texas, with plants in Houston and Irving (near Dallas). (Turner, Tr. 915.) Jim Turner is President and CEO of Turner DP, and owns a minority interest in the company. Turner DP holds franchises for DPUSA, RC Cola, 7-Up USA, Big Red, Canada Dry, A&W, Original New York Seltzer, Sunkist, and other flavor companies in various parts of its sales territory. (Turner, Tr. 926-28.)

37. AbTex holds Pepsi-Cola and Dr Pepper franchises for West and Southwest Texas and operates a bottling operation in Abilene, Texas. (Cole, RX 3008, pp. 90-91.)

38. H. E. Butt Grocery Company (“HEB”) is a privately-owned regional grocery chain with headquarters in San Antonio, Texas. (Gonzala, Tr. 2024; Summers, Tr. 6767, 6589-93.) HEB is the largest volume grocery chain in CCSW’s territory. There are 153 regular HEB stores in Texas, with 86 located in CCSW franchise territory. There are 23 smaller “Pantry Stores” operated by HEB in areas outside the CCSW franchise territory. Robert Chapman is Vice President of procurement at HEB and Tim Brinkley is Manager of Information Services. (Summers, Tr. 6593.)

39. Albertson is a national grocery chain which operates retail stores in parts of Texas. Albertson is several times the size of HEB, although it has fewer stores in CCSW’s area. (Summers, Tr. 6767.)

40. Other supermarket chains which operate stores in Texas include Handy Andy and Super S. (Howell, Tr. 4058; Sendelbach, Tr. 7686-89.) Convenience store chains which operate stores in Texas include: National Convenience Stores, which operates the Stop-N-Go stores, the largest volume convenience stores in South Texas (Summers, Tr. 6630-6631; Howell, Tr. 4063; Davis, Tr. 4604-05), with 195 stores in San Antonio (Hiller, Tr. 5531-32); Circle K (Summers, Tr. 6631); and Maverick Markets. (E. Hoffman, Tr. 575.)

41. Concentrate companies and “fountain wholesalers” sell post-mix fountain syrup in this market including: CCUSA (RX 861); DPUSA; Martin-Brower, which supplies McDonald’s restaurants (Summer, Tr. 6515, 7060; Knowles, Tr. 2813-17); Burger King Distribution Systems, formerly Distron, which supplies Burger King

restaurants; Sysco; Sugar Foods; White Swan; and McLane. (RX 861; Summers, Tr. 6503; Short, Tr. 7740-45.)

42. Full-line vending companies operating in CCSW's territory include: Servomation (Little, Tr. 657) and ARA (Summers, Tr. 6655), L. C. Vending (a family-owned business, headed by Ladd Little) (Little, Tr. 632-33) and A&W Leasing. (Summers, Tr. 6655.)

This Proceeding

43. The original complaint was filed on July 29, 1988, naming CCSW and DPUSA as respondents. The complaint asked that CCSW be required to divest the Dr Pepper and Canada Dry licenses and assets acquired from DP-SA in 1984. On August 4, 1989, complaint counsel and DPUSA entered into a settlement agreement and DPUSA was dismissed from the case. On November 18, 1988, an amended complaint was filed.

44. Trial in this matter commenced on July 10, 1990 and concluded on October 3, 1990.

History of Challenged Acquisition

45. In 1984 Forstmann-Little began selling the Canada Dry business (Turner, Tr. 920-21) and DPUSA's company-owned bottling plants. (CX 3817.) Jim Turner (DPUSA President of company-owned Bottling Operations) and Don Antle (DPUSA Vice President, Franchise Department) were appointed to handle the sale of the plants. (Turner, Tr. 1411-12.)

46. Bud Grant, a geologist and oilman, and Lee Lydick, owner of Triple XXX Root Beer, wanted to buy DP-SA but their offer of \$16-17 million was refused by DPUSA. (Lydick, Tr. 3023.) They made a later offer, but were unable to obtain financing for the purchase. (Turner, Tr. 1097-98, 1150)

47. CCSW wanted the franchises for Dr Pepper and Canada Dry. CCSW had no need for DP-SA's main production facility, the former Big Red Bottling Company of San Antonio plant. CCSW indicated its interest but DPUSA wanted to sell the operation as a whole and initially rejected CCSW's response. (Antle, Tr. 3059.)

48. In 1984, DPUSA preferred granting Dr Pepper franchises to independent bottling companies not owned by competing concentrate companies. The Pepsi bottler in San Antonio was wholly-owned by

Pepsi USA. Further, Pepsi USA officials told DPUSA that the amount requested by DPUSA for the DP-SA bottling operation was too high. (Antle, Tr. 3059-60; Turner, Tr. 1095.)

49. DPUSA sold the operation in two parts. (Turner, Tr. 1152.) CCSW bid on the Dr Pepper and Canada Dry franchises. CCSW initially offered \$5 million, later increased to \$14.5 million. (CX 3; RX 2092-F; Turner, Tr. 1158.)

50. On August 28, 1984, CCSW purchased from DP-SA assets for \$14.5 million (RX 1292, p. 1; CX 1662; CX 253): a warehouse adjacent to the CCSW bottling plant (Bodnar, Tr. 1276; 1518-20); 2150 DP-identified used vending machines with an average age of five to six years (Little, Tr. 653); 40% of the delivery and over-the-road trucks owned by DP-SA, with an average age of seven to ten years (Bodnar, Tr. 1689; CX 254); and DP-SA's rights in contracts relating to the Dr Pepper and Canada Dry franchises were reissued to CCSW. (CX 3, p. 7; CX 247-C; CX 270.)

51. In the same transaction, DPUSA agreed to issue Dr Pepper license agreements to CCSW. (CX 3, pp. 17-18.) DPUSA and Canada Dry issued new franchise agreements for the Dr Pepper and Canada Dry brands to CCSW in 1984. (CX 266-67.)

52. CCSW and DPUSA also entered into a sales agency agreement requiring CCSW to act as DPUSA's agent in the sale of Dr Pepper products produced in DPUSA company-owned plants to customers in CCSW's Dr Pepper territory until a specified number of cases had been sold. (CX 3, p. 276; CX 275; CX 276; CX 1838-A; Schwerdtfeger, Tr. 2571-73, 2622.)

53. After the sale to CCSW, DP-SA still owned the DP-SA bottling plant, the bottling equipment, non-Dr Pepper-identified vending machines, the remaining 60% of the vehicles, and the franchises for Big Red, RC, Crush, and Hires. (Bodnar, Tr. 1668; CX 237.)

54. DP-SA continued to operate its business as Big Red Bottling Company of San Antonio, until DPUSA's assets were sold to Grant-Lydict. (CX 2052; CX 2484; CX 3254-A; CX 237-C.)

55. In October 1984, Grant-Lydict acquired the remaining assets of DP-SA, including the bottling plant (RX 1663), 60% of the trucks, and some vending machines for \$6.5 million. (RX 2408; RX 2409; Lydict, Tr. 2981-82; RX 1648.) Grant-Lydict put up \$100,000. (Lydict, Tr. 2977, 2984.) The remaining \$6.4 million was lent by

General Electric Credit Corporation, which received a 44% share of the business. (Lydick, Tr. 2983-84; RX 2410; RX 2411.)

56. Grant-Lydick hired Emery Bodnar, the manager of DP-SA, to run the business. (Bodnar, Tr. 1223.) Grant-Lydick also hired half of the former employees of DP-SA. (Bodnar, Tr. 1294.)

57. Grant-Lydick obtained licenses to produce and sell Big Red, RC, Crush, Hires, and DP-SA's other remaining brands (CX 3495, CX 3504, CX 3505), about 58% of DP-SA's 1983 sales volume. (Knowles, Tr. 2874.) Grant-Lydick operates its soft drink business in San Antonio as Big Red Bottling Company of San Antonio. (Bodnar, Tr. 1581.)

58. On December 3, 1986, TBG acquired the Biedenharn ownership in CCSW (R. Hoffman, Tr. 5588, CX 3052; RX 2805-K) for \$211 million, consisting of \$145 million in cash and the assumption of \$65.4 million in existing debt. (CX 29; CX 28; CX 3123.) Prudential Insurance Company ("Prudential") provided financing in exchange for 57% of the stock of TBG. Prudential provided \$20 million in cash and \$40 million as Senior Debt and \$80.5 million as Subordinated Debt. Additional financing was provided by a revolving loan of \$95 million from Texas Commerce Bank. (R. Hoffman, Tr. 5601; RX 2874-75; Admit.)

59. DPUSA and Canada Dry Corporation then issued new franchise agreements to CCSW. (R. Hoffman, Tr. 5618-20; CX 1391-A; CX 1938-X-Z-1 and Z-10-13; CX 3113; RX 2902.) The new Canada Dry franchise was for 34 counties in South Texas. (CX 2852; CX 3065-B; RX 2932.)

60. In April 1987, CCSW acquired the assets of the American Bottling Company, a Dunnam family partnership, for \$54 million. (CX 2805.) The American Bottling Company held the franchises for Coca-Cola, Dr Pepper and several other brands around Corpus Christi, Texas. CCSW closed the Corpus Christi production facility and supplied the Corpus Christi sales center from San Antonio and Cuero. (Summers, Tr. 6365; E. Hoffman, Tr. 230-31.)

61. In March 1989, CCSW acquired the remaining interest held by CCE in Crossroads Canning Company, a canning co-operative located in Cuero, Texas, for \$3 million. (Summers, Tr. 6397-98.)

62. CCSW acquired Coca-Cola Bottling Company, Cuero, Texas from the Summers family in 1985 (CX 3261; CX 22) and the Del Rio and Mason/Menard Coca-Cola bottling operations in 1986. (CX 28-29.)

63. Grant-Lydick has acquired additional soft drink brands and new geographic territories. (Bodnar, Tr. 1334-36; RX 2970.) In 1987, Grant-Lydick acquired Texas Bottlers Inc. (the Seven-Up nonproducing bottler in San Antonio and Austin, Texas) for \$7.8 million (Bodnar, Tr. 1334) and the Seven-Up bottler in Corpus Christi from the Nielsen family in August 1987 for \$1.2 million. (Lydick, Tr. 2999-3000.)

64. Grant-Lydick purchased the assets of Big Red Bottling Company of Austin in December 1988 for \$1.3 million. (Lydick, Tr. 3002-03.)

65. In April 1990 Grant-Lydick purchased Timberline Corporation, an RC Cola distributor in LaGrange, Texas, for \$134,000. (Lydick, Tr. 3005-06.)

66. Pepsi COBO in the early 1980's acquired the Pepsi bottlers in Dallas, San Antonio, Houston, Austin, and Harlingen. (Davis, Tr. 4451-54; CX 3971.)

67. In September 1984, the Texas Attorney General's Office filed suit to challenge the transactions whereby CCSW acquired the Dr Pepper and Canada Dry brands, charging that the transactions violated Texas antitrust law. (CX 2-A-B.)

68. On July 1, 1986, CCSW, DPUSA, and the Texas Attorney General entered into a Settlement Agreement. (CX 2-E.) CCSW was enjoined until July 1, 1993, from the following: selling to its vending subsidiary on terms different from those offered to third party vendors; placing vending equipment on an "exclusive" basis; seeking or accepting more than 65% of the shelf space "regularly allocated for the sale of soft drinks" in any store; seeking or accepting "exclusive end-of-aisle display space" for "more than 65% of the weeks in any given calendar year"; or "seeking or consenting to participate in, on the average, more than 65% of" promotional ads during any calendar year.

69. CCSW was required to offer to sell the vending machines acquired from DP-SA "to the owner of the site at which such vending machine(s) was currently located" or to any of CCSW's third party vending customers at book value. For any vending machine not sold, CCSW is required to make available at no charge two slots in each vending machine for the sale of products of CCSW's competitors. (CX 2-G, Sec IV; Summers, Tr. 6665.)

70. Texas Attorney General is entitled to seek an extension of the order for a period of up to three years. (CX 2-H, Section VIII).

71. CCSW sent a letter to vending companies offering to sell the vending machines which CCSW acquired from DP-SA at book value. None of the machines was purchased. (Little, Tr. 73132.)

COMPETITION

Soft Drinks

72. CCSW's primary business is bottling, distributing, and selling carbonated soft drinks² at wholesale. (F 236-39.)

73. Soft drinks are sold in cans, glass, and plastic (PET) containers. The term "bottles" sometimes refers to soft drinks sold in any container ready to drink. Soft drinks are also sold in five gallon tanks to fountain outlets ready to drink ("pre-mix") or as syrup which must be mixed with carbonated water ("post-mix"). (Turner, Tr. 1085-86; Knowles, Tr. 2681-82.)

74. Soft drinks are produced by combining "concentrate," sweetener, and carbonated or still water. "Concentrate" includes the flavors, extracts, and essences used to produce soft drinks. "Syrup" is concentrate mixed with sweetener and some water. (Turner, Tr. 1046.)

75. In 1987, national sales of carbonated soft drinks totaled \$38 billion. (CX 833-X; CX 784-J.)

76. The 1988 per capita consumption of carbonated soft drinks was 45.9 gallons. Carbonated soft drinks lead all beverages in per capita consumption, including water. (RX 990-R.)

77. Texas is the "heartland" of both Coca-Cola and Dr Pepper. (Hoffman, E., Tr. 227-28; Turner, Tr. 982.) Texas is very weak for Pepsi and represents 90% of Pepsi's national share gap with Coca-Cola. (Amrosowicz, Tr. 889; Limon, Tr. 4977.)

78. The national carbonated soft drink industry's main flavors are cola, lemon-lime, pepper, orange, and root beer. (CX 2956-B-C; CX 2527-D; RX 990-S, Z-19.) These five flavors are 95% of all soft drink sales. (CX 3956-B-C; RX 990 Z-19; CX 3982-E.)

79. Colas are about 65% of carbonated soft drink sales. (Bodnar, Tr. 1253, 1263; RX 990-S, Z-19-21.) The cola category is dominated by Coca-Cola and PepsiCo. Royal Crown is a weak third. (CX 41-

² "Soft" drinks contain no alcohol.

V; RX 990-S.) Most consumers of soft drinks regularly drink colas and look for other flavors as a change of pace. (CX 858-C, E.)

80. In 1984, the national market shares for the other soft drink flavors were (CX 864 at p. 14; RX 990-Z-19): lemon-lime, 12.7%; pepper, 6.9%; orange, 7.0%; and root beer, 4.9%.

81. In 1984, the national market sales by brand were (RX 990-Z-18): Coca-Cola, 21.6%; Pepsi, 17.1%; Diet Coke, 5.5%; 7-Up, 5.0%; and Dr Pepper, 5.4%.

82. Market shares of soft drink brands in San Antonio food stores in October, November 1989 were (RX 34-D): Coca-Cola (Classic and New Coke), 25.7%; Pepsi, 9.5%; Dr Pepper, 7.4%; Diet Coke, 7.3%; Big Red, 6.9%; Sprite, 5.2%; 7-Up, 2.5%; Royal Crown, 2.1%; and control brand (private label), 11.6%.

83. In 1984, national sales of non-diet soft drinks by channels included (RX 990-U; CX 3218-K): grocery chain, 50.8%; fountain, 14.0%; vending, 10.2%; small grocery store, 5.7%; convenience store, 4.7%; discount store, 1.4%; and drug store, 0.8%.

84. In 1985, the number of independent bottlers of soft drinks in the United States by brand were (RX 990-Z-29): Coca-Cola - 206; Pepsi-Cola - 167; 7-Up - 24; Dr Pepper - 10; Royal Crown - 45; and Canada Dry - 2.

85. San Antonio is Big Red's largest market, and Grant-Lydick Beverage Company is the largest Big Red bottler. (Turner, Tr. 953.) CCSW introduced Cima Red to compete against Big Red. (Hoffman, E., Tr. 346.)

86. Carbonated soft drink package sizes include 6.5, 10, 12, 16, 20 and 32 ounce glass or PET bottles, 1, 2 and 3 liter PET bottles, and 12 oz. cans. (CX 53-G, Y-Z-6.) Private label carbonated soft drinks are sold in 12 ounce cans and 2 and 3 liter PET bottles. (CX 3158-K.) H.E.B.'s Plaza is only in loose cans and 2 liter bottles. (Chapman, Tr. 7165; CX 4022.)

87. The sales of soft drinks are seasonal. (CX 3816.) The peak selling months are from May to September. Soft drink sales are strong at the holidays: July 4, Memorial Day, and Labor Day. After a lull at Thanksgiving, sales increase during the Christmas/New Year holiday period. Sales are slowest in February. (Summers, Tr. 6609-10.)

Fountain

88. Concentrate firms, including CCUSA, Dr Pepper, and PepsiCo have exclusive geographic territories for their pre-mix fountain syrup. (Admit.)

89. PepsiCo and RC Cola have exclusive geographic franchise territories for post-mix fountain syrup. (Knowles, Tr. 2681-82.) CCUSA and Dr Pepper do not have exclusive franchise territories for post-mix franchise syrup.

90. CCUSA and DPUSA sell post-mix directly to some customers. (Howell, Tr. 4005; Turner, Tr. 1010-11; Koch, Tr. 1804.) Dr Pepper post-mix syrup manufactured by CCSW is sold by CCSW, and resold by Pepsi COBO, and Grant-Lydick. (RX 2783; Summers, Tr. 6509.) Coca-Cola and Dr Pepper fountain products are available from many fountain wholesalers in the San Antonio area. (Short, Tr. 7741-42; RX 861; Turner, Tr. 1172-74; CX 33-Z-18.)

91. Dr Pepper fountain is delivered directly to the customer, or to a bottler, commissary or food broker who services the customers. (RX 1919.) HEB, Kroger, Albertson's, Skaggs and Furr's are all national fountain accounts for DPUSA. (Knowles, Tr. 2831.)

92. Larger fountain accounts qualify for "national account pricing" from both CCUSA and DPUSA. (Short, Tr. 7736; Cassagne, Tr. 7585; Knowles, Tr. 2820-2823.)

93. About 65-70% of CCSW's sales of post-mix are made at the national account price. (Knowles, Tr. 2820; CX 4073.) Coca-Cola fountain syrup is also distributed by food distributors McLane's, Sugar Foods, Frostex and Distron, the Burger King commissary (RX 3108; Summers, Tr. 6505-06, 6515-16; CX 387-Z-103; CX 4039), and Martin-Brower, which supplies McDonald's. (Short, Tr. 7759-60; Turner, Tr. 1177).

94. Most of CCUSA's fountain business is through commissaries and distributors, with the rest through Coca-Cola bottlers like CCSW. (CX 387-Z-103; RX 636-N.)

95. McDonald's and other restaurant chains sell private label fountain products. The largest selling orange fountain soft drink is McDonald's private brand. (Cassagne, Tr. 7759-60.)

Franchises

96. Franchises for bottled soft drinks are territorially exclusive. (CX 1666.) The franchisor grants to the franchisee the exclusive right to make and sell soft drinks in bottles and cans bearing the franchisor's trademark and using the franchisor's formula, in a specified geographic territory. (RX 2848.)

97. Concentrate companies historically required the bottler to own a facility to produce the product sold in the franchise territory. (RX 2848-D, E (CCUSA); RX 2909-A (DPUSA); RX 2932-A (Canada Dry); RX 2930-B (A&W).) Some concentrate companies now waive the production requirement and allow a bottler to become a "non-producing bottler" who may acquire product from elsewhere. (RX 602; RX 2925; RX 912-G.)

98. Coca-Cola (RX 2848-E) and Dr Pepper (RX 2908-A) franchises are perpetual. Franchises for allied products of The Coca-Cola Company are granted for ten-year renewable terms. Both types can be terminated for cause. (Admit.)

99. CCSW has a license to market Hi-C products to schools; all other marketing for Hi-C is conducted by Coca-Cola Foods division of The Coca-Cola Company. (Admit.)

100. CCSW sells New York Seltzer under a distributorship agreement providing for termination on thirty days notice. (Admit.)

101. In many franchise agreements (but not including certain franchises issued by The Coca-Cola Company), a transfer of the franchise, including a change of ownership of the corporation which holds the franchise, constitutes a breach of the franchise agreement unless the franchisor has given prior written consent. The Coca-Cola Company First Line Bottling Contract and Bottler's Bottling Contract each restricts direct franchise transfers, but both are silent as to changes in control of corporate franchisees. (E. Hoffman, Tr. 220; R. Hoffman, Tr. 5618-20.)

102. CCSW and SWCC are licensed under the First Line Bottling Contract for Coca-Cola (RX 2848) as amended by adding geographic territory. (RX 2849; RX 2851; RX 2852; RX 2856; Summers, Tr. 6734-38.)

103. DPUSA does not allow any franchise to be transferred without its consent. The sale of a bottling operation allows DPUSA to choose a different franchisee. (Knowles, Tr. 2802-03, 2877.)

104. Concentrate companies use "transfer restrictions" to control bottler performance. (Knowles, Tr. 2802; Treibelcock, Tr. 5839.) They may refuse to grant a new license to the prospective purchaser. (E. Hoffman, Tr. 491-92.) Or they may revoke the existing license if the bottler is sold (or even refinanced) without their prior approval. (Knowles, Tr. 2872; RX 1390.)

105. Bottling franchises prevent the bottler from selling more than one brand in a "flavor segment." (CX 1668; RX 2938-C.) These provisions are known as "imitative products provisions." (CX 1912.)

106. Concentrate companies may waive imitative products provisions, allowing the bottler to sell more than one brand of a soft drink flavor. CCSW sells two orange flavors, Minute Maid and Sunkist. (RX 2936-A; RX 2937; RX 2136.) CCSW also sells two seltzers, Canada Dry and Original New York Seltzer. (RX 2877; Summers, Tr. 6751; CX 3182.)

107. Franchise agreements establish the standards for bottlers, performance, including sales volume, logos, and vending. (R. Hoffman, Tr. 5625-26; Summers, Tr. 6747-49; RX 2933-34.)

108. Canada Dry required CCSW to agree to performance requirements to obtain the Canada Dry franchise following the change of control of CCSW, from the Biedenbarns to TBG, in December 1986. (RX 2932-33.)

109. CCUSA includes "right of first refusal" clauses in newly-issued franchises. (RX 914-I-M.) By September 1988, 76.7% of Coca-Cola volume was subject to such restrictions. (RX 769.)

110. The performance standard in CCSW's Coca-Cola franchise requires that CCSW "vigorously push," and "use reasonable efforts to sell" Coca-Cola products. So does the DPUSA franchises. (RX 2848-E, O; CX 1861 (Coca-Cola franchise); RX 2850-D (1983 Amendment); Summers, Tr. 6486.)

111. Concentrate companies enforce territorial-exclusivity of the bottling franchises by prohibiting a bottler from "transshipping," selling in another bottler's territory. (CX 1667; Davis, Tr. 4473-74; RX 2850-B; RX 2908-B; RX 2932-A.)

112. Many bottlers are licensed by several concentrate companies to sell their brands of soft drinks. (Shanks Test., CX 3989, p. 35.) CCSW sells Coca-Cola owned by CCUSA, Dr Pepper owned by DPUSA, Sunkist owned by Cadbury-Schweppes, and Original New York Seltzer owned by ONYS, among others. (RX 2931; E. Hoff-

man, Tr. 507-09, 549; CX 2196-Z-37; CX 3716-Z-19.) This practice is sometimes called "piggybacking." (Knowles, Tr. 2764-67.)

113. Piggybacking facilitates entry of new brands. (E. Hoffman, Tr. 507-09; Knowles, Tr. 2764-67, 2770-74; R. Hoffman, Tr. 5627; CX 3646 (Quickkick); CX 321; CX 3650 (ONYS Iced Coffee); CX 3782 (ProMotion); CX 3726 (Topo Chico).)

114. DPUSA built its business by franchising Coca-Cola and Pepsi-Cola bottlers, picking the most effective distributor. (Knowles, Tr. 2856, 2667-68; R. Hoffman, Tr. 5620-21; Turner, Tr. 1134-35, 1154-55; Clarke, Tr. 4374-76; Antle, Tr. 3078.)

115. Dr Pepper uses mostly Coca-Cola bottlers (40-45% of Dr Pepper volume) and Pepsi bottlers (40% of Dr Pepper volume). (Knowles, Tr. 2765.) Only one or two bottlers remain who bottle just Dr Pepper products. (Knowles, Tr. 2769.)

116. Other concentrate companies also have a similar policy of licensing the most effective bottler. (Coyne, Tr. 3597 (RC); CX 857 (Crush).)

Production

117. A "case" of soft drinks includes: 24 twelve-ounce aluminum cans; 24 bottles of 6.5-ounce, 10-ounce, 16-ounce or 20-ounce bottles; 6 two-liter PET bottles; 6 three-liter PET bottles; or 12 one-liter bottles. (Summers, Tr. 6491.)

118. Sixteen-ounce returnable is usually sold in 8-packs; sixteen ounce nonreturnable is usually sold in six-packs or singles. Twenty-ounce PET is always sold in singles, while 12 ounce cans may be packaged in six packs, 12 packs, 15 packs or 20 packs. Two and three-liter PET bottles are sold individually. (Summers, Tr. 6492.)

119. Soft drinks are bottled and canned on automated production "lines." (Cole Depo., RX 3008, p. 43.) A bottling plant usually includes a can line and one or more bottle lines. (Morath, Tr. 7662-64.)

120. Equipment for a can line consists of a filler, a can seamer, a proportioner, high-side refrigeration equipment, a can warmer, a date coder, a can rinser, a tray former/case packer, a depalletizer, a Hi-Cone machine, a multi-pack machine, and a conveyor belt. (Summers, Tr. 6447-60.)

121. A bottle line must also have a labeling machine. Returnable bottles also require bottle sorting capability and a bottle washer. (Summers, Tr., 6373.)

122. There are economies of scale in bottling and canning. (Turner, Tr. 1026-27.) Economies of scale are more significant in canning than in bottling. Most economies of scale are achieved at a soft drink plant of three to five million cases per year of cans and two to four million cases per year of bottles. (CX 3218-P (Figure 16), Z-14; Amrosowicz, Tr. 826; CX 570-N.)

123. Small companies may achieve economies of scale by hiring others to produce the product ("contract" or "copacking"). (Campbell, Tr. 1926; Summers, Tr. 6465-66; Turner, Tr. 1119-22.)

124. The contract packer spreads fixed overhead over a larger number of cases. (Turner, Tr. 1119-20.) The customer does not have to invest in equipment, and can purchase the product for less than it would cost to produce it. (Turner, Tr. 1121.)

125. The 1983 Amendment to the Coca-Cola Bottler's Contract permits the Coca-Cola bottler to provide contract packing services, even for another cola product. (Howell, Tr. 3998.) CCSW provides contract packing for other bottlers. (Cole, RX 3008, p.45, (1.5 million cases in 1986).)

126. Bottlers who contract-pack in Texas include Turner DP (Turner, Tr. 929-30, 1117-18), Better Beverages (Campbell, Tr. 1925-26; Turner, Tr. 1120-21), the Pepsi COBO plants in Conroe and Dallas (Amrosowicz, Tr. 866), Temple Dr Pepper Bottling Company (Espinoza, Tr. 4193; Turner, Tr. 1120-21), Grant-Lydick (Bodnar, Tr. 1534-36, 1656; RX 1607; RX 2015), AbTex (Turner, Tr. 1120), Garland Beverages (Morath, Tr. 7667, 7670; RX 2440; RX 1711), Texas Beverage (Hixon, Tr. 7271), Beverage Packers, Inc. (Hixon, Tr. 7274; Morath, Tr. 7670), the Shasta plant in Houston (Hixon, Tr. 7283; Morath, Tr. 7670; Skinner Test., RX 3011, pp. 3167-68), and the Winn-Dixie plant in Ft. Worth (Hixon, Tr. 727879).

127. Contract packers, price is slightly higher than the marginal cost of production. (Bodnar, Tr. 1657-68.)

128. Some bottlers, including Grant-Lydick, have no can line, and purchase all of their cans from contract packers. (Bodnar, Tr. 1256-57.)

129. New brands have been introduced by contract packing, including Soho (Collier Test., RX 3015, pp. 4082-84), Original New York Seltzer (Miller Test., RX 3013, pp. 3441-45, 3448), and Aga. (Limon, Tr. 4956.)

130. Bottlers can join a cooperative canning or bottling plant. (Howell, Tr. 4011-12; Turner, Tr. 1121-22; CX 3218-Q, R; Summers,

Tr. 6405-06.) Co-ops help bottlers lower their cost of goods and become more efficient. (Howell, Tr. 4012, Summers, Tr. 6405-06 CX 3218-Q, R.)

131. Crossroads Canning Company was a production cooperative formed by Coca-Cola Bottling Company--Cuero, San Marcos Coca-Cola Bottling Company and Coca-Cola Bottling Company of McAllen. In 1989, CCSW acquired it. (Admit.)

132. CCSW and SWCC own Western Container, a cooperative which manufactures PET bottles for its bottler members at facilities located in Houston and Big Spring, Texas. (Summers, Tr. 6404.)

Excess Capacity

133. There is excess capacity in bottling and canning in Texas. (RX 2939; Summers, Tr. 6465-66; Campbell, Tr. 1983-84; Morath, Tr. 7662-64, 7681-82 (Kroger); Turner, Tr. 1122-25; RX 2983.)

134. During the busiest time of the year Grant-Lyduck operates with 20-40% unused capacity. (Bodnar, Tr. 1651-53.)

135. CCE has 23 million cases per year of unused capacity. (CX 167.)

136. In Texas, Pepsi COBO has 42 million cases (65% of total capacity) of excess capacity for cans (CX 2380-J), 13.3 million cases (57%) of excess capacity for 2 liter bottles (CX 2380-K), and 7.0 million cases (53%) excess capacity for nonreturnable bottles. (CX 2380-J, L; Amrosowicz, Tr. 856-57, 892; RX 2986.)

137. Better Beverages, Inc. has excess production capacity on the can line of six million cases annually, which could expand to ten million cases with the addition of a second shift working six days. The capacity of the bottle line is one million cases, and 600,000 cases are produced annually. (Campbell, Tr. 1983-84.)

138. The Turner DP production in Irving is 27 million cases with the capacity of 35 million, and in Houston production is 12 million cases with 20 million cases capacity. (Turner, Tr. 1122-25. Texas Beverage (CX 2710-E; Hixon, Tr. 7294) and Kroger (Morath, Tr. 7662-64) also have excess capacity.

139. In 1986 Procter and Gamble planned to manufacture its Hires/Crush lines through contract bottlers, based on "over capacity in the industry." (CX 858-G.)

Distribution

140. Soft drink bottlers distribute finished goods to retail outlets that sell soft drinks to consumers. For bottles and cans, the tasks include (Clarke, Tr. 4272-75): (a) warehousing (RX 329); (b) taking orders (Turner, Tr. 955); (c) delivering to the retailer's premises (Summers, Tr. 6468; E. Hoffman, Tr. 327); (d) placing on the shelves "fronting," and pricing the product (E. Hoffman, Tr. 327-28; Howell, Tr. 4032; Knowles, Tr. 2662); (e) removing old merchandise (E. Hoffman, Tr. 203, 327-28; Turner, Tr. 956-57); (f) ensuring "point of sale," signs are displayed (Summers, Tr. 6474; CX 2161-D, E); and (g) changing space allocation. (Summers, Tr. 6960-61.)

141. Soft drinks are distributed to retail outlets by "direct-store-door delivery" ("DSD") and warehouse delivery ("warehouse"). (Knowles, Tr. 2662-63.) In DSD the bottler's employees do (a) to (g). In warehouse, the bottler's employees do (a) to (c) and the retailer's employees do the rest. (Knowles, Tr. 2663-64.) Low quality merchandising can reduce sales volume. (Coyne, Tr. 3338-39, 3341; E. Hoffman, Tr. 327-28, 335-37.)

142. In a DSD the driver drives to the store, carries the soft drinks inside, and merchandises the shelves. (Turner, Tr. 955-56.)

143. "Bulk delivery" DSD is used with larger retailers. (Turner, Tr. 1530-31.) Delivery is by a 45 foot tractor-trailer; unloading by a forklift. (Summers, Tr. 6414-15.) A salesperson stocks the shelves.

144. Some bottlers telephone the customer to take the order for "cold drink" the day before delivery is scheduled. This system is called "Tel-Sell." (Summers, Tr. 6640-41.)

145. CCSW (CX 2503-Z-5) and Pepsi COBO (Davis, Tr. 4471-72), use all three types of DSD. (Summers, Tr. 6414-16.)

146. Some bottlers rely on independent distributors. Half of Oneta's sales are handled by independent distributors. (Koch, Tr. 1901.) CCSW has used independent distributors to sell in the Rio Grande Valley. (E. Hoffman, Tr. 621.) DP-SA also used independent distributors. (Bodnar, Tr. 1235-36.)

147. In addition to DSD and warehouse there are food brokers and beer distributors. Food brokers in Texas include Sweeny & Co., Gordon/Southtex, Fleming, Nelson Beverage, Bill Lyons, and Marketing Specialists. (CX 1999-W.) IBC Root Beer (Knowles, Tr. 2685), Canfield (RX 1823). Shasta (RX 1957), BPI (RX 2043; RX

1827), Rocky Top (Morath, Tr. 7667), and Parade (RX 1829-B) have been sold by food brokers. (Knowles, Tr. 2809.)

148. Beer distributors sell beer by DSD. They also sell soft drinks, including: Original New York Seltzer (CX 2725; RX 3013, pp. 3443, 3449; Turner, Tr. 1016), Hawaiian Punch (Anderson, Tr. 3886-87), Jolt Cola (RX 1810), Soho (Collier Test., RX 3015), DPUSA (Bodnar, Tr. 1235-36), RC Cola (Coyne, Tr. 3436-37), and Crush/Hires (CX 2609.)

149. IBC Root Beer, a premium priced soft drink produced by DPUSA through contract packers, is distributed in brown nonreturnable bottles to the home market by food brokers. (Hiller, Tr. 5340; Kaiser, Tr. 3158.) It is better suited to warehouse delivery because it is a premium priced product in a long-necked glass bottle that does not permit high-speed manufacturing or high volume delivery. (Knowles, Tr. 2664-65.) Crush and Hires have been delivered by DSD and warehouse delivery. (Turner, Tr. 954-55.)

150. The "home" market includes soft drinks consumed at home. "Cold drink" is immediately consumed. Cold drink includes vending and fountain sales, and sales from cold vaults in convenience stores. The home market is 83.5% of bottle and can sales, and cold drink is 14.5%. (CX 883-V.)³

151. The A.C. Nielsen Company ("Nielsen") tracks sales in the home market. (RX 875.) "Nielsen Audits" show total sales and market share by brand and package for bimonthly periods. (CX 109-A.)

152. The Nielsen Audit for San Antonio includes Bexar County. (CX 3557-F.)

153. Nielsen collects "scanning" data from stores with electronic scanners at the checkout counters. In Texas, Scantrack data is available for Austin/San Antonio. (CX 752; CX 1165; CX 753; RX 780; Bodnar, Tr. 1573-74.)

154. CCSW soft drink sales are 66% bottling and 34% fountain. Pre-mix is 15-18% of fountain sales, three to five percent of CCSW's sales. (RX 405-E; Summers, Tr. 6497.)

155. CCSW delivers Coca-Cola and Dr Pepper fountain syrup to national accounts for a fixed delivery fee per gallon; CCSW also sells Coca-Cola and Dr Pepper fountain syrup to smaller accounts on

³ Bottles and cans sold to convenience stores may be sold to the consumer "hot" or "cold." Some of the products sold at wholesale in the home market are purchased by third-party vending companies and placed in vending machines. (R. Hoffman, Tr. 5520.)

terms negotiated between CCSW and the local account. (E. Hoffman, Tr. 449-50, 548.)

156. Convenience stores most often buy fountain soft drinks through their wholesale grocery supplier. (Summers, Tr. 6525.)

157. Concentrate for Coca-Cola fountain syrup is supplied to CCSW and SWCC from the Coca-Cola syrup plant in Dallas, Texas. Dr Pepper fountain syrup and concentrate are supplied from the Dr Pepper syrup facility in St. Louis, Missouri. (E. Hoffman, Tr. 546-47.) CCSW manufacturers Dr Pepper and Coca-Cola fountain syrup from concentrate. (Summers, Tr. 6508-09.)

158. Vending companies in the San Antonio area include: CCSW's vending division, Snappy Snack, ARA, Marriott, Canteen, Service America, Drappala, D&J, Tom's Peanuts, A&W Leasing and L.C. Vending. (Summers, Tr. 6655.)

159. Vending customers of CCSW also purchase soft drinks for their vending machines at Sam's Wholesale Club or other wholesale outlets, or at supermarkets when prices are discounted. (R. Hoffman, Tr. 5713, 5520; Jackson, Tr. 3375.)

160. In 1988, CCSW's vending sales were 12.6% of total sales. (Snappy Snack 2%, other vending firms 3.4%, and 7% through its own machines, CX 3418-F; Summers, Tr. 6668-73.)

Prices

161. Few soft drink wholesale sales are made at list price. The price is reduced by a discount or allowance. (RX 327.) In 1990 at least 90% of CCSW's sales were made at less than list price. (R. Hoffman, Tr. 5555, 5645.) only 2% of Pepsi COBO sales are at full list price. (Davis, Tr. 4684-85.)

162. Bottlers change promotional offers often. (Campbell, Tr. 1954; R. Hoffman, Tr. 5551-52; Summers, Tr. 6613 (monthly).) In January 1986 CCSW issued 199 different promotional offers. (CX 2179.) Wholesale prices vary by brand, package and geographic area. (CX 1979; CX 2180; Turner, Tr. 1474; Bodnar, Tr. 1648-49; Davis, Tr. 4702-03; Kaiser, Tr. 3224.)

163. Promotional allowances reduce the price to the retailer and facilitate lower prices to the consumer. (Turner, Tr. 960.) When soft drinks are on sale, consumers consume faster and purchase more soft drinks. (Knowles, Tr. 2838-40.) Soft drink promotions encourage volume purchases. (Coyne, Tr. 3474.)

164. Promotional allowances involve a feature ad, an instore display, or a reduced retail price. (CX 1039-B, C; CX 1041-H; CX 2373-G, I.)

165. Soft drink bottling is a “volume-oriented” business. (Knowles, Tr. 2838-39; Bodnar, Tr. 1271; Turner, Tr. 1395; CX 836-P.) Bottlers seek additional volume to spread overhead over additional sales. (CX 3407-C; Knowles, Tr. 2846, 2899.) Concentrate companies require volume increases from bottlers to increase the concentrate companies’ sales of concentrate. (Howell, Tr. 4072-73; R. Hoffman, Tr. 5625-26.) The most effective means of increasing Bales unit volume is to reduce price. (Knowles, Tr. 2838-39, 2845; Howell, Tr. 4020; Coyne, Tr. 3563-64.)

Promotions

166. CCSW’s Coca-Cola franchise provides that Coca-Cola USA pays 100% of the national advertising for Coca-Cola Classic and 50% of the national advertising for all other brands, sharing all local media costs equally. (Howell, Tr. 3930-31; E. Hoffman, Tr. 406-07.) DPUSA and Seven-Up Company also fund national and local media advertising and other promotions. (E. Hoffman, Tr. 40607.)

167. In retail stores, soft drinks are in a beverage aisle of the store. Retailers also display soft drinks at the end of the aisle. (Summers, Tr. 6602.) Soft drinks are usually purchased on impulse. (CX 2008-P, Q.)

168. Retailers award display space to suppliers who offer the most attractive promotional deals. (Summers, Tr. 6602-03.) Bottlers offer discount pricing to retailers for displays and lower consumer prices. (Coyne, Tr. 3486, 3488; Summers, Tr. 6613, 6621-22.)

169. Retailers include soft drinks in their weekly newspaper advertising. (Turner, Tr. 1130-31.)

170. In order to obtain a feature ad, a bottler must offer greater discounts than those required to obtain an in-store display. (Gonzaba, Tr. 2057; Davis, Tr. 4616.)

171. Sales volume for products promoted in a feature ad may increase 500 or 600%. When products are promoted on display without a feature ad, sales may increase 250%. (Coyne, Tr. 345152.)

172. Recently, the cost of ad payments has increased. (CX 203; CX 205-06; CX 212-13; CX 3020; CX 1620 (\$3.7 million to HEB);

CX 2464-N (DPUSA and CCE); Bodnar, Tr. 1481; CX 4018-G; Cole Depo., CX 3843, pp. 258-60.)

173. In 1986 Pepsi COBO paid Kroger \$275,000 for 22 feature ads in South Texas and in 1987 the payment increased to \$1.1 million for 20 feature ads. (RX 1130-G.)

174. A calendar marketing agreement (“CMA”) is an ad payment by a bottler to the retailer for displays, feature ads in supermarkets, or in-store advertising, such as window banners. (Kaiser, Tr. 3229-31.)

Bottlers

175. The number of bottling plants in the United States has been steadily declining since 1950. (CX 1671; CX 836-E; CX 3218-M.) The number of bottlers decreased by almost 50% from 1980 to 1988. (CX 858-D.)

176. CCUSA and PepsiCo have acquired over half of the volume of their own bottling systems. (CX 858-E; RX 579.)

177. Economies of scale led to production in larger, modern plants. (CX 3218-M, N; RX 912-0; Bodnar, Tr. 1237-38; E. Hoffman, Tr. 189-90, 277.) Consolidation and the non-producer agreements allow production through more efficient bottlers. (Howell, Tr. 4007-08, 4011-12; Coyne, Tr. 3435.)

178. The geographic consolidation of bottlers increased the efficiency of the bottlers, achieving economies of scale in distribution and administration. (Bodnar, Tr. 1232; Schwerdtfeger, Tr. 2290; Howell, Tr. 3935, 4006; E. Hoffman, Tr. 190-92, 513; Lydick, Tr. 3008-09.)

RELEVANT PRODUCT MARKET

179. Complaint counsel contend that the relevant product market consists of “the manufacture, distribution, and sale of finished carbonated soft drinks (or syrups) produced from the concentrates of widely advertised branded, carbonated soft drinks, merchandised and distributed by direct-store-door delivery, in all channels of distribution” which includes: “branded soft drinks” carried by the Pepsi, Big Red, and Coca-Cola bottlers, and Mr. Espinoza’s companies, including fountain soft drinks, mixers and club soda. (Hilke, Tr. 6153-54, 6176-77.) I find that relevant product market must be expanded to

include: private and warehouse brand soft drinks, seltzers and other flavored waters, and non-carbonated soft drinks produced and sold by CCSW and competing bottlers.

Competing Brands

180. The Dr Pepper Company sells: Dr Pepper, Diet Dr Pepper, Caffeine-Free Dr Pepper, Caffeine-Free Diet Dr Pepper, IBC Root Beer, IBC Cream Soda, Diet IBC Root Beer, Diet IBC Cream Soda, Welch's Grape, Welch's Strawberry, Welch's Orange, Welch's Pineapple, and Welch's Punch. (Knowles, Tr. 2642)

181. The Canada Dry Company sells: Ginger Ale, diet Ginger Ale, Club Soda, Tonic, diet Tonic, Seltzer regular, Seltzer Lemon-Lime, and Collins Mixer. (RX 2932-34.)

182. CCSW sells: Coca-Cola Classic, diet Coke, Caffeine free diet Coke, Caffeine-Free Coca-Cola Classic, Coca-Cola (New Coke), Caffeine-Free Coca Cola, Cherry Coke, diet Cherry Coke, TAB, Sprite, diet Sprite, Minute Maid Orange, diet Minute Maid Orange, Mello Yello, diet Mello Yello, Sunkist, diet Sunkist, Fresca, Mr. PIBB, A&W Root Beer, diet A&W Root Beer, A&W Creme Soda, diet A&W Creme Soda, Welch's Strawberry, Welch's Grape, Lipton Tea, diet Lipton Tea, Delaware Punch, Dr Pepper, diet Dr Pepper, Pepper Free, diet Pepper Free, Original New York Seltzer, Raspberry, diet Raspberry, Root Beer, diet Root Beer, Cream Soda, diet Cream Soda, Peach, diet Peach, Lemon Lime, diet Lemon Lime, Cima Red, Canada Dry Ginger Ale, diet Ginger Ale, Club Soda, Tonic, diet Tonic, Tom Collins, diet Tom Collins, Spike Orange, Red punch and Lemon Lime, Hawaiian Punch (in Corpus Christi), and red cream, root beer, orange, strawberry, mixers and tonic Fanta in fountain. (Summers, Tr. 6581-82; Teague Depo., RX 3007, pp. 33-34.) These brands are in cans (6-pack and 12-pack), 1-liter, 2-liter and 3-liter PET bottles, 10-ounce, 16-ounce and 20-ounce non-returnable bottles, BIB and figals as post-mix and pre-mix fountain syrup, 6 ½ ounce and 16-ounce returnable bottles. CCSW sells 145 different items. (Summers, Tr. 6582.)

183. Pepsi COBO sells: Pepsi, Diet Pepsi, Pepsi Free, Caffeine Free Pepsi, Diet Caffeine Free Pepsi, Mountain Dew, Diet Mountain Dew, Orange Slice, Diet Orange Slice, Lemon-Lime Slice, Diet Lemon-Lime Slice, Wild Cherry Pepsi, Diet Wild Cherry Pepsi, and Apple Slice. (Davis, Tr. 4464, 4639.)

184. Grant-Lydick sells: Big Red, 7-Up, Royal Crown, Crush, Hires, Squirt, Diet Squirt, Country Time, Hawaiian Punch, Dr Pepper, Yoo Hoo, Upper 10, Schweppes, Canfields, and Diet Rite. (RX 1665; RX 1614-15.)

185. DP-SA sold: Dr Pepper, Frostie Root Beer, Country Time Lemonade, Hawaiian Punch, Salute Flavors, Canada Dry, Crush, Big Red, Royal Crown, Hires, and Barq's. (Turner, Tr. 1035-37; CX 3825; Bodnar, Tr. 1234.)

186. Star Distributing, Mr. Espinoza's company, sells: Nehi flavors, Koala Springs Mineral Waters, and Mason Root Beer. (Espinoza, Tr. 4182-83.)

187. Texas Beverage Packers produces: Canfield's, Plaza flavors, and Texas Brand. (Hixon, Tr. 7275-83.)

188. HEB sells Plaza brand in 2-liter PET bottles and cans in the same flavors as national brands, including colas. (Chapman, Tr. 7162-68.)

189. Kroger produces and sells Big K brand in 2-liter PET bottles and cans. (RX 2444; RX 1685.)

190. Shasta (RX 1957; RX 958-H-J) and Faygo (RX 1953; RX 958-J) sell flavors in 2-liter PET bottles and cans. (CX 1084; RX 958, pp. 810-13; RX 1001; Skinner, RX 3011, pp. 3161-62.)

191. Yoo-Hoo, Artesia, and Ozarka are sold in the San Antonio area. (RX 3112; RX 2951.)

192. Independent soft drink warehouse brands include (CX 814-Z-7-8): Shasta, Faygo, Sunkist, Hires/Crush/Sundrop, A&W, Dad's/Bubble-Up, Welch's, Nesbitt's, No-Cal, Frostie, NuGrape, Sun Crest, Moxie, Mason's, and Dr. Wells.

193. Royal Crown brands include (Coyne, Tr. 3828): Royal Crown, Nehi and Diet Rite.

194. National brand⁴ and private label⁵ and other carbonated soft drinks are produced on the same equipment. (Summers, Tr. 6445-66; RX 2939.)

⁴ "National brand" - brand of soft drinks distributed in most of the United States, generally by direct-store-door delivery.

⁵ "Private label" (also private brand or control label) - brand of soft drinks owned by a grocery chain or other retailer.

195. National brand and private/warehouse brands⁶ are produced in the same plant. (Hixon, Tr. 7275-83.)

196. Non-carbonated soft drinks (such as Lipton's Iced Tea, Hi-C, Hawaiian Punch, and isotonic drinks like Spike) are bottled and canned on the same equipment and in the same containers used for carbonated soft drinks, except that nitrogen is used instead of carbon dioxide. (Summers, Tr. 6426-28.)

197. The same tasks are required for distributing and merchandising private/warehouse brands and national brands and non-carbonated soft drinks. (Summers, Tr. 6469.)

198. Consumers seldom are aware of what type of delivery method was used for soft drinks. (Kaiser, Tr. 3159; Gonzaba, Tr. 2125-26; Brinkley, Tr. 2249-50.)

199. In retail stores, including HEB (Gonzaba, Tr. 2123-24; Chapman, Tr. 7156), Kroger (Morath, Tr. 7682; Kaiser, Tr. 3239), and Super S (Sendelbach, Tr. 7691-92), private/warehouse, non-carbonated, and national brands are sold next to each other in the soft drink aisle. (Summers, Tr. 6595; Howell, Tr. 4024.)

200. Private label soft drinks in stores in CCSW's territory include: HEB ("Plaza") (CX 4022). Kroger ("Big K"), Winn-Dixie ("Chek Cola"), Stop N' Go ("Parade"). (Hiller, Tr. 5337-38; Howell, Tr. 4024-25; Kaiser, Tr. 3158, 3160; Turner, Tr. 1208; Bodnar, Tr. 1311.)

201. Grocery wholesalers and bottlers provide "warehouse brand" soft drinks to independent grocers. Examples include Shasta (RX 1531; RX 1957; Howell, Tr. 4031), Paygo (RX 1953; Summers, Tr. 6551), IBC Root Beer (CX 1294), Rainbow, Rocky Top, and Parade. (Hiller, Tr. 5337-38; R. Hoffman, Tr. 5534-35.)

202. Some bottlers produce their own brand name products, including the "Texas" brand of Texas Beverage Packers (Hixon, Tr. 7277-78) sold in Super S (Sendelbach, Tr. 7691). Rocky Top brand sold in Kroger (Morath, Tr. 7667, 7668-69), and "BPI" brand of Beverage Packers, Inc. (RX 1819; CX 202; RX 2245.)

203. Private label, non-carbonated soft drinks, and warehouse brands are delivered to the retailer's warehouse. The retailer delivers the product to the retail stores, stocking the shelves and displays, and

⁶ "Warehouse brand" - brand of soft drinks distributed to retailers by delivery to their warehouses. The brand may be owned by grocery wholesaler, contract packer, bottler, or concentrate company.

merchandising the product. (Summers, Tr. 6468; Turner, Tr. 955; Hoffman, Tr. 327.)

204. National brands are delivered by the "direct store door" ("DSD") method of delivery, where the bottler or distributor delivers the product to the retailer's store and stocks and merchandises the product on the store's shelves and displays. Some brands like Shasta and Faygo are sold nationally but delivered by warehouse delivery. (RX 1001.)

205. The United States Department of Commerce's "Standard Industrial Classification" code for soft drinks, SIC No. 2086, includes private label, non-carbonated and warehouse brands as well as national brands. (CX 4080, Hilke, Tr. 8540; CX 4160.)

206. The National Soft Drink Association, the primary industry trade association, considers private label soft drinks, warehouse soft drinks, and non-carbonated soft drinks produced by soft drink bottlers (Lipton Tea, Delaware Punch, Hawaiian Punch) to be "soft drinks." (RX 3128; Strickland, Tr. 7956-57.)

207. Companies which track the sales of private label and warehouse brand soft drinks include Nielsen Audits (E. Hoffman, Tr. 7289-91; CX 27-V), Nielsen Scantracks (Summers, Tr. 6549-50; CX 1165-H, W, Z-30-37), and Information Resources, Inc. (CX 2392-A).

208. The Share of Intake Panel ("SIP"), prepared by NFO Research, tracks all beverages including private/warehouse brand soft drinks. (RX 2197, pp. 6707-12; RX 2204.)

209. Witnesses from the marketplace perceive private label, warehouse brand, national brand and regional brand soft drinks to be generally competitive products. (Howell, Tr. 4028-29; Campbell, Tr. 1995; Knowles, Tr. 2806-07; Koch, Tr. 1875-76; Trebilcock, Tr. 5873-74, Turner, Tr. 988.)

210. Documents and testimony from soft drink bottlers and concentrate companies refer to competition from private label and warehouse brands. Concentrate firms include Procter & Gamble (CX 774-B, C; CX 858-A); CCUSA (CX 3436, RX 687-D, M, RX 958-B-D, CX 1084, CX 1991-Z-31, CX 3436, pp. 870-71; CX 2230-C, CX 169-C, Howell, Tr. 4029, 4023-25); PepsiCo (CX 4122-E); DPUSA (RX 1405-E); RC Cola (Coyne, Tr. 3602-03, RC Annual Report, RX 2837, p. 10, RX 2838, RX 2841, p. 10); 7-Up (RX 1990, p. 415); Schweppes (CX 2871-B); Canada Dry (RX 2245); and Welch's (RX 1937, pp. J, L-M).

211. The bottlers include CCSW (RX 2060 at C-11965, RX 226-A, K, RX 480-J, CX 3158-K, CX 3784, CX 2974-Q-R, RX 398); Pepsi COBO (RX 2503-A, D, RX 1259-A, RX 1287-E, CX 4122); and CCE (RX 1479-J).

212. The retailers include: HEB (Gonzaba, Tr. 2122-23); Super S (Sendelbach, Tr. 7691); Stop-N-Go. (RX 1506.)

213. In 1984, a CCSW market report stated that (RX 2059 p. 11757): "We continue to watch price brands such as Shasta and private label store brands increase their space, share of market and even ad take."

214. Fanta, the Coca-Cola flavor line, competes directly with private label soft drinks. It is delivered direct-store-door. (RX 687; CX 8134-D-X; RX 958-Z-6.)

Prices

215. When Jim Turner, the Dr Pepper bottler in Houston, sets his prices on the pepper and lemon-lime soft drinks he looks at branded competitors, Coca-Cola and Pepsi. But he watches the prices for private labels because they could affect his sales of Sunkist, NuGrape, Squirt, Big Red and A&W. (Turner, Tr. 988.)

216. Robert Chapman, of H.E. Butt, explained the price gap between private and national brands (Tr. 7190):

Q. Does H-E-B try to maintain Plaza as the cheapest brand?

A. Yes, we do.

Q. Can you tell us why?

A. Yes. To be competitive with other private labels from other companies, other private label brands such as companies like Kroger or somebody else might have.

Also, we pay less for it, and the consumer can only buy it at H-E-B. If the consumer is really a Plaza liker, then the consumer can only get it at our stores. So we want to keep them coming back there and keep them happy, so we try and price it below the other brands.

Q. Does H-E-B make any effort to try to maintain at least an everyday margin between national brands, DSD brands and its private label?

A. We have set our markups based on cost, generally, and because the costs are different, there is a spread. We don't say, well, we are going to be 15 cents a six-pack or whatever difference, but we base it off of costs and the costs naturally do that.

Q. If DSD prices decreased, what impact would that have on your private labels, or would it necessarily have an impact?

A. I believe the sales would decrease on private labels.

217. In February 1989, Texas Bottling Group in San Antonio raised wholesale price six percent resulting in a three to four percent net price increase after discounts. Big Red matched the price increase in mid February. Pepsi matched the increase on March 1. The Nielsen Ratings for the February/March period indicated that private label market share increased up to 20%. (CX 3806-Z-56.)

218. An RC bottler from Iowa testified that he priced off national brands but watched the price gap (20% in his market) between national brands and private labels. (Trebilcock, Tr. 5873.)

219. Texas Beverage, a contract packer, has given up major holidays to national brands because their prices are so low. (Hixon, Tr. 7303.)

220. Shasta seeks a mid-point position between the prices of private label and national brands. (RX 3011, p. 3197.)

221. In 1983, a Coca-Cola official estimated that "private/control labels peg their net prices to those of the national brands (an average of 29% lower)." He estimated warehouse brands, like Shasta and Faygo, at 20% lower in price. (CX 814.)

222. David Davis, Vice President of Pepsi USA, testified about the affect in San Antonio of price competition between national and private brands (Tr. 4528-29):

Q. With regard to San Antonio, did private labels come back or increase in their market share?

A. Yes, they did.

Q. Was that a result of the branded price increase?

A. It's my opinion it is, yes.

Q. How so?

A. We felt like when you're getting national brands down so low -- 99 cents, you're taking market share out of private label then.

When the prices are higher, then you still have the price shopper that's going to pick up the private label. Therefore, you're losing share back to the private label.

Q. Well, since 1988 have you seen any interaction between private labels and your Pepsi brands?

A. You mean in the same ad?

Q. No. With regard to either losing market share or losing volume.

A. Yeah. We took a volume hit when prices came up. Share -- We saw private label pick up some share also.

Q. How significant?

A. I don't recall. It just seems like it was out of both of us.

- Q. "Both of us" meaning?
A. Pepsi and Coke.

223. In 1989 Pepsi Cola report on Nielsen performance stated that (RX 2503-A):

Private label was the key beneficiary of 1988 Corp. Pepsi (-0.9) and Corp. Coke (0.7) share losses in Pepsi-Cola South with a 1.3% share growth v. 1987.

The Pepsi report stated that in San Antonio, private label increased market share by 2.4% in 1988 and Coca-Cola lost 2.8% while Pepsi stayed the same. (RX 2503-M.)

224. When setting the retail price for Coca-Cola, the H.E. Butt grocery chain does not consider private label or Pepsi prices, but uses cost-based pricing. (Gonzaba, Tr. 2106-07.)

225. Toby Summers testified about the market share changes caused by price competition between national brands and private labels (Summers, Tr. 6556, 6726-27):

- Q. What is your opinion as to why control brands fell that particular bimonthly?
A. It's influenced by the ad feature activity. The summer ad feature activity, the summer of '89 was heavily influenced by national soft drinks and, therefore, I think what you saw would be -- What you should see is that the national soft drinks, when they go on ad, spike down or get down, whatever you want to call it, and suck up and siphon off private label volume.
And the inverse happens when the private labels are on ad. They spike up into the national brand share and siphon off share.
So you see a trade-out that's heavily influenced by the ad feature frequency.
- Q. Have you and I discussed that earlier in your testimony concerning the situation in 1989 on the FM and AM Nielsens, bimonthly Nielsens?
A. Yes, we did.
- Q. Can you tell us again what that relationship was?
A. It was the same relationship. When private labels hit one of their two strongest months, which was FM at 18 share, I believe, Pepsi hit one of their lowest months.
The following month private labels were at 14-something, which was another strong month, and Pepsi continued to be somewhat depressed.
Later on in the summer months, Pepsi went up and the private label share went down to about seven -- or control brands went down to about seven, I believe.

226. In 1982, private label and control brand soft drinks had 5.7% of the San Antonio market. This is one of the lowest such market shares in the country. The United States average was about 10.5%, and in some markets the share is over 20%. (CX 1084-D.)

227. "Control brand" in Nielsen means private label controlled by retailer (excluding Shasta and Faygo). (Summer, Tr. 6551.) Controlled brands bimonthly share of food stores in San Antonio was (RX 2806-X pp. 17):

	<u>1988</u>	<u>1989</u>
February	5.1%	18.0%
April	7.2%	14.9%
June	8.6%	7.0%
August	8.2%	11.5%
October	10.0%	13.2%
December	6.7%	

The 18% shares in February 1988 and February 1989 coincided with Plaza ads by HEB. The drop in share in December 1988 and June 1989 coincided with ad feature activity by the national brands. (Summers, Tr. 6553-57.)

228. Normally, private/warehouse prices average between 20% and 30% below the prices of national DSD brands. (Adams Depo., CX 3814, p. 39; CX 814-A.)

229. When national brands are promoted, the retail price of national brands drops near or below the price of private/warehouse brands. (Trebilcock, Tr. 5873-74; Bodnar, Tr. 1555-56; Summers, Tr. 6549.) Retailers use reduced prices on national brand soft drinks to demonstrate to consumers that their prices in general to consumers are low. (Howell, Tr. 3951-52.) Retail price reduction of national brand soft drinks reduces sales of private label brands. (CX 3031; RX 538-Z-99 ("The primary victims of lower DSD prices were the warehouse and private label brands, which experienced marked share loss and volume decline"); Hixon, Tr. 7303, 7360; Lydick, Tr. 2973; Chapman, Tr. 7190; Turner, Tr. 988; Campbell, Tr. 1999; Skinner Test., RX 3011, pp. 3171-78, 3197-98.)

230. When the price difference between private/warehouse brands and national brands increases (Davis, Tr. 4528-29), or when retailers promote their private brands heavily, the market share of private label increases. (Kaiser, Tr. 3252; Bodnar, Tr. 1359-60; Sendelbach, Tr. 7692-93; Hixon, Tr. 7303; Howell, Tr. 4118.) Private brands in San Antonio had 18.3% share in February/March 1990. (Summers, Tr. 6554; CX 3708; CX 3784-A, D.)

231. Dr. Hilke, complaint counsels economist, ran “price sign tests” comparing the movement of prices of national brand to that of private label and warehouse soft drinks. (Hilke, Tr. 5948-56; CX 1678) Prices moved in the same direction eight out of ten times. (CX 1678-B.)

232. Respondent’s economist, Dr. Strickland, calculated the probability that private label and national brand soft drinks would randomly move in the same direction eight out of ten times was less than six percent. (RX 3088; Strickland, Tr. 7979.)

Consumers

233. The quality of merchandising for DSD and warehouse brands can vary. Some bottlers’ employees do a good job of merchandising their DSD products; others do a poor job. (CX 2627-Y to Z-10; Hixon, Tr. 7362.) HEB does a better job of merchandising its Plaza private brand than Pepsi does of merchandising its DSD-delivered brands. (Summers, Tr. 6472.)

234. One market research report perceived that the use of private brand soft drinks is “significantly higher” among Hispanic consumers than it is among other consumers. (CX 2662-Z-66.) About 55% of San Antonio’s population is Mexican-American. (Bodnar, Tr. 1224.)

235. The three liter PET bottle is a much better seller than the two liter PET bottle in San Antonio. The opposite is true for the rest of the state. (Kaiser, Tr. 3189, 3249.)

Retailers

236. Private label soft drinks are more profitable for the retailer than national brands. (Sendelbach, Tr. 7692.)

237. Private label soft drinks have more space relative to sales than national brand soft drinks (Kaiser, Tr. 3267-68; Smith Test., Rx 3005, p. 3721) because the retailer controls the allocation of space. (Davis, Tr. 4761-62; RX 256; CX 3270; CX 3384-H.)

Similar Products

238. Canada Dry mixers and seltzers are in the relevant product market. (Hilke, Tr. 6177.343) Similar products like Original New

York Seltzer, Perrier and Artesia should also be included. (Strickland, Tr. 8005, 8012-13.)

239. CCSW sells Canada Dry mixers and Ginger Ale in bottles, cans and fountain syrup. Canada Dry mixers include Tom Collins mix, club soda, sparkling water, and diet versions of these products. (Summers, Tr. 6529-30.)

240. Bottled carbonated water and Canada Dry products are usually in the beverage section of a supermarket. (Summers, Tr. 7860.)

241. Flavored seltzer is a premium-priced drink which is clear in color, premium priced, in flavors such as lemon, raspberry, peach and root beer. (Summers, Tr. 6532; CX 2916 (CD Sparklers).) The seltzer segment has grown recently. (CX 2914-Q, R; CX 2390; Espinoza, Tr. 4196-97.) New products have been introduced by both existing concentrate companies and new entrants. (RX 2235.)

242. CCSW has developed a new product called "Spike," which is an isotonic soft drink similar to Gatorade. (CX 308; CX 3685.) Other isotonic products sold in CCSW territory are QuicKick, ProMotion, and 10-K. (Summers, Tr. 6534; Antle, Tr. 3111-12.)

243. CCSW produces and packages non-carbonated soft drinks, including Lipton Iced Tea (RX 345), Delaware Punch, and Hawaiian Punch. (Summers, Tr. 6426-27.) Grant-Lydick sells Country Time Lemonade, a non-carbonated soft drink, in 12-ounce cans in food stores and vending machines. (Bodnar, Tr. 1547.) These "still" drinks must be packaged with nitrogen to provide pressure to strengthen aluminum cans. (Turner, Tr. 1405-06.) CCSW packages these products, using the same production equipment, in the same sizes and types of containers that it packages carbonated drinks. (Summers, Tr. 6427-28.) CCSW generally prices these still products at the same prices charged for carbonated soft drink brands in food stores and vending machines. (Summers, Tr. 6538.)

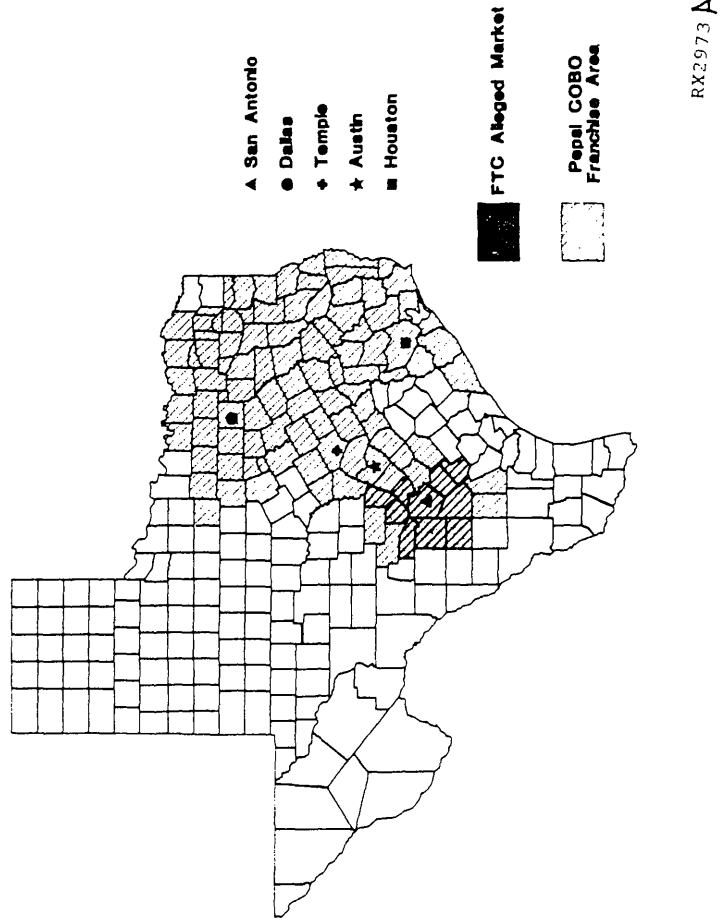
244. Pepsi USA is test-marketing H₂O!, a bottled water, Mountain Dew Sport (an isotonic beverage), and Tea Breeze (a canned tea). (Davis, Tr. 4639-43; Christian Depo., CX 3912, pp. 79-83; CX 387; CX 1934; CX 2903-F, G ("Schweppes"); CX 2916-Q.) The differences between carbonated soft drinks and non-carbonated drinks have blurred as products with characteristics of both have been introduced. (RX 2200; CX 2330-D; CX 2903-F, G; CX 2916-Q; RX 2255; RX 2267; RX 2963; Koch, Tr. 1876.)

RELEVANT GEOGRAPHIC MARKET

245. The geographic area of the Dr Pepper franchise acquired by CCSW in 1984 consisted of seven counties in Texas (Atascosa, Bandera, Bexar, Frio, Kendall, Medina, and Wilson) and portions of three other counties (Blanco, Comal, and Karnes). This region will be referred to as "the ten-county area." (Amended Complaint, p. 3 Section 9; Hilke, Tr. 5988.) I find that the relevant geographic market exceeds the ten-county area.

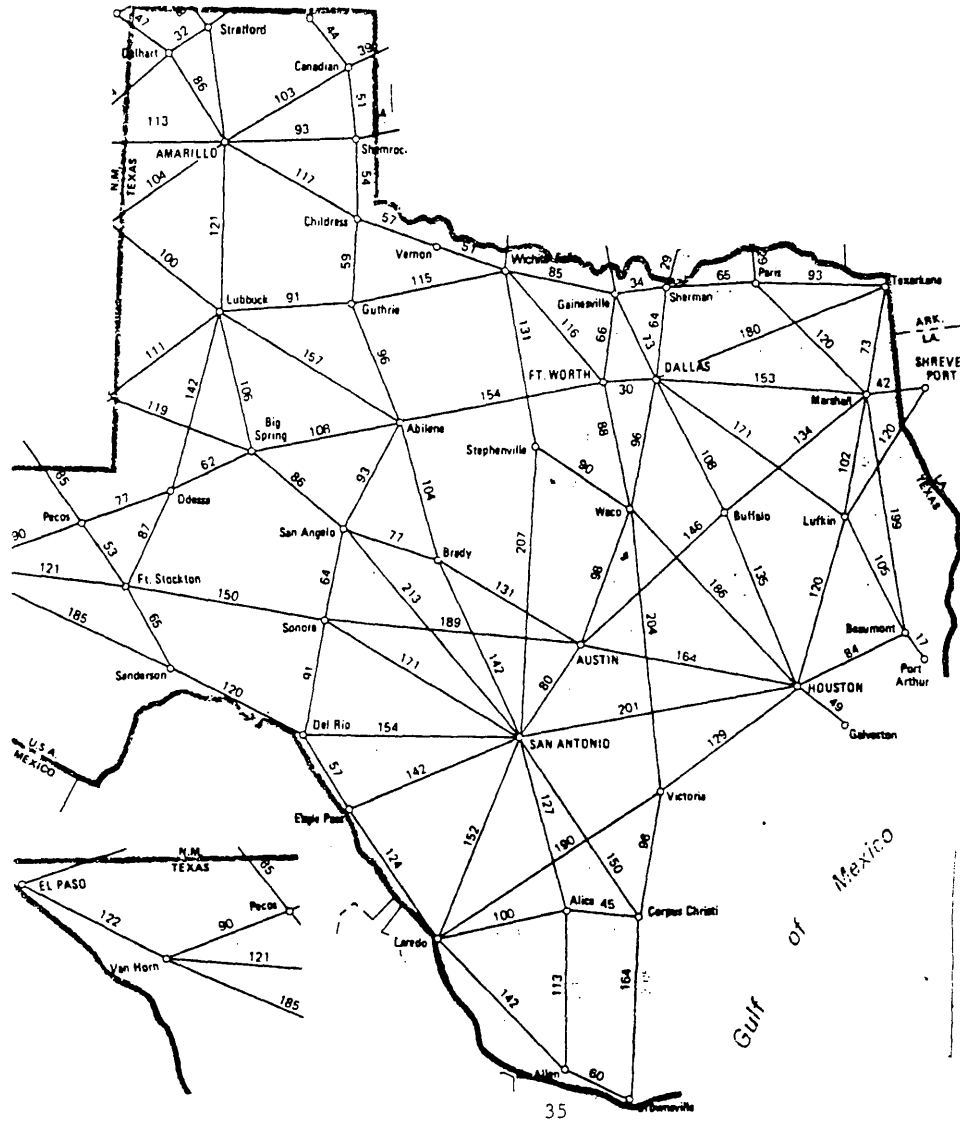
246. Here is a map of the ten-county area compared to the Pepsi Cola franchise area (RX 2973-A):

**COMPARISON OF THE FTC ALLEGED MARKET TO
THE PEPSI COBO FRANCHISE AREA**



RX2973 A

246a. Here is a map with cities and distances (RX 2964):



Shipments

247. Much of the soft drinks sold within the ten-county area are produced outside that area. Grant-Lydick has no canning line, and has purchased 98-99% of its canned soft drinks from the Turner DP canning plant in Irving (Turner, Tr. 1117; Bodnar, Tr. 1526-27) and the Better Beverage, Inc. plant in Hallettsville (Campbell, Tr. 1926, 1987), both of which are outside the ten-county area. The Seven-Up and RC Cola products sold by Grant-Lydick and its predecessors in the San Antonio area since 1982 have been produced in the Houston bottling facility presently operated by Turner DP. (Turner, Tr. 929; Espinoza, Tr. 4248-49; Bodnar, Tr. 1557.)

248. Until June 1990, Pepsi COBO imported all canned soft drinks sold within the ten-county area from its plant in Houston (Davis, Tr. 4461-62, 4464, 4630-32) which is outside the ten-county area. Fifty percent of Pepsi COBO's sales are in cans. (Davis, Tr. 4630-31.)

249. Pepsi COBO also obtained 22% of its bottled soft drink products from outside the ten-county area. (Davis, Tr. 4632.)

250. In 1990 Pepsi COBO moved a can line from Conroe to its bottling plant in San Antonio, at a cost of from \$1.0 to 1.3 million. (Amrosowicz, Tr. 808, 822-23.)

251. Kroger produces its Big K soft drinks for Texas in its plant near Dallas. (Knowles, Tr. 2837; Morath, Tr. 7665-66; Kaiser, Tr. 3254-56.) Shasta's plant in Houston, Texas, produces all of Shasta's soft drinks for Texas. (Knowles, Tr. 2689.)

252. Beverage Packers, Inc. supplies all of Texas, including San Antonio, from its Fort Worth plant. (Hixon, Tr. 7274; Morath, Tr. 7670.)

253. Star Distributing purchases Nehi finished products from Temple Dr Pepper Bottling Company in Temple, Texas (outside the ten-county area) for distribution in San Antonio and the Rio Grande Valley. (Espinoza, Tr. 4193; Coyne, Tr. 3433.)

254. CCSW produces 12-pack cans in its Cuero facility (outside the ten-county area) for distribution throughout its franchise territory. (Summers, Tr. 6403-04.)

255. USA supplies Coca-Cola concentrate and much of the Coca-Cola fountain syrup sold in the ten-county area and throughout Texas from its syrup plant in Dallas. (Short, Tr. 7734-35; Howell, Tr. 3984.)

256. Much of the soft drinks produced within the ten-county area is shipped and sold outside that area. CCSW ships soft drinks from San Antonio and Cuero throughout its territory to the Corpus Christi, Victoria, Temple, Uvalde and Del Rio warehouses. (Summers, Tr. 6410; E. Hoffman, Tr. 130, 201.) CCSW produced soft drinks for Fredericksburg Coca-Cola Bottling Company. (Schwerdtfeger, Tr. 2463.) About 45% of CCSW's sales are outside the ten-county area. (Summers, Tr. 6423-25.)

257. Texas Beverage supplies soft drinks throughout Texas from its San Antonio plant. (Hixon, Tr. 7272-74, 7278.) About 50% of Texas Beverage's production is sold outside San Antonio. (Hixon, Tr. 7290.)

258. Grant-Lydick has one bottling plant, located in San Antonio. (RX 2939-D.) Grant-Lydick supplies its sales centers in Austin, Corpus Christi, Victoria, Rio Grande and La Grange with bottled products produced in the San Antonio plant. (Bodnar, Tr. 1338-40.)

259. Pepsi COBO's San Antonio bottling plant packages soft drinks in two-liter and three-liter PET bottles. (Davis, Tr. 4461.) Three-liter Pepsi bottles for shipment throughout Texas are produced in San Antonio. (Davis, Tr. 4636; Amrosowicz, Tr. 827-28; CX 2360-A.) About 35% of the San Antonio three-liter bottle production is sold outside the ten-county area. (Amrosowicz, Tr. 827-28.)

260. In 1983, 75% of the product produced by plants in San Antonio was sold in the ten-county area, and 78% of the product sold within the ten-county area was produced within that area. (Strickland, Tr. 8040-41, 8672; RX 3129.)

261. In 1988, 57% of the product produced by plants in San Antonio was sold in the ten-county area and 77% of the product sold in the ten-county area was produced within that area. (Strickland, Tr. 8046-50; RX 3130.)

262. Hilke performed Elzinga-Hogarty ("E-H") calculations.⁷ One set involved an E-H calculation based on a 1990 extrapolation of 1988 production and sales estimates (CX 4089-E), adjusted for the fact that Pepsi has moved a can line to San Antonio in June 1990. (Hilke, Tr. 8516, 8554.) Another set re-calculated Dr. Strickland's E-H figures, but excluded private label and warehouse brand sales and production. (CX 4089-A; CX 4089-C; Hilke, Tr. 8516, 8555.)

⁷ The E-H test measures actual shipments of relevant product into and outside of a proposed region. To qualify as a relevant geographic market, an area must satisfy a two-pronged test: "Little in From Outside" ("LIFO") and "Little Out from Inside" ("LOFI").

263. The 1983 calculation gave a LOFI percentage of 81% and a LIFO percentage of 77% (CX 4089-A1 B), thus failing the most recent (90%) version of the E-H test. (Hilke, Tr. 8551-52.)

264. The 1988 calculation gave a LOFI percentage of 59% and a LIFO percentage of 76% (CX 4089-C, D), failing the "weak" (75%) LOFI test. (Hilke, Tr. 8553-54.)

- 265. The 1990 calculations gave a LOFI percentage of 62% and a LIFO percentage of 85% (CX 4098-E, F) thereby failing the "weak" 75% LOFI test. (Hilke, Tr. 8554.)

266. The freight cost to ship a truckload of soft drinks is between \$0.75 and \$1.10 per mile. (Hixon, Tr. 7286; Amrosowicz, Tr. 807, 859-60; Summers, Tr. 6884, 6915.) Truckload capacity varies with the type of soft drink package; a truck can carry 2200 cases of cans. (Amrosowicz, Tr. 859-60.)

267. Using a cost figure of \$0.75 per mile, Toby Summers calculated that a 10% increase (\$0.59) in the wholesale price of canned soft drinks would enable canned soft drinks to be shipped a distance of 793 additional miles on a round-trip basis without back hauling. (Summers, Tr. 6437-38, 6885, 6915-17.) Back haul would reduce the shipping cost. (Bodnar, Tr. 1528-29.)

268. CCSW has sales centers in Del Rio, Uvalde, Kerrville, Victoria, Corpus Christi, Temple and San Antonio. (E. Hoffman, Tr. 57, 201-03; Summers, Tr. 6407-08.) CCSW ships from its San Antonio plant up to 150 miles to supply its sales centers. Three of the sales centers are about 150 miles from San Antonio, two are about 100 miles away and one is 60 miles. (RX 353.)

269. Turner DP purchases Original New York Seltzer from a contract producer in Des Moines, Iowa, 900 miles away. (Turner, Tr. 1006; Trebilcock, Tr. 5811, 5867, 5869.)

270. Pepsi COBO ships throughout Texas from its plants in Conroe, Houston, San Antonio and Mesquite. (RX 1238-E, F; Amrosowicz, Tr. 847-48.) Pepsi COBO ships 260 miles from its Conroe can plant. (Amrosowicz, Tr. 847-49; CX 2380-C.)

271. Grant-Lydick purchases soft drinks in cans from Dallas and ships them to San Antonio (280 miles) and from there an additional 240 miles to Harlingen, Texas, for a total cost of 25¢ per case. (Bodnar, Tr. 1528-30.)

272. Kroger supplies soft drinks to its warehouses in Louisiana, Tennessee and throughout Texas from the Garland production facility. (Morath, Tr. 7665-66; Kaiser, Tr. 3254-58.)

Territories

273. The ten-county geographic market consists of the Dr Pepper franchise area acquired by CCSW in September 1984. (F 274.) It is smaller than the territory in which: CCSW operated before and after September 1984 (CX 1854-B); the geographic territory in which DP-SA operated before and after September 1984 (Bodnar, Tr. 1522-24); and the 35 county franchise area for the Canada Dry brands acquired by CCSW in September 1984. (RX 2972.) The ten-county area does not include the eleven additional counties in the Dr Pepper franchise territory acquired by CCSW after September 1984. (Rx 352.)

274. In 1984, the Dr Pepper franchise acquired by CCSW was for ten counties including San Antonio. (RX 2964.) Later the franchise was expanded to 21 counties, through the acquisition of American Bottling Company of Corpus Christi. (RX 352; R. Hoffman, Tr. 5597-98; RX 6-B.) In 1984, CCSW was franchised by Coca-Cola Company in 29 counties, including San Antonio. By 1989, the franchise had increased to 51 counties. (RX 2971; Strickland, Tr. 8085-86.) In 1985, CCSW operated primarily in the ten-county area, but about 30% of its sales were distributed outside of that area. (CX 418-Z-4.) In 1986, CCSW operated in 39 counties in Texas. (CX 1854-B.)

275. CCSW's current franchise territory includes San Antonio and 60 counties in southern, central and eastern Texas. (RX 352; RX 6; E. Hoffman, Tr. 201, 496-98.)

276. Grant-Lydick's current franchise territory includes San Antonio and 60 counties in southern central and eastern Texas. (RX 3; RX 5 (RC Territory); Coyne, Tr. 3502-04; RX 2970.)

277. Pepsi COBO's franchise territory includes San Antonio and 105 contiguous counties in the eastern half of Texas. (RX 2973; RX 2; Howell, Tr. 4013-14; Davis, Tr. 4451-54.) Pepsi COBO also has other counties in West Texas and in the Rio Grande Valley. (RX 2; F 246.)

278. There are no territorial restrictions in the sale of CCUSA or DPUSA fountain syrup to retail accounts. (Howell, Tr. 4005; Cassagne, Tr. 7619-20.)

279. There are no territorial restrictions in the sale of private label or warehouse soft drinks. (Hixon, Tr. 7277-78.)

280. HEB currently operates 165 stores in South-Central Texas. (RX 4; Gonzaba, Tr. 2111-13.) Forty of these are within Bexar

County. (Chapman, Tr. 7144; Summers, 7843.) There are 86 HEB stores in CCSW's franchise territory. (Summers, Tr. 6593; RX-4.) HEB distributes grocery products (including its Plaza soft drinks) to all its stores from the warehouse located in San Antonio. (Chapman, Tr. 7141; Gonzaba, Tr. 2114.)

281. Kroger's Houston "KMA" ("Kroger Marketing Area"), is from Eastern Louisiana to West Texas, and includes San Antonio and the ten-county area. (CX 3966-Z-12; CX 2037-C; Kaiser, Tr. 3156.)

282. Albertson's Texas Division marketing area includes 55 stores in North and South Texas and 12 stores in Louisiana. (Donald, Tr. 5287.)

283. Eckerd's Houston District marketing area includes Houston, Beaumont, Corpus Christi, San Antonio and Austin, Texas. (CX 1144.)

284. The media advertising measure for television and radio is The A.C. Nielsen Company's "Area of Dominant Influence" ("ADI"). (Strickland, Tr. 8075.) The San Antonio ADI is 15 counties larger than the ten-county area. (RX 2967.)

285. The advertising areas for the two major San Antonio papers, the San Antonio Light and the San Antonio Express (Strickland, Tr. 8696-97), includes about 30 counties.

286. Arbitron sells warehouse shipment data for grocery items as a Selling Area Marketing, Inc. ("SAMI") report. (RX 1945; Strickland, Tr. 8077-78.) The SAMI region which includes San Antonio is about 50 counties. (RX 2696.)

Transshipping

287. Transshipping is the movement of franchised soft drink products from the territory of one bottler for resale in the territory of another bottler. The franchise agreements issued by CCUSA, DPUSA and Pepsi USA prohibit transshipping by bottlers. (F 111.) Retailers are not parties to bottling franchises. (Neslage, Tr. 8727; E. Hoffman, Tr. 391; Howell, Tr. 3977.)

288. Almost a million cases of Coca-Cola products were transshipped into an area north of Houston in 1982. (RX 3122.)

289. A Pepsi USA log of transshipment complaints against the Conroe can plant shows 230 complaints within a 62-month period, mostly made by Oneta Company in Corpus Christ. (CX 2327; Davis Tr., 4748; Koch, Tr. 8629-32.)

290. Quality Liquor Wholesalers, a beverage distributor in Amarillo, Texas, dealing primarily in liquor and beer, transships cases of soft drinks into SWCC territory. (R. Hoffman, Tr. 568990.)

291. SWCC received over \$200,000 in 1986 and 1987 for lost sales due to transshipping charged to CCE and other bottlers because of the activities of Quality Liquors. (R. Hoffman, Tr. 5691; CX 3623; CX 3645-Z-46 (38,000 cases in 2 months); CX 3624 (153,000 cases in 10 months).) Quality Liquors continues to transship. (CX 3636-A (20,000 cases in 1988); R. Hoffman, Tr. 5688, 5691.)

292. In September 1988 CCUSA fined CCE \$177,165 for 35,433 cases of transshipped product found in SWCC's franchise territory. (CX 2409-C.)

293. In 1989, CCE paid more than a million dollars of transshipping fines to CCUSA. (RX 3131-R; Neslage, Tr. 8729-30.)

294. Resellers of soft drinks in CCSW's market sell to others who sell at retail either in or outside of that market. Such resellers include: Sam's Wholesale Club (RX 3121; CX 2199-I), Quality Liquors, and vending companies. (Jackson, Tr. 3365, 3375.)

COMPETITIVE HISTORY

Effect of Acquisition

295. The 1984 acquisition did not reduce the number of competing firms or soft drink plants in the market. (Turner, Tr. 1158-59.) DP-SA continued in operation until it was sold to Grant-Lydick. (F 54.)

296. In 1982 DP-SA acquired the former Big Red Bottling Company of San Antonio. (F 31.) In 1987 Grant-Lydick acquired the San Antonio 7-Up bottler. (F 63.)

297. Since 1982, PepsiCo acquired the Huntress bottling company in San Antonio (F 33), the Pepsi-Cola bottler in Houston and in Dallas (F 17), thereby integrating vertically Pepsi operations throughout much of the eastern half of Texas. In September 1986, CCUSA acquired the JTL bottling operations in Dallas, Houston, and Austin, thereby integrating vertically Coca-Cola operations in much of the eastern half of Texas except for CCSW's territory. (CX 1512-D.)

298. As part of the 1984 acquisition, CCSW purchased 40% of DP-SA's fleet of used delivery and over-the-road trucks. (F 50.)

299. CCSW could have acquired the trucks from many other sources, including lease companies that sell trucks at the end of the lease period. (Summers, Tr. 6771.)

300. DP-SA sold CCSW the warehouse that was located on property adjoining the CCSW property. (Summers, Tr. 6661.) DP-SA had its bottling operation in the building until it acquired the Big Red Bottling plant in 1982. (F 56; RX 1580-A.) At the time of CCSW's purchase, DP-SA had publicly listed the warehouse for sale but it had not been purchased. (Bodnar, Tr. 1519.)

301. DP-SA sold CCSW 2,150 used vending machines (F 50), many of which were located in accounts where CCSW already had vending machines. (Summers, Tr. 6773.) Soft drink companies offer programs to finance new vendors, and used vendors are readily available from brokers. (Summers, Tr. 6671-72, 6772, 6957-58; Turner, Tr. 1194-95; F 60.)

302. The average age of the machines was five to six years at the date of the 1984 transactions. (Little, Tr. 653.) The average useful life of a vending machine is ten years. (Turner, Tr. 1194; Lauterjung, Tr. 4901; Little, Tr. 691.)

303. Most of the machines were in place at customer locations. (Schwerdtfeger, Tr. 2452.) Many of the locations already had a Coca-Cola or Pepsi-Cola vending machine in addition to the Dr Pepper machine. (Summers, Tr. 6773.)

304. Dr Pepper products could be added to CCSW vending machines without reducing availability of other products. In locations where another vending machine could not be installed, CCSW replaced the second or third button allocated to Coca-Cola, thereby increasing the variety of products available to consumers, without reducing competition among products. (E. Hoffman, Tr. 418.)

305. Many of the DP-SA vending machines were located at military bases around San Antonio, pursuant to vending contracts between DP-SA and the Army-Air Force Exchange Service ("AAFES"). (CX 255-B, D, Z-8, Z-38, Z-44, Z-67.)

306. After the acquisition of the Dr Pepper brand, CCSW dropped Mr. PIBB, which had a market share of 2.1% in 1983. (Hoffman, E., Tr. 342, 421; CX 122; CX 1681-C.)

Finance

307. After adjustment for inflation, the retail and wholesale prices of soft drinks in the San Antonio area declined over the 1984-1990 period. (Davis, Tr. 4697-99; Bodnar, Tr. 1569; Coyne, Tr. 3500; Campbell, Tr. 1999-2000; Atchison, Tr. 5242.)

308. The costs to produce finished soft drinks increased over the 1984-1990 period. (CX 3258; CX 1026.)

309. CSW's costs increased and financial support from CCUSA has been cut. The cost of an HEB ad buy was 45% higher in 1990 than in 1989, increasing CCSW's marketing costs by \$1.4 million. (R. Hoffman, Tr. 5635-36.)

310. Increasing costs and declining prices of soft drinks decreased profits of CCSW (Schwerdtfeger, Tr. 2592-93; CX 1541-C), and Pepsi COBO. (Davis, Tr. 4695-96.)

311. Although the financial performance of Better Beverages, Inc. is improving in 1990, margins decreased fifty percent from the early 1980's to 1989. (Campbell, Tr. 2001-2.) The Victoria area, where Better Beverages, Inc. competes with CCSW, is one of the lowest priced soft drink markets in Better Beverages' territory. (Campbell, Tr. 1950-51, 2000.)

312. L.C. Vending Company's sales have increased since 1985 but profits have not. (Jackson, Tr. 3356.)

313. Texas has the lowest soft drink prices in the United States due to high per capita consumption, the strength of Dr Pepper brands and promotional efforts of PepsiCo to buy market share. (Turner, Tr. 979; Campbell, Tr. 1950-51; Trebilcock, Tr. 5874-75.)

314. CCSW's and SWCC's net prices per case were lower than the national average for Pepsi bottlers during 1988. (Strickland, Tr. 8433-36, 8444; CX 53; RX 2990.)

315. Price competition has been intense in the San Antonio area since the 1984 transactions. (Lydick, Tr. 2974; Bodnar, Tr. 1480; CX 919-A; CX 1459.)

316. Soft drink prices decreased in 1987 when Pepsi COBO increased its discounts on soft drinks in Texas and the San Antonio area. (RX 1126-M; RX 1129-H, K.) CCSW matched these discounts, followed by further reductions by Pepsi COBO. (Davis, Tr. 4548-49, 4549-59.)

317. The price of soft drinks in San Antonio in 1987 was below the price in 1977. (CX 1427-G.) The average net effective price of Pepsi soft drinks in San Antonio during 1987 was \$5.45, 12.4% below the \$6.22 average for 1986. (CX 2382-Y.)

318. Pepsi COBO forgoes profits at the bottler level to build sales volume and market share in Texas over the long run. (CX 422-C; CX 2389-K, P; RX 2867; CX 2389-K, P, Z-3; Howell, Tr. 4019; Davis 4559-60, 4653; Bodnar, Tr. 1482, 1568; CX 1427-F.) Pepsi COBO has never made a profit at the bottler level in San Antonio. (Coyne, Tr. 3456; Davis, Tr. 4561.)

319. Pepsi COBO directed lower prices at CCSW, hoping to take advantage of CCSW's financial burdens to generate sales, volume and market share. (Davis, Tr. 4605, 4614-15, 4676-80; CX 3141-C; CX 2177-G.)

320. Pepsi planned to offset \$10.4 million in bottling losses in South Texas during 1989 with \$9.5 million in concentrate profits. (CX 778-Z-25.)

321. CCSW must meet its fixed costs and its interest expense while maintaining the cash flow ratios required by its loan agreements. (CX 1437; R. Hoffman, Tr. 5634.)

322. In 1987, price competition and the inability to generate sufficient volume growth placed CCSW in financial difficulty. (R. Hoffman, Tr. 5643-44; E. Hoffman, Tr. 523-24; Howell, Tr. 3985-86.)

323. Based on the unsatisfactory financial performance of CCSW in 1987, and the risk occasioned by violations of loan covenants, TBG refinanced the acquisition loan. In addition, George Van Houten and David Green replaced Norb Cole and David Schwerdtfeger as President and Chief Financial Officer, respectively, on January 8, 1988. Toby Summers was promoted to Executive Vice President and Chief Operating Officer. The Vice President of Sales, Larry Teague, had been terminated in September, 1987. (E. Hoffman, Tr. 428-31, 525.) In June 1988, Toby Summers replaced

George Van Houten as President of CCSW. (E. Hoffman, Tr. 526; Summers, Tr. 6708.)

324. CCSW's bottling profitability has been below that of other Coca-Cola bottlers in recent years. (RX 759 (1987); RX 760 (1986); RX 598 (1985); RX 2049 (1983); RX 303-U.)

325. The Coca-Cola Bottling Group (Southwest), Inc. (Texas) refinanced its debt in 1990 with a group of insurance companies at a fixed rate with no principal payments for seven years. (CX 891; E. Hoffman, Tr. 291-92.)

Volume Share

326. "Brand loyal" consumers will pay higher prices for their brand of soft drinks. (Turner, Tr. 1397-98.) "Brand loyalty" refers to the extent to which a consumer purchases only one flavor of soft drink. (CX 848-V-W; RX 642-E; RX 686-E-F, I.)

327. Brand loyalty for soft drinks is low and declining. (CX 1126-C, K; RX 642-E; RX 2842; CX 972-E-4; RX 1323-J; Koch, Tr. 1869; Davis, Tr. 4757-58; RX 2842-B-L; RX 1368-A; Coyne, Tr. 3574-75.)

328. In this market, price competition, and the frequency of low "promotional" prices for soft drinks, induce consumers to buy on price. (Hixon, Tr. 7304-05; Knowles, Tr. 2837-38; RX 686-E, I; CX 972-E-4; RX 2843-A007006; RX 1533-F, G; CX 2424-E; CX 2407-S.)

329. At least one cola is always on sale. Cola drinkers are switchers who buy on price, especially in the sugar segment (non-diet). (Coyne, Tr. 3449-50; RX 686-E-F, I.)

330. The decline in brand loyalty is due in part to the proliferation of varieties of one trademark. (CX 1274-H.) Before 1983 the only brand which carried the "Coca-Cola" and "Coke" trademarks was Coca-Cola. Since that time, diet Coke, Coca-Cola Classic, Caffeine-Free Coke, Caffeine-Free diet Coke, and Caffeine-Free Coca-Cola Classic have been introduced. (F 332-36.)

331. Sales of the new brands reduce the sales of existing brands. (Atchison, Tr. 5190-91; Stout, Tr. 5115.) The projected "cannibalization rate" of Cherry Coke was 49%. (Stout, Tr. 512627; CX 1140-A.) TAB share declined 50% when diet Coke was introduced. (Sum-

mers, Tr. 6730-31; CX 168-A.) New packers have the same effect. (RX 1365-E.)

332. In May 1985, CCUSA substituted a reformulated Coca-Cola brand ("New Coke") for the old formula ("Old Coke"). (Stout, Tr. 5042.)

333. Consumers, especially in Texas, rejected New Coke and Coca-Cola market share declined sharply. (RX 680-S.) CCUSA reintroduced Old Coke as "Coca-Cola Classic" in September 1985. (Atchison, Tr. 5202, 5232; Stout, Tr. 5048.) Sales of New Coke dropped dramatically. (Atchison, Tr. 5202, 5205.) New Coke had a 0.3% market share in the October/November 1989 San Antonio Nielsen. (RX 2806-R.)

334. During the May-September 1985 period, CCSW had an 18.8% decrease in its sales/share. (CX 3557-0.) Sales of Royal Crown Cola, Dr Pepper and Pepsi Cola increased. (Nicholson, Tr. 3718, 3804; Knowles, Tr. 2660.) Royal Crown's Nielsen share jumped from 1.8% in the June/July 1985 to 5.2% in the August/September 1985 Niensens. (RX 2806-U.)

335. In the summer of 1985, CCUSA introduced Cherry Coke. The sales share of Cherry Coke in the San Antonio Niensens peaked at 3.3% during August/September 1985, and has been declining ever since. (CX 3991-Q; CX 3558-P; RX 2806-R.) Its 1989 annual share was 0.3%. (RX 2806-R.)

336. Caffeine-Free Coca-Cola Classic was introduced in March 1990 and the national share is now 0.9%. (Atchison, Tr. 5219, 5222.)

337. Caffeine-free soft drinks appeal to 15-20% of consumers. The caffeine-free category recently began with SevenUp and Sprite. (Coyne, Tr. 3475-76; Atchison, Tr. 5218.)

338. Surveys of sales show large swings related to changes in retail pricing. (RX 452-M; Davis, Tr. 4563.) Texas consumers have low prices as a result of the "cola wars" and have become price sensitive, so that a change in price will produce a significant volume change. (Knowles, Tr. 2837-38.)

339. Pepsi sales surged 16% as a result of the price wars in 1987. (RX 2867; RX 2807.) In 1988 Pepsi COBO increased net effective prices by an average of 6.9%. (CX 4148.) During the first seven months of 1989, Pepsi shares were down 19% in bottle/can and 12% overall compared to 1988. (CX 4148-A.)

340. COBO and Grant-Lydict have increased their Nielsen market share in CCSW's territory since 1985. (Summers, Tr. 6766.)

341. Private label sales volume will increase if CCSW raises prices. When private label is featured on ad at a lower price, sales volume rises, eroding CCSW sales volume. (Summers, Tr. 6771.)

342. When private label brands, market share increases, Pepsi COBO's share decreases, and when Pepsi COBO's share increases, private label share decreases. (RX 2975; RX 43; Strickland, Tr. 7966-67; Summers, Tr. 6554-57.)

343. Several retailers, led by HEB, promote private label soft drinks heavily. The market share of private label ("control brands") has increased from 3.9% in 1982 (CX 3557-T), to 18% in 1989. (RX 2806; RX 2961; Summers, Tr. 6553; Howell, Tr. 4092.) From 1984 to 1989, control brands grew 57%, sales of all other brands grew 20%, in Bexar County. (Summers, Tr. 6766.)

344. The 1989 San Antonio private brand share for three flavor categories of soft drinks (7.3% of the market) was: grape 75%; root beer 44%; orange 25%. (CX 421-C; E. Hoffman, Tr. 624.)

345. From 1984 to 1989 the sales share of Dr Pepper in Bexar County increased from five to eight percent, a 60% increase. (RX 34-A; Summers, Tr. 6727.)

346. During 1984 and 1985, market share for Dr Pepper, Pepsi (CX 27-Q) and RC Cola (CX 27-U) products increased, while Coca-Cola lost share. (E. Hoffman, Tr. 541-42.)

347. Soft drink sales and market share in Texas are volatile. (CX 2392-H, N; RX 488-N-R; RX 666-E; CX 2533-Z-28; RX 1200; RX 1469-Z-6 (CCE).)

Public Reaction

348. Retailer employees testified that there had been no adverse consequences from the 1984 acquisition. Chapman of HEB called it "a non-event" (Chapman, Tr. 7249) and Sendelbach of Super S Foods said that the acquisition benefited Dr Pepper. (Sendelbach, Tr. 7690.)

349. Ladd Little, president and owner of L.C. Vending, and his sales manager, Terry Jackson, complained about the 1984 acquisition. (Little, Tr. 669-70, 705; Jackson, Tr. 3309-10.) L.C. Vending buys soft drinks from CCSW and sells them as a direct competitor of

CCSW's vending operations. (Jackson, Tr. 3374; Little, Tr. 652, 703-04.)

350. L.C. Vending wants to raise the vending price on its soft drink machines, but competition with CCSW has undercut any higher price. (Little, Tr. 739-41.)

351. Emery Bodnar, former General Manager of DP-SA and currently General Manager of Grant-Lydick also complained about CCSW's low prices. (Bodnar, Tr. 1571-72, 1695.) Mr. Bodnar was concerned about low pricing on CCSW's Cima Red, which is similar to Grant-Lydick's Big Red. (Bodnar, Tr. 1369.)

Innovation

352. New brands introduced in the San Antonio area since 1984 include Coca-Cola Classic, Caffeine-free diet Coke, Cherry Coke, diet Cherry Coke, Minute Maid Orange and Lemon-Lime, Pepper Free, Original New York Seltzer natural fruit-flavored soda, and other seltzers, Lipton Tea, Cherry 7 Up and diet Cherry 7 Up 7 Up Gold, IBC Root Beer, and Slice. (CX 2038-F, G; CX 2503-Z-3; CX 1673-B, C; RX 803, p. CC36128633 (New brands introduced from 1978-87 reached 20.2% share in 1987 Nielsen audit); RX 1183-C (New Pepsi brands introduced since 1982 are 15% of business).) Thirty-four new brands appeared from 1985 to October 1988. (CX 1673-B, D; CX 3998.)

353. New packages have been introduced or emphasized in CCSW's territory since 1984, including 16-ounce PET, 1-Liter PET, 20-ounce PET, 3-Liter PET, Bag-in-Box, and multi-paks of 12, 15, and 20 cans. (E. Hoffman, Tr. 563.)

354. San Antonio was a test market for the 3-liter PET package, introduced in 1984. (Atchison, Tr. 5226.)

Efficiency

355. In January, 1987, CCSW had a "Reduction In Force," reducing payroll by 20%. (CX 920-E, CX 959; CX 241.)

356. CCSW's acquisition of the Corpus Christi territory, from American Bottling Company, and the consolidation into San Antonio,

led to a cost savings. CCSW's labor cost per case dropped 21.7% between 1986 and 1987. (CX 1399-D.)

357. Consolidating production into one facility and using idle equipment reduced CCSW's fixed overhead costs of manufacturing. (Summers, Tr. 6366.)

358. CCSW delivers to the customer's warehouse in truck/trailer rigs rather than route trucks. Soft drinks are loaded on pallets. (Summers, Tr. 6411-12.)

359. Under ownership of The Coca-Cola Bottling Group (Southwest), Inc., CCSW has had cost savings in consolidation and volume discounts on raw materials. (E. Hoffman, Tr. 277-78, 523.)

Dr Pepper USA

360. The Dr Pepper brand and DPUSA have been helped by the 1984 acquisition.

361. Sales volume and share of Dr Pepper brand soft drink in the San Antonio area increased since the 1984 acquisition. (CX 3946; RX 2823; Knowles, Tr. 2784-85.)

362. Dr Pepper per capita sales in the San Antonio area increased 40% between 1984 and 1988. (CX 709-H.) The rate of Dr Pepper sales growth for the nation was about half that rate. (Knowles, Tr. 2848-49.) CCSW provided Dr Pepper products an excellent distribution system and worked to develop the brand. (Knowles, Tr. 2668, 2784-85, 2853-54, 2848; Coyne, Tr. 3598; E. Hoffman, Tr. 413.) Dr Pepper brands benefit when advertised with Coca-Cola. (Kaiser, Tr. 3232-33.)

363. In 1984, per capita sales of Dr Pepper in CCSW territory were 74.5 gallons, lower than the 85.1 gallon per capita sales of surrounding bottlers, but by 1988, per capita sales of Dr Pepper in CCSW territory were 104.7, higher than surrounding bottlers. (RX 2826; RX 2828; Knowles, Tr. 2794-96; Clarke, Tr. 4380.)

364. In San Antonio, Dr Pepper bottle/can sales decreased from 1982 to 1984 but began to increase in 1985 to 1988. (Knowles, Tr. 2878; RX 2823; RX 2980.)

365. Military bids require that 80% of the can vending business be from Coca-Cola and Pepsi bottlers. Dr Pepper Company brands are in many vending machines as a result. (Summers, Tr. 6676-77.)

Other Competitors

366. Grant-Lydick purchased the remaining assets of DP-SA, including the bottling plant and equipment and approximately 60% of the trucks (Lydick, Tr. 2978-79), for \$6.5 million. (Antle, Tr. 3074, 3099; Turner, Tr. 1158; Lydick, Tr. 2981-82.)

367. Grant-Lydick estimated that the assets and franchises they acquired were worth over \$12 million. (RX 1648; Bodnar, Tr. 1645-46; Lydick, Tr. 2982; Antle, Tr. 3074, 3099.)

368. The brands which Grant-Lydick took over from DP-SA in 1984 accounted for 60% of DP-SA's 1983 volume. (Lydick, Tr. 2978-79.)

369. Respondent's accounting expert compared Grant-Lydick's profitability to the average profitability of 120 bottling companies. (RX 204; RX 205-K; Goode, Tr. 7427-33.) He concluded that Grant-Lydick was "doing very well in relation to the average for the industry." (Goode, Tr. 7439, 7444.)

370. Grant-Lydick has been successful in obtaining feature grocery ads and in-store promotions for its brands. (CX 2954-B; CX 3248-A-E; RX 256-B, C; RX 461; RX 1678.)

371. Nielsen data show that Grant-Lydick receives a higher percentage of the total shelf space than its percentage share of sales. (Bodnar, Tr. 1613-14.)

372. Grant-Lydick increased profits from 1984 to 1988. (RX 2991.) Grant-Lydick has had geographic expansion in recent years. (RX 2970.)

373. Grant-Lydick's brands have had increased sales and share. (RX 201-A; CX 438-B, C; Lydick, Tr. 3011-12.) Sales of the Big Red brand have grown. (Sharp, Tr. 7546-47.)

374. Royal Crown's sales records (RX 2846; RX 1793), and Grant-Lydick's reported sales of RC brand products (RX 2784-C, D) show growth of RC products sold by Grant-Lydick. (RX 2954-Z-2; RX 2955-V, W; RX 2956-V, W; RX 2957-Z-4-7, 10; RX 2958-Z-8, 11, 12.)

375. Emery Bodnar believes that he has caused Grant-Lydick to be a "tremendous success story." (Bodnar, Tr. 1692.)

376. The financial statements of Texas Beverage Packers show a growth in profitability from 1981 to 1988. (Hixon, Tr. 7319-21; RX 2953; RX 1845-49.)

377. TBP's sales increased from 1981 to 1988. (RX 1850-56; RX 2952; Hixon, Tr. 7316-18.)

EASE OF ENTRY

Distributors

378. Bottling plants in Texas are willing to facilitate new entry by producing new products (RX 2273), and new soft drink distributors have entered by having contract packers produce their product. (Limon, Tr. 4956 (AGA Beverages); Hixon, Tr. 2698; RX 2699.) New entrants need not invest the capital required to build a new bottling plant. (Howell, Tr. 3999.)

379. The physical requirements for distributing soft drinks consist of: a warehouse to store the product; trucks to deliver the product to retailers; and delivery and administrative employees. (Espinoza, Tr. 4237; Summers, Tr. 6478-79.)

380. The cost of the equipment to enter into the business of distributing soft drinks is relatively low. The cost of developing a DSD distribution system to serve the San Antonio area is about \$25,000. (Espinoza, Tr. 4237.) A 1988 Nehi business plan estimated that the start-up would cost \$30,000 (Rx 2858-G), and take three and a half months (RX 2858-E, F), and that profits during the first five months would recoup those costs. (Espinoza, Tr. 4231-33; RX 2858-Q, P.)

381. A soft drink brand must be accepted by retailers and be allotted shelf space, and have access to ad features or instore displays. (Espinoza, Tr. 4210 (with HEB); Donald, Tr. 5293.)

382. CCSW and Pepsi COBO obtained ad features with HEB but lost money because the sales increase did not offset the cost of obtaining the ad. (Summers, Tr. 7829-33; Clarke, Tr. 4387-88 (Dr Pepper); Davis, Tr. 4705; CX 2394-Z-67 (Pepsi).)

383. Brands by newer, smaller distributors, such as IBC Root Beer (Nelson Brokerage) and Nehi (Espinoza), have acquired ad features and sales with San Antonio retailers. (CX 1295; CX 1299 (IBC in HEB ad); CX 88.)

384. Retailers can feature their private label brands in ads or instore displays without incurring any direct costs. (Hilke, Tr. 6282-83.)

385. Access to ad features does not guarantee the success of a soft drink product. (Knowles, Tr. 2656-57.)

386. Grant-Lydick and Texas Beverage, which have obtained fewer feature ads than CCSW and Pepsi COBO in the San Antonio area in recent years (Bodnar, Tr. 1378-80), have been profitable during this period. (F 372.)

387. Mr. Espinoza has formed distribution companies for Nehi flavors and other brands in the San Antonio area and the Rio Grande Valley. (Espinoza, Tr. 4163-67; RX 1777-F, U-V.)

Bottlers

388. The cost to install a can line to produce five million cases of cans per shift per year with used equipment is \$825,000. (Summers, Tr. 6460.)

389. Used equipment is available because of recent consolidation in the soft drink industry. (Hixon, Tr. 7296; Bodnar, Tr. 1653-54.) Such equipment costs less than half of the cost of new equipment. (Summers, Tr. 6447-60.)

390. Other requirements for entering into the bottling and canning business are: a plant, a warehouse and trucks. (Summers, Tr. 6464, 6467, 6478-79.)

391. Due to the depressed real estate market in South Texas, a prospective bottler could easily lease a suitable facility to install a bottling line (4,000 square feet). (Summers, Tr. 6465, 6479.)

392. Just-in-time inventory requires little warehouse space; space for seasonally higher inventory is readily available for lease. (Summers, Tr. 6463-64.)

393. Since 984 new firms have entered the bottling business in competition with CCSW. Entry has been quick and inexpensive. Kroger purchased the Safeway bottling and canning plant in Garland, Texas in the fall of 1987 for \$1.1 million. (CX 2827; CX 2828-A; Morath, Tr. 7661-62; RX 2304; RX 2441; RX 1740-B, H, I, N; RX 1741; RX 1744; RX 1745; RX 1750; RX 2441-A; RX 1711.) Kroger spent \$600-700,000 to get the plant into production (Morath, Tr. 7661-62; RX 2441; RX 1760), which took four months. (Morath, Tr. 7662.) The Garland plant produces five million cases per year, including Kroger's private label brand and contract-packed brands. (Morath, Tr. 7662-64.)

394. HEB previously produced soft drinks (Chapman, Tr. 7155), but now uses Texas Beverages Packers ("TBP"), a contract packer, to produce Plaza, its private label soft drink. (Chapman, Tr. 7147; Hixon, Tr. 7298; Summers, Tr. 6562.) In 1987 HEB determined the costs of installing a bottling line in an HEB warehouse. (CX 201-B, C; RX 2040.) The project would cost \$2.7 million and take a year. (Chapman, Tr. 7152-53; CX 201-B; RX 2040-A.) HEB projected that the annual contribution from running the bottling line would be \$449,000. (Chapman, Tr. 7153; CX 201-B; RX 2040-A.)

395. HEB compared this cost with price offered by TBP, their current contract-packer. (CX 201-C, E; RX 2040-B; RX 2041.) HEB decided to extend their current contract-packing with TBP for two years. (Chapman, Tr. 7150-51; Hixon, Tr. 7298-7301; CX 201-B, M; RX 2040-A, B.) HEB reserved the right to build their own bottling plant during the life of the contract. (CX 201-A; RX 2039.) Recently, while remodeling an existing warehouse in San Antonio, HEB installed water and sewage equipment to facilitate the installation of a bottling line. (Chapman, Tr. 7150.)

396. Bottling of nationally branded soft drinks, to be delivered-store-door in the San Antonio market, has comparatively high entry barriers. "[N]ew entrants are severely restricted and are relegated primarily to additional regional or other non-major brands with relatively insignificant market positions." (CX 1406-Z-9; CX 102-P.)

Concentrate Manufacturing

397. "Flavor houses" inexpensively provide concentrates for new products. (CX 650 (Monarch); Antle, Tr. 3115-16; Turner, Tr. 1427; Bonica Test., RX 3010, pp. 3373-74.) A new entrant like Soho (Collier Test., RX 3015, pp. 4080-82) can rely on flavor houses to produce concentrates for their products. (Morath, Tr. 7668 (Kroger).) CCSW makes and sells Cima Red and Spike. (CX 436; RX 541; Summers, Tr. 6687.) The flavor extracts for these two products are purchased by CCSW from Universal Flavors. Flavor extracts from a flavor house like Universal Flavors are less expensive than the bottling concentrate sold to CCSW by its soft drink franchisors. (RX 541-B; Summers, Tr. 6546-47.)

398. A bottler could introduce a new product within a short time. (Bodnar, Tr. 1681-82; Clarke, Tr. 4372 ("four weeks"); Turner, Tr.

1425-27 ("8-12 weeks"); Coyne, Tr. 3584-91 ("3-6 weeks"); Amrosowicz, Tr. 869-70 ("60 days").)

399. CCSW introduced Cima Red, a red cream soda product similar to Big Red (Schwerdtfeger, Tr. 2366-69; E. Hoffman, Tr. 345-46; CX 436) within six months at a cost of \$7,500 - \$15,000 (CX 428-C; CX 436-O). Cima Red reached a 1.1% market share in the October/November 1988 Bexar County Nielsen audit. (RX 2806-X.) CCSW's new isotonic soft drink, Spike (RX 541; CX 3685; CX 308) reached full production within three months after the name was selected. (Summers, Tr. 6692.)

400. Better Beverages introduced ProMotion, an isotonic soft drink product, in May 1990, two months after signing the franchise agreement, with newspaper coupons, point of sale material, and retailer authorization in place. (Campbell, Tr. 1991-93.)

401. Better Beverages introduced Red Red, a red soft drink product of the Monarch Company that is similar to Cima and Big Red, in May 1990 after two months of preparation. (Campbell, Tr. 1995.)

402. Better Beverages introduced Nesbitt's Orange, Strawberry, and NuGrape immediately after obtaining the franchise. (Campbell, Tr. 1994-95.) Oneta Company developed and introduced Everest Seltzer in a two-month period. (Koch, Tr.1902.)

Piggybacking

403. New entry at the concentrate level has been facilitated by "piggybacking." (F 112-16.) A new concentrate can enter a market readily by distribution through a bottler already distributing competing products. (Espinoza, Tr. 4185, 4189.) Dr Pepper distribution through CCSW is piggybacking.

404. Piggybacking allows new entrants to take advantage of the distribution systems developed by established concentrate companies. (Knowles, Tr. 2765-67, 2772-73.)

405. Piggybacking allowed fast, low-cost new entry or geographic expansion of Dr Pepper, Welch's, A&W, Sunkist, and Canfield. (Lydick, Tr. 2975, 2975-76; Knowles, Tr. 2767-68, 2772-73.)

406. As a result of the decision to license cola bottlers, Dr Pepper's national market share grew from 2% in 1960 to 5% in 1978, a growth rate faster than the national average for the soft drink industry. (Knowles, Tr. 2767-69.)

407. CCSW quickly distributed new drinks like Lipton Tea, Delaware Punch and Original New York Seltzer. Caffeine-free Classic Coca-Cola took less than five weeks to introduce in the San Antonio market. (Summers, Tr. 6687.)

POTENTIAL EFFECTS

Market Power

408. CCSW attempted to raise its prices in 1988, but was unable to do so. (Summers, Tr. 6763; R. Hoffman, Tr. 5546-47, 5550-51.) CCSW had to match Pepsi price reductions or lose market share. (F 316.)

409. CCSW in 1989 increased its average list price from \$9.37 to \$10.06, or 69¢ per case. (RX 2990.) CCSW was unable to increase its prices above the amount required by cost increases. (Strickland, Tr. 8134, 8186.)

410. In 1989 Pepsi COBO attempted a series of price increases averaging 6.9% in South Texas. This led to a 19% reduction in Pepsi COBO's sales during the first seven months of 1989. (RX 2987; Strickland, Tr. 7987-88, 8000-04.)

411. Bottlers' profit margins on soft drinks have shrunk since the early 1980's. (F 310.) This has forced bottlers to cut operating costs and pursue increased sales. (R. Hoffman, Tr. 5634-35; Turner, Tr. 1431.)

412. Pepsi COBO is aware of CCSW's financial difficulties (Davis, Tr. 4605; Schwerdtfeger, Tr. 2375-76, 2601) and is unlikely to allow CCSW to increase prices. (Summers, Tr. 6763.)

Collusion

413. The 1984 acquisition did not reduce the number of competitors in the San Antonio area. (Turner, Tr. 1158-59; F 295.)

414. Soft drinks are sold by thirteen bottling companies in CCSW's territory. This does not include sales of private label and warehouse brands, contract packers, or fountain wholesalers. (RX 3109; Strickland, Tr. 8142-44.)

415. There are numerous fountain wholesalers selling Coca-Cola fountain syrup in Texas. (RX 1869.) DPUSA also has many fountain wholesalers in Texas. (Cassagne, Tr. 7598-99; RX 2799.)

416. Pepsi USA profits from the sale of concentrate in Pepsi COBO's products. (Knowles, Tr. 2840-42, 2894; Howell, Tr. 4019; F 320.) Pepsi USA's concentrate profits are used to offset Pepsi COBO's operating losses at the bottling level in South Texas. (CX 778-Z-25; F 320.)

417. Pepsi COBO has a large bottling and canning plant in Conroe, as well as smaller bottling plants in San Antonio and Houston. (RX 2939.) Because of the volume produced at Conroe, Pepsi COBO has lower production cost for cans than CCSW. (Cole, RX 3008, pp. 118-19.)

418. Pepsi COBO is low priced and buys its way into the ad cycle. (Turner, Tr. 989-90, 1056.)

419. CCUSA profits from the sale of concentrate and syrup to bottlers like CCSW and CCE. CCUSA wants bottlers to reduce prices of soft drinks to stimulate retail soft drink sales, which leads to higher concentrate sales and profits. (Howell, Tr. 4072-73.)

420. CCUSA sells fountain syrup directly to fountain customers and to fountain wholesalers. (Howell, Tr. 4005; F 90, 93.)

421. DPUSA's cost of concentrate sold to bottlers like CCSW and CCE is less than 10% of the DPUSA's price. (Knowles, Tr. 2665.)

422. DPUSA negotiates the price of fountain syrup sold to most Dr Pepper fountain customers and to fountain wholesalers. (Cassagne, Tr. 7590; RX 1919-C.)

423. CCSW must increase unit sales volume. (Summers, Tr. 6636, 6763-64.) If CCSW increased prices, volume would be reduced and the loan covenants could be violated. CCSW has \$220 million of debt and interest expense of \$27 million per year. (R. Hoffman, Tr. 5471, 5481-84, 5569, 5614, 5600, 5634, 5718, 5633; CX 1354-G.) Cash flow, rather than profitability, is success for CCSW, because TBG's lenders look to cash flow as the source of debt repayment. (R. Hoffman, Tr. 5417, 5481-84, 5612-13, 5706.)

424. Kroger discounts soft drinks to draw consumers to its stores to increase grocery sales. (Howell, Tr. 3951-52.)

425. HEB also uses soft drinks as a loss leader to increase consumer traffic in its stores. (Gonzaba, Tr. 2032; Howell, Tr. 3951; Summers, Tr. 7004.)

426. Convenience stores sell fountain soft drinks because the cost to the retailer is lower than finished soft drinks and the consumer serves himself. (Summers, Tr. 6935.)

427. Fountain wholesalers like Martin-Brower, Sysco and Sugar Foods purchase fountain syrup from CCUSA and resell it to fast-food restaurants and other customers. (Short, Tr. 7740-41, 7753; RX 1869.)

428. None of the sequentially-operated Espinoza companies has owned a bottling plant; each purchased all of its finished soft drinks from contract-packers in Fort Worth and Temple, Texas and in Mexico. (Espinoza, Tr. 4193, 4249-51; Limon, Tr. 4956.)

429. Texas bottlers who contract pack for other soft drink distributors include: Texas Beverages in San Antonio, Beverage Packers in Ft. Worth; Temple Dr Pepper Bottling Company; Better Beverages in Hallettsville; CCE at various locations; and Dr Pepper Bottling Company of Texas in Dallas and Houston. (Summers, Tr. 6466; F 126.)

430. There is excess capacity in the bottling and canning of soft drinks in Texas. (F 133-39.)

431. Soft drink price competition in Texas makes collusion difficult. (Knowles, Tr. 2899.)

432. HEB is the leading retail grocery chain in San Antonio and Corpus Christi. (Knowles, Tr. 2836; Howell, Tr. 4041; Bodnar, Tr. 1743.) HEB has 50% of the retail grocery business in the San Antonio area. (CX 3138-B; CX 2088-D.) In 1990, 25% of CCSW's sales were to HEB. (Summers, Tr. 6589; CX 3806-Z-37.) From 20-25% of Pepsi sales in San Antonio were to HEB. (Davis, Tr. 4525.)

433. HEB buys more than five million cases a year from CCSW. (CX 956-A) HEB has a larger market share in the San Antonio area than both Albertson and Kroger (Davis, Tr. 4525 (each 8-9% share)) but Kroger and Albertson are national grocery chains which are much larger than HEB. (Summers, Tr. 6767; Howell, Tr. 4130-31.)

434. Kroger is the second largest customer of CCSW, purchasing 9-12% of CCSW's total unit sales. (Summers, Tr. 6589.)

435. Sam's Wholesale Clubs purchase 7-8% of CCSW total unit sales. (Summers, Tr. 6638.)

436. Sales to convenience stores are 15% of CCSW's total case sales. (CX 53-I.)

437. The Stop-N-Go, operated by National Convenience Stores, is a nationwide chain, and has 203 stores served by CCSW. (Summers, Tr. 6631.)

438. Circle K, with 45 stores, was the second largest convenience store chain served by CCSW. (Summers, Tr. 6631.)

439. Super S is a major retailer in rural markets with 45 stores. (Summers, Tr. 6629-30.)

440. The Army-Air Force Exchange Service [AAFES] and the United States Navy operate stores on military bases in the San Antonio area. (Summers, Tr. 6675-76.)

441. HEB requires that CCSW and other bottlers offer HEB the lowest net wholesale price available to retailers from each bottler. (Brinkley, Tr. 2234; Bodnar, Tr. 1660-61; Chapman, Tr. 7245; Turner, Tr. 1200; Summers, Tr. 6646; CX 3700-D.) Kroger and Albertson have similar policies. (Donald, Tr. 5320-21, 532728; Kaiser, Tr. 3264.)

442. HEB expects that bottlers will offer to other retailers the same prices offered to HEB. (Chapman, Tr. 7245; Howell, Tr. 4055.)

443. HEB pressures CCSW to offer the same wholesale price as CCE on Coca-Cola products. (Summers, Tr. 6626.)

444. Retailers specify the type of payments for promotions, including flat payments for HEB, and flat payments plus per case rebates for Kroger. (Howell, Tr. 3943-44.) Stop-N-Go requires payment in advance. (Summers, Tr. 6638; Howell, Tr. 3988-89, 4059-60, 4063; CX 1068.)

445. Retailers can limit promotions and display activities of soft drink products. (Coyne, Tr. 3487.) Ads and in-store displays are important to soft drink companies. (Turner, Tr. 1130; Coyne, Tr. 3449-50; F 171.)

446. HEB sometimes promotes its private-label soft drinks rather than national brands. Other chains run 52 weeks of national brands. Kroger may run private label on top of national brands. (CX 2379-C; Hixon, Tr. 7303; Brinkley, Tr. 2199; Davis, Tr. 4526; Donald, Tr. 5324.)

447. In Fall 1989, HEB promoted Pepsi products at the same time as Plaza private label products. (Knowles, Tr. 2753-55.)

448. In 1986, Kroger did not buy outside bottlers, 3-liter product so that Big K, its private label soft drink line, could be the only 3-liter package available from its stores. (Howell, Tr. 4063.)

449. In 1988, HEB notified all vendors that it would not accept price increases for four months. CCSW complied rather than risk retribution for HEB. (Summers, Tr. 6769.)

450. In 1986, Stop-N-Go refused to feature Coca-Cola products for six months in South Texas, because CCSW would not agree to Stop-N-Go's terms for promotional programs. (Howell, Tr. 4061-63.)

451. HEB required Oneta, the Pepsi-Cola bottler in Corpus Christi, to remove its vending machines from all HEB stores because Oneta offered Sam's Wholesale Club a lower price than Oneta offered to HEB. (Davis, Tr. 4745-46.)

452. HEB and Kroger have each canceled scheduled ads because the price was not competitive. (Summers, Tr. 6626-27 (HEB); Kaiser, Tr. 3218 (Kroger).)

453. There are thirteen private brands of soft drinks in the CCSW market, usually with a retail price of six cans for \$1.00. (Summers, Tr. 6549.)

454. CCUSA and DPUSA pressure CCSW to keep prices down to increase sales volume, criticizing its performance by comparison to sales records of other bottlers, and granting or withholding marketing support. (R. Hoffman, Tr. 5646-48.)

455. DPUSA provides inducements to bottlers to assure that pricing for Dr Pepper products is low. (Knowles, Tr. 2698, 2846.) If a bottler experiences intense competition, DPUSA provides funds to assist the bottler's efforts to meet competition. (Knowles, Tr. 2747.)

456. Concentrate companies pay part of the cost of promotions by their bottlers. (RX 498-C; RX 337; Coyne, Tr. 3417-18; Howell, Tr. 3928-29; Turner, Tr. 963-65; Knowles, Tr. 2698, 2745-48; Bodnar, Tr. 1484-88.) In 1986 CCUSA's promotional payments to CCSW totaled \$3.37 million (CX 3205-A), and DPUSA's funding for the San Antonio area totaled \$644,851. (CX 3204-B.)

457. Concentrate companies use "best efforts" requirements in franchise agreement to threaten to terminate the franchises of bottlers who have not increased sales. (RX 2835; CX 2676; Nicholson, Tr. 3775-76; Summers, Tr. 6759.)

458. Low consumer prices increase volume and the purchase of concentrate which bottlers must buy from concentrate companies at a high-margin, fixed price. (Knowles, Tr. 2912, 2838-39.)

459. Personal income is relatively low in San Antonio and consumers are very price sensitive, even more price sensitive (Davis, Tr. 4811) than consumers in other Texas cities. (CX 1489; CX 108-E-G; CX 3778-A; CX 3162; CX 1054-P; Bodnar, Tr. 1545-46, 1664; Davis, Tr. 4758; Kaiser, Tr. 3234-35 ("San Antonio more blue collar").)

460. The 3-liter bottle provides consumers in San Antonio the lowest price per ounce nonreturnable soft drink package. (CX 1999-B, D; Summers, Tr. 6770.)

461. Recent demographic and economic trends in the San Antonio and South Texas (CX 3705-Z-28) areas have led to increasingly price-sensitive consumers. (Knowles, Tr. 2837, Summers, Tr. 6770.)

462. The Texas Attorney General's Office has authority and incentive to deter any collusive price increase by CCSW. (CX-2; F 68-70.) The provisions of the AG's order impose constraints on CCSW's use of marketing programs and practices in the San Antonio area. (CX 2; F 68.)

DISCUSSION

The complaint challenges CCSW's acquisition in 1984 of the Dr Pepper and Canada Dry bottling franchises,⁸ alleging a violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, and Section 7 of the Clayton Act, 15 U.S.C. 18. The acquisition allegedly lessened competition by weakening Grant-Lydick, reducing competition between Dr Pepper and Canada Dry brands and other brands, and by increasing the likelihood of collusion and the likelihood that respondent will unilaterally exercise market power. Amended Complaint paragraph 13.

I. THE RELEVANT PRODUCT MARKET

Complaint counsel argue that the relevant product market is widely advertised, brand, finished carbonated soft drinks or syrup merchandised and distributed by direct-store-door delivery, in all channels of distribution. This definition includes the national brands of carbonated soft drinks sold by CCSW, Pepsi COBO, Grant-Lydick and the Espinoza companies. (F 179.)⁹

⁸ CCSW also acquired from San Antonio Dr Pepper Bottling Company trucks, a warehouse, and Dr Pepper vending machines. (F 50.)

⁹ CCUSA and DPUSA also sell fountain soft drinks. The parties agree that those sales are also in the relevant market. Nationally, fountain sales are about one-third of all soft drink sales. (CX 3418-F.)

Respondent argues that the relevant product market includes private and warehouse brand¹⁰ soft drinks, and non-carbonated soft drinks, delivered by DSD or warehouse.

A. Law

Product markets are defined by the “cross-elasticity of demand” or the “reasonable interchangeability of use” between the product in question and potential substitutes. *Grand Union Co.*, 102 FTC 812, 1041-42 (1983). When reliable evidence of cross-elasticity (the extent to which a change in price of the product will cause customers to switch to substitutes) is available, it can be “most important” in product market definition. Less direct evidence may also be considered such as, *Olin Corp.* 5 Trade Reg. Rep. 22,540 at p. 22,543 (1990): “perceptions of buyers that the products are or are not substitutes, certain differences in price movements that are not explained by parallel trends, similarities or differences in use, design, physical composition and technical characteristics, and the perceptions of sellers that the products are substitutes.”

B. Private Label

1. Prices

The issue on which this case turns is whether private label soft drinks are in the relevant product market. Private label products sell at prices lower on average than national brand products, in this market traditionally about 30% lower. (F 221, 228.)¹¹ A lower price alone does not create a submarket. *Brown Shoe Co. v. United States*, 370 U.S. 294, 326 (1962). Here, national brands on discount draw customers from private labels, and vice versa. (F 222, 225, 227, 229-30.) Although private label prices average below the prices of national brands, that difference diminishes during the almost constant promotions (F 229), and private label market share in San Antonio has increased to 18% when on promotion. (F 227.) Similarly, in

¹⁰ Since private brands and warehouse brands differ solely in ownership of the label, they will be treated together as “private label.”

¹¹ Despite lower retail prices, private labels have been held to be in the same relevant market as national brands. *United States v. Jos. Schlitz Brewing Co.*, 253 F. Supp. 129, 133, 143 (N.D. Cal.), *aff’d per curiam*, 385 U.S. 37 (1966); *International Tel. and Tel. Corp.*, 104 FTC 280, 410-11 (1984).

- *Olin Corp.*, 5 Trade Reg. Rep. at 22,545, the two swimming pool sanitizers were in the same relevant market because, after the traditional price spread between them had narrowed, a small price increase would cause consumers to switch. In *Grand Union*, 102 FTC 812, 1046 (1983), despite their lower prices smaller food retailers were held to be in the same relevant product market as the merging supermarkets. 102 FTC at 1046. And in *Beatrice Foods Co.*, 101 FTC 773, 802-03 (1983), chilled orange juice glass containers and cartons were in the same product market, despite a wide price difference between the containers, because their prices were mutually responsive.

2. Characteristics

Private label carbonated soft drinks on store shelves are in the same package sizes and flavors as national brand drinks. (F 188-89.) Private label soft drinks have no peculiar characteristics different from national brand soft drinks, and are formulated, mixed, packaged and consumed in the same manner as national brand soft drinks. (F 194, 197, 199.) Much of the "image" of a soft drink brand is created by advertising. (CX 858-C.) To a great extent, any perceived difference among soft drinks exists in the mind.

Private label soft drinks and national brands are made in the same way. HEB, the largest grocery and private label seller in CCSW's territory, contracts with a local bottler to manufacture and package its Plaza line of soft drinks. (F 394.) Kroger, another private label vendor, purchased its own plant in Garland, Texas (near Dallas) from which it supplies the state. (F 24, 393.) These private label bottling plants are just like national brand bottling plants. (F 194-95.)

Most national brand carbonated soft drinks are delivered and stocked on store shelves by bottler employees ("direct-store-door delivery" or "DSD"). (F 204.) Some (like Shasta) (F 201) are delivered to the retailer's warehouse and then transported and stocked in the stores by the retailer's employees ("warehouse delivery"). (F 203-04.) Some national brands like Crush and Hires are sometimes sold by the DSD method and sometimes by the warehouse delivery. (F 149.) Consumers are generally unaware of how different soft drinks are delivered. (F 198.)

3. Industry perception

Most market analysts put private labels and national brand soft drinks in the same category. The National Soft Drink Association includes all carbonated soft drinks (bottled, canned, or fountain), along with carbonated mixers, seltzers and waters and non-carbonated waters. (F 206.) Government agencies and market reports put private labels with national brands. (F 205, 207-08.)

CCSW focuses on its strongest competitor, Pepsi COBO. That does not mean, however, that other competitors are outside the product market. *Grand Union Co.*, 102 FTC at 1045; *Beatrice Foods Co.*, 101 FTC at 811. CCSW and Pepsi COBO watch private labels. (F 209, 211.) Other firms in this market recognize that private labels compete with national brands. (F 209-10.)

4. Price changes

Similarity in price movements indicates product substitutability. *B.A.T. Industries, Ltd.*, 104 FTC 852, 909 n. 328 (1984). Here, price movements indicate that private labels are in the same market with national brand soft drinks. In one study, prices of national brand and private label soft drinks moved together eight out of ten times. (F 231.) The price movements were not random and were consistent with both being in the same product market. (F 232.)

C. Direct-Store-Door Distribution

Most national brands are delivered to the retailer by "direct-store-door." Employees of the bottler deliver to the retailers' stores, and stock the store shelves and displays. (F 142.) Most private label soft drinks and some national brands are delivered to retailers, warehouses and later distributed and stocked on store shelves by the retailers, employees. Complaint counsel would exclude these sales from the relevant market.

The consumer is unaware of which distribution method is used for the different brands (F 198); private label and national brand soft drinks are displayed in the same aisle of the store, often side-by-side. (F 199.) Concentrate companies, bottlers, and grocery chains believe that private label and warehouse brands compete with branded soft drinks. (F 209-13.) Because of the prevailing industry recognition

that private label and warehouse brands compete, the argument that they do not compete because they tend to use different delivery methods is overstated and-not persuasive. *Beatrice Foods Co.*, 101 FTC at 808, and n. 29.

D. Non-Carbonated Beverages

Lipton Iced Tea, Country Time Lemonade, and Hawaiian Punch appear on the same shelves, fountain dispensers, and vending machines with carbonated soft drinks. (P 243.) Minute Maid Orange Soda and Slice, containing 10% fruit juice, appear in 12-ounce cans side-by-side with carbonated soft drinks like Hires Root Beer and 7-Up. (F 244; RX 2200, pp. 107, 116; CX 2330-G.) Canned and bottled Lipton Iced Tea and isotonic drinks such as Spike and Gatorade are in the same market as carbonated soft drinks. (F 242-44.)

Consumers sometimes choose sparkling waters to replace carbonated soft drinks. (CX 310-B-E; RX 752-C.) Mixers and seltzers belong in the product market. (F 238.)

E. Conclusion on Product Market

The relevant product market includes national brand, private label and warehouse brands of soft drinks, as well as mixers, seltzers, non-carbonated beverages such as Lipton Iced Tea, Country Time Lemonade, and Hawaiian Punch, and isotonic drinks.

II. THE RELEVANT GEOGRAPHIC MARKET

A relevant geographic market must conform to the commercial realities of the industry and be economically significant. *Brown Shoe Co. v. United States*, 370 U.S. 294, 336-37 (1962). The economically significant area is the area of effective competition. *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 359 (1963). The area of effective competition is "the market area in which the seller operates and to which the purchaser can practically turn for supplies." *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961); *B.P. Goodrich Co.*, 110 FTC 207, 289 (1988).

Complaint counsel argue that the effective area of competition is the ten-county area of San Antonio and suburbs¹². That was the area of the Dr Pepper franchise acquired by respondent. Respondent argues that the relevant geographic market is most of the eastern half of Texas.¹³ It is complaint counsels burden to show the size of the market. Respondent is entitled to show that that market is erroneous without proving the size of the market it claims is proper. Topps Chewing Gum Inc., Docket No. 8463, Interlocutory Order, Nov. 15, 1962.

CCSW puts most of its competitive effort into the San Antonio ten-county area. (CX 1405-Z, Z-9.) On the other hand, the area of effective competition "must be charted by careful selection of the market area in which the seller operates and to which buyers can practicably turn of supplies. *Tampa Electric Co. v. Nashville Coal*, 365 U.S. 320, 327 (1961). CCSW's Dr Pepper territory now includes 21 counties. (F 274.) CCSW's sells its other brands in a 60 county territory. (F 275.) Grant-Lydicke also has 60 counties. (F 276.) Pepsi also has more than 105 counties. (F 277.) While much of this area may be mostly jack rabbits and sagebrush and sparsely populated compared to the city and its suburbs, the issue of geographic relevant market must be looked at more deeply, beyond what appears to be the marketplace at first glance. Factors which may be considered include, *B.F. Goodrich Co.*, 110 FTC at 289: "persistent price differences; price change differences, similarities or differences in price movements; impediments to trade, such as transportation costs that are high relative to product value; shipment patterns and transshipment levels and industry perceptions.

A. Shipment Patterns

Shipping patterns are perhaps the best test in determining a geographic market. *General Foods Corp.*, 103 FTC 204, 234-35 (1984) (Initial Decision by ALJ Parker).

¹² The arbitrary nature of the alleged market is indicated by the fact that one of the three counties in the San Antonio Standard Metropolitan Statistical Area is not included in the ten-county area. (RX 2965-A; Strickland Tr. 8071-72.)

¹³ Dr. Strickland identified a relevant geographic market of the eastern half of Texas, which excluded Harlingen and the Rio Grande Valley but included San Antonio, Austin, Dallas and Houston. (RX 2983, 3107; Strickland, Tr. 8094-96, 8702.)

1. The Elzinga-Hogarty Test

The Elzinga-Hogarty ("E-H") test evaluates whether a proposed geographic market is too small. *Hospital Corp. of America*, 106 FTC 361, 396 (1985). It measures shipments into and out of an area. An appropriate market area must satisfy LIFO (little in from outside) and LOFI (little out from inside). When Professors Elzinga and Hogarty first published the test in 1973, they proposed that 75% or more not shipped in or out shows a "weak" market and 90% or more not shipped in or out shows a "strong" market. Elzinga and Hogarty, *The Problem of Geographic Market Delineation in Antimerger Suits*, 18 Antitrust Bull. 45, 74-75 (1973). They now feel that the 90% test is more accurate. Elzinga and Hogarty, *The Problem of Geographic Market Delineations Revisited: The Case of Coal*, 23 Antitrust Bull. 1, 2 (1978). (Hilke, Tr. 8551.)

a. LIFO

Dr. Strickland analyzed shipment patterns in the ten-county area using shipment data for 1983 and 1988. Under the E-H test the relevant geographic market is larger than the ten-county area. Shipments into the ten-county area include the following soft drinks:

- Grant-Lydicke canned soft drinks produced by the Turner DP plant in Dallas. (F 247.)
- Pepsi COBO canned soft drinks produced at a canning plant close to Houston until 1990 (most of Pepsi COBO's cans are now produced in San Antonio). (F 248-50.)
- Shasta's soft drinks produced in Houston. (F 251.)
- 7-Up soft drinks produced in Houston. (F 247.)
- Kroger's Big K soft drinks produced in Dallas. (F 251.)
- Original New York Seltzer produced outside the ten-county area. (F 269.)
- CCUSA's fountain syrup produced in Dallas. (F 255.)

Dr. Strickland testified that 78% of soft drinks sold in the ten-county area in 1983 was produced in that area. (F 260.) In 1988 the amount was 77%. (F 261.)

b. LOFI

Much of the soft drinks packaged in the ten-county area is shipped outside for sale:

- CCSW's San Antonio plant ships throughout its Texas territory. (F 256.)
- Texas Beverage ships HEB's Plaza brand and other brands to all parts of the state from its plant in San Antonio. (F 257.)
- Grant-Lydick supplies its sales centers in Austin, Corpus Christi, and Victoria from its plant in San Antonio. (F 258.)
- Pepsi COBO's three-liter PET bottles are produced in San Antonio and shipped throughout Texas. (F 259.)

Dr. Strickland testified that 75% of all soft drinks produced in San Antonio in 1983 were sold inside the ten-county area. In 1988, the amount was 57%. (F 260-61.)

The ten-county area therefore fails the more accurate and newer version of the E-H Test.

2. Shipping costs

Products with low shipping costs relative to price are more likely to be traded in a broader geographic market. *General Foods Corp.*, 103 FTC 204, 232 (1984). Soft drinks are shipped from \$.75 to \$1.10 per mile, with about 2000 cases per truckload. (F 266.) A 5% increase price would increase the shipping radius by 390 miles. A 10% increase in price would increase it by 780 miles. (F 267.) A price increase in San Antonio could be undercut by shipment from Dallas/Fort Worth, Austin or Houston. All of these cities are outside of the ten-county area, yet within Pepsi COBO's franchise territory, and thus are not subject to Pepsi transshipment prohibitions. (Strickland, Tr. 8088.)

CCSW ships from its San Antonio plant to Corpus Christi and Temple, about 100 and 150 miles. (F 268.) Pepsi COBO shipped cans from its Conroe plant to Harlingen, about 260 miles. (F 270.) Grant-Lydick purchases cans from Dallas and ships them to San Antonio and from there to Harlingen, a total distance of 500 miles.

Warehouse and private brands also are shipped widely.¹⁴ (F 269, 272.)

If prices were to increase in the ten-county area, low shipment costs would increase the supply of soft drinks from outside of that area. (Hilke, Tr. 8559.)

B. Prices

Another factor delineating a geographic market is similarity in prices. *Grand Union Co.*, 102 FTC 812, 1041 (1982). Soft drink prices are uniform in a trade area beyond the ten-county area.

The HEB stores in CCSW's and CCE's territories have a leveling effect on prices because of HEB's preference for the same price throughout its territory. (Chapman, Tr. 7246-47.) Pepsi COBO offers HEB unified pricing throughout its territory. CCSW, CCE and Grant-Lydict provide similar prices across HEB's marketing area. (RX 2985.)

C. Other Market Factors

The marketing areas of wholesale purchasers show that the ten-county area is not a realistic geographic market. The largest retailer in CCSW's territory is HEB. (F 433.) About half of HEB's stores are in CCSW's franchise territory. The others are in CCE's territory adjoining CCSW's territory. (F 280.) Except for the area around Corpus Christi and Hallettsville, HEB's territory is within the Pepsi COBO franchise area of more than 100 counties. (RX 2; RX 4; F 277.)

Kroger's marketing area includes Eastern Louisiana to Western Texas and both San Antonio and Houston (F 281); Albertson's marketing area includes 55 stores in North and South Texas, and 12 stores in Louisiana (F 282); Eckerd's marketing area includes Houston, Beaumont, Corpus Christi, San Antonio and Austin, Texas. (F 283.)

¹⁴ A company which measures trade areas of supermarkets. Selling Area Marketing, Inc. ("SAMF"), indicates that warehouse shipping patterns for supermarkets located in San Antonio includes an area of about 50 counties. (F 286.)

D. Transshipment Prohibitions

Concentrate companies, franchise agreements restrict bottlers from transshipping their national brand soft drinks outside of the franchise territory. (CX 102-G; CX 166-A-E; CX 418-F.) These market restrictions, while severe, are authorized by statute. They are not, however, completely effective. Transshipment prohibitions do not apply to private labels and to some fountain soft drinks, nor to customers who purchase soft drinks from the bottlers to resell. (F 287.)

Despite transshipment prohibitions, soft drinks are shipped, to some extent, between bottlers' franchise territories. Unauthorized transshipments have occurred in the San Antonio market. (F 288-89, 291.)

Concentrate companies do seek to restrict bottlers from transshipping. But defiant transshipment indicates that such barriers might be discounted in defining the geographic market. "[T]heoretical concepts must yield to the facts which have persisted in the industry through the years and reflect an industry pattern." *United States v. Bethlehem Steel Corp.*, 168 F. Supp. 576, 599 (S.D.N.Y. 1958).

E. Conclusion on Area of Competition

The relevant geographic area of effective competition is larger than the ten-county area around San Antonio. The respondent sells in a larger area, and customers turn to a larger area for supplies of competing products.

III. COMPETITIVE HISTORY

The alleged relevant market having failed for lack of proof, no accurate concentration analysis is possible. There is, however, a wealth of proof of competition in respondent's trade.

A. Post-Acquisition Evidence

Post-acquisition evidence is relevant in a Section 7 case when it is reliable and cannot be manipulated by the respondent. *United States v. General Dynamics Corp.*, 415 U.S. 486, 506 (1974). When

so much time goes by between the acquisition and the trial, business records may be prepared with litigation in mind, *e.g.*, CX 3806-Z-56 (the history of respondent's 1989 attempt to raise prices). When such evidence is unchallenged on cross-examination, or is corroborated, however, it must stand regardless of its unnatural clarity and intent.

B. Number of Competitors

The acquisition did not reduce the number of competitors in the market. The asset acquisition left DP-SA as a viable bottler.¹⁵ There was no transfer of any production plant or capacity. The physical assets which were transferred were used and of relatively small value.¹⁶ The important assets transferred were the Dr Pepper and the Canada Dry franchises.

In 1982, DP-SA had acquired Big Red bottling Company of San Antonio, an independent bottler. (F 31.) After CCSW obtained the Dr Pepper and Canada Dry franchises in 1984, Grant-Ly dick acquired the DP-SA bottling plant and the rest of DP-SA's brands. (F 53-55.) In 1987, Grant-Ly dick purchased the Seven-UP distributor, reducing the number of soft drink bottlers. (F 63.)

C. Prices Since 1984

Soft drink prices in San Antonio have declined since 1984. (F 307.) Soft drink prices in Texas are among the lowest in the United States. (F 313-14.)

Concentrate companies profit from increases in bottler sales volumes. Pepsi USA reduced its bottling subsidiary's¹⁷ prices in order to boost bottling sales volume and market share. (F 318, 320.)

¹⁵ DP-SA continued as a bottler of a number of products including Big Red and Royal Crown until November 1984, when it sold its plant to Grant-Ly dick. Grant-Ly dick continued and expanded the bottling operations.

¹⁶ CCSW purchased approximately 40% of DP-SA's used delivery trucks. Also purchased was a warehouse adjacent to CCSW is bottling facility which DP-SA no longer used and which had been listed for sale with a real estate agent for several months. (F 50, 300.) CCSW also purchased 2150 used vending machines, the average age of which was three to five years at the time of the 1984 acquisition. (F 50, 301.) The useful life of the average vending machine is seven to ten years. (F 302.) The acquisition of these assets had little competitive significance. (Hilke, Tr. 6321-24.)

¹⁷ The Pepsi bottler in San Antonio, Austin, Houston, Dallas, and much of the rest of the state is Pepsi COBO, which is a wholly-owned subsidiary of Pepsi USA. (F 17-18.)

Pepsi USA also hoped to increase the sale of its own high profit concentrate.¹⁸ (F 320, 421.)

Pepsi COBO is aware that CCSW has financial difficulty and directed its lower prices at CCSW. (F 319; CX 3141-C; RX 2465-G.) Further, costs have been increasing at the bottling level. The costs of concentrate, sweetener, and containers have risen since 1984. (F 314.) The effect of increasing costs and declining prices pushed CCSW to the edge of default on its loan. (F 310, 321, 323.)

Pepsi COBO can incur losses more easily than CCSW. Pepsi can afford low prices. (F 15.) This disparity of size must be considered in assessing competitive effects. “[T]he [Clayton Act] would not impede, for example, a merger between two small companies to enable the combination to compete more effectively with larger corporations dominating the relevant market *Brown Shoe Co. v. United States*, 370 U.S. 294, 319 (1962).

Another reason for the low prices of soft drinks in CCSW’s trade area is the competition from private labels. Private labels have increased market share in Bexar County (San Antonio) grocery stores from 3.2% in 1981 to 11.6% in 1989 and 18.3% in 1990. (CX 27-W; RX 2806-X; F 230.) This increase was at the expense of Pepsi and Coca-Cola brands. (F 222-23.) Pepsi COBO was battling CCSW, and private label sales were increasing at HEB and Kroger. (F 230.)

CCSW attempted to raise list prices in 1987 and in 1989, and was forced to discount prices back to the former levels due to lost sales. In 1989, CCSW raised its list price by \$.69 per case, but over the year had a net profit increase of \$.01 per case. (F 419.) CCSW came close to default, and had to refinance.¹⁹

Pepsi also unsuccessfully attempted to raise prices in 1989. (F 410.) Pepsi COBO lost 19% of its Nielsen share during the first seven months of 1989. (F 410.)

D. Brand Loyalty

“Brand loyal” consumers attach a premium to a soft drink brand and are willing to pay more for it. (F 326.) Recently brand loyalty in Texas has eroded due to intense price competition which induces

¹⁸ Pepsi USA’s gross profit from the sale of concentrate is approximately 90 to 95%. (Drewes Dep., CX 3913, pp. 32-33.)

¹⁹ CCSW’s profitability has been below that of other Coca-Cola bottlers in recent years. (F 324.)

consumers to shop for lower-priced soft drinks. (F 327-31.) The trend is also due to "brand dilution" caused by the influx into the market of new brands. (F 330.) The "New Coke" episode shows that consumers easily substitute other brands. (F 332.)

Consumers in CCSW's territory are more price-sensitive than elsewhere. (F 458.) Consumers like the economical three-liter package (F 459), and buy private labels and national brands when put on sale.

E. Benefits to Dr Pepper and Grant-Lydict

Since the acquisition, sales of Dr Pepper have increased in the San Antonio market, in volume and compared to the sales by neighboring bottlers. (F 361-62.) This contrasts with the decline in sales Dr Pepper experienced when piggybacked with Big Red from 1982-1984. (F 364.)

Grant-Lydict has operated profitably since 1984 and has acquired other bottlers. (F 63, 372.) Grant-Lydict increased sales through in-store displays while avoiding costly CMA expenses.²⁰ (F 369.) Grant-Lydict has outperformed both CCSW and Pepsi COBO and is a "success story" of this marketplace.²¹ (F 375.)

F. Impact of the Acquisition

A key factor to consider in analyzing whether an acquisition violates Section 7 is the impact of the transaction on customers. *FTC v. Great Lakes Chem. Corp.*, 528 F. Supp. 84, 94-95 (N.D. Ill. 1981). The Commission in *Weyerhaeuser Co.*, 106 FTC 172, 286 (1985), said:

In considering [anecdotal] testimony we do find it significant that complaint counsel did not offer any evidence of opposition to the acquisition, either from the integrated box producers without medium mills in the west, or from customers of the box companies. Although lack of customer complaints is not always a reliable indicator of the competitive effect of an acquisition, the fact that the representatives from groups likely to be harmed by any diminution of competition in the western

²⁰ "CMA" is a lump dollar payment to a retail chain which agrees to promote the soft drink, typically over a holiday weekend. (F 172-74.)

²¹ Texas Beverage, the fourth bottler located in San Antonio has grown and also continues to grow. Its sales have expanded substantially over the last seven years. (F 377.)

market in fact have only testified in support of the acquisition suggests to us, in this case, that Weyerhaeuser's move into North Bend is unlikely to promote collusion.

No retailer complained about the transaction. Some felt that CCSW's acquisition of the Dr Pepper branches benefited competition. HEB felt that the 1984 licensing was a "non-event." (F 348.)

A competing third-party vendor, L.C. Vending Co., complained that its supplier/competitor CCSW kept the price of soft drinks in vending machines down to \$.50. (F 350.) Emery Bodnar of Grant-Lydick complained because of CCSW's low prices in competing with Grant-Lydick's Big Red product. (F 351.)

That an acquisition would allow the acquiring company to lower prices and capture market share states no antitrust injury since vigorous price competition is what antitrust laws were designed to promote. *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 115-16 (1986). The testimony of injury in this case is the wish of two competitors for higher prices.

IV. POTENTIAL EFFECTS

Effective competition in the soft drink industry in this part of Texas rebuts the allegations that interbrand competition is deficient in the relevant market. There is no credible proof that the 1984 acquisition will allow CCSW "to collude, expressly or tacitly, and thereby force prices above or farther above the competitive level." *United States v. Rockford Memorial Corp.*, 898 F.2d 1278, 1283 (7th Cir. 1990).

Even if the relevant market had been more narrowly drawn in this case, the most the evidence shows is high concentration. A high HHI alone "cannot guarantee litigation victories." *United States v. Baker Hughes, Inc.*, 908 F.2d 981, 992 (D.C. Cir. 1990). Market share alone is not conclusive proof of market power, but may be rebutted by other market considerations. *United States v. General Dynamics*, 415 U.S. 486, 498-504 (1974).

Competition rather than preservation of rivals is the "lodestar that shall guide the contemporary application of the antitrust laws, not excluding the Clayton Act." *Hospital Corp. of America v. FTC*, 807 F.2d 1381, 1386 (7th Cir. 1986), *cert. denied*, 481 U.S. 1038 (1987). Market share cannot supplant a careful analysis of the factors pertinent to predicting future competitive conditions in a market. *United States v. Baker Hughes, Inc.*, 908 F.2d 981, 988 (D.C. Cir. 1990).

A. *Entry Into This Market*

In the absence of barriers to entry, an acquisition cannot violate Section 7. *B.F. Goodrich Co.*, 110 FTC 207, 296 (1988). This case involves an acquisition by a bottler of licenses to be used in soft drink bottling and distribution.

1. Entry as a distributor

Entry as a soft drink distributor is easy.²² The cost of equipment and facilities necessary to warehouse and move finished soft drinks is low. (F 379-80.)

The cost to lease the delivery trucks and warehouse is about \$25,000. The time to set up as a distributor is about 3 ½ months. (F 380.) A distributor does not need to be a bottler; the excess capacity in Texas allows a distributor to purchase contract-packed bottled and canned soft drinks at low prices and without any capital expenditures for bottling equipment. (F 378.)

Numerous non-bottling distributors exist in this market. There are many fountain distributors.²³ (F 90, 93.) Independent bottle and can distributors actively compete. Approximately 50% of the Pepsi distribution in the Victoria/Corpus Christi area is through independent distributors. (F 146.)

Promotional payments paid to retailers can be expensive in sales to food chains.²⁴ However, as Grant-Lydic has demonstrated, in-store promotions are available, at no cost other than the discounts granted. The companies which engage in CMA programs spent mightily and have lost money, and the companies with the least promotional cost have been profitable.²⁵

Major competitors are able to advertise and promote soft drink products without the necessity of any payment program. Retailers like HEB and Kroger promote and advertise their private label

²² If the prevalent product and geographic market had been found as alleged by complaint counsel, entry barriers exist. (F 396.)

²³ Fountain accounts for 34% of all CCSW carbonated soft drink sales. (F 154.)

²⁴ Both CCSW and Pepsi COBO have spent millions of dollars on CMAs in the last seven years. (F 172-73.)

²⁵ Grant-Lydic and Texas Beverage have been profitable during the same time period. (F386.)

products without any promotional cost other than the low cost of a newspaper ad. These promotions have caused increases in volume and market share. (F 230.) Retailers face no barrier to entry as far as promotional costs are concerned. (Hilke, Tr. 6282-83.) The retailer opens as much shelf space as it chooses for its private label products.

2. Entry as a bottler

All of the bottlers in the relevant market are operating with excess capacity. (F 133-38.) Each may add a new product to its production line of products and ship it in weeks. (F 398402.) Entry does not depend on the construction of a bottling plant.²⁶ Expansion of existing capacity to produce is just as effective entry as the construction of new facilities. *Weyerhaeuser Co.*, 106 FTC 172, 287-88 (1985); *Grand Union Co.*, 102 FTC 812, 1064 (1983). Since 1984, existing bottlers have added many new products: Coca-Cola Classic, Caffeine-free diet Coke, Cherry Coke, diet Cherry Coke, Minute Maid Orange and Lemon Lime, Pepper Free, Original New York Seltzer natural fruit flavored soda and other seltzers, Lipton Tea, Cherry 7-Up and diet Cherry 7-Up, 7-Up Gold, IBC root beer, Pepsi Free and Slice. (F 352.)

Used bottling equipment is cheaply available to facilitate entry. Kroger entered the market as a new bottler since 1984 and HEB stands poised to do so. (F 393, 395.) Entry as a bottler is easy, rapid, and relatively inexpensive. (F. 393-94.)²⁷ The recent trend in closing bottling plants leaves physical facilities available which indicates barriers to entry are not high. (F 175.) *Dairymen, Inc.*, 102 FTC 1151, 1158 (1983).

Economies of scale can easily be achieved in the bottling industry. (F 122.) Kroger and Winn-Dixie have entered the Texas market with very little capital investment. HEB anticipates the expenditure of \$2.7 million to erect a canning facility to serve its South Texas area which would rival Texas Beverage's existing plant in efficiency. (F 394.)

²⁶ The flavor exclusivity provisions in the bottlers' franchises do not prevent a new flavor from coming into the market. Contract packers such as Texas Beverage, Kroger, Beverage Packers, Better Beverages, and Turner DP have excess capacity available. (F 137-38.)

²⁷ Kroger spent \$600,000 - \$700,000 and four months to start up the old Safeway plant. (F 393.) HEB estimated \$2.7 million and 12 months would be required to start up a new production facility. (F 394-95.)

B. Unilateral Price Increase By CCSW

CCSW tried in 1987 and 1989, to raise prices but was forced to lower prices within a short time. (F 408-09.) In 1988, Pepsi COBO's unilateral price increase failed. (F 410.) CCSW, Pepsi COBO, Grant-Lydick, and other sellers in the market, have been forced to keep prices low despite rising costs.

C. Collusion

Collusion is a primary concern underlying Section 7. *United States v. Rockford Memorial Corp.*, 898 F.2d 1278, 1282-83 (7th Cir. 1990). Collusion here is unlikely to occur because of the number of sellers (F 414), varied cost structures and profit incentives (F 416-28), excess capacity (F 133-39), price competition (F 161), and strong buyers. (F 441, 449-52.)

1. Competitive conditions

a. Competitors

Collusion is easier as the number of competitors decreases. *FTC v. Elders Grain, Inc.*, 868 F.2d 901, 905 (7th Cir. 1989). The 1984 acquisition left unchanged the number of competitors. (F 295.) Here, there are a large number of competitors. In the ten-county market, four DSD companies (CCSW, Pepsi COBO, Grant-Lydick, and the Espinoza companies), two concentrate companies (CCUSA and DPUSA), and dozens of fountain distributors compete. In a larger market which recognizes actual shipment patterns and product substitutability, 13 national brand bottlers (F 414), private label bottlers (F 424-25), and many distributors (F 415), also sell. Collusion in this market is unlikely.

b. Costs and profit incentives

The concentrate companies (Pepsi USA, CCUSA, and DPUSA) profit on sales of concentrate (F 416, 419, 421); their interest is in keeping bottler prices low to spur retail sales and sales of concentrate to the bottler. Pepsi COBO is a wholly-owned subsidiary of Pepsi USA. (F 17-18.) Pepsi COBO's prices sacrifice bottler profits to

increase sales volume (F 320), which increases the parent's sales of concentrate on which Pepsi USA makes a 95% gross profit. CCSW, as an independent bottler, makes no profit from CCUSA's concentrate sales. Any bottler collusion would be less likely because of Pepsi COBO's and CCSW's different profit motivations.

Grant-Lydick operates with a different cost structure. Unlike CCSW and Pepsi COBO, Grant-Lydick must purchase its cans of soft drinks from an independent packer in Dallas. (F 247.) Grant-Lydick has a greater incentive to keep can prices high relative to other packages which Grant-Lydick produces itself in San Antonio. "If cost functions vary widely from one firm to another, each will prefer a different industry price level, and developing a collusive consensus price will consequently be more difficult." *B.F. Goodrich Co.*, 110 FTC 207, 321 (1988).

In addition, HEB and Kroger, which sell soft drinks to increase store traffic, have little incentive to maintain higher prices on private label soft drinks. Higher-priced soft drinks would be less of a consumer draw, and HEB and Kroger would lose profits from their grocery sales if they were to raise their private label soft drink prices.²⁸

The variety of brands, packages, and flavors for soft drinks further complicates the market. (F 73, 86, 180-93.) With more variety of relevant products, price collusion is more difficult. *Cf.*, *United States v. Container Corp. of America*, 393 U.S. 333, 337 (1969); *Hospital Corp. of America v. FTC*, 807 F.2d 1381, 1390 (7th Cir. 1986).

c. Price competition

Prices in this market fluctuate. (F 347.) Only 10% of CCSW's soft drinks sell at list price and 90% is discounted, changing monthly and varying store-to-store. (F 161.) In order to increase volume, especially during holidays, discounts vary. (F 162.)

Collusion is more likely when prices are relatively steady and change gradually. "Greater stability and predictability make it easier to create and sustain a collusive arrangement." *B.F. Goodrich Co.*, 110 FTC 207, 326 (1988). In a volatile market, parties to the collusive agreement can cheat more easily without detection by the others, thereby frustrating any collusion.

²⁸ Supermarkets like HEB and Kroger have the incentive to keep prices of all soft drinks low as loss leaders. *General Foods Co.*, 103 FTC 204, 362 and n. 68 (1984).

d. Ad and display competition

Colluders would also have to agree on advertising before any collusive agreement could succeed. Pepsi COBO and CCSW promote their products through CMAs (F 172-74); Grant-Lydick relies on in-store promotions. (F 370.) Private label competitors advertise and rely on in-store promotions and consistently lower price to boost sales. (F 222; Turner, Tr. 1208.) Colluders would have to agree on promotional programs so that volume changes would not disrupt each colluders' profit.

2. Buyers

Large retailers have the power and incentive to thwart any collusive agreements made by bottlers. Grocery stores account for 40% of soft drink case sales in San Antonio, (CX 53-I.) HEB sells half of the soft drinks sold through supermarkets in San Antonio. (F 432.) Convenience stores account for 15% of soft drink case sales. (CX 53-I.)

Large sophisticated buyers deter collusion and price discretion by sellers. *FTC v. Elders Grain, Inc.*, 868 F.2d 901, 905 (7th Cir. 1989); *Hospital Corp. of America v. FTC*, 807 F.2d 1381, 1391 (7th Cir. 1986); *B.F. Goodrich Co.*, 110 FTC 207, 323-24 (1988). Here, HEB controls the most important channel in the soft drink business.²⁹ It and other large retailers assert power over soft drink suppliers.

HEB, Kroger and Stop-N-Go allocate and control bottlers, promotions in ads or point-of-sale displays within the store. (F 445.) HEB and Kroger have their own private label soft drinks to supplant national brands on the shelf, in ads, or on displays. (F 188-89, 446.) In the face of a price rise among national brand soft drinks, HEB, Kroger, and other retailers who stock private labels could easily promote those brands in place of national brands.³⁰ (F 446.) HEB and other retailers can shatter any collusive agreements to raise soft drink prices. Soft drinks are a favorite loss leader in San Antonio to

²⁹ HEB alone buys more than five million cases of soft drinks a year from CCSW. (F 433.) That is 50% of all volume in Bexar County. (F 432.)

³⁰ HEB demands non-discriminatory pricing from soft drink sellers. (F 442.) This power has an effect in deterring collusion. Private label soft drinks take volume from the national brands. For example, private labels attained an 18% Nielsen share in San Antonio when HEB advertised Plaza two weeks out of nine in a bi-monthly period. (F 230.)

generate store traffic for the purchase of all grocery items. Retailers watch the national brand prices closely and would quickly spot collusive agreements to raise prices.

3. Concentrate companies

Concentrate companies such as CCUSA, Pepsi U.S.A. and DPUSA have the power and incentive to deter collusion at the bottler level. (F 454-56.) Bottlers lack power in the fountain segment of the market. (F 92.) Most of the fountain sales of Coca-Cola and Dr Pepper are made on the account of the concentrate companies or by grocery wholesalers and distributors other than CCSW.³¹ (F 93-94.) CCSW services the accounts sold directly by CCUSA and DPUSA, but does not set the price or terms for the sale. (F 92.) Much of this market is not subject to control by CCSW.

The concentrate companies also fund and arrange for advertising and promotions in selling national brands. (F 456.) If CCSW were to collude with other bottlers to reduce promotional allowances, not only the retailers but also the concentrate manufacturers would know. Like the retailers, the concentrate companies can deter bottler misconduct by reduction of funding, and even the threat of litigation under the terms of the franchise agreements. (F 166, 457.)

Soft drink licenses contain best-efforts clauses requiring the bottler vigorously to promote and sell that line of products. (RX 2932-B.) The bottler could face nonrenewal of the contract.³² (F 104, 457.) If a bottler wants to sell its business, it must request the concentrate company to approve the purchaser as a new franchisee. (F 101-03.)

4. Consumers

If consumer demand drops in response to price increases, suppliers are constrained. Soft drink sales are particularly susceptible to price. (Strickland, Tr. 7982-85.) The sensitivity of soft drinks to

³¹ Usually syrup and carbonated water are mixed after the sale ("post-mix") at the customer's place of business, but some fountain accounts prefer a single container of already mixed beverage ("pre-mix"). (F 73.) The sale of pre-mix is usually governed by an exclusive franchise. (F 88.) Coca-Cola and Dr Pepper post-mix is not sold through an exclusive franchise. (F 89.)

³² Sprite, Tab, Fanta and Fresca licenses are for ten-year terms. (F 98.) CCSW's Original New York Seltzer distributorship agreement is an at-will license. (F 100.)

price, and the growth of national brand soft drinks is due to consumer demand by price promotion. (F 229.)

Consumers in San Antonio are particularly price sensitive. (F 459, 461.) The economical three-liter PET bottle sells well (F 460), and private labels went from 3.2% to 18.2% in the Nielsen ratings from 1981 to 1989. (CX 27-W; RX 2806-X.)

5. The Texas Attorney General

CCSW signed a consent decree with the Texas Attorney General under which CCSW is constrained competitively. (F 68-69.) CCSW, unlike the other competitors in the relevant market, is subject to this decree and to court supervision until 1993, or to 1996 if the decree is extended. Collusion therefore seems unlikely.

CONCLUSION AND ORDER

Respondent's acquired assets from a competitor in 1984, the most important of which were the franchises for Dr Pepper and Canada Dry for the San Antonio area. The record in this case shows a failure of proof that this transaction may substantially lessen competition. The relevant product and geographic markets are broader than alleged, including private label and other soft drinks in a market which extends well beyond the environs of San Antonio. Further, the market was competitive in 1984 and competition is healthy now, with over capacity and low prices being hallmarks. Respondent lacks market power and collusion appears unlikely.

The complaint must, therefore, be dismissed.

OPINION OF THE COMMISSION

BY YAO, *Commissioner*:I. INTRODUCTION¹

In 1984, Coca-Cola Bottling Company of the Southwest ("CCSW") acquired the Dr Pepper and Canada Dry bottling franchises for certain areas around and including San Antonio, Texas.² Previously, these franchises were held and operated by a so-called "third bottler," San Antonio Dr Pepper Bottling Company ("DP-SA"), a wholly-owned subsidiary of Dr Pepper Company.³ Certain other assets held by DP-SA -- including franchise rights for a regionally distributed branded soft drink, Big Red -- were subsequently acquired by Grant-Lydict Beverage Company ("Grant-Lydict"), a successor "third bottler" in the market.⁴

Complaint counsel alleges that this acquisition substantially lessened competition in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, and Section 7 of the Clayton Act, 15 U.S.C. 18. The administrative law judge ("ALJ") who tried the case found that a reduction of competition was unlikely and thus ordered dismissal of the complaint. Complaint counsel now appeals.

Our review of this matter is *de novo*, and our assessment of the evidence differs from that of the ALJ. We reverse the initial decision, find violations of the FTC and Clayton Acts resulting from

¹ The following abbreviations are used in this opinion:

ID	Initial Decision (page no.)
IDFF	Initial Decision Findings of Fact (paragraph no.)
CCPFF	Complaint Counsel's Proposed Findings of Fact (paragraph no.)
RPF	Respondent's Proposed Findings of Fact (paragraph no.)
RRCCPFF	Respondent's Reply to Complaint Counsel's Proposed Findings of Fact (paragraph no.)
CCAPB	Complaint Counsel's Appeal Brief (page no.)
ABR-A	Answering Brief of Respondent-Appellee (page no.)
CX, RX	Complaint Counsel and Respondent Exhibits
RCX	Rejected Complaint Counsel Exhibit
Name, Tr.	Administrative Hearing Transcript

² CX 3.

³ Turner, Tr. 918, 928, 1035. As we noted in Coca-Cola Co., Dkt. No. 9207 (June 28, 1994), "[m]ost local markets for carbonated soft drinks have a Coca-Cola bottler, a Pepsi-Cola bottler, and a so-called 'third bottler,' which carries soft drinks other than Coca-Cola or Pepsi-Cola brands." Slip op. at 57.

⁴ Lydict, Tr. 2978-79.

CCSW's acquisition of the Dr Pepper franchise, and now enter an order of divestiture as to the Dr Pepper franchise. For reasons differing from those of the ALJ, we find that CCSW's acquisition of the Canada Dry franchise did not violate the FTC and Clayton Acts.

II. THE BACKGROUND OF THE ACQUISITION

Respondent CCSW is a privately held corporation with headquarters in San Antonio, Texas.⁵ CCSW holds the Coca-Cola franchise (among others) for San Antonio and the surrounding area.⁶ CCSW's sole shareholder is Texas Bottling Group ("TBG")⁷; a sister corporation is Southwest Coca-Cola Bottling, Inc. ("SWCC"), which is the Coca-Cola bottler in West Texas, Eastern New Mexico, Western Oklahoma, and parts of Colorado and Kansas.⁸

CCSW's primary business is bottling, distributing, and selling carbonated soft drinks pursuant to franchises from several concentrate companies. IDFF paragraph 72. The franchisor grants the franchisee the exclusive right in a specified geographic territory to make and sell soft drinks in bottles and cans bearing the franchisor's trademark and using the franchisor's formula.⁹ CCSW sells Coca-Cola brands,¹⁰ Dr Pepper brands,¹¹ and Sunkist brands,¹² among others.

⁵ CX 980 R-U; RX 549 A.

⁶ RX 232 A-C.

⁷ CX 1372 H; CX 1373 Z-23; RX 572 I. The stock of TBG in turn is held by affiliates of Prudential Insurance Company of America, which hold 51% of the stock, and a 49% stockholder, the Coca-Cola Bottling Group (Southwest), Inc. ("CCBG-Texas"), which in turn is a wholly-owned subsidiary of the Coca-Cola Bottling Group, Inc. ("CCBG-Delaware"). Hoffman, Tr. 5603; CX 1372 G, H. All of the voting stock of CCBG-Delaware is held by Edmund M. Hoffman and his son Robert K. Hoffman. RX 572 H; RX 2805 J, K, Z15. At the time of the acquisition at issue in this case, CCSW was held by the Biedenhorn Corporation, RX 232 A-C, which sold its interest in CCSW to a TBG subsidiary in 1986. CX 3052; RX 549 A, B.

⁸ SWCC is a wholly-owned subsidiary of CCBG-Texas, which is controlled by CCBG-Delaware, which is owned by the Hoffmans. CX 4; CX 2805 Z3, Z4; RX 2805 Z5, Z6.

⁹ RX 2848.

¹⁰ Coca-Cola USA ("CCUSA") is the division of the Coca-Cola Company that manages domestic soft drink operations and produces the concentrate that CCSW purchases to make Coca-Cola soft drinks. Howell, Tr. 4004; Atchison, Tr. 5237-38. The Coca-Cola Company also owns 49% of the stock of Coca-Cola Enterprises ("CCE"), which owns Coca-Cola bottling operations in various parts of the United States, including Dallas/Fort Worth, Houston, and Austin, Texas. Howell, Tr. 4002-07; RX 3131 G.

¹¹ As noted above, the Dr Pepper franchises were previously held by San Antonio Dr Pepper Bottling Company ("DP-SA"), a wholly-owned subsidiary of Dr Pepper Company. Turner, Tr. 918, 928, 1035. The Dr Pepper Company was a publicly held corporation until 1984, when it was bought

The practice of having a single bottler licensed by each of several concentrate companies to sell their brands of soft drinks is sometimes called "piggybacking."¹³

Prior to CCSW's acquisition of the Dr Pepper franchise, the franchise was held by DP-SA, a wholly-owned subsidiary of DPUSA.¹⁴ Until 1984, DPUSA owned bottling operations in San Antonio, as well as in Dallas/Fort Worth, Waco, Houston, and Corpus Christi, Texas.¹⁵ After DPUSA was bought in a leveraged buyout, its acquirer, Forstmann-Little, began selling off the DPUSA company-owned bottling plants and the Canada Dry business.¹⁶ CCSW wanted the San Antonio area franchises for Dr Pepper and Canada Dry, but had no interest in DP-SA's main production facility, the former Big Red Bottling Company of San Antonio plant.¹⁷ Although DPUSA initially wanted to sell the operation as a whole,¹⁸ it eventually sold the operation in two parts.¹⁹ CCSW bid on both the Dr Pepper and Canada Dry franchises, initially offering \$5 million, but subsequently increasing its offer to \$14.5 million.²⁰ On August 28, 1984, CCSW bought the Dr Pepper and Canada Dry franchises, along with other assets, from DP-SA for \$14.5 million.²¹

in a leveraged buyout. CX 614 B; RX 1447 D; RX 990 E, N. After some assets were divested, the Dr Pepper franchise contracts and syrup manufacturing facilities were sold to an investment group, which subsequently bought the Seven-Up Company. Knowles, Tr. 2640. The current franchiser of Dr Pepper bottling operations in the United States is Dr Pepper/Seven-Up Companies, Inc. ("DPUSA"). The Dr Pepper and Seven-Up companies were combined in 1988. RX 1989 at 3-4. Dr Pepper/Seven-Up owns the trademarks and manufactures the concentrates for Dr Pepper and Seven-Up brand products. Clarke, Tr. 4297-99; Knowles, Tr. 2638-41. For convenience, we will use "DPUSA" to refer to both the Dr Pepper Company and its successor, Dr Pepper/Seven-Up Companies, Inc.

¹² RX 2931; E. Hoffman, Tr. 507-09.

¹³ Knowles, Tr. 2764-67.

¹⁴ RX 1648 Z29; Turner, Tr. 917-18; Antle, Tr. 3041.

¹⁵ RX 1648 Z29-Z31; Turner, Tr. 916; Antle, Tr. 3041, 3079.

¹⁶ CX 3817; Turner, Tr. 920-21.

¹⁷ Antle, Tr. 3059.

¹⁸ Antle, Tr. 3059.

¹⁹ Turner, Tr. 1152.

²⁰ CX 3; RX 2092 F; Turner, Tr. 1158.

²¹ CX 3 at 7; CX 247 C; CX 270; RX 1292 at 1; CX 1662; CX 253. In the same transaction, DPUSA agreed to issue Dr Pepper license agreements to CCSW. CX 3 at 17-18. DPUSA and Canada Dry issued new franchise agreements for the Dr Pepper and Canada Dry brands to CCSW in 1984. CX 266, CX 267. CCSW also received a warehouse, 2150 used vending machines, and 40% of DP-SA's used delivery and over-the-road trucks. Bodnar, Tr. 1276, 1518-20, 1689; Little, Tr. 653.

After the sale, DP-SA still owned the franchises for Big Red, RC, Crush, and Hires, and various equipment including the DP-SA bottling plant.²² DP-SA continued to operate its business as Big Red Bottling Company of San Antonio until DPUSA's assets were sold to Grant-Lydict in October, 1984.²³ Grant-Lydict obtained DP-SA's franchises to produce and sell Big Red, RC, Crush, Hires, and DP-SA's other remaining brands, which accounted for about 58% of DP-SA's 1983 sales volume.²⁴ Grant-Lydict also hired DP-SA's manager, Emery Bodnar, to run its business, as well as about half of DP-SA's other employees.²⁵

Grant-Lydict operates its soft drink business in San Antonio as the Big Red Bottling Company of San Antonio,²⁶ and has subsequently acquired additional soft drink brands and new geographic territories. In 1987, Grant-Lydict acquired the Seven-Up bottler in San Antonio and Austin, as well as the Seven-Up bottler in Corpus Christi.²⁷ In 1988, Grant-Lydict purchased the assets of Big Red Bottling Company of Austin, and, in 1990, an RC Cola distributorship in La Grange, Texas.²⁸

The other major branded carbonated soft drink ("CSD") bottler in San Antonio is the Pepsi COBO (Company-Owned Bottling Operation), owned by the Pepsi-Cola Company ("Pepsi USA").²⁹ Pepsi USA also owns bottling operations in various parts of the United States, including San Antonio, Houston, Dallas/Fort Worth, and Austin, Texas. These company-owned bottling operations ac-

²² CX 237; Bodnar, Tr. 1668.

²³ CX 2052; CX 2484; CX 3254 A; CX 237 C; RX 1663; RX 2408; RX 2409; Lydict, Tr. 2981-82; RX 1648.

²⁴ CX 3495; CX 3504; CX 3505; Knowles, Tr. 2874.

²⁵ Bodnar, Tr. 1223, 1294.

²⁶ Bodnar, Tr. 1581.

²⁷ RX 2970; Bodnar, Tr. 1334-36; Lydict, Tr. 2999-3000. From 1982 to January, 1986, the 7-Up franchise was held by the Seven-Up Bottling Company of San Antonio, which was owned by Seven-Up USA. RX 2002; Lydict, Tr. 2996-97. The franchise was then held by Texas Bottlers, Inc. ("TBI") until May 1987, when G-L purchased TBI. Bodnar, Tr. 1334.

²⁸ Lydict, Tr. 3002-03, 3005-06.

²⁹ Pepsi USA is a division of PepsiCo, Inc., which owns the United States trademark and produces concentrate for Pepsi-Cola and other brands of soft drinks. RX 2864 Z34; Davis, Tr. 4463, 4638; Amrosowicz, Tr. 787.

count for about 37% of Pepsi USA bottle and can sales.³⁰ In addition, there is a small, branded CSD distributor, Star Distributing, that has undergone three corporate restructurings in the last three years.³¹

III. THE HISTORY OF THE PROCEEDING

The Commission's complaint in this matter was issued on August 28, 1988, and was amended on November 18, 1988. Administrative hearings on the merits began before Administrative Law Judge James P. Timony on July 10, 1990. The hearings on the merits were concluded on October 3, 1990. IDFF paragraph 44.

On June 14, 1991, the ALJ issued his opinion, finding a failure of proof that CCSW's acquisition of the Dr Pepper and Canada Dry franchises may substantially lessen competition. He found that "[t]he relevant product and geographic markets are broader than alleged, including private label and other soft drinks in a market that extends well beyond the environs of San Antonio." ID 78. He found further that "[r]espondent lacks market power and collusion appears unlikely[.]" and that "the market was competitive in 1984 and competition is healthy now, with over capacity [sic] and low prices being hallmarks." *Id.*

For the reasons set forth below, we reverse the ALJ's findings as to the relevant product and geographic markets and as to the likely competitive effects of CCSW's acquisition of the Dr Pepper and Canada Dry franchises, and find that CCSW's acquisition of the Dr Pepper franchise constitutes a violation of the FTC and Clayton Acts. Although we agree with the ALJ that CCSW's acquisition of the Canada Dry franchise did not violate the FTC and Clayton Acts, we reach our conclusion based on factual findings and legal reasoning that differs from that of the ALJ.

IV. THE RELEVANT PRODUCT MARKET

Bottlers may sell to retailers a variety of beverages, ranging from nationally known, branded CSDs to non-branded CSDs, non-carbon-

³⁰ RX 1218; Amrosowicz, Tr. 791-93, 837-38.

³¹ Espinoza, Tr. 4166-67; Bodnar, Tr. 1559-60, 1713.

ated soft drinks, seltzers, juices, and even iced tea drinks.³² Here, the franchises that were transferred were those of branded CSDs: Dr Pepper and Canada Dry.³³ The issue is whether the relevant product market is confined to branded CSDs or conversely includes certain beverages in addition to branded CSDs. As we explain in detail below, we define “branded CSDs” as widely available carbonated soft drinks distributed by direct-store-door delivery and heavily promoted by concentrate companies, bottlers, and retailers. “Private label” carbonated soft drinks are less heavily promoted and are available in fewer channels of distribution since they are sold by retail chains that own the trademark. “Warehouse” carbonated soft drinks use warehouse delivery, are less heavily promoted, and are also available in fewer channels of distribution. *See* Section IV.C. *infra*.

Complaint counsel has asserted that all branded CSDs comprise the relevant product market.³⁴ CCAPB at 12. By contrast, CCSW has claimed that the relevant product market consists of all carbonated soft drinks (including private label and warehouse brands) and certain non-carbonated soft drinks packaged and sold in the same manner as CSDs. RPF paragraph 348. The ALJ found that the relevant product market includes “national brand, private label and warehouse brands of soft drinks, as well as mixers, seltzers, non-carbonated beverages such as Lipton Iced Tea, Country Time Lemonade, and Hawaiian Punch, and isotonic drinks.” ID 62.

For the reasons set forth below, we find that the evidence in this case supports a relevant product market consisting of branded CSDs.

³² For example, CCSW at various times has distributed in the San Antonio area the following beverages: Coke (and allied brands, such as Sprite, Fresca, and Mr. PIBB), Sunkist, A & W (and allied brands), Welch’s Grape and Strawberry, Cima Red, Minute Maid CSDs, Old New York Seltzer, Spike, Hawaiian Punch, Delaware Punch, Lipton Iced Tea, and Country Time Lemonade. CX 3489 Z29, Z10-13; CX 3483 R,Q; Summers, Tr. 6581.

³³ As a result of acquiring the franchises, CCSW added the following Dr Pepper and Canada Dry products to its list of brands for sale and distribution in the San Antonio area:

Dr Pepper products: Dr Pepper, Sugar Free Dr Pepper, Pepper Free, Sugar Free Pepper Free. CX3 at 396.

Canada Dry products: Ginger Ale, Sugar Free Ginger Ale, Club Soda, Tonic Water, Sugar Free Tonic Water, Seltzer, Collins Mixer. CX3 at 397.

³⁴ Complaint counsel presented evidence that the relevant product market is “the manufacture, distribution, and sale of finished carbonated soft drinks (or syrups) produced from the concentrates of widely-advertised, branded, carbonated soft drinks, merchandised and distributed by direct-store-door delivery, in all channels of distribution.” IDFF; *see* Hilke, Tr. 5944-86.

A. *The Legal Standard for Defining the Relevant Product Market*

The purpose of defining a relevant market is to identify a market in which market power might be exercised and competition thereby diminished. *H.J. Inc. v. Int'l Tel. & Tel. Corp.*, 867 F.2d 1531, 1537 (8th Cir. 1989). Product markets may be defined either by "the reasonable interchangeability of use or the cross-elasticity of demand." *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962). To assess whether market power might be exercised, the courts and the antitrust enforcement agencies have sought to define a market in which "sellers, if unified by a hypothetical cartel or merger, could raise prices significantly above the competitive level." *H.J. Inc.*, 867 F.2d at 1537. Under the Merger Guidelines,³⁵ the federal antitrust agencies seek to identify a product market as a "product or group of products such that a hypothetical profit-maximizing firm that was the only present and future seller of those products ("monopolist") likely would impose at least a 'small but significant and nontransitory' increase in price." Merger Guidelines, Section 1.11.³⁶ This inquiry focuses on whether other products are sufficiently substitutable that customers would turn to them in the event of a "small but significant and nontransitory" price increase by the hypothetical monopolist. At the point at which other products are not substitutable in that sense, the contours of a relevant product market have been defined. Because a "small but significant and nontransitory" price increase is generally interpreted to be 5%, this test is known as the "5% test." Merger Guidelines, Section 1.11.

In *Beatrice Foods Co.*, 101 FTC 733, 801 (1983), the Commission stated that "cross-elasticity of demand [is] the most important factor in product market definition." Although the Commission considers all reliable evidence of interchangeability, *Olin Corp.*, 113 FTC 400, 594-95 (1990), the Commission has recognized the utility of evidence of cross-elasticity of demand such as the 5% test is designed to elicit, despite some of the difficulties in calculating such

³⁵ *United States Department of Justice and Federal Trade Commission Horizontal Merger Guidelines*, reprinted in 4 Trade Reg. Rep. (CCH) paragraph 13,104 (Apr. 2, 1992) ("Merger Guidelines").

³⁶ The version of the Merger Guidelines that was generally used by both enforcement agencies at the time of the ALJ's decision. *United States Department of Justice Merger Guidelines*, reprinted in 4 Trade Reg. Rep. (CCH) paragraph 13,103 (June 14, 1984) ("1984 Guidelines"), uses essentially the same methodology for product market definition as the 1992 Merger Guidelines. *Coca-Cola Co.*, slip op. at 26 n.50.

elasticities. Coca-Cola Co., slip op. at 27-29; *see also* Merger Guidelines, Section 1.11. The ALJ here, however, failed to discuss any of the testimony relating to the 5% test. The testimony in this case is undisputed that bottlers of branded CSDs in the San Antonio area could profitably raise prices more than 5%.³⁷ Moreover, the weight of the other evidence relevant to this issue -- including the opinions of market participants, historical evidence of price interactions, and industry business records -- also supports a product market limited to branded CSDs.

The ALJ's narrow focus on certain selected pieces of evidence concerning industry perception, characteristics of the product, and price movements failed to give an accurate and complete picture of the relevant product market. *E.g.*, ID 60-62. We find that the ALJ erred in asking only whether certain beverages "competed" against each other in a broad sense, without focusing on which products were sufficiently substitutable that they could constrain a small but significant, nontransitory price increase. For example, the ALJ implies that an inverse relationship between branded and non-branded CSD market shares shows that they are in the same product market. ID 60. That this alone is an insufficient basis on which to reach such a conclusion is easily illustrated by considering the case of two different product markets that are arbitrarily lumped together to calculate shares, such as two unrelated products: branded CSDs and mouthwash. Assuming that mouthwash sales are stable throughout the year, an increase in branded CSD sales (because of feature activity with consumers stocking-up on favorite brands or seasonal swings in consumption) will produce a share increase for branded CSDs and a share decrease for mouthwash. However, this inverse relationship provides no reasonable basis for claiming that branded CSDs are in the same product market as mouthwash; rather, it is an artifact of arbitrarily treating the unrelated products as though they are in the same market.

Moreover, even if branded CSD price increases produced some consumer switching to non-branded CSDs, that would not establish that both products are in the same antitrust product market. The key to product market definition is not whether some consumers will switch to other products in the event of some price increase. Unless demand for a product is perfectly inelastic, some consumers will

³⁷ *See* Section IV.D.1 *infra*.

switch in response to a minimal price increase. Rather, the question is which beverages are sufficiently substitutable that they could constrain, *i.e.*, make unprofitable, a price increase in the relevant market. The evidence here establishes that consumers will not switch to other products in the event of a small but significant, nontransitory price increase of branded CSDs in sufficient numbers to make such a price increase unprofitable.

B. The Concentrate and Carbonated Soft Drink Industry

In order to assess the extent to which branded CSDs face competition from other beverages, it is necessary to understand some aspects of the soft drink industry. Soft drinks are produced by combining concentrate, sweetener, and carbonated or still water. "Concentrate" includes the flavors, extracts, and essences used to produce soft drinks. "Syrup" is concentrate mixed with sweetener and some water. IDFF paragraph 74.

Bottlers purchase concentrate from concentrate companies, such as CCUSA, DPUSA, and PepsiCo, Inc. ("Pepsi"). IDFF paragraphs 10, 16, 29. Bottlers generally sell soft drinks to retailers in cans, glass, and plastic (PET) containers; retailers in turn sell the finished soft drinks to consumers. IDFF paragraph 140. Concentrate companies, bottlers, and wholesale grocery suppliers sell soft drinks to fountain outlets in ready to drink form ("pre-mix") or as a syrup that must be mixed with carbonated water ("post-mix"). IDFF paragraph 73.

The record in this case establishes that soft drinks are differentiated products.³⁸ One obvious difference among soft drinks involves flavors, such as colas, lemon/limes, and oranges. However, in addition to flavor differences, soft drinks are also differentiated in other, less obvious ways. For instance, there are differences among soft drinks as to the image that their advertising projects to

³⁸ The Commission also recently found this to be the case in *Coca-Cola Co.*, slip op. at 30.

consumers,³⁹ and even whether the soft drink is advertised significantly at all.⁴⁰

There are also differences among soft drinks as to their availability in either the “take home” distribution channel (cans and bottles to be consumed later) or the “cold drink” distribution channel (chilled soft drinks, usually sold for immediate consumption (“fountain”) or dispensed by vending machines (“vending”) through convenience stores and restaurants). Soft drinks that are available through fountain or vending outlets are typically branded CSDs that use “direct-store-door” or “DSD” delivery,⁴¹ or are private label CSDs of the outlet itself (such as McDonald’s private soft drink brands).⁴² Warehouse and private label brands are generally not available in the cold drink channel.⁴³

In the “take-home” distribution channel, soft drinks also may be differentiated by the services that the bottler provides to the retailers, such as grocery and convenience stores. Typically, bottlers provide only delivery to the retailer’s central warehouse for private label and warehouse brand soft drinks, whereas bottlers provide DSD delivery for branded soft drinks such as Coke and Pepsi. *See* Section IV.C.2 *infra*. The in-store merchandising⁴⁴ by the bottlers’ own employees in DSD delivery provides advantages generally not available through

³⁹ Mr. Carew, Vice President for Planning of CCE, which owns Coca-Cola bottling operations in various parts of the United States, testified that “soft drink service is called a necktie product. They are sold on image. If you have any success, you have built an image up.” CX 3967 at 205-06. Mr. Carew testified that brands that have the kind of consumer demand that allow them to “sit back and do nothing” for a long time while “selling off share” include Coca-Cola, PepsiCo, Dr Pepper Company, Seven Up Company and Royal Crown. CX 3967 at 205.

⁴⁰ Most private label brands are not advertised on television or radio, but may appear in the retailer’s newspaper ads or circulars. Turner, Tr. 1208; Summers, Tr. 6546-47; Howell, Tr. 4025; Hixon, Tr. 7344. Some warehouse brands, notably Shasta, had engaged in television and radio advertising at one time, although Shasta now markets itself more as a private label brand. Chapman, Tr. 7171-72. By contrast, concentrate firms allocate millions of dollars annually toward acquiring, improving, securing, protecting, and capitalizing on the value of trademark equity they develop for their trademark names and branded CSD products. Summers, Tr. 6523, 6547-48. Branded CSD bottlers and their concentrate firms realize that it is important to manage and protect the equity of the brand. Knowles, Tr. 2802; CX 3915 at 29 [Clements]; Amrosowicz, Tr. 891; Summers, Tr. 6547-48, 6523.

⁴¹ CX 3989 at 65-66 [Shanks].

⁴² Summers, Tr. 6517; Short, Tr. 7759-60.

⁴³ *See* Section IV.D.2 *infra*.

⁴⁴ “Merchandising” the product includes the tasks of placing the product on the shelves or other displays, “fronting” the product to ensure the label is facing forward and, if necessary, individually pricing the product, “rotating” the product to remove older, out-of-date merchandise from the shelves, and ensuring that the price and other merchandising signs (called “point of sale” or “POS”) are adequately displayed. Coyne, Tr. 3439-41; CX 2161 D, E.

warehouse delivery, such as: (a) ensuring the visual impact of trademarked brands,⁴⁵ (b) ensuring quality control of damaged or out-of-date stock,⁴⁶ (c) maintaining shelf space,⁴⁷ (d) facilitating responsiveness to competitive situations,⁴⁸ (e) maintaining and promoting a full stock of product,⁴⁹ (f) maintaining a good relationship with the retail account.⁵⁰

A review of the evidence shows that soft drinks are divided into at least three distinct categories: major national and regional brands; "warehouse" brands; and private label brands.⁵¹ Major national and regional brands are characterized by: wide availability in both the take home and cold drink distribution channels;⁵² DSD delivery;⁵³ and heavy advertising to promote a particular image and trademark.⁵⁴ For convenience, we will refer to these as "branded CSDs."

The remaining soft drinks consist of those that have brand names, but use warehouse distribution ("warehouse brands"), such as Shasta and Faygo,⁵⁵ and private label products, such as H.E.B.'s Plaza, that

⁴⁵ CX 505 C; CX 1948; CX 2240 D-ZI3; CX 2243 D-2.

⁴⁶ CX 505 D, G, H; CX 2240 F, O, Z; CX 2243 I-ZI7.

⁴⁷ CX 505 E. Although the shelf space that retailers allocate to their own private labels may be considered "untouchable," (Summers, Tr. 6624; Davis, Tr. 4526, 4764; Bodnar, Tr. 1763; Howell, Tr. 4050; Sendelbach, Tr. 7718), bottlers still compete among themselves for shelf space not allocated to the retailer's own private label. Summers, Tr. 7119.

⁴⁸ CX 505 E.

⁴⁹ CX 505 D, I-J,O; CX 2240; CX 2240; CX 2627 Y-ZI0; Summers, Tr. 7119.

⁵⁰ CX 505 E.

⁵¹ In Coca-Cola Co., this Commission reached the same conclusion. Slip op. at 30-32.

⁵² Donald, Tr. 5291; RX 990 E. See also Section IV.D.2 *infra*. There was also testimony that, to have a fully effective merchandising operation, carbonated soft drinks must be distributed in all channels of distribution. Turner, Tr. 934; CX 3915 at 17-18 [Clements]; CX 3988 at 530-531 [O'Donnell]; CX 1853 N; CX 1909.

⁵³ See Section IV.C.2 *infra*.

⁵⁴ For example, the trademark "Coca-Cola" is "the most widely known brand name in the world." CX 131 D. Concentrate firms typically make available marketing support to local branded CSD bottlers. CX 3989 at 78-79, 104 [Shanks]; CX 3987 at 2085 [Lowenkron]; CX 3976 at 2129 [Quirk]; Coyne, Tr. 3413-17; Knowles, Tr. 2745-49; Trebilcock, Tr. 5812; Turner, Tr. 963-65; Howell, Tr. 3928-31; RX 990 Z2.

⁵⁵ RX 1531; RX 1957; Howell, Tr. 4031; Summers, Tr. 6551. Other examples include: IBC Root Beer, CX 1294; Rainbow, Rocky Top and Parade. Hiller, Tr. 5337-38; Hoffman, R., Tr. 5534-35. This category includes the proprietary brand name products produced by bottlers, such as the "Texas" brand of Texas Beverage Packers. Hixon, Tr. 7277-78.

are sold by the particular store chains that own the trademark.⁵⁶ Warehouse brands are available primarily in large retail chains⁵⁷; are generally not available in the cold drink channel⁵⁸; are less heavily advertised than major national and regional brands⁵⁹; and are less expensive than branded CSDs.⁶⁰ The private label products are also not usually available in the cold-drink channel;⁶¹ use little or no advertising;⁶² and are even less expensive than warehouse brands.⁶³ For convenience, this opinion will refer to warehouse and private label brands collectively as “unbranded” or “nonbranded” products.

C. The Distribution and Marketing of Branded Carbonated Soft Drinks

1. Channels of Distribution

Soft drinks are sold through various “channels” of distribution.⁶⁴ One broad distinction is between the “home market” or “take home” channel, which consists of sales for later consumption, and the “cold drink” channel, which consists of sales for immediate consumption.⁶⁵

⁵⁶ CX 4022. Private label soft drinks are usually proprietary brand names of retail chains. Hixon, Tr. 7278-79. *See also* Morath, Tr. 7674-75; Howell, Tr. 4023-24; Knowles, Tr. 2860-61.

The A.C. Nielsen Company (“Nielsen”) tracks sales in the home market segments of the bottling market, including sales to supermarkets and convenience stores. RX 875. Nielsen refers to private label brands as “control” brands. RX 2806 X.

⁵⁷ *See* Section IV.C.2 *infra*.

⁵⁸ *See* Section IV.D.2 *infra*.

⁵⁹ Although one warehouse brand, Shasta, has engaged in television and radio advertising, [Chapman, Tr. 7171-72], most do not. *See also* Section IV.C.3 *infra*.

⁶⁰ *See* Section IV.D.3.b *infra*.

⁶¹ *See* Section IV.D.2 *infra*; CX 3989 at 65-66.

⁶² Most private label brands are not advertised on television or radio, but may appear in the retailer’s newspaper ads or circulars. Turner, Tr. 1208; Summers, Tr. 6546-47; Howell, Tr. 4025.

⁶³ *See* Section IV.D.3.b *infra*. In addition, private label soft drinks are available in many fewer package sizes than branded CSDs. Branded CSDs come in a variety of package sizes, including 6.5, 10, 12, 16, 20 or 32 ounce glass or PET bottles, 1, 2 and 3 liter PET bottles, and 12 oz cans. CX 53 G, Y-Z6. Typically, private label CSDs are sold in 12 ounce cans and 2 and 3 liter PET bottles. CX 3158 K. H.E.B.’s Plaza is available only in loose cans and 2 liter bottles. Chapman, Tr. 7165; CX 4022. Warehouse-delivered CSDs are also limited in their package availability. Hixon, Tr. 7279, 7285-86, 7300, 7342.

⁶⁴ CX 836 H, S.

⁶⁵ Knowles, Tr. 2647-48; Turner, Tr. 1185-86; CX 418 J, K.

The take-home channel is primarily served by chain supermarkets and independent grocery stores, mass merchandisers, and convenience stores.⁶⁶ The cold drink channel is served by stores and other locations that offer (a) vending sales, (b) fountain sales, and/or (c) single drink sales.⁶⁷

Concentrate companies and bottlers recognize significant differences between the take-home and cold-drink channels. As described in a 1985 CCSW "Corporate Information Memorandum":

Almost all Coca-Cola bottlers divide their business into two broad categories, the home market and the cold drink market. The home market consists of all soft drinks which are sold for consumption at some place other than where they are purchased - hence for "home" consumption. The major types of outlets which comprise the home market are supermarket chain stores, mass merchandisers and discount stores, drug stores, independent supermarkets, and convenience stores. The cold drink market segment is composed of those outlets where soft drinks are purchased for immediate consumption: vending machines, restaurants and bars, athletic and other social events, and convenience stores. It is obvious that almost all cold drink accounts require some form of special equipment since the product must be delivered cold, while home market accounts generally sell soft drinks off the shelf or possibly off of a special rack.

Soft drinks are sold in different packages in different market channels. In the home market, soft drinks are sold in bottles and cans. In the cold drink market, product is sold in bottles, cans, and cups. Approximately 76% of all soft drinks are sold in bottles and cans. The remaining 24% are sold in cups or similar containers. Cups are filled using either a post-mix or pre-mix system. Pre-mix, which is the same as the product in bottles and cans, and accounts for only 18% of cup sales today, is distributed in five gallon metal tanks. It is pumped out under pressure and is used primarily where no local water hook-up is available. Post-mix is also distributed in five gallon tanks, as well as one gallon jugs. It is very similar to bottling syrup and must be mixed with carbonated water at the point of serving.

CX 418 J, K.

In addition to these differences, there are other significant differences between the take-home and the cold-drink channels, especially the fountain portion of the cold-drink channel. For example, both CCUSA and DPUSA handle fountain sales differently than sales of take-home, branded CSDs in that CCUSA and DPUSA -- not bottlers -- set the price at which a large proportion of Coca-Cola and Dr Pepper fountain sales are made. Large fountain accounts qualify for

⁶⁶ CX 883 V; RX 990 U; CX 418 J, K.

⁶⁷ CX 783 E; CX 3419 Z56; RX 990 U.

“national account pricing” from both CCUSA and DPUSA.⁶⁸ About 65-70% of CCSW’s sales of post-mix fountain syrup are made at the national account price.⁶⁹

In addition, CCUSA and DPUSA do not have exclusive franchise territories for post-mix fountain syrup, although DPUSA does restrict each bottler’s sales of post-mix fountain syrup to its specified territory for bottle and can sales.⁷⁰ This means that Coca-Cola and Dr Pepper post-mix fountain syrup can be sold by a variety of entities, such as wholesalers, in addition to concentrate companies and bottlers. As a result, Coca-Cola and Dr Pepper fountain products are available from many fountain wholesalers in the San Antonio area in addition to the two franchised bottlers.⁷¹ Indeed, Mr. Carew, Vice President for Planning of CCE, the owner of Coca-Cola’s bottling operations, described the marketing of post-mix fountain syrup as “so totally different from bottle/can marketing that efforts to merge the two are not in the best long term interest of either system.”⁷²

Finally, there are often significant price differences between the take-home and cold-drink channels. For example, an individual branded CSD can is typically \$.50 in a vending machine in the San Antonio area.⁷³ By contrast, a six-pack of Pepsi take-home cans in San Antonio sells at an everyday price of \$1.99 and may be sold at a promotional price of \$1.49 or even \$.99 on occasion.⁷⁴

2. Direct-Store-Door Delivery

Nationally and regionally branded CSD manufacturers overwhelmingly use “direct-store-door” (“DSD”) delivery for their prod-

⁶⁸ Short, Tr. 7736; Cassagne, Tr. 7585; Knowles, Tr. 2820-23.

⁶⁹ Knowles, Tr. 2820.

⁷⁰ Knowles, Tr. 2681; Turner, Tr. 1086. DPUSA does allow post-mix fountain to be distributed by food wholesalers and brokers within a bottler’s exclusive territory. Turner, Tr. 1086.

By contrast, PepsiCo and RC Cola do have exclusive geographic territories for post-mix fountain syrup. Knowles, Tr. 2681-82.

⁷¹ CX 33 Z18; RX 861; Short, Tr. 7741-42; Turner, Tr. 1172-74.

⁷² CX 799 M.

⁷³ Turner, Tr. 646.

⁷⁴ CX 3973; Davis, Tr. 4526.

ucts⁷⁵ as opposed to warehouse delivery.⁷⁶ For DSD delivery, the bottler's own employees will: place the product on the shelf, "front" it to make sure that the label is properly displayed, and price the product; remove old merchandise; ensure that "point of sale" signs are properly displayed; and change space allocation.⁷⁷ For warehouse delivery, the bottler relies on the retailer's employees to perform these tasks.⁷⁸ In such circumstances, the private label and warehouse soft drinks are delivered to the retailer's warehouse.⁷⁹

Under DSD delivery, the DSD vendor bears the cost of distribution, stocking, and in-store checks on promotional efforts past the point of the warehouse; in the warehouse delivery sequence, this cost is borne by the retailer.⁸⁰ Distribution costs typically account for about 35% of a branded CSD bottler's overall costs.⁸¹

The DSD delivery system provides at least two strengths which justify its added expense to the bottlers. First, it allows bottler control. Second, given sufficient overall volume, the DSD delivery system allows the bottler to reach smaller outlets.

⁷⁵ All of the major carbonated soft drink brands are distributed by DSD distribution, using soft drink bottlers or soft drink distributors. CX 3967 at 181; CX 3976 at 2111; CX 3582 at 2238; Nicholson, Tr. 3713. In fact, major franchises prohibit warehouse distribution. Turner, Tr. 956; Koch Tr. 1814. The Coca-Cola Company's soft drink products are distributed entirely by Coca-Cola franchised bottlers through DSD delivery. No warehouse delivery is used for retail channels. CX 3967 at 181 [Carew]; CX 793 A. Pepsi built its business on the merchandising advantages of DSD distribution. David Davis, Vice President for Trade Development for Pepsi USA, testified that Pepsi had better control of where its products went and how to merchandise them and move business by keeping itself vertically integrated. Davis, Tr. 4471-72. Consequently, Pepsi has not explored warehouse and beer distributors as an alternative to DSD distribution. Davis, Tr. 4471-72.

⁷⁶ Turner, Tr. 956-57; Nicholson, Tr. 3713-14; CX 3582 at 2238 [Clements]. The two largest systems of DSD delivery are the Coke bottler system and the Pepsi bottler system. CX 3976 at 2128 [Quirk]; CX 3978 at 2066-67 [Lowenkron]; CX 3990 at 929 [Kail]; CX 864 H, I.

⁷⁷ Knowles, Tr. 2662-63; Turner, Tr. 956-58; Nicholson, Tr. 3711; CX 3989 at 27 [Shanks]; CX 3988 at 505 [O'Donnell]; CX 3921 at 355 [Currie]; Hoffman, E., Tr. 327-28.

⁷⁸ Knowles, Tr. 2663-64. In some cases, bottlers have relied on independent distributors to perform DSD distribution for them. Koch, Tr. 1901. It is significant that the bottlers have hired independent distributors to ensure that these tasks are performed, rather than relying on retailers' employees for them.

⁷⁹ Warehouse delivery is used for retailers' private labels (also known as "control brands"). Private labels are a retailer's proprietary brand of soft drink. Howell, Tr. 4031; E. Hoffman, Tr. 412-13. There are a few national brands -- Shasta, Faygo, and IBC Root Beer -- that also use warehouse delivery. Howell, Tr. 4031. IBC Root Beer, produced by DPUSA, uses warehouse delivery among other reasons because of its unique bottle. IDFF paragraph 149.

⁸⁰ Summers, Tr. 6469.

⁸¹ See RX 0867.

Bottler control means that the bottler has someone in the store pushing the brand.⁸² This marketing push is extremely important given the degree to which sales respond to advertising, promotions, displays, and price (see next section).⁸³ It also gives the bottler the ability to get the product merchandised, priced, rotated,⁸⁴ and looking fresh. A bottler would lose this with the warehouse delivery system.⁸⁵ Bottlers characterized the services performed by bottler employees in DSD as extremely important in producing volume sales of soft drinks. Toby Summers, President of CCSW, stated: "We are an impulse item. If you don't have a display to execute it, you can't sell it off the shelf." Summers, Tr. 7117-19.⁸⁶ In response to questioning by complaint counsel, Mr. Summers stated: "Apparent-

⁸² Davis, Tr. 4471-72. David Davis, Vice President of Trade Development for Pepsi USA, testified that he viewed a new 7Up brand as a competitive threat, but not a comparable warehouse delivered brand, in part because of the differences in the delivery system: "7-Up is a DSD brand. You've actually got people in the store pushing the brand versus a Jolt Cola that's warehouse. They have to kind of depend on the store personnel doing it themselves. So you've got more selling involved with a DSD brand on the store level, which is where the product gets moved or not." Davis, Tr. 4569. Texas Beverage Packer ("TBP")'s lack of volume for its private label and warehouse brands is blamed on its failure to gain proper distribution. Hixon, Tr. 7332.

⁸³ Hoffman, E., Tr. 358, 362; CX 3814 at 22-23; Koch, Tr. 1831; Turner, Tr. 974. When soft drinks are on sale, consumers purchase more soft drinks. Knowles, Tr. 2838-40.

⁸⁴ Soft drinks--especially diet soft drinks--deteriorate in quality over time, so careful attention must be paid to stocking and rotation of these items. Carbonation, flavorings, and aspartame are all sensitive to heat. CX 851. The level of carbonation in plastic containers, the quality of flavorings in all containers and the sweetening effect of aspartame decline over time. CX 851; E. Hoffman, Tr. 330-31. Regular soft drinks after 150 days, and diet products after 90 days have diminished quality sufficient to adversely affect repeat sales and consumer preferences. CX 851; CX 4005 at 63 (R. Hoffman). CCSW believes that its CSDs with aspartame have an expected shelf life of approximately 90 days. E. Hoffman, Tr. 328-29. Consumers are sensitive to aspartame breakdown. CX 2281. When aspartame breaks down it turns bitter and the flavor and quality become substandard due to deterioration. CX 4005 at 63; E. Hoffman, Tr. 328-29. Although this substandard product can be consumed safely, bottlers run the risk that consumers might never buy that product again, resulting in loss of volume. E. Hoffman, Tr. 32829; Turner, Tr. 956-57. *See also* CX 851, CX 3186 B.

⁸⁵ Turner, Tr. 956-57; Knowles, Tr. 2663; E. Hoffman, Tr. 327-28; CX 505 C-K; CX 3145 Y. Mr. Clements, President and CEO of Dr Pepper from 1974 through 1986, testified that his attempts to use warehouse delivery for Dr Pepper in Indianapolis and Los Angeles in the 1950's had convinced him "that with a product like Dr Pepper, and if you want to develop a consumer franchise and if you want to develop an equity in that market, that we could not do it anyway except the store door delivery." CX 3582 at 2238 [Clements]. He explained that retailers "didn't reorder because they were not accustomed to having soft drinks that way, they were accustomed to having store door delivery, and if they did reorder, they didn't reorder in sufficient quantities, and so we went out of stock and after about six months we determined that that test was a failure and voted off." CX 3582 at 2236 [Clements].

CCSW disputed this point, citing testimony by CCSW President Summers that, in his opinion, the retailer H.E.B. merchandised its private label, Plaza, better than Pepsi merchandised its DSD delivered brands. Summers, Tr. 6472. Summers, testimony, however, supports the importance of control over distribution and merchandising by the entity that ultimately would benefit most from volume sales of the product.

⁸⁶ *See also* CX 2008 P, Q.

ly you don't understand what sells volume in the soft drink industry. So let me tell you, it is not just price. You can have the lowest price in the world. If you can't get the product delivered, if you can't get the display, you can't keep the display properly priced and stocked, then the price becomes insignificant." Summers, Tr. 7117-19.⁸⁷ Other evidence similarly confirmed the importance of the services involved in DSD delivery for increasing the volume of soft drink sales.⁸⁸

In addition, the DSD delivery system also makes deliveries to smaller outlets economically feasible.⁸⁹ Such outlets, while having a relatively small direct volume effect, are important for image⁹⁰ and permit sampling that can lead to later sales.⁹¹

3. The Importance of Advertising

Branded CSD bottlers and concentrate companies invest significantly in advertising and promotion of their products. Concentrate

⁸⁷ Other CCSW documents indicate the same view. When CCSW considered developing a "house" control brand to compete with private label, its analysis recommended use of DSD over a broker system for several reasons:

1. DSD gives us an opportunity to reach more channels convenience stores, mom & pops, mass merchandisers, etc. without increasing our costs dramatically. It also establishes an image and consumer sampling point of difference versus other private labels.

2. DSD allows us more flexibility to respond to changes in the marketplace (*i.e.*, lack of Coke ad feature activity, high volume hurdles, packaging emphasis changes, competitive features, etc.). RX 398 D.

⁸⁸ See Section IV.B *supra*.

⁸⁹ Use of a warehouse-delivered system of distribution limits a firm to the large retail chains. Turner, Tr. 941. As a result, warehouse-distributed products cannot gain access to retail outlets such as drug stores, convenience stores, and smaller retailers that do not have the capacity to store the product. CX 3921 at 355 [Currie]; Turner, Tr. 941; CX 3943 at 15 [Rapp]; CX 3944 at 3511-12 [Rapp]; Coyne, Tr. 3438, 3445. Even CCSW admitted that "private/warehouse brands are less available in other market segments, including convenience stores, vending and fountain." RPF paragraph 332 (citing Knowles, Tr. 2662, 2892).

⁹⁰ CCSW's president testified that presence in the fountain segment is important to develop the consumer's image of a product. Summers, Tr. 6513-14.

⁹¹ Mr. Clements explained that Dr Pepper was not able to reach all of the types of outlets that they wanted to reach with warehouse delivery in Indianapolis and Los Angeles: "We were only able to get the people like the chains, and not all of them, and some of the independents like IGA that had a warehouse that could deliver. What we couldn't reach were the outlets we needed most, and that's the single drink sales -- the moms and the pops and the cafes and beauty shops and places like that. We did not have enough availability to create any great sampling of the product in order to develop the brand." CX 3582 at 2236 [Clements]. See also RX 398 D. Sampling occurs largely through cold drink sales rather than take-home sales. Turner, Tr. 1028-29.

firms pay millions of dollars annually in total marketing funding.⁹² Huge amounts of monies, in the aggregate and as a percentage of total marketing, are spent by concentrate firms in support of local branded CSD bottler activities. For example, the largest component of Pepsi Cola total cost is allocated to marketing.⁹³

With respect to advertising by retail stores, major retailers typically run two types of carbonated soft drink promotions: "ad features" and "in-store promotions." An ad feature is typically a newspaper advertisement featuring a branded CSD at an attractive reduced price, often at or below cost.⁹⁴ An in-store promotion typically involves a branded CSD in-store display also featuring a reduced price, though not usually as low as the ad feature price and without any accompanying newspaper advertisement.⁹⁵

An ad feature may give a bottler 10 times the non-featured sales volume⁹⁶, while an in-store display may give just twice to 2 ½ times the normal sales volume.⁹⁷ The volume lift is much lower on the in-store display in part because the retail price to the consumer is usually higher.⁹⁸ Thus, bottlers are willing to pay thousands to hundreds of thousands of dollars to obtain ad features.⁹⁹ Bottlers also offer and pay large dollar amounts in order to have exclusive promotion and advertisement for their branded CSDs.¹⁰⁰ For example, CCSW's 1988 Calendar Marketing Agreement with Diamond Sham-

⁹² Turner, Tr. 965.

⁹³ CX 3913 at 38 [Drewes].

⁹⁴ CX 3806 Z50; Turner, Tr. 973-74; Davis, Tr. 4515 (at or below cost ads are termed "hot ads"); Gonzaba, Tr. 2032.

⁹⁵ Turner, Tr. 1126.

⁹⁶ Bodnar, Tr. 1498; Davis, Tr. 4504; Koch, Tr. 1831-32. Consumers also tend to stock-up during ad features, depending on the attractiveness of the ad feature price. Bodnar, Tr. 1766.

⁹⁷ Bodnar, Tr. 1498.

⁹⁸ Bodnar, Tr. 1498; Turner, Tr. 974; E. Hoffman, Tr. 362-63. Increased sales volume due to an ad promotion or reduced price end-aisle display is known in the industry as volume "lift." E. Hoffman, Tr. 358, 362.

⁹⁹ Turner, Tr. 1129-30.

¹⁰⁰ CX 1040 A-F (Pepsi); CX 1041 A-K (Grant-Lydick); CX 1042 A-V (CCSW).

rock stated that “[n]o national brand soft drink may be co-featured during these promotional periods.”¹⁰¹

Ad features are run as part of retailers’ promotional “ad cycles,” which include bottlers, branded CSDs as part of the advertising.¹⁰² Most major chain retailers advertise one branded CSD in each of their weekly ads during a 52-week cycle.¹⁰³ Major convenience stores usually offer a monthly ad cycle.¹⁰⁴

Bottlers believe that you cannot grow your brands without being in the ad cycle.¹⁰⁵ In fact, some believe that if a bottler never gets an ad feature, the effect will be volume deterioration in the market-place.¹⁰⁶ Nor can the lost volume necessarily be made up for through in-store displays.¹⁰⁷

There are promotional periods that are more advantageous than others. Holiday periods are the most advantageous and create considerable volume lift.¹⁰⁸ For that reason, a retailer’s holiday ad features cost hundreds of thousands of dollars for bottlers and concentrate firms.¹⁰⁹ Additionally, to obtain such ads from a retailer, the bottler must provide a greater discount than normal on its product.¹¹⁰ Retail-

¹⁰¹ CX 1039-B. Pursuant to Calendar Marketing Agreements (“CMAs”), the bottler and retailer agree to a schedule of promotional activities and the payments to be made to the retailer. CMAs were originally developed to help the retailer offset the cost of advertisements for their chain stores. Davis, Tr. 4506. CMAs usually involve a base payment by the bottler to a retailer for a set number of ads. There are additional incentive payments for incremental volume growth. The bottler and retailer agree to sales projections and various requirements. CMAs are also known as “soft drink agreements,” or “ad buy” agreements, “ad assistance,” or “volume incentives.” Davis, Tr. 4509, 4706; Gonzaba, Tr. 2055; Hiller, Tr. 5355.

¹⁰² Turner, Tr. 970.

¹⁰³ Turner, Tr. 970; Davis, Tr. 4526; Kaiser, Tr. 3177.

¹⁰⁴ E. Hoffman, Tr. 362.

¹⁰⁵ Turner, Tr. 974; CX 3941 at 288-89 [Schmid].

¹⁰⁶ CX 3941 at 288-89 [Schmid].

¹⁰⁷ Turner, Tr. 974.

¹⁰⁸ Turner, Tr. 971; Summers, Tr. 6919; Davis, Tr. 4514-16. The July 4th ad is usually considered the most valuable, followed by other summer holidays, then the Thanksgiving, Christmas and New Year’s holiday periods. Turner, Tr. 971; E. Hoffman, Tr. 367-68; Turner, Tr. 4514. As to non-holiday ad periods, pay week periods are more valuable than non-pay week ads. Turner, Tr. 971; E. Hoffman, Tr. 368; Davis, Tr. 4514.

¹⁰⁹ Summers, Tr. 6919. For example, the holiday ads of H.E.B., a very large retailer in the San Antonio area (and other areas in Texas), run from a low of \$175,000 for Easter to a high of \$500,000 for summer holiday ads. Summers, Tr. 6919; Gonzaba, Tr. 2055.

¹¹⁰ Gonzaba, Tr. 2057. However, there is a safety net of \$50,000 for holiday ads if volume falls short. Summers, Tr. 6918-19.

ers, such as H.E.B., must meet volume requirements in order to receive the ad payments in full.

Bottlers also compete with each other for retail space in retail outlets which sell branded CSDs.¹¹¹ Bottlers attempt to convince retailers that their branded CSD products will generate sufficient traffic to warrant display space and end-aisle displays.¹¹²

D. Branded CSDs as a Relevant Product Market

With this background information in place, we can now properly address the question that the parties have presented to us: whether beverages other than branded CSDs could constrain a price increase by branded CSDs in the relevant geographic market. For this inquiry, we examine all of the relevant evidence concerning price and non-price competition that could affect the likelihood that nonbranded CSDs would constrain a small but significant, nontransitory price increase by branded CSDs. Such evidence includes the opinions of market participants concerning price and advertising differences among different categories of soft drinks, historical evidence of price interactions among different categories of soft drinks, and industry perceptions about the degree of competition between different categories of soft drinks.

As we will discuss, nonbranded CSDs are largely unavailable in the cold drink channel.¹¹³ Therefore, we will focus in particular on the likely substitution responses if branded CSD bottlers in the relevant geographic market raised their prices to retailers in the take-home channel, who purchase branded CSDs for sale to the ultimate consumer.¹¹⁴ The retailer typically receives a discount or allowance off the wholesale list price in return for its promotion of the product.¹¹⁵ "Net price" charged to the retailer equals the list price minus

¹¹¹ CX 4005 at 55 [R. Hoffman].

¹¹² CX 4005 at 55-56 [R. Hoffman].

¹¹³ See Section IV.D.2 *infra*.

¹¹⁴ The Merger Guidelines advise that "[i]n general, the price for which an increase will be postulated will be whatever is considered to be the price of the product at the stage of the industry being examined." Section 1.11. The same sentence appears in the 1984 Guidelines.

¹¹⁵ For example, in 1990, at least 95% of CCSW's sales were made at less than list price. Summers, Tr. 6721. Only 2% of the sales of the Pepsi COBO in the San Antonio area were made at list price. Davis, Tr. 4684-85. See also RX 327.

discounts and allowances.¹¹⁶ “Net/net” or “net/net/net” prices are list prices minus discounts, allowances, and ad payments.

It is also relevant here to examine the likely substitution responses if retailers raised the prices of branded CSDs to consumers, since the demand for the bottlers’ products derives from consumer demand for those finished products.¹¹⁷ Some agreements between bottlers and retailers regarding advertising funds attempt to influence the retailer to offer a certain price to consumers for the finished product, a further indication of the interrelationship between prices to retailers and prices to consumers.¹¹⁸

For the reasons set forth below, we find that the evidence demonstrates a relevant product market of branded CSDs.

1. Overall Substitution Possibilities: Views of Branded SD Bottlers

Both of CCSW’s primary branded CSD competitors in the San Antonio area stated that if branded CSD bottlers in San Antonio raised their prices by 10%, and everything else remained constant, they could profitably raise their price by 10%.¹¹⁹ Bottlers of branded CSDs in other South and Central Texas areas gave similar responses.¹²⁰ This evidence was uncontroverted.¹²¹

¹¹⁶ R. Hoffman, Tr. 5652-53; Summers, Tr. 6713-14; CX 414 B.

¹¹⁷ The Merger Guidelines state that, among other evidence, the Commission may take into account “the influence of downstream competition faced by buyers in their output markets” in evaluating market definition. Section 1.11.

¹¹⁸ Promotional allowances are usually related to a performance requirement. This most commonly takes the form of a feature ad, in-store display, or a reduced retail price. CX 1039 B, C; CX 1041 H (“lowest retail price on featured package”). Although bottlers do not usually suggest retail prices, they often set discounts at levels calculated to drive a desired retail price, based on the margin usually added by a particular retailer. Campbell, Tr. 1972-73. In addition, when soft drinks are in a feature ad, retailers often add little or no margin to the wholesale price, or use incremental funding from the bottler to further reduce the retail price. Turner, Tr. 960, 973-74. As explained by Mr. E. Hoffman, “[w]hat we’re really trying to have happen is for the retailer to pass the cost, the lower cost, on to the consumer so that the benefit of the consumer -- the lower price is to induce more consumption or purchases.” E. Hoffman, Tr. 380.

¹¹⁹ Bodnar, Tr. 1492, 1496, 1762-63; Davis, Tr. 4610.

¹²⁰ Koch, Tr. 1815-16; Turner, Tr. 988-89; CX 3931 at 1801-04 [Westerman].

¹²¹ Respondent CCSW argues that this testimony is not probative because complaint counsel did not specify a time frame for the hypothetical price increase. ABR-A at 8. An example of the testimony elicited by complaint counsel is given by Mr. Davis, a Pepsi official:

Q. If Coke SW and Big Red raised their prices ten percent in San Antonio, would Pepsi find it profitable to raise its prices the same?

The internal documents of the three bottlers of branded CSDs in the San Antonio area confirm that they take into account ~~only~~ the prices of other branded CSD products in deciding on pricing for their own branded CSD products. CCSW's own business records indicate that CCSW does not consider the price of private label or warehouse-delivered soft drinks when it considers increasing the price of its branded CSDs.¹²² Rather, CCSW considers the prices of other branded CSDs in determining the price of its-branded CSDs.¹²³

Moreover, CCSW's business records characterize its major competition as limited to manufacturers, distributors, and sellers of branded CSDs.¹²⁴ CCSW markets its branded CSDs against other branded CSDs.¹²⁵

A. Yes, they would.
Davis, Tr. 4610.

As discussed above, the hypothetical "5%" price increase test is set forth in the Merger Guidelines, which typically define a small but significant and "nontransitory" price increase as a 5% price increase maintained for a year or more. Section 1.11. Although we agree that complaint counsel could have clarified the precise implications of this question by specifying a time frame, we do not find that the absence of a specified time frame renders such testimony worthless. "Profit" is generally understood as the gain still left after expenditures; this is not a short-run concept, but rather something that businesses typically calculate over a time frame of months or years, not days. Thus, we believe that the question implied a "nontransitory" time frame. In any case, the witnesses' responses indicate that the answer may well have been the same whether a short or long time frame had been specified, since no witness asked "Do you mean in the short run or the long run?" Finally, we note that this is just one piece of the evidence supporting a branded CSD product market definition. We interpret the responses to complaint counsel's questions in light of that surrounding evidence, the weight of which also supports a branded CSD product market.

¹²² CX 2244; CX 198; CX 3101 C-H, J; CX 3102 B-H, J, L.

¹²³ CX 104 D, G, H, M-N; CX 198.

¹²⁴ CX 418 Z2-3, Z9, Z12, Z16, Z20; CX 1406 Z9-10; CX 1854 H-I, K-L, T-U, X, Z2-5, Z7-8; CX 1866 K-L. For example, CCSW's records reveal that it viewed Mr. PIBB as the closest substitute to and a direct competitor of Dr Pepper. CX 596 A-I. Indeed, that CCSW recognizes the difference between branded and nonbranded CSDs is well-evidenced by their consideration of a proposal to establish a house product flavor line in the take home segment that would fill the gap between branded CSDs and private label. The proposal was to "[i]ntroduce a DSD house line of flavors to include a Cola, Cherry Cola, Red, Rootbeer, and Orange. The line should be positioned as an image product with a low price (slightly higher than the private labels). Image development can be achieved through quality graphics, package availability, broad channel distribution and a unique trademark (perhaps the Buck Brand label)." RX 398. This document is consistent with other CCSW documents that express concern that CCSW needed a flavor line to compete with an expanding private label market. *See, e.g.*, RX 2059; RX 2060; RX 226 A, K; CX 2974 Q, R.

¹²⁵ CX 3760 ("In summary, beat the hell out of Pepsi!"); CX 104; CX 108 H; CX 1854 R,U, Z2, Z4; CX 2255 S, T; CX 3109 C. Messrs. R. Hoffman and Summers, Tr. 6853, testified that CCSW's branded CSDs compete in a broad sense with virtually all liquids (*See, e.g.*, R. Hoffman, Tr. 5524: CCSW competes with water in the sense that all beverages vie for the same shelf space), but CCSW documents do not evidence the same approach.

CCE bottlers in Texas, Coke-Austin and Coke-Houston, create periodic reports in which they monitor the activities of their competitors. Such activities -- which include pricing, package availability, marketing activities, sales, market share and pricing strategies -- are generally limited to observing the activities of bottlers of branded CSDs.¹²⁶ Similarly, the bottling operations of CCE use Keystone reports that provide information only with regard to branded CSDs.¹²⁷

When Coke-Austin introduced diet Coke, its introductory plans included volume and share forecasts. These projections were limited to branded CSDs and did not include private label or warehouse soft drinks.¹²⁸ When Coke-Austin did a competitive analysis entitled "Competitive Corporate Brands," it discussed only branded CSDs.¹²⁹

Pepsi official Davis testified that at the bottler level, Coke products are the only products to which the Pepsi bottler in San Antonio would react with regard to price.¹³⁰ ". . . Coke [CCSW] is usually the leader in the market. They go up and then we usually follow, depending on our pricing structure."¹³¹ Davis stated that Pepsi does not follow private label CSDs closely enough to know whether they had price increases.¹³²

Pepsi bottler-related testimony and documents evidence a similar distinction between branded CSDs and nonbranded CSDs. For example, Pepsi official Davis testified that Pepsi would not be worried about promoting its products in conjunction with private labels, but would not want Pepsi jointly marketed with Coke.¹³³ When the Pepsi COBO bottler serving the San Antonio area performs comparisons with its competitors, it looks in detail to bottlers of branded

¹²⁶ CX 2689; CX 2690; CX 2691; CX 2693.

Some documents note an increasing private label market share (*e.g.*, CX 2623 F, CX 2561 N, O, Q), but very few suggest a price response from branded CSDs to such brands, and this evidence is much weaker than that pointing in the opposite direction. In one exception, an SWCC employee apparently suggested that a response to private label brands was necessary to forestall the "expense of regaining price leadership long term." RX 1479 J.

¹²⁷ CX 2680; CX 2688 A-D; CX 2695; CX 2918.

¹²⁸ CX 503 B-J.

¹²⁹ CX 171.

¹³⁰ Davis, Tr. 4532-33.

¹³¹ Davis, Tr. 4532; CX 441 C; CX 445 H-I, K; CX 448; CX 449 R-S.

¹³² Davis, Tr. 4531, 4829.

¹³³ Davis, Tr. 4824.

CSDs for their pricing and other competitive activity,¹³⁴ as well as the "ad feature" or in-store allowances and ad assistance that they are offering.¹³⁵

Emery Bodnar, former General Manager of DPSA and current Executive Vice President, General Manager and part owner of Grant-Lydick, similarly testified that Grant-Lydick considers and reacts only to prices of other branded CSDs in setting Grant-Lydick's branded CSD prices, and does not consider the prices of private label or warehouse-delivered soft drinks in setting branded CSD prices.¹³⁶

Other bottlers also consider and react only to prices of the products of branded CSD bottlers in their areas when setting the prices of

¹³⁴ CX 455 G-L, Z-24; CX 456 B-C; CX 457 C; CX 458 B; CX 459 E; CX 460 I; CX 461 J, L; RX 1013 U-W; CX 380. At least one document notes that, in 1989, private label's market share had increased at the expense of Pepsi. RX 1287 E. Mr. Davis of Pepsi COBO explained that this followed the deep discounting of 1987-88, when branded CSD prices had become so low that they were "taking share out of private label." Davis, Tr. 4528-29. When the branded CSD prices went back up, however, then you still have "the price shopper that's going to pick up private label," and so "you're losing share back to the private label." Davis, Tr. 4528-29. See also Section IV.D.3.d *infra*.

¹³⁵ RX 1013 J-Y; CX 455 H-I, K, Z-1, Z-3; CX 456 E, F; CX 457 C, F; CX 458 G.

¹³⁶ Bodnar, Tr. 1359-61, 1364, 1490, 1492-94, 1762-63.

Emery Bodnar, as manager of the Big Red bottler in San Antonio, explained why he would not lower Big Red's price to retailers if a warehouse or private label lowered its price 10%:

- Q. Let me ask you this question. If Texas Beverage Packers lowered its triple net price in the ten-county area including and surrounding San Antonio ten percent and all other things remain constant, again for a sustained period of time, would you find it profitable to lower your prices?
- A. I don't know what Texas Beverage Packers' triple net price is. I wouldn't know if they lowered it or not. See, because that doesn't come through the same channel as we do. We're a direct store and they're through warehouses and through, you know, private label.
- Q. Let's assume you did know.
- A. If I did know that they went down ten percent?
- Q. Yes.
- A. Would I do anything? No.

I've got to -- Let me just, if I can, state why. Private label or control brands, at least from where I sit, are not direct competition, as I look at Coke and Pepsi in San Antonio and maybe whatever they're calling themselves today, Premiere. Okay?

Those brands that are essentially the warehouse or private label, first of all, space is dictated by somebody at headquarters and we're not going to change that.

Number two, the product is displayed by somebody in the store or has to be handled by somebody in the store.

If you really go out and look at beverage sections, most often than not if you look at a beverage section that looks ragged, it is the section that is supposed to be controlled by store personnel.

As far as display space, that is pretty much, again, dictated, not at store level but at some buyer's level or higher.

So really, there's not much I can do to compete, if I really wanted to. I mean, it's there, just the same say that Kool-Aid is, as we talked about earlier.

So if he lowered his price 15, 20 percent, I wouldn't do anything. Fifty percent. He doesn't have that kind of margin to do it, but if he did.

They just can't execute. I mean, they just don't have the force to execute such a thing. Bodnar, Tr. 1762-63.

their branded CSDs.¹³⁷ Moreover, bottler collusion cases indicate that branded CSD bottlers in other geographic areas believe that it is possible to raise price successfully together without having to involve bottlers of nonbranded CSDs.¹³⁸

2. Substitution Possibilities: The Cold Drink Channel

In the cold drink channel, which includes fountain, vending machine, and single drink sales¹³⁹ there is relatively little availability of nonbranded CSDs that is, warehouse-delivered and private label CSDs. Respondent admitted that warehouse delivered brands are generally not available in the cold drink channel,¹⁴⁰ and stated that "private/warehouse brands are less available in other market segments, including convenience stores, vending and fountain."¹⁴¹ The evidence confirms that warehouse distribution does not provide access to the vending and fountain channels.¹⁴²

In addition, the evidence shows that carbonated soft drinks sold in vending machines are almost entirely brands that are direct-store-door delivered, not warehouse-delivered or private label brands.¹⁴³ Vending machines are stocked with nationally branded CSDs, with virtually no private label brands available.¹⁴⁴ Moreover, although private label brands may be marginally more available in the fountain channel, since a few restaurant chains sell certain flavors as their own private label brands,¹⁴⁵ the record does not establish that the occasion-

¹³⁷ Trebilcock, Tr. 5844-46, 5848-50; Davis, Tr. 4532-33; CX 3990 at 923 [Kalil].

¹³⁸ As we discuss in Section VI.C.3 *infra*, we find the bottler collusion cases relevant to this case, and we therefore find that the ALJ erred in excluding evidence relating to them. For the cases cited by complaint counsel (*See* Section VI.C.3.c *infra*), warehouse-delivered and private label firms in areas where branded CSD bottlers have been convicted of fixing prices were not named as defendants. The price-fixing cases involved only branded CSD bottlers.

¹³⁹ *See* Section IV.B *supra*.

¹⁴⁰ RRCCPFF paragraph 876.

¹⁴¹ RPFF paragraph 332, citing Knowles, Tr. 2662, 2892.

¹⁴² RX 3005 at 3759 [Smith]; CX 3978 at 2063-64 [Lowenkron]; Turner, Tr. 941, 1403; CX 3945 at 177 [Rapp]; CX 3944 at 3511-12 [Rapp]; CX 3977 at 72 [Carew]; Coyne, Tr. 3438; CX 3942 at 1905 [Wilson].

¹⁴³ CX 804 G; CX 3989 at 65-66 [Shanks]; RX 3003 at 82-84 [Huey].

¹⁴⁴ Koch, Tr. 1835; Clarke, Tr. 4284; Turner, Tr. 1007; RX 3003 at 84 [Huey].

¹⁴⁵ Summers, Tr. 6517; Short, Tr. 7759-60. For example, McDonald's sells its own orange private label fountain product. Short, Tr. 7759.

al presence of nonbranded CSDs in the cold drink channel would provide a constraint on the pricing of branded CSDs.

3. Substitution Possibilities: The Take Home Channel

The record shows that private label and warehouse brands are available in this channel. Therefore, we must examine in greater detail whether their presence would be sufficient to constrain a small but significant, nontransitory price increase in branded CSDs.

a. Views of Bottlers of Warehouse and Private Label

Texas Beverage Packers, Inc. ("TBP") is a manufacturer of private label and warehouse-delivered CSDs on its own account and for some of the major supermarkets in San Antonio.¹⁴⁶ Steve Hixon, its general manager, testified that his carbonated soft drinks do not compete with those of CCSW and San Antonio Pepsi,¹⁴⁷ and that to do so would render his company "dead meat."¹⁴⁸ He sees manufacturers and distributors of private label and warehouse-delivered CSDs as his direct competitors,¹⁴⁹ and not CCSW or Pepsi.¹⁵⁰ With respect to pricing, he reported the following:

- Q. Now, in your opinion, there has not been an impact on your business by Coke Southwest's purchasing of the San Antonio Dr Pepper Bottling Company; is that correct?
- A. Yes.
- Q. Your basic opinion is we're dealing with apples and oranges in this case?
- A. We're dealing with apples and oranges other than if there's some kind of pricewar going on. If they get down to 99 cents, then they do impact me, but I don't feel the -- If Coke had bought Pepsi, yes.
- Q. And you feel that that's because -- You don't see a relationship between you and Coke Southwest because you basically sell to different clientele on different bases?
- A. No. We're -- Well, we're sitting in a grocery store next to each other, but I don't -- For the people to take my product over Coca-Cola, there's got to be a substantial differential in price to make them select the private label.

¹⁴⁶ Hixon, Tr. 7269.

¹⁴⁷ Hixon, Tr. 7354-57.

¹⁴⁸ Hixon, Tr. 7356.

¹⁴⁹ Hixon, Tr. 7359.

¹⁵⁰ Hixon, Tr. 7360.

- Q. In fact, when you were first interviewed by FTC staff, you told them this doesn't have anything to do with you and you wish we'd leave you alone?
- A. Absolutely. Still feel that way.

Hixon, Tr. 7354-55.

With respect to the "impact" when branded CSDs reduce their prices, Mr. Hixon explained:

- Q. In your experience, have national brands gotten down to the level of private labels in their pricing?
- A. They haven't gotten quite that low but it's been kind of -- They've gotten close enough to make it scary.
- Q. Have they in fact begun to squeeze out private label with low prices?
- A. That's a tough question. Certainly, to a limited extent, I think they have. When they get in their 99-cent a six-pack wars with cans, yeah, at that point they're driving out private label. It's so low.
- We virtually have given up the major holidays to the national brands. We no longer try to compete with them.

Hixon, Tr. 7303.

Hixon views CCSW and Pepsi as "just out there screwing up the market with [their] occasional low prices." Hixon, Tr. 7360. He sees these bottlers as not trying to get his business, nor as having an impact on his business. Hixon, Tr. 7360-61. Hixon described himself and his "fellow copackers" as competing with branded CSDs only on the fringe:

[We are] out there scrambling over the ten percent of the business that Coke and Pepsi don't realize really exists or have slipped through their fingers, or whatever, that they choose to ignore. So yeah, if Coke or Pepsi drop their prices to 99 cents, it impacts our ten percent that we're fighting over. It takes business away from us.

Hixon, Tr. 7360.

The Kroger Company operates a CSD manufacturing plant in Garland, Texas, called Garland Beverage Company ("GBC").¹⁵¹ GBC does not consider the prices of branded CSDs in determining the price of its private label and warehouse-delivered products. The record does not show such a comparison.¹⁵² GBC monitors only other private label and warehouse-delivered soft drinks, such as

¹⁵¹ Morath, Tr. 7672-73.

¹⁵² RX 1716-17; RX 1721-22; RX 1726; RX 1740-41; RX 1744-45; RX 1750; RX 1754-57; RX 1760.

Rocky Top, Big K, Mega, Parade, and Cragmont.¹⁵³ GBC also monitors TBP.¹⁵⁴

This evidence also supports the existence of a branded CSD product market. The weight of the testimony by and documentary evidence of bottlers of both branded CSDs and nonbranded CSDs indicates that branded and nonbranded CSDs generally do not compete in the sense that a branded CSD price increase could be constrained by nonbranded CSDs.¹⁵⁵ The evidence does establish that branded CSDs occasionally may constrain pricing by private labels and warehouse-delivered soft drinks, but it does not provide any reason to believe that nonbranded CSDs could constrain price increases by branded CSDs.¹⁵⁶

b. Consumer Conduct: The Typical Price Gap Between Branded and Nonbranded CSD Retail Prices to Consumers

Prices of CSDs appear generally to fall into three separated groupings. Most expensive are the branded CSDs; less expensive are warehouse-delivered brands; and cheapest are the private label products.¹⁵⁷ The price gaps separating these groupings may indicate that these soft drinks are in different product markets.¹⁵⁸ Although the Commission and the courts do not always divide premium and

¹⁵³ RX 1760 (991440; 991475-79; 991482-85); CX 2827 D, E.

¹⁵⁴ RX 1756; RX 1757.

¹⁵⁵ For example, Mr. Campbell, warehouse manager for a Pepsi/Dr Pepper/7-Up bottler in Hallettsville, Texas, was asked whether he competed with H.E.B.'s Plaza brand with his Dr Pepper and Pepsi brands. Mr. Campbell responded: "Well, yes and no. I mean, not really. I mean, I don't -- I don't think about competing against those people. I mean, that's not who I go to look in the grocery store to see if they've reduced their price by one cent a can and then I adjust my pricing and my promotional strategies based upon that. I base my competing more against other direct store delivery products." Campbell, Tr. 2007. Even Mr. Howell of CCUSA admitted that he had never seen the price of Coke drop in response to private label prices. Howell, Tr. 4123. And Mr. Summers explained that CCSW created a private label to compete with private label and warehouse brands, being careful not to cannibalize CCSW's branded products. Summers, Tr. 696284.

¹⁵⁶ Similarly, Pepsi's research shows that it is very hard for a private label to steal from a national brand, but that a national brand can gain share from a private label temporarily if its price comes down low enough. CX 3912 at 65-66, 97 [Christiani].

¹⁵⁷ CX 814 E; CX 3989 at 92-93 [Shanks].

¹⁵⁸ See, e.g., *United States v. Archer-Daniels-Midland Co.*, 866 F.2d 246 (8th Cir. 1988), cert. denied, 493 U.S. 809 (1989) (despite functional interchangeability of sugar and high fructose corn syrup, persistent price difference of 10% to 30% resulting from price support system required treatment as separate product markets).

lower-priced brands into separate markets,¹⁵⁹ the existence of a price gap calls for some examination of its degree and possible significance.

We note first that the wholesale prices available to retailers vary, because bottlers may change their promotional offers on a weekly to monthly basis.¹⁶⁰ At any time, there may be a variety of effective wholesale prices for any given brand and package within any given geographic area.¹⁶¹ Retail prices to consumers also vary frequently, depending on the extent to which and whether particular brands are on "promotion." The promoted prices of branded CSDs may be substantial discounts off the everyday or list retail price to consumers. The differences between the promoted retail prices of branded CSDs and the nonpromoted prices of branded CSDs vary from 20% to over 100%.¹⁶²

Despite these variations in price differences, there are clear distinctions between the average prices of branded CSDs and non-branded CSDs, at both the wholesale and retail price level. As respondent CCSW has explained, the wholesale prices paid by the retailer for most private/warehouse brands generally are less than the price charged by the bottler for branded CSDs.¹⁶³ Much of this differential is attributable to the labor cost of stocking and merchandising the product, which is usually borne by the bottler using DSD delivery for branded CSDs, but by the retailer for private/warehouse brands.¹⁶⁴ An additional cost difference is that national concentrate companies often spend significant sums of money advertising and

¹⁵⁹ Coca-Cola Co., Dkt. No. 9207, slip op. at-32 n. 62; *see also Olin Corp.*, 113 FTC 400, 595-600 (1990), *aff'd*, 986 F.2d 1295 (9th Cir. 1993) (finding two relevant product markets, one consisting only of premium-priced product and one consisting of the premium-priced product and its functional equivalent), *cert. denied*, 114 S. Ct. 1051 (1994).

¹⁶⁰ Campbell, Tr. 1954; R. Hoffman, Tr. 5551-52; Summers, Tr. 6613-H. However, some retailers set their promotional schedule for an entire year at the beginning of the year. Summers, Tr. 6618.

¹⁶¹ CX 1979; CX 2180; Turner, Tr. 1474; Bodnar, Tr. 1648-49; Davis, Tr. 4702-03; RX 1200; Kaiser, Tr. 3224.

¹⁶² CX 3973 (20-100%); CX 3926 A (30-50%); CX 3832 (20%); CX 3835 (20%).

¹⁶³ Howell, Tr. 4028-29; RX 2423.

¹⁶⁴ CX 3700 J; Brinkley, Tr. 2191-92; Kaiser, Tr. 3159; Turner, Tr. 1401-02. *See also* Section IV.C.2 *supra*.

promoting their branded CSDs.¹⁶⁵ These costs are often reflected in a higher concentrate price to bottlers.¹⁶⁶

Similarly, the average retail prices of most private/warehouse brands are less than the average retail prices of branded CSDs.¹⁶⁷ Estimates of the price differential vary, but a common estimate is that private/warehouse prices average between 20% to 30% below the prices of branded CSDs.¹⁶⁸ There was testimony that the retail price gap between branded CSDs and private label CSDs is normally two to three price points, per unit.¹⁶⁹ In 1984, CCUSA found that, on average, private and controlled labels net retail prices were an average of 29% lower than those of the national brands, while warehouse-delivered Shasta/Faygo net retail prices were about 20% below the national brands.¹⁷⁰ In 1988, an analysis of the average case price differences for several bottler groups was performed, comparing Fanta, Shasta, Faygo, Controlled label and Coke Classic in 34 geographic areas.¹⁷¹ The average case price difference between Coke Classic and the highest priced control label products was \$0.94. Branded flavor lines were priced above control labels at an average price difference of \$0.77 a case.¹⁷²

This retail price gap shows that certain consumers are willing to pay more for branded CSDs than for private label or warehouse-delivered brands. Many consumers perceive a quality difference

¹⁶⁵ CX 3158 Z11-Z21; CX 814 A-B. Most private label brands are not advertised on television or radio, but may appear in the retailer's newspaper ads or circulars. Some warehouse brands, notably Shasta, have engaged in television and radio advertising in the past. See Section IV.C.3 *supra*.

¹⁶⁶ Bodnar, Tr. 1739.

¹⁶⁷ Hixon, Tr. 7356-57; Trebilcock, Tr. 5841-42.

¹⁶⁸ Trebilcock, Tr. 5841-42; Howell, Tr. 4082; CX 3814 at 39 [Adams]; CX 814 at 874. At different times, the retail price gap between branded CSDs and private label/warehouse soft drinks may range from 10% to 130%, depending on whether special promotions are offered. Trebilcock, Tr. 5841-42 (20-30%); Hixon, Tr. 735657 (30-40%); CX 3989 at 89-90 [Shanks]; Bodnar, Tr. 1715-16; CX 3835; CX 3832; CX 3926B (20-70%); Limon, Tr. 4981 (6-pack ("6-pk") cans: private label CSD is 99 cents; Pepsi is \$1.49 - \$1.69 [49-69%]); Sendelbach, Tr. 7703-06 (6-pk cans: private label CSD is \$1.20; branded carbonated soft drink is \$1.59 [33%]); Brinkley, Tr. 2194-95 (6-pk cans: private label CSD is \$1.20-\$1.32; branded CSD is \$2.50 [50%]); Chapman, Tr. 7208, 7211 (6-pk cans: private label CSD is \$1.06-\$1.26; branded CSD is \$1.59 \$2.00 [26-88%]); Davis, Tr. 4519-24.

¹⁶⁹ CX 3967 at 186 [Carew]. Each price point has significance for a bottlers' revenue; for example, for CCSW, a ten-cent increase in the net price of a six-pack can increase cash flow by an additional \$8 million a year, holding all else constant. E. Hoffman, Tr. 284; CX 875 G.

¹⁷⁰ CX 814 A.

¹⁷¹ CX 3436 S-Y.

¹⁷² CX 3436 F.

between branded CSDs and private label/warehouse delivered CSDs.¹⁷³ Because of that perception, branded CSDs have greater consumer appeal than do private label/warehouse-delivered CSDs,¹⁷⁴ and brand switching by consumers is generally limited to branded products.¹⁷⁵

The perceived differences in quality apparently account for the fact that branded CSDs have some degree of brand loyalty.¹⁷⁶ The extent of brand loyalty has decreased recently, and consumers more readily switch between branded CSDs if prices differ significantly; however, there is little evidence of switching from branded CSDs to private label/warehouse-delivered CSDs,¹⁷⁷ at least until the price differences are very large.¹⁷⁸ If the retail price of branded CSDs drops near or below the price of private/warehouse brands, then private/warehouse brands may lose sales to the branded CSDs.¹⁷⁹ Again, such evidence indicates that branded CSDs may constrain nonbranded CSD pricing on occasion, but not the converse.¹⁸⁰

¹⁷³ Morath, Tr. 7676.

¹⁷⁴ CX 3912 at 65-66, 97 [Christiani].

¹⁷⁵ CX 3942 at 1911-12 [Wilson].

The ALJ concluded that branded and private label CSDs have similar functional characteristics, implying that they are in the same product market, although he acknowledged that "[t]o a great extent, any perceived differences among soft drinks exists in the mind." ID at 61. In evaluating the likelihood of customer switching in the event of a small but significant, nontransitory price increase, such perceptions in the mind are more relevant than a chemical test of whether the ingredients are basically the same.

¹⁷⁶ CX 3967 at 205 [Carew]; Morath, Tr. 7676.

¹⁷⁷ CX 3942 at 1911-12, 1940-41.

¹⁷⁸ CX 3921 at 386-87.

Mr. Koch, President of Oneta Company, the Pepsi-Cola bottler in Corpus Christi, testified that, as to supermarkets only, "[w]e know that private labels have about a 10 percent residual share of the market that's based on existing price structures and existing price differences." Koch, Tr. 1876. He stated that "private labels do a lot to keep us honest," in the sense that "[g]o maybe 20 percent higher with a national brand than you can with private label, and then you start to lose volume." Koch, Tr. 1875. Other than the responses of branded CSD bottlers to the 5% question, *see* Section IV.D.1 *supra*, this is virtually the only piece of testimony that directly addresses whether private label could constrain upward pricing of branded CSDs. We do not find this testimony sufficient to outweigh the weight of the evidence related to this point, especially since Mr. Koch only states his belief that branded CSDs would lose volume to private label, but does not state that such losses would make it unprofitable for branded CSDs to raise price.

¹⁷⁹ Bodnar, Tr. 1555-56; Summers, Tr. 6549 (branded CSD discount to \$.99 will pick up some private label share, but "usual" discount of \$1.49 does not); Hixon, Tr. 7303-04, 7360; Chapman, Tr. 7190; Turner, Tr. 988; Campbell, Tr. 1999; RX 3011 at 3171-78, 3197-98 [Skinner].

¹⁸⁰ *Cf. Olin Corp.*, 113 FTC at 598-600 (lower-priced swimming pool chemical could not constrain upward price movement of premium-priced swimming pool chemical). *See also* Coca-Cola Co., slip op. at 36.

Indeed, the preponderance of the evidence concerning brand loyalty suggests that consumers may be reluctant to switch to nonbranded CSDs in the event of branded CSD price increases.

For purposes of product market definition, the relevant question is whether, if a wholesale branded CSD price increase were passed on as a retail price increase, consumers would switch to nonbranded CSDs and thereby force a rollback of the wholesale branded CSD price increase? The record contains a study designed specifically to address the issue of what magnitude of branded CSD price would cause consumers to switch to nonbranded CSDs, albeit in a different geographic market. When Procter & Gamble owned Coke-Mideast Bottling Company, it did an elasticity analysis, comparing warehouse-delivered CSDs and Coca-Cola products. It found that an acceptable spread between Coke products and Big K's private label products was between 80 and 100%. If the prices of Coke products were above this level, consumers' normal preferences for branded CSDs began to diminish.

On the other hand, if the Coke was for sale for 99 cents and Big K was for sale for 95 cents, Big K didn't sell almost at all because the spread was so small, consumers would virtually all opt for Coca-Cola.

CX 3921 at 386 [Currie].

This study supports the conclusion that sales of nonbranded CSDs would not constrain a retail price increase to consumers of branded CSDs when the initial price gap is the average size that we observe -- that is, branded CSD prices averaging 20-30% above the prices for private/warehouse soft drinks.¹⁸¹ Since the study indicates that consumers' preferences for Coke products would not diminish until the prices for Coke products were more than 80-100% above the prices for private label products, the study indicates that retailers most likely could pass along to consumers any 5% or other small but significant, nontransitory price increase by branded CSD bottlers. This ability would likely diminish the incentives of retailers to fight

The ALJ cited testimony of Robert Chapman of H.E.B., a retailer, that his belief was that, if prices of branded CSDs decreased, sales of private labels would decrease. IDFF paragraph 216. That such substitution might occasionally occur, however, does not establish that if prices of branded CSDs generally increased, then sales of private label would increase sufficiently to make the price increase unprofitable for the branded CSDs.

¹⁸¹ See note 168 *supra*.

such a price increase, since they would not have to absorb the price increase themselves.

c. Views of Concentrate Companies

Evidence from concentrate firms also is consistent with a product market confined to branded CSDs. CCUSA analyzes the market with regard to branded CSDs.¹⁸² CCUSA performs business reviews of retail accounts in which it evaluates the performance of Coke products. In its 1988 H.E.B. business review, it listed the top ten brands of CSDs in both San Antonio and Austin; not one private label or warehouse brand was listed.¹⁸³ The 1990 Marketing Program presented to H.E.B. by CCUSA and Coca-Cola bottlers discusses and makes comparisons among only branded CSDs.¹⁸⁴ CCUSA generally has compared its prices of cherry Coke and Mr. PIBB only to Dr Pepper and not to any nonbranded CSD.¹⁸⁵

PepsiCo as a concentrate company looks at the retail prices of only branded CSDs.¹⁸⁶ Pepsi performs periodic competitive analyses comparing Pepsi brands to CSDs of its competitors.¹⁸⁷ These studies generally do not involve private label CSDs.¹⁸⁸ Arthur Christiani,

¹⁸² CX 2547; CX 801; CX 803; CX 1892 L.

In the instances where CCUSA compared its products with nonbranded CSDs, the comparison involved a CCUSA product that diverges from the profile of a branded CSD. For example, CCUSA analyzes Fanta, which is not nationally advertised, in comparison to warehouse-delivered Shasta and private label brands. *See, e.g.*, CX 3436 B, C; RX 687 D, M; RX 958 B-D; CX 1084; CX 1991-Z31; Howell, Tr. 4029-31, 4023-25. In assessing whether to create a Fanta line of flavors, CCUSA believed that "[a] Fanta line would be unlikely to incur competition from Pepsi Cola USA," and that "Fanta cola would compete with Coke and Coca-Cola classic only on the fringe, and thus not have any significant negative effect on these two brands." CX 799 F. For CCUSA's branded CSDs, the documents reveal only infrequent references to concern about competition from private label and warehouse brands. *E.g.*, CX 169 C (concern that some Coke sales had been lost to private label or warehouse brands).

¹⁸³ CX 506 T, Q, U.

¹⁸⁴ CX 2263.

¹⁸⁵ CX 790 E; CX 791 M.

¹⁸⁶ CX 381 I. Concentrate companies subscribe to Nielsen's retail sales report service, which provides one collective entry for most private label and warehouse-delivered CSDs (except Shasta and Faygo). RX 694 at 13, 16; RX 2806. Concentrate firms do not subscribe to SAMI, which provides detailed analyses of the sales of warehouse-delivered brands, including CSDs. Clarke, Tr. 4279.

¹⁸⁷ CX 381.

¹⁸⁸ CX 3912 at 121 [Christiani].

Two documents have compared the profitability of DSD versus warehouse delivery for retailers and noted that, to compete with warehouse on price, it would be necessary for Pepsi to lower costs, since DSD costs more than warehouse delivery. CX 385 X to Z-53; CX 1922.

manager of business analysis for Pepsi, explained the process by which he performs retail elasticity studies for Pepsi.¹⁸⁹ Christiani concluded when a retailer promotes its private label CSDs it does not supplant purchases of Coke or Pepsi products.¹⁹⁰ He also concludes that, generally, “[i]t is hard for a private label brand to gain share from a national brand because of the types of consumer dynamics.” CX 3912 at 65-66, 97 [Christiani].¹⁹¹

When Dr Pepper performs reviews of retail accounts, it does not compare the performance of Dr Pepper brands with private label or warehouse soft drinks.¹⁹² Dr Pepper looks to Coke, Pepsi, 7-Up and RC products when comparing sales volume movements, not to those of private label and warehouse soft drinks.¹⁹³ During the period of time that Dr Pepper Company owned and operated production facilities, its review of these operations involved analysis of Dr Pepper products’ performance with branded CSDs.¹⁹⁴

The testimony of other market participants similarly confirmed that the pricing and marketing of branded CSDs is separate from that for non-branded CSDs. For example, A&W does not market its A&W brand products against private label products, nor does it develop marketing strategies with respect to private label products.¹⁹⁵ Michael Skinner of Shasta testified that increasing the price difference between his warehouse-delivered CSDs and DSD-delivered CSDs was not profitable,¹⁹⁶ that he saw little response by Pepsi or Coca-Cola to Shasta’s prices,¹⁹⁷ and that he experienced price pressure from private label brands only in limited areas of the

¹⁸⁹ CX 3912 at 139-40 [Christiani].

¹⁹⁰ CX 3912 at 70 [Christiani].

¹⁹¹ Mr. Christiani testified that “a national brand can gain share from a private label brand temporarily if its price came down low enough.” CX 3912 at 65-66 (emphasis added). This statement does not establish the converse, of course. Mr. Christiani stated that private labels on sale would typically cannibalize Pepsi only if private label were included in the top three brands in the market, which was not the case in the six markets he examined. CX 3912 at 24-27 [Christiani].

¹⁹² CX 504; CX 206; CX 212 K-M; CX 214 H.

¹⁹³ CX 600; CX 836 J-Q; CX 2524; CX 2526; CX 834.

¹⁹⁴ CX 834; CX 2526.

¹⁹⁵ CX 3978 at 2096-97 [Lowenkron].

¹⁹⁶ RX 3011 at 3198-3201 [Skinner].

¹⁹⁷ RX 3011 at 3201 [Skinner].

country, not including Texas.¹⁹⁸ The testimony indicated that so-called 'boutique' firms such as Jolt Cola Co., Original New York Seltzer, Soho, Sundance and Snapple have no effect on the prices of branded CSDs.¹⁹⁹ The president of Double Cola stated that private label CSDs compete primarily with warehouse-delivered CSDs.²⁰⁰

The ALJ relied on evidence that the National Soft Drink Association includes a large variety of CSD and non-CSD beverages in its reports, and that government agencies put private labels with national brands in certain reports, as evidence of a product market broader than branded CSDs. ID at 61; IDFF paragraphs 205, 206. But neither the government's "SIC" categories nor the NSDA's categories track whether all of the items within each category could constrain price increases of the other items. We find the business records and testimony of market participants to be more probative of the relevant competitive issues and the weight of that evidence supports a product market confined to branded CSDs.

d. Pricing History and Price Patterns

(i) 1987-1990 Branded CSD Pricing in
San Antonio and Other Areas

The history of price changes by branded CSD bottlers during the 1987-1990 time period also provides some insight into whether branded CSDs are a relevant product market. In contrast to the ALJ,²⁰¹ we find that this evidence supports the existence of a product market of branded CSDs.

In 1987, the Pepsi COBO significantly increased its discounts in its territories overall, starting in San Antonio in particular.²⁰² Pepsi official Davis explained that the Pepsi COBO became concerned because they had only a few ads scheduled for the year and feared a

¹⁹⁸ RX 3011 at 3202 [Skinner].

¹⁹⁹ CX 3989 at 99-100, 169 [Shanks (Double Cola)]; CX 3941 at 320 [Schmid (7-Up)]; CX 3921 at 408 [Currie (Procter & Gamble)]; CX 3990 at 928 [Kalil (Kalil Bottling)]; RX 3014 at 3557-59 [Greenberg (Unadulterated Food Products)].

²⁰⁰ CX 3989 at 93 [Shanks].

²⁰¹ The ALJ interpreted the evidence surrounding these price changes as supportive of a product market including non-branded CSDs. *See, e.g.*, IDFF paragraph 222; ID 60. As we will discuss, we believe that the ALJ's conclusion resulted from a misinterpretation of the evidence.

²⁰² Davis, Tr. 4527, 4548-59.

loss of volume if something was not done to compensate for the lack of ads.²⁰³ They decided that, in San Antonio, they wanted to be “at least one, if not two, [price] levels below Coke,” and that “[w]herever Coke went, we’d go a little lower.”²⁰⁴

Davis stated that the Pepsi COBO serving San Antonio “led” pricing down in 1987.²⁰⁵ According to Davis, during this period usually Pepsi would move its prices down first, and Coke would then match Pepsi’s lower prices.²⁰⁶ There was some variability in the direction of prices during this period. For example, in January 1988, Pepsi and CCSW raised prices.²⁰⁷ Similarly, in March, 1988, Coke moved its pricing for cans back up, and Pepsi followed. However, during the summer of 1988, Pepsi led pricing back down.²⁰⁸ Finally, in the fall of 1988, the price war abated when Pepsi led pricing back up.²⁰⁹ This conduct was in contrast to Coke’s usual position as price leader, which Mr. Davis described: “Coke is usually the leader in the market. They go up and then we usually follow, depending on our pricing structure.”²¹⁰

Davis described Pepsi’s 1987-88 pricing as Pepsi’s attempt to gain market share at the expense of losing money.²¹¹ He stated that the Pepsi COBO probably gained about four share points as a result of the deep discounting,²¹² but reported that the Pepsi COBO has found that it can “drive [its] business a lot easier” by bringing up prices and giving ad payments to retailers than by “trying to drive it just with price.”²¹³ Since the Pepsi COBO wanted to become more

²⁰³ Davis testified that Pepsi gains a “significant increase in volume” -- from 4 to 10 times the usual volume -- when an ad feature for Pepsi is on. Davis, Tr. 4504.

²⁰⁴ Davis, Tr. 4548.

²⁰⁵ Davis, Tr. 4527.

²⁰⁶ Davis, Tr. 4550-59.

²⁰⁷ Davis, Tr. 4557-58; Hilke, Tr. 5959.

²⁰⁸ Davis, Tr. 4558-59.

²⁰⁹ Davis, Tr. 4559. Overall, CCSW’s San Antonio wholesale net/net/net prices (that is, net of discounts, allowances, and ad payments) increased 2.8% (from \$6.11 to \$6.28) between 1987 and 1988. CX 4114; RX 3085.

²¹⁰ Davis, Tr. 4532.

²¹¹ Davis, Tr. 4560.

²¹² Davis, Tr. 4564.

²¹³ Davis, Tr. 4528.

profitable, it has now adopted a strategy of working on getting ads and not dropping prices so low.²¹⁴

Both the ALJ and CCSW rely heavily on two Pepsi documents,²¹⁵ stating that private label gained share at the expense of both Pepsi and Coke because of the 1988 price increases to show that branded and nonbranded CSDs are in the same product market. However, this reliance misses the point.

As Mr. Davis explained, private labels had lost share when branded CSD prices became so low during the deep discounting in 1987-88.²¹⁶ When branded CSD prices rose again, branded CSDs lost share back to the private labels because "you still have the price shopper that's going to pick up the private label."²¹⁷ Mr. Davis agreed that both Pepsi and Coke had taken "a volume hit" when branded CSD prices rose again,²¹⁸ but pointed out that, since Pepsi's Nielsen data include Big Red in the category of private label, "we're not really sure how much of it is Big Red and how much of it is private label."²¹⁹

A resolution of whether Pepsi actually lost volume to private label instead of to Big Red is not necessary for disposition of this issue, however. The question is not simply whether a branded CSD price increase caused branded CSDs to lose share to private labels. Rather, the question is whether any loss of share made the price increases so unprofitable that Pepsi or Coke rescinded them. If no rollback of the price increases occurred, then one can assume that Pepsi and Coke found them profitable despite any loss of volume to private label, and that therefore their pricing was unconstrained by private label.

The testimony shows that whatever losses of volume to private label might, have occurred were insufficient to constrain price increases of branded CSDs in the San Antonio area in 1987-88 or in other, more recent times. Mr. Davis testified that Pepsi had no concern about possible volume losses to private label and that Pepsi

²¹⁴ Davis, Tr. 4528. Davis testified that, although the Pepsi COBO has always lost money in the San Antonio area, it lost a lot more as a result of the deep discounting in 1987-88. Davis, Tr. 4561.

²¹⁵ *E.g.*, RX 2503 A.

²¹⁶ Davis, Tr. 4528-29.

²¹⁷ Davis, Tr. 4529.

²¹⁸ Davis, Tr. 4529.

²¹⁹ Davis, Tr. 4829-30.

had not rolled back any wholesale prices or increased any discounts to retailers in response to increased private label sales resulting from H.E.B. private label ads.²²⁰ He noted that Pepsi had rolled back some wholesale price increases in 1990 due to competition with Coke, not because of private label price competition.²²¹

Grant-Lydict's Big Red followed CCSW's pricing increase in 1989 as confirmed in an internal lender report which relates a conversation that the author of the report had with Toby Summers, CCSW's president, and David Green, CCSW's chief financial officer:

Toby [Summers] and David [Green] analyzed month-by-month performance beginning with January, 1989.

. . . In February, TBG implemented a 6% price increase at the wholesale level resulting in a 3% to 4% net price increase after discounts. Big Red matched the price increase immediately in mid-February. Pepsi matched the price increase on March 1.

CX 3806 Z56.

In addition, Mr. Bodnar of Grant-Lydict testified that if CCSW raises its prices, the convenience stores and independent stores will raise Big Red's retail prices to match CCSW's prices even if Grant-Lydict does not raise Big Red's wholesale prices. Thus, Mr. Bodnar's practice is to raise his prices when CCSW's increases its prices.²²² For example, in early 1990, CCSW raised the wholesale prices of certain of its package sizes, and Grant-Lydict maintained its same price levels. A month later Mr. Bodnar surveyed 100 accounts and found that:

Our retails went up to match Coke's. So we had no choice but to raise our levels. I mean, the retailer was taking the long margin on us.

Bodnar, Tr. 1493.²²³

Although this evidence alone is not dispositive, it is overall supportive of the existence of a branded CSD product market.

²²⁰ Davis, Tr. 4530-32, 4760.

²²¹ Davis, Tr. 4531-32.

²²² Bodnar, Tr. 1492-96.

²²³ Some retailers testified that they would not raise the price of one branded CSD based on a price rise for another, *e.g.*, Gonzaba, Tr. 2106-07, but Mr. Bodnar's review of 100 accounts indicates that it can happen.

(ii) Price Relationship Studies

When the prices for two products move in different directions over time, it indicates that the products are in different antitrust product markets.²²⁴ In this case, complaint counsel presented evidence attempting to show that prices for branded and non-branded CSDs have moved in different directions over time. We find, however, that complaint counsel's study is inconclusive and cannot be afforded much weight.

Complaint counsel's economic expert, Dr. Hilke, compared the relative net price movements of branded CSDs with those of private label and warehouse brands for 1987 through 1989.²²⁵ For his analysis, he used a "sign test," which simply tests whether the prices moved in the same direction, but does not provide any information on the relative differences in magnitude of any price movements.²²⁶ Using comparisons of quarterly data, Dr. Hilke found different direction price movements 2 times out of 10; using monthly data, he found different direction price movements 17 times out of 32.²²⁷ Complaint counsel argues that these data show that branded and nonbranded CSDs are in different product markets, especially since the sign test does not take into account possible large differences in same direction price movements. By contrast, respondent's economic expert, Dr. Strickland, asserted, and the ALJ agreed, that the data show highly parallel price movements that are not random.²²⁸

Overall, we find that the price movement data is not particularly useful in resolving the product market question. Especially for branded CSDs, which are frequently sold on low-priced ad features, prices may change on a week-to-week basis; the unusually large swings in price attest to this.²²⁹ Comparisons of monthly data, in our view, are overly sensitive to this problem.

Moreover, even assuming that this problem can be overcome by comparisons of quarterly (instead of monthly) data -- which is not

²²⁴ See *United States v. Aluminum Co. Of America*, 377 U.S. 271, 276-77 (1964); see generally Antitrust Law Developments (3d) at 285 (1992).

²²⁵ CX 1678 A-D.

²²⁶ Hilke, Tr. 5954.

²²⁷ CX 1678 A-D.

²²⁸ Strickland, Tr. 8060; IDFF paragraph 232.

²²⁹ See Section IV.C.3 *supra*.

obvious to us -- and that the quarterly data show similar direction price movements, such nonrandomness can be caused for reasons other than that branded and nonbranded CSDs are in the same product market. For example, there is ample testimony that soft drink prices in general (as is true for many retail prices) are seasonal.²³⁰ The prices of products in two different antitrust product markets could well exhibit some movements in the same direction simply because of seasonal price changes or holiday-oriented discounting. Such may well be the case here.

In sum, we do not rely on the price movement data because we believe they are unreliable and should be given little weight. In any case, the results are inconclusive and therefore do not add to the substantive analysis.

e. Views of Retailers

Evidence from retailers is consistent with a product market confined to branded CSDs. Trish Adams, the senior DSD buyer for all Target Corporation stores²³¹ testified that Target department stores have a limited amount of shelf space to dedicate to CSDs. Consequently, Target meets consumer demand head-on by offering only branded CSDs. This demand includes Big Red in San Antonio.²³² Even a 20% increase in branded CSD prices would not motivate Target to include private label CSDs in its beverage aisle.²³³ When Target carried private label CSDs, branded CSDs were not affected by placing private label CSDs on sale.²³⁴

Circle K and 7-Eleven convenience stores had private label CSDs at one time, but discontinued them.²³⁵ Mass merchandisers in San Antonio also do not carry the private label CSD, Texas Cola, because they only want branded CSDs.²³⁶

²³⁰ See Section IV.C.3 *supra*.

²³¹ CX 3814 at 5 [Adams].

²³² CX 3814 at 9-11 [Adams]. San Antonio is Big Red's largest market, and Grant-Lydict is the largest Big Red bottler. IDFF paragraph 85; Turner, Tr. 953.

²³³ CX 3814-54 [Adams]. See also CX 3821-48 [Imper].

²³⁴ CX 3814-36, 39-41.

²³⁵ Howell, Tr. 4000; Knowles, Tr. 2892.

²³⁶ Hixon, Tr. 7358-59.

4. Summary

We find that the weight of the evidence establishes the existence of a relevant product market limited to branded CSDs. With respect to the cross-elasticity of wholesale prices, there is consistent San Antonio bottler testimony that they could profitably raise branded CSD prices by 10%. Similarly, the documents and testimony of bottlers, concentrate companies, and retailers overall indicated that branded CSDs are priced in comparison to other branded CSDs, not private label or warehouse brands. With respect to retail pricing of finished products, the weight of the evidence demonstrated a persistent price gap between branded and non-branded CSDs, reflecting a premium that consumers are willing to pay for branded CSDs. There was no testimony or other evidence that retailers would be unable to pass along any cost increases for branded CSDs, thus possibly putting pressure on bottlers to refrain from price increases.

With respect to industry perceptions, the documents and testimony consistently supported significant distinctions between branded and non-branded CSDs in terms of prices, level of brand name recognition and advertising support, method of distribution, and availability in different channels of distribution. Thus, we conclude that the weight of the evidence shows a relevant product market of branded CSDs.

V. THE RELEVANT GEOGRAPHIC MARKET

Having determined the product market to be branded CSDs, we turn now to defining the geographic market, the second "necessary predicate" for analyzing an acquisition's effect on competition. See *United States v. Marine Bancorporation*, 418 U.S. 602, 618 (1974); *Brown Shoe Co. v. United States*, 370 U.S. 294, 324 (1962); *United States v. E.I. DuPont de Nemours & Co.*, 353 U.S. 586, 593 (1957). Such an inquiry is, of course, a prerequisite to determining whether the acquisition may result in a substantial lessening of competition in branded CSDs "in any section of the country" (Clayton Act Section 7, 15 U.S.C. 18). See *United States v. Marine Bancorporation*, 418 U.S. at 618.

Complaint counsel alleges that the geographic market within which to assess this acquisition consists of a ten-county area centered

around San Antonio, Texas (the "San Antonio market").²³⁷ These ten counties comprised the original territory granted through the 1984 sale of the Dr Pepper franchise to CCSW. Respondent contends in response that the San Antonio market is inappropriately narrow, and suggests instead a far larger market that includes the major cities of San Antonio, Austin, Waco, Dallas, and Houston. See RX 2983. Although the ALJ ultimately failed to delineate a specific geographic market, he rejected the San Antonio market, finding that the relevant geographic market was larger than the ten-county area around San Antonio. See IDFF paragraph 245; ID 67.

For the reasons discussed below, we reject the ALJ's findings and conclude, based upon our own review of the record, that complaint counsel carried its burden of proving that the relevant geographic market is the San Antonio market. In reaching this conclusion, we note that the ALJ's geographic market evaluation was erroneous in several important respects. First and foremost, the ALJ's assessment must be disregarded because it was premised on an incorrect and unreasonably broad view of the product market as encompassing not only branded CSDs, but also private label and warehouse (non-branded) CSDs, mixers, seltzers, non-carbonated beverages (e.g., Lipton Iced Tea), and isotonic drinks (e.g., Gatorade). Second, the ALJ failed to apply the proper standard for defining a geographic market, as set forth in the Merger Guidelines, at Section 1.21, 4 Trade Reg. Rep. (CCH) paragraph 13,104 at 20,573.²³⁸ See Adventist Health System/West, FTC Dkt. 9234 (Apr. 1, 1994), 5 Trade Reg. Rep. (CCH) paragraph 23,591 at 23,258. In addition, the ALJ gave undue weight to, and otherwise misapplied, the Elzinga-Hogarty test concerning shipping patterns.

Under Section 1.21 of the Merger Guidelines, the relevant geographic market is defined as the smallest region within which a hypothetical monopolist could "profitably impose at least a 'small but significant and nontransitory' increase in price, holding constant the terms of sale for all products produced elsewhere." The "profitably impose" language implicitly recognizes that, in the face of a price

²³⁷ This proposed market includes seven counties (Atascosa, Bandera, Bexar, Frio, Kendall, Medina, Wilson) and portions of three others (Blanco, Comal, and Karnes). IDFF paragraph 245.

²³⁸ The approach to geographic market in the Merger Guidelines is essentially identical to that taken in Section 2.3 of the 1984 Merger Guidelines, 4 Trade Reg. Rep. (CCH) paragraph 13,103 at 20,558.

increase, some sales will inevitably be diverted elsewhere, as would be expected. Consequently, a geographic market will exist, notwithstanding some diversion of trade, so long as the additional profit from the price increase over the remaining customers exceeds the profit lost from the trade that was diverted.

In defining the geographic market using the methodology described in the Merger Guidelines, the Commission begins with the location of the merging firms and asks what would happen if a hypothetical monopolist imposed at least a "small but significant and nontransitory" price increase, typically 5% over a one-year period. If, in response to the price increase, the reduction in sales would be sufficiently large to render the price increase unprofitable, then the agency adds the next best substitute location to the proposed market, and the test is repeated. *See* Adventist Health-System/West, 5 Trade Reg. Rep. (CCH) paragraph 23,591 at 23,258.

The record contains direct evidence establishing that a hypothetical monopolist selling branded CSDs in the San Antonio market could profitably raise prices by more than 5% for a nontransitory period. Most significantly, branded CSD bottlers in the San Antonio market provided undisputed testimony to the effect that they could profitably -- and without fear of outside competition -- raise their prices by as much as 10% if other branded CSD bottlers in this market did the same.²³⁹ Consistent with the foregoing evidence, bottlers of branded CSDs outside the San Antonio market testified that they would not ship into the San Antonio market, even if the price of branded CSDs in that market increased by 10%.²⁴⁰

Another consideration that directly bears upon the likely response to a price increase is the fact that competition in the local soft drink industry is characterized by the use of exclusive territories.²⁴¹ Concentrate firms grant bottlers exclusive rights (franchises) to manufac-

²³⁹ Bodnar, Tr. 1492, 1496, 1762; Davis, Tr. 4610; Koch, Tr. 1815-16; Turner, Tr. 995-96.

Respondent argues that this testimony should be disregarded because the hypothetical question posed by complaint counsel failed explicitly to incorporate a one-year time frame. We disagree. Because the question was framed in terms of profitability (*see, e.g.*, Davis, Tr. 4610), we believe that this question was correctly understood by the witnesses as referring to a nontransitory price increase, *i.e.*, a price increase that would be maintained for more than an insignificant period of time. Consequently, we accept the responses as constituting probative evidence of the existence of a San Antonio market.

²⁴⁰ Turner, Tr. 8598-99; Campbell, Tr. 1946-47; Van Houten, Tr. 8470-76; Koch, Tr. 8625-26; Davis, Tr. 4476-78; Bodnar, Tr. 1712-13, 1372; Neslage, Tr. 8720-23.

²⁴¹ CX 1666.

ture and sell, in a specified geographic territory, soft drinks in bottles and cans bearing the concentrate company's trademark and using its formula.²⁴² This feature is universal for packaged branded CSDs and for pre-mix fountain syrup, and partial for post-mix fountain branded CSDs.²⁴³ We will first address the operation of exclusive territories for sales of packaged branded CSDs and pre-mix fountain syrup.

Under the exclusive franchise agreements, concentrate firms prohibit their franchised bottlers from transshipping, that is, from shipping packaged CSD products, pre-mix fountain syrup, and concentrate outside of the exclusive franchise territory for which they are licensed into the franchise territory of another bottler.²⁴⁴ The restrictions against transshipping are vigorously enforced.²⁴⁵ Indeed, they have become stricter over time, with increased penalties and tighter monitoring.²⁴⁶

Because territories of the branded CSD bottlers are exclusive, branded CSD bottlers outside of the San Antonio market would be contractually prohibited from selling packaged CSDs to a San Antonio customer that looked for an alternative seller outside the San Antonio market in order to a small but significant, nontransitory price increase by a San Antonio branded CSD bottler. Moreover, the impact of territorial exclusivity within the San Antonio market is highlighted by the fact that the major branded CSD bottlers in San Antonio also possess exclusive rights in various other portions of the immediately surrounding area beyond the ten-county San Antonio market. *See, e.g.*, IDFF paragraph 275-77 (showing CCSW, Pepsi and Grant-Lydic's exclusive franchises in Texas).²⁴⁷ Consequently,

²⁴² See CX 102 G; CX 1666 A-E; CX 418 F; CX 1853 ZI; RX 2850 A; Howell, Tr. 4004; Dr Pepper Company, RX 2908 A-D; E. Hoffman, Tr. 381-82; Bodnar, Tr. 1372; Neslage, Tr. 8720; CX 574 A; CX 896 Z6; CX 891 K.

²⁴³ All major concentrate firms provide exclusive geographic territories for their pre-mix fountain syrup. Summers, Tr. 6894 Davis, Tr. 4470; Knowles, Tr. 2671, 2681; CX 379 Z71-Z84; CX 1667 B-C; Strickland, Tr. 8681; Turner, Tr. 1086; CX 1406 Z5. While Pepsico provides exclusive geographic franchise territories for its post-mix fountain syrup (Davis, Tr. 4470; Knowles, Tr. 2670; Strickland, Tr. 8681; Turner, Tr. 1086), CCUSA and Dr Pepper do not (Knowles, Tr. 2681; Summers, Tr. 6895; Strickland, Tr. 8681; Turner, Tr. 1086; Cassagne, Tr. 7619; CX 418 K).

²⁴⁴ CX 1667 A-D; CX 1853 ZI; Davis, Tr. 4473-74; Knowles, Tr. 2742; Turner, Tr. 1055; Schwerdtfeger, Tr. 2414-15.

²⁴⁵ CX 1667 A-D; CX 3009 A-B; CX 3432 B; RX 2850 B; CX 3414 A-C, RX 2908 B; Knowles, Tr. 2743-44; CX 3976 at 2111-12 [Quirk]; Summers, Tr. 6901, 6920; CX 2203 A; CX 3011; Schwerdtfeger, Tr. 2414-15.

²⁴⁶ Davis, Tr. 4473-74; Little, Tr. 674-75, 679.

²⁴⁷ See also RX 352 (CCSW); RX 2973 (Pepsi).

a collective price increase by the branded CSD bottlers in the San Antonio market would be far more difficult to defeat than in conventional markets.

San Antonio retailers uniformly testified that they would not purchase their branded CSD requirements from an outside bottler even if the outside bottler offered substantially lower prices.²⁴⁸ This is because retail accounts will abide by bottlers' geographic territory limitations, and therefore will not purchase outside of those territories or transship into their own territories, even if CSD prices were to go up significantly.²⁴⁹ In addition, retailer transshipment is unlikely due to the high cost of DSD delivery.²⁵⁰ Retailers are presumably also reluctant to purchase transshipped products because the retailers would have to compensate for the loss of DSD marketing assistance,²⁵¹ a factor as important as price in the sale of CSDs.²⁵² We therefore turn next to the possibility of unauthorized transshipments by branded CSD bottlers.

Importantly, the record shows very few, if any, significant instances of transshipment of branded CSDs into the San Antonio

²⁴⁸ CX 3963 at 28-29 [Thurmond]; E. Hoffman, Tr. 388-90; Davis, Tr. 4476; Chapman, Tr. 7213; Hiller, Tr. 5367; CX 3815 at 28-29 [Joyner]; CX 3814 at 35 [Adams]; CX 3985 at 89 [Daub]; CX 1853 ZI; Little, Tr. 659-60, 674-76, 679.

²⁴⁹ *Id.*

Another possible explanation for retailers' unwillingness to purchase outside the San Antonio market if faced with a price increase may be that retailers do not absorb price increases charged by bottlers, but rather typically respond by passing the price increase along to the ultimate consumers. Kaiser, Tr. 3196; Chapman, Tr. 7212, 7255-56; Brinkley, Tr. 2235; Anderson, Tr. 3904; Davis, Tr. 4533; Donald, Tr. 5300-01; Turner, Tr. 991. Because retailers would therefore likely pass on a 10% price increase (Anderson, Tr. 3904; Turner, Tr. 991; Donald, Tr. 5300-01), profitability would be relatively unaffected and retailers would have little motivation to undermine the increase.

²⁵⁰ DSD delivery, which generally involves delivery to the actual retail outlet, unpacking, and reshelving (Turner, Tr. 955-56, 1530-31, 6414-15), obviously entails high costs. *See* RX 0867 *supra* (study by CCUSA indicated that distribution accounts for about 35% of a bottler's costs). This would be even more true for retailer transshipment, where the retailer would also have to gather previously-delivered bottles and cans and repack the trucks. The record evidence indicating that shipping costs are relatively low (Amrosowicz, Tr. 807, 859-60) refers only to the freight costs incurred in shipping in bulk quantities from warehouse to warehouse.

²⁵¹ Bottlers pay for DSD, but retailers must pay for warehouse delivery. Summers, Tr. 6469.

²⁵² Summers, Tr. 7119.

market by franchised bottlers.²⁵³ Since it therefore appears that only relatively small quantities of branded CSDs have been transshipped into San Antonio, the issue is whether a price increase would induce transshipments in quantities sufficient to undermine that increase. We do not believe that this is a likely occurrence, for a variety of reasons.

First of all, as previously noted, exclusive territories are defined and enforced by concentrate companies, which strictly prohibit transshipping. Substantial penalties are imposed against an offender, creating monetary disincentives against transshipping.²⁵⁴ Also, the offended bottler is compensated for the loss of sales,²⁵⁵ thus creating an additional incentive to monitor and enforce prohibitions against transshipping. In fact, CCSW has complained against a bottler for as little as ten cases of transshipped product.²⁵⁶

Transshipping is also relatively easy to detect. DSD delivery provides bottlers with day-to-day contact with retail stores, and bottlers can often identify products by means of date codes and proprietary labels.²⁵⁷

End-use consumers will not undermine a price increase because it would not be worthwhile for most consumers to drive the substantial distance required to exit the ten-county San Antonio market

²⁵³ In the initial decision, the ALJ listed the major instances of transshipping shown in the record. See IDFF paragraph 288-94. Notably, however, these examples all involved transshipment between areas outside of San Antonio (IDFF paragraph 288-92; but see IDFF paragraph 293 (transshipping fines paid for undefined transgressions)) or by retailers (IDFF paragraph 294; RX 3121). None of them involved significant shipments of branded CSDs into San Antonio by franchised bottlers. See CX 3645 Z46 (69 cases of Coca-Cola and 20 cases of Dr. Pepper estimated to have been shipped into San Antonio over a two-month period in 1988). Moreover, the evidence of transshipment outside of San Antonio demonstrates that, in general, transshipment is minimal relative to total sales volume. Thus, for example, the fact that CCE paid more than \$1 million in transshipment penalties in 1989 (IDFF paragraph 293) pales in comparison to the company's sales of almost \$4 billion (Standard and Poor's Register of Corporations 624 (1990)); this penalty represents transshipments of far less than 1% of sales. Similarly, although SWCC received over \$200,000 in transshipping penalties in 1986 and 1987 (IDFF paragraph 291), this is less than .2% of SWCC's 1989 net sales. See CX 891 Z3; CX 1357 Z3. The 230 complaints against Pepsi COBO, mostly by the Oneta Company (IDFF paragraph 289), are likewise *de minimis* in comparison to Pepsi CODO's annual sales of around 11 million cases (RX 1238) and Oneta's annual sales volume of around \$10 million, representing about 1.5 million cases per year (Koch, Tr. 1906-07; CX 4114; RX 3085).

²⁵⁴ CX 3432 B; CX 531; CX 538; CX 2927; CX 534; CX 539; CX 1667.

An additional disincentive bottlers face is that parent concentrate companies may regulate the amount of concentrate that bottlers obtain in order to prevent them from transshipping. CX 1853 Z1.

²⁵⁵ Davis, Tr. 4822; E. Hoffman, Tr. 383; CX 379 Z41; CX 2327 A-F.

²⁵⁶ Summers, Tr. 6903-04; CX 2296 B.

²⁵⁷ E. Hoffman, Tr. 393-94; CX 3667 E.

simply to purchase CSDs at a slightly lower price. This common-sense conclusion is supported by ample record evidence.²⁵⁸

Thus, with respect to the overwhelming majority of branded CSD sales for which exclusive geographic territories exist, we conclude that there is no competitive force that would effectively defeat a small but significant, nontransitory price increase on branded CSDs in the San Antonio market. We next examine whether the existence of non-exclusive geographic territories as to certain post-mix fountain sales requires any different conclusion.

Dr Pepper franchises assign exclusive territories for bottlers' sales of post-mix fountain syrup, but allow food wholesaler and broker sales within a bottler's exclusive territory.²⁵⁹ Coca-Cola franchises do not grant any exclusive geographic territories for post-mix fountain sales.²⁶⁰ In addition, as noted earlier, both CCUSA and DPUSA control national account pricing for branded CSDs.²⁶¹ Thus, for post-mix fountain sales of Coke and Dr Pepper products from outside a San Antonio market, customers may look to Coke bottlers outside of San Antonio, food wholesalers and brokers, and the parent concentrate companies. Other branded concentrate companies assign exclusive territories for post-mix fountain syrup sales.²⁶²

These somewhat different facts do not lead us to any different geographic market definition, however. The Coke bottlers around San Antonio are CCSW itself and its sister corporation, SWCC; SWCC would be unlikely to constrain a price increase by CCSW.²⁶³ Food wholesalers and brokers must obtain fountain syrup from some

²⁵⁸ The San Antonio market is a compact population center surrounded by large, sparsely populated areas. See CX 1684 C; see also CX 4131, CX 4149. Indeed, a single county in this market, Bexar, contains approximately 86% of the total ten-county population. See CX 4131 A. This population distribution suggests limited alternatives for San Antonio consumers beyond the immediate market. Also, national and regional retailers view San Antonio as a separate retail market (see CX 3963 at 10-11 [Thurmond]; Hiller, Tr. 5332, 5347; CX 3985 at 8-9 [Daub]), thus demonstrating that consumers tend to shop in this area, and not beyond.

²⁵⁹ Turner, Tr. 1086-87; Short, Tr. 7597, 7619-20.

²⁶⁰ Knowles, Tr. 2681; Summers, Tr. 6895.

²⁶¹ See note 68 *supra*.

²⁶² This includes sales of post-mix fountain of Pepsi, RC, and 7-Up, all of which grant exclusive geographic territories as to post-mix fountain syrup. Davis, Tr. 4470; Knowles, Tr. 2670, 2681-82; Turner, Tr. 1086.

²⁶³ Both corporations are controlled by TBG. See Section II *supra*. CCSW's current franchise territory includes San Antonio and sixty counties in southern, central, and eastern Texas. IDFF paragraph 275. SWCC is the Coca-Cola bottler in west Texas. See Section II *supra*.

source; in the face of a hypothetical collusive price increase by input suppliers in the San Antonio market, food wholesalers and brokers, as a practical matter, would have to rely on the same sources we have outlined above: bottlers with exclusive rights in other portions of the immediately surrounding area and national concentrate companies that also sold inputs in the immediately surrounding area.²⁶⁴

We therefore conclude that, for the entire branded CSD product market, there is no competitive force that would effectively defeat a small, but significant and nontransitory price increase in the San Antonio market. Thus, we disagree with the ALJ's assessment of the relevant geographic market issue.

Rather than attempting to ascertain whether branded CSD bottlers in the San Antonio market could collusively impose a small but nontransitory price increase, the ALJ instead relied primarily, and almost exclusively, on the Elzinga-Hogarty test of shipping patterns.²⁶⁵ See ID 64-65. However, the Commission has previously found no basis for "definitive reliance" on the Elzinga-Hogarty test to establish a geographic market under the Clayton Act. *Adventist Health System*, 5 Trade Reg. Rep. (CCH) paragraph 23,591 at 23,259. Consequently, the Commission "does not . . . endorse either the 'strong' or the 'weak' test as the basis for establishing a relevant market." *Id.* at 23,260.

Shipping patterns, whether analyzed using the Elzinga-Hogarty methodology or in some other fashion, clearly constitute one source of information in analyzing the possible exercise of market power. But other evidence is equally relevant. *Adventist Health System*, 5 Trade Reg. Rep. (CCH) paragraph 23,591 at 23,259. In other words, shipping patterns are only one of many surrogates for assessing market power (*see, e.g., B.F. Goodrich Co.*, 110 FTC at 289), and

²⁶⁴ Although in theory food wholesalers and brokers might purchase fountain syrup from far outside the San Antonio area and ship it into San Antonio, the record is silent on whether it would be cost effective for wholesalers or brokers to do so in the face of a 5% or similar price increase on fountain syrup.

We are not implying that national concentrate companies would necessarily participate in any collusive branded CSD price increase; that is an issue we will address later. See Section VI.C *infra*. Rather, we are simply assessing the alternatives available to customers in the face of a hypothetical collusive price increase in post-mix fountain syrup. If the national concentrate companies participated in such a price increase, then it would be highly unlikely that they would undermine their own price increase in San Antonio by permitting food wholesalers and brokers to obtain fountain syrup at a lower price outside San Antonio.

²⁶⁵ See Kenneth Elzinga & Thomas Hogarty, *The Problem of Geographic Market Delineation Revisited: the Case of Coal*, 23 Antitrust Bull. 1 (1978); Kenneth Elzinga & Thomas Hogarty, *The Problem of Geographic Market Delineation in Antitrust Suits*, 18 Antitrust Bull. 45 (1973).

therefore should not be overemphasized, as the ALJ erroneously did here in describing them as “perhaps the best test in determining a geographic market.” ID 64.

Moreover, the Elzinga-Hogarty test is less relevant to settings like this one, where territorial exclusivity imposes legal and contractual impediments to transshipping by competitors.²⁶⁶ By virtue of exclusive territories, legal bottler shipments from outside the geographic area (*e.g.*, contract packing) are controlled by franchised bottlers within the area;²⁶⁷ other shipments are in violation of contract. Shipments from outside the San Antonio market that are under the control of a hypothetical collusive group would obviously not be used to defeat a price increase. Because the Elzinga-Hogarty test nonetheless takes such shipments into account, the test is an especially imperfect measure of market power in this case. Finally, to the extent that the Elzinga-Hogarty test has some limited value in the present context, the ALJ completely undermined the test by using the wrong product market, thus skewing the analysis.²⁶⁸

Relative prices and movements of those relative prices are additional surrogates for the ability to exercise market power and, as such, can be useful considerations to assist in defining a geographic market. *See B.F. Goodrich Co.*, 110 FTC at 289. If prices of branded CSDs in the San Antonio area moved together with one another, and independently from prices in other areas, this would support the conclusion that there is a San Antonio market.

²⁶⁶ Hilke, Tr. 6240-41.

²⁶⁷ CCSW produces cans in its Cuero facility outside the San Antonio market for distribution in San Antonio and elsewhere throughout its franchise territory. Summers, Tr. 6403-04. Grant-Lydic purchases its products from contract packers outside the San Antonio market. Turner, Tr. 929, 1117; Bodnar, Tr. 152627, 1557; Campbell, Tr. 1926, 1987; Espinoza, Tr. 4248-49. Pepsi COBO also imports both bottles and cans from outside the San Antonio market. Davis, Tr. 4461-62, 4464, 4630-32.

²⁶⁸ If all shipments of branded CSDs into and out of the San Antonio market that were not controlled by the franchised San Antonio bottlers were taken into account, the LIFO calculations would range from 78% to 85%, indicating a market. *See CX 4089.* (If analyzed in this manner, we would consider LOFI calculations irrelevant to the question of whether a price increase could be constrained in the present case.) Moreover, if an Elzinga-Hogarty analysis were conducted to measure shipments of take-home branded CSDs into and out of the San Antonio market that were not controlled by the franchised San Antonio bottlers both the LIFO (“little in from outside”) and LOFI (“little out from inside”) figures would approach 100%, thus satisfying even the most stringent Elzinga-Hogarty test. RX 3062 A.

In reaching this conclusion, we reject respondent’s assertion that this is a “tautological” approach that “assum[es] away the data of any supplier whom [the Commission] might choose to include in the market.” ABR-A 43. We simply believe it is inappropriate to reduce the LIFO and LOFI numbers by including shipments into or out of San Antonio that are controlled by the franchised San Antonio bottlers, because such shipments clearly would not be used to defeat a price increase.

While the only systematic price data in the record show differences in percentage price changes between the areas of San Antonio, Waco, and Corpus Christi,²⁶⁹ there is also at least some weak evidence suggesting price uniformity throughout at least some bottling territories.²⁷⁰ On balance, we find the evidence on relative prices and price movements to be weakly supportive of complaint counsel, but relatively unreliable, and therefore we do not rely on it.²⁷¹ We do not view the essentially inconclusive nature of this evidence as significant, however, because the more probative evidence strongly points to the existence of a San Antonio market, and also because the confounding effects of ad features and in-store displays would, in any event, limit our ability to discern true price variations.²⁷²

Finally, it is clear from the record that recognition of a San Antonio market comports with both economic and geographic realities. From an economic perspective, a number of trade and marketing factors support this market definition. For example, national and regional retailers view San Antonio as a separate retail market.²⁷³ These retailers run localized advertising and marketing campaigns that treat the San Antonio market as a separate and distinct marketing area.²⁷⁴ Retail prices and sales of CSDs in the San Antonio market are compiled separately, and compared to prices and sales in other geographic markets.²⁷⁵ The behavior of retailers thus constitutes strong confirmation of the existence of a San Antonio market.

Viewed from a geographic and demographic perspective, a San Antonio market is eminently sensible. The San Antonio area is a

²⁶⁹ See, e.g., CX 3999 A, E.

²⁷⁰ See, e.g., Summers, Tr. 6711, 6719; RX 2985.

²⁷¹ In reaching this conclusion, we reject the ALJ's essentially unsupported finding that CSD prices "are uniform in a trade area beyond the ten-county area." ID 66. Although the ALJ found that H.E.B. preferred a uniform price throughout its territory, the cited testimony demonstrates that local competitive conditions generally prevented this (Chapman, Tr. 7247, 7200-01). The exhibit (RX 2985) cited for the proposition that numerous bottlers (Pepsi COBO, CCSW, CCE and Grant-Lydic) offered H.E.B. uniform pricing applies only to Pepsi COBO, not to the other companies, and fails to reflect the fact that those prices were often not accepted. See CX 4111; Hilke, Tr. 8507-08.

²⁷² Another problem with price movement data is that prices change seasonally, so that prices of different brands and products will reflect this seasonality whether they are in the same market or not. This means any simple "statistical analysis" of sign changes can be misleading, and is yet another reason why we believe that comparisons of price movements are of little value here.

²⁷³ Hiller, Tr. 5333, 5347; CX 580; CX 3963 at 10-11 [Thurmond].

²⁷⁴ Chapman, Tr. 7198-200; Kaiser, Tr. 3187-89; Hiller, Tr. 5347; CX 1054 P-S.

²⁷⁵ CX 2263 F-R, U-Z6; CX 580; Kaiser, Tr. 3188-89; CX 1014 A-M.

compact population center, with 86% of its population in a single county, that is surrounded by large, sparsely populated areas.²⁷⁶ By virtue of this population distribution, consumers in the San Antonio market would appear to have only limited realistic alternatives beyond the immediate market.

In sum, we conclude that the ten-county San Antonio market is the relevant geographic market within which to assess the challenged acquisition.

VI. THE LIKELY COMPETITIVE EFFECTS OF THE ACQUISITION

The purpose of Section 7 of the Clayton Act is to prevent mergers or acquisitions whose effect "may be substantially to lessen competition, or to tend to create a monopoly."²⁷⁷ To fulfill this purpose, we seek to discern whether a particular transaction is likely to create or enhance market power or to facilitate its exercise.²⁷⁸

"Market power" is "the ability profitably to maintain prices above competitive levels for a significant period of time," or to "lessen competition on dimensions other than price, such as product quality, service, or innovation."²⁷⁹ In certain circumstances, firms may exercise market power jointly through collusive conduct. Thus, one prong of our inquiry focuses on whether the transaction under scrutiny here may enable the acquiring firm to cooperate (or cooperate better) with other leading competitors in raising price or reducing output or colluding on other aspects of competition.²⁸⁰ In other circumstances, a firm may exercise market power unilaterally by raising price and reducing output.²⁸¹ Thus, the other prong of our inquiry focuses on whether the acquisition at issue here may facilitate the exercise of unilateral market power.

The ALJ found that, since complaint counsel had failed to establish a relevant product market, an accurate measure of concentration

²⁷⁶ See note 258 *supra*.

²⁷⁷ 15 U.S.C. 8. Mergers are subject to Section 5 of the Federal Trade Commission Act if they constitute an "unfair method of competition."

²⁷⁸ Merger Guidelines, Section 0.1.

²⁷⁹ Merger Guidelines, Section 0.1 & n. 6; Owens-Illinois, slip op. at 4-5 (quoting 1984 Guidelines).

²⁸⁰ See *HCA v. FTC*, 807 F.2d at 1386; *B.F. Goodrich*, 110 FTC at 294.

²⁸¹ Merger Guidelines, Section 2.2.

levels was not possible, and that, in any case, there was a “wealth of proof of competition” in CCSW’s trade. ID 67. As set forth above, we find that the ALJ erred in his assessment of the relevant product and geographic market. Using the correct relevant market -- branded CSDs in San Antonio and the immediately surrounding counties -- we find that there is ample evidence of the likelihood of competitive harm from the acquisition at issue here, both in terms of likely coordinated interaction and unilateral effects.

A. Market Concentration

In *United States v. Philadelphia National Bank*,²⁸² the Supreme Court noted that a crucial initial question in merger cases is whether the transaction at issue “produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, [such that] it is..... inherently likely to lessen competition substantially....” 374 U.S. at 363; accord, *B.F. Goodrich*, 110 FTC at 303-304.

The transaction at issue in this case raised concentration levels significantly in an already highly concentrated market, as measured by the Herfindahl-Hirschmann Index (“HHI”).²⁸³ The following are the pre- and post-acquisition HHIs in the relevant market:

Pre-acquisition HHI	2807
Post-acquisition	3421
HHI Increase	614 ²⁸⁴

Under the Merger Guidelines, “[w]here the post-merger HHI exceeds 1800, it will be presumed that mergers producing an increase in the

²⁸² 372 U.S. 321 (1963).

²⁸³ The HHI is calculated by summing the squares of the market shares of the market participants. The HHI ranges from 10,000 in a pure monopoly to near zero in a purely atomistic market. Merger Guidelines, Section 1.5 & n. 17.

²⁸⁴ CX 4146A, H. These data were provided by complaint counsel, but they are based on data used by respondent’s expert, Dr. Strickland, in RX 3057 and RX 3058, with adjustments made to equate fountain units with package units. We rely on these data, rather than complaint counsel’s proposed HHI calculations because these data include CCUSA, DPUSA, and fountain wholesalers in the market as sellers of post-mix fountain syrup. We agree with respondent that those post-mix fountain sales must be attributed to the entity that sets the price for the sales, not to CCSW, although CCSW does deliver many of these sales for a delivery fee from the parent concentrate company. See Summers, Tr. 6500-6501, 6507.

HHI of more than 100 points are likely to create or enhance market power or facilitate its exercise.” Merger Guidelines, Section 1.51. These figures show that the relevant market was highly concentrated before the acquisition and became significantly more so as a result of the acquisition.

The resulting post-acquisition HHIs are in the same range as or higher than those in most of the cases in which the Commission has successfully litigated a challenge to a merger or acquisition in the last ten years.²⁸⁵ For example, they significantly exceed the HHIs in the VCM market in *B.F. Goodrich*, which were found to justify a “relatively strong presumption of anticompetitive effects.”²⁸⁶ These HHIs, which are much larger, create a strong presumption of possible anticompetitive effects; thus, relatively strong evidence from other factors will be necessary to rebut that presumption.²⁸⁷

B. The Significance of Increased Concentration

The ALJ and respondent assert that these HHIs do not carry the same significance as other HHIs because, although they show a large increase in concentration, the number of market participants has remained the same. This argument ignores certain aspects of the information conveyed by HHIs, information that is particularly crucial to an accurate understanding of competition and the likeli-

²⁸⁵ See *Coca-Cola*, slip op. at 44 (HHI increase of 443 to post-merger HHI of 3572); *Occidental Petroleum Corp.*, Dkt. No. 9205 (Dec. 22, 1992), slip op. at 27 (post-acquisition HHI in one market of 1305 with increase of 158 points); *Owens-Illinois*, slip op. at 27 (using production figures, post-acquisition HHI of 2478 with increase of 852 points); *Olin Corp.*, 113 FTC 400, 610-11 (1990), *aff'd*, 986 F.2d 1295 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 1051 (1994) (based on production, post-acquisition HHI of 4122, with increase of 1186); *Hospital Corp. of America*, 106 FTC 361, 488 (1985) (post-acquisition HHI of 2416 with increase of 395 points).

²⁸⁶ In *B.F. Goodrich*, the parties presented various measures of the HHIs in the VCM market (*e.g.*, nameplate capacity, practical production capacity, and actual production). The highest HHI figures were those for actual production, which showed an HHI increase of 304 to produce a post-acquisition HHI of 1663. *B.F. Goodrich*, 110 FTC at 313. The Commission found that the data were “well above those that created a presumption of illegality in *United States v. General Dynamics* and *Weverhauser*,” and that the data supported a “relatively strong presumption of anticompetitive effects.” 110 FTC at 314.

²⁸⁷ See *PPG*, 798 F.2d at 1502-03 (acquisition resulting in 1352 point increase in HHI to post-acquisition HHI of 3295 put merger “well within the range where, absent really extraordinary circumstances, the Department and the Commission will proceed against an acquisition under section 7 of the Clayton Act on the theory that the increased concentration raises a likelihood of “interdependent anticompetitive conduct” [citations omitted]); *B.F. Goodrich*, 110 FTC at 314.

hood of collusion among and/or unilateral anticompetitive conduct by branded CSD bottlers.²⁸⁸

The HHI conveys information about both the number of market participants and the size disparity of the market shares among market participants. As explained by then-Judge Bork, writing for the Court of Appeals for the District of Columbia Circuit in *FTC v. PPG Industries, Inc.*:

Market power or the lack of it is often measured by the HHI. The FTC and the Department of Justice, as well as most economists, consider the measure superior to such cruder measures as the four- or eight-firm concentration ratios which merely sum up the market shares of the four or eight largest firms. The HHI, by contrast, is calculated by squaring the individual market shares of all firms in the market and adding up the squares. This method, unlike the four- and eight-firm concentration ratios, shows higher market power as the disparity in size between firms increases and as the number of firms outside the first four or eight decreases.

PPG, 798 F.2d at 1503 (emphasis added). Market share, of course, is an initial proxy for market power, since we typically have no direct means by which to measure market power. One premise underlying antitrust jurisprudence is that, absent other factors, a firm's market power is likely to increase as its market share increases, and that its market power relative to other market participants increases as its share becomes disproportionately larger than the shares of other market participants.²⁸⁹

In this case, the three main soft drink bottlers in the relevant market stayed the same -- CCSW, Pepsi COBO, and Big Red Bottling (now owned by Grant-Lydic) -- and the other sellers of post-mix fountain syrup (CCUSA, DPUSA, and fountain wholesalers) also remained the same. However, the acquisition increased CCSW's pre-acquisition market share from 44.7% to 54.5%.²⁹⁰

We conclude, based on the record, that CCSW's acquisition of the Canada Dry franchise, which accounted for only about 1% of this market share increase, had no anticompetitive effect. If only the

²⁸⁸ As we discuss in Section VI.C.1 *infra*, we do not find that tacit collusion among the branded CSD bottlers in the relevant market would likely be prevented or disrupted by the other market participants that sell post-mix fountain syrup that is, the parent concentrate companies and food wholesalers and brokers.

²⁸⁹ See *Warner Lambert Co.*, 87 FTC 812, 870 (1976); see also *Heublein, Inc.*, 96 FTC 385, 577 n. 10 (1980); W. Shepherd, *Market Power and Economic Welfare* 40 (1970).

²⁹⁰ CX 4146 H.

Canada Dry franchise had been transferred to CCSW, the pre- and post-acquisition HHIs would be as follows:

Pre-acquisition HHI	2807
Post-acquisition HHI	2862
HHI Increase	55

See CX 4146 H; CX 4079. Under the Merger Guidelines, such a change would be viewed as “potentially rais[ing] significant competitive concerns” Merger Guidelines Section 1.51. In terms of the competitive issues we discuss next, however, we find that virtually no evidence exists to demonstrate that a one-percent increase in CCSW’s market share due to an acquisition of the Canada Dry franchise would provide CCSW with significantly greater market power than it already had and thus would substantially lessen competition. We note that a one percent -- or even less -- market share increase might have competitive significance in circumstances where the one percent was being combined with several other low-percentage shares. In this transaction, however, it is clear that the 8.6% market share increase from the Dr Pepper franchise acquisition is the true source of the likely anticompetitive effects that we describe in the following sections.

The acquisition of the Dr Pepper franchise increased CCSW’s market share by about 8.6%.²⁹¹ This acquisition changed the number of product offerings that each firm had available and thus changed CCSW’s and Big Red Bottling’s relative costs of and advantages with respect to producing and marketing their branded CSDs.

As we explain in more detail below, such changes can significantly affect the ability and incentive of smaller bottlers such as Big Red Bottling to compete. In this case, the evidence confirms that CCSW’s acquisition of the Dr Pepper franchise provided CCSW with increased market power and left Big Red Bottling facing significant disadvantages.²⁹² As we discuss further below, this situation increases both the likelihood that CCSW and the Pepsi COBO could tacitly and successfully collude with Big Red Bottling -- since Big Red Bottling would have little or no ability or incentive to do any-

²⁹¹ *See* CX 4146 H; CX 4079 B; CX 1681 C.

²⁹² *See* Section VI.C.2 *infra*.

thing other than follow -- and the potential for an exercise of unilateral market power by CCSW.

C. The Likelihood Of Successful Collusion

1. The Market Participants Required for Successful Tacit Collusion

The first issue to be addressed is whether the presence of CCUSA, DPUSA, and fountain wholesalers as sellers of post-mix fountain syrup could prevent or disrupt any tacit or explicit collusive arrangement among the bottlers of branded CSDs in the San Antonio market. We find that fountain wholesalers would be unlikely to disrupt a hypothetical collusive arrangement that included bottlers and the parent concentrate companies, because fountain wholesalers must obtain fountain syrup either from bottlers or from the parent concentrate companies. Thus, the key issue is whether CCUSA and DPUSA might be likely to participate in a collusive arrangement with bottlers as to San Antonio sales of branded CSDs, including post-mix fountain syrup.

The evidence indicates that it is highly unlikely that either CCUSA or DPUSA would have the incentive to become part of a collusive arrangement in the San Antonio area. Both CCUSA and DPUSA use "national account" pricing for their post-mix fountain sales -- that is, pricing that is uniform across the geographic areas in which the chains and other purchasers of post-mix fountain syrup operate.²⁹³ CCUSA representative Short testified that this is one of the advantages perceived by the chain customers.²⁹⁴ Thus, there does not appear to be any incentive for either CCUSA or DPUSA to deviate from their national account pricing solely in the San Antonio area. Moreover, such a deviation would be highly noticeable and presumably hard to justify.

This does not mean that CCUSA and DPUSA post-mix fountain syrup sales would necessarily be sufficient to constrain an overall collusive branded CSD price increase instituted by the bottlers, however. First, as to post-mix fountain sales, both the CCUSA and the DPUSA representatives testified that they did not compete with

²⁹³ Short, Tr. 7739, 7797; Knowles, Tr. 2820.

²⁹⁴ Short, Tr. 7797.

the bottlers for the accounts to which the bottlers sold post-mix fountain syrup, because the bottlers typically served smaller accounts than those served by CCUSA or DPUSA.²⁹⁵ Thus, there is some reason to doubt that CCUSA or DPUSA would respond aggressively to a collusive branded CSD price increase by bottlers. Second, because post-mix fountain products (the channel in which CCUSA and DPUSA are present) are differentiated from other branded CSD products, it does not appear that expanded sales of post-mix fountain syrup by CCUSA and DPUSA would be sufficient to constrain a collusive overall branded CSD price increase by bottlers. Therefore, we turn next to whether CCSW's acquisition of the Dr Pepper franchise increased the likelihood of tacit collusion by branded CSD bottlers in San Antonio.

2. The Increased Likelihood of Tacit Collusion in the Take-Home Channel: Ad Features

The record suggests that CCSW's acquisition of the Dr Pepper franchise may have had an effect on Big Red Bottling's ability to obtain ad features, a significant element of competition. As we explained earlier, the most significant discounting and volume generation for take-home sales of branded CSDs occurs through ad features.²⁹⁶ The loss of significant franchises could reduce the ability of the smaller bottler to obtain ad features in retail chains, a key component in effective competition among branded CSDs. Without ad features, price decreases have much less effect on attracting volume.²⁹⁷ Moreover, even if the smaller bottler were still able to

²⁹⁵ CCUSA will provide national account pricing to any qualified entity with five outlets; DPUSA will provide national account pricing to any qualified entity with three outlets. Short, Tr. 7735-36; Knowles, Tr. 2821. Mr. Short of CCUSA testified:

Q. So then are you in competition with Coke Southwest for fountain accounts?

A. Not for fountain accounts, no. Not to pick up a fountain account. I have a segment of the business that I -- We manage the whole business. We allow them to go manage the local side of the business, and that's the part they manage. But we don't compete for that business.

Q. Does Coke Southwest compete for your national accounts?

A. No.

Short, Tr. 7800-01. Mr. Knowles of DPUSA testified that, for fountain sales not covered by DPUSA's national account price, "[t]hat's basically the bottler selling up and down the street to the buy downstairs, and he doesn't have a contract. So, I mean, who knows what he's paying for his syrup." Knowles, Tr. 2820. Indeed, Mr. Knowles testified that the prices at which bottlers sold post-mix fountain syrup probably already ran higher than DPUSA's national account price, but that he didn't know because "[w]e just don't get into it." Knowles, Tr. 2824.

²⁹⁶ See Section IV.C.3 *supra*.

²⁹⁷ See *id*

obtain some ad features, the loss of significant franchises might mean that those ad features would cost the smaller bottler significantly more than was previously the case -- another deterrent to effective competition. In addition, smaller retail outlets with limited shelf space are more likely to carry the high volume brands, other things being equal.²⁹⁸

Conversely, the addition of significant franchises to the holdings of a larger bottler such as CCSW could increase its advantages in terms of ad features. As a result, the smaller bottler may become less willing to challenge the market strength of the larger bottler through vigorous price competition and more willing to become a follower of noncompetitive market activity. We next examine whether the evidence demonstrates an increased advantage for CCSW and a decreased ability by Big Red Bottling to obtain ad features.

a. Big Red Bottling's Loss of "Critical Mass"

Ad features involve significant retailer advertising of specially discounted products. Retailers use ad features offering sharply discounted branded CSD prices as a means to "pull" customers into their stores. For example, Kaiser representative Mr. Kroger testified that: "We consider soft drinks the best customer count produced of any feature we run. It is the best item in grocery to run as a feature."²⁹⁹ Thus, branded CSDs are used by retailers as volume generators and to increase consumer foot traffic.³⁰⁰ They are often sold at cost or even as loss leaders in order to generate retail store volume.³⁰¹ As with retailers nationally, San Antonio retailers recognize CSDs as one of the largest, if not the largest, retail food item and promote them accordingly.³⁰²

²⁹⁸ See *id.*

²⁹⁹ Kaiser, Tr. 3231-33.

³⁰⁰ Davis, Tr. 4709; Turner, Tr. 1206; CX 3815 at 153 [Joyner]; Anderson, Tr. 3840-41, 3896; Chapman, Tr. 7256; Clarke, Tr. 4280; Brinkley, Tr. 2188; Knowles, Tr. 2840; CX 3821 at 48 [Imper]; CX 3814 at 54 [Adams].

³⁰¹ Kaiser, Tr. 3185-86; Coyne, Tr. 3485-86; Chapman, Tr. 7256; Turner, Tr. 973-74, 1206-07; Anderson, Tr. 3840-41; Clarke, Tr. 4280; Donald, Tr. 5289, 5297-98; Gonzaba, Tr. 2085; Brinkley, Tr. 2188; Sendelbach, Tr. 7696; Bodnar, Tr. 1570. These low prices are often known as "hot prices." Howell, Tr. 3952. See also IDFF paragraph 425 ("H.E.B. uses soft drinks as a loss leader").

³⁰² Sendelbach, Tr. 7695; Donald, Tr. 5288; Brinkley, Tr. 2187. San Antonio retailers advertise and promote branded CSDs, often at prices which are at or below cost. Sendelbach, Tr. 7698; Anderson, Tr. 3841; Turner, Tr. 973-74.

For branded CSD bottlers, the first priority for promotions is to get into the ad cycle. The second priority would be to have in-store displays.³⁰³ A bottler cannot grow its brands without attaining the volume lift benefit associated with an ad feature in the ad cycle; in-store specials alone are not enough to obtain the necessary volume increases.³⁰⁴ As discussed in Section IV, *supra*, bottlers are aware that ad features give much more volume "lift" than do in-store displays.³⁰⁵

Without "critical mass" or market share, however, a bottler's ability to get into the ad cycle is reduced because the retailer will not give a week of its ad cycle to a product that will not attract significant numbers of customers.³⁰⁶ "Critical mass" as related to advertising means that a bottler has a significant enough market share and consumer appeal that retailers believe it draws customers into the store.³⁰⁷ The more products or flavors a bottler has in its stable of products, the greater the overall ability it has to sell product.³⁰⁸ If a bottler only has a single brand, it requires significant brand equity or recognition to sell products.³⁰⁹ In order to put a CSD in an ad cycle, the retailer must be convinced that the CSD would be a good customer draw.³¹⁰ The bottler must have the market share or "pull-through" necessary to obtain the critical mass necessary to get into

³⁰³ E. Hoffman, Tr. 366.

³⁰⁴ Turner, Tr. 974.

³⁰⁵ Bodnar, Tr. 1498; Turner, Tr. 974; E. Hoffman, Tr. 362. An ad feature may give a bottler 10 times the non-featured sales volume, Bodnar, Tr. 1498; Davis, Tr. 4504; Koch, Tr. 1831 while an in-store display gives just twice to 2 1/2 times the normal sales volume, Bodnar, Tr. 1498. A month long display at an attractive price produces close to the same volume as a one week ad, Bodnar, Tr. 1498. The volume lift is much lower on the in-store display because the retail price to the consumer is usually higher. Turner, Tr. 974; E. Hoffman, Tr. 362-63. *See also* Section IV.C.3 *supra*.

³⁰⁶ Turner, Tr. 1040-44; CX 3941 at 287 [Schmid].

³⁰⁷ Turner, Tr. 1040

³⁰⁸ CX 3989 at 37 [Shanks].

³⁰⁹ CX 3989 at 37 [Shanks].

For example, Mr. Kaiser of Kroger testified that he would probably not run Dr Pepper on its own as an ad feature because "[i]t would be too weak on its own to offset a Pepsi and/or a Coke feature." Kaiser, Tr. 3232-33. Although Dr Pepper has received a few exclusive ads from some of Kroger's competitors, RX 438, even Dr Pepper's own study advised that it should be advertised with Coke to build sales. RX 2825 C.

³¹⁰ Gonzaba, Tr. 2053. Feature support is very expensive unless there is enough volume to justify it. Coyne, Tr. 3480; CX 971.

the promotional rotation.³¹¹ A bottler is "locked-out" when it receives no promotional period during a particular calendar span.³¹²

The testimony of Mr. Kaiser of Kroger is illustrative:

- Q. Now in selecting a particular brand to be in an ad-buy program, how important is the customer draw of the product that's being put into the ad?
- A. The most important consideration we have is how strong the brand is and how many cases we can sell of it.³¹³

The evidence in this case shows that, after Big Red Bottling lost the Dr Pepper franchise, the Big Red bottler became significantly less able to obtain ad features at major supermarkets than it was before the acquisition. Mr. Bodnar, former General Manager of DPSA and currently Executive Vice President, General Manager, and owner of Grant-Lydick, explained that, pre-acquisition, the Big Red bottler had just acquired "critical mass":

- A. You know, you have to have the necessary market share or pull-through of the products you represent to have the critical mass, if you will, to get into a promotional rotation, to get the shelf space that you need or the promotional efforts behind the brands that you represent.
- Q. At what point . . . did you acquire critical mass . . .
- A. I'm going to say in 1983 we started to acquire it with the addition of RC Cola and the fact that we had a cola to offer. . . . Come mid-1983 we started to get feature ads from the major chain supermarkets on a regular basis, again; because of the lineup of brands would say we more than tripled our ad rate.

Bodnar, Tr. 1254-55. *See also* Turner, Tr. 1043. This situation changed drastically after the Dr Pepper franchise went to CCSW, however.

- Q. On average how many ads did you get during the course of the year pre [sic]?
- A. With the major chains -- and by that I mean H.E.B., Kroger's, Handy Andy, Albertsons, and Warehouse Grocery -- we were averaging a minimum of one chain per month.
- Q. And then after?
- A. Never got a Kroger or an Albertsons ad. . . . We did have an ad with Kroger's in part of the stores. . . . So half of an ad. . . . Handy Andy, the first year I

³¹¹ Bodnar, Tr. 1254. It takes less critical mass to obtain in-store displays. Turner, Tr. 1043.

³¹² Davis, Tr. 4740.

³¹³ Kaiser, Tr. 3231-32.

would say we continued to get one a month. Warehouse Grocery, one a month. And H.E.B., maybe three ads for the year.

Bodnar, Tr. 1308-09. CCSW's own document confirms Mr. Bodnar's recollections.³¹⁴ Indeed, CCSW has conceded that "[i]n recent years, CCSW and Pepsi COBO have used their CMA programs to obtain the majority of ad features offered by San Antonio area retailers." RPF paragraph 595. Mr. Bodnar testified that Big Red Bottling tried to interest San Antonio retailers in CMAs but was unsuccessful, because Big Red Bottling lacked the necessary volume throughput.³¹⁵ That Big Red Bottling has been able to obtain some ad features does not negate the fact that the large majority of ad features have gone to Coke or Pepsi in the San Antonio area.³¹⁶

b. Big Red Bottling's Increased Costs

Dr. Hilke testified that there are economies of scale associated with several aspects of the branded CSD bottling industry and that

³¹⁴ CX 2954 H lists the number of feature ads in various San Antonio retailers for 1984 and 1985 for five branded CSDs: Coke, Pepsi, Dr Pepper, 7Up, and Big Red. As Mr. Bodnar recalled, it indicates that Big Red continued to receive about one ad per month from Handy Andy, but that the number of ads from other major chains such as Albertsons and H.E.B. had sharply declined from 1984 to 1985. The precise amount of the decline is difficult to discern, because it is not possible to know how many of the Dr Pepper feature ads took place while the franchise was still held by the same entity as Big Red (DPSA), prior to the August 1984 acquisition of the Dr Pepper franchise by CCSW. However, one can compare the 1984 and 1985 totals with Dr Pepper as part of CCSW and, hypothetically, if it had remained as one of the franchises held by the Big Red bottling operation. According to CX 2954 H, Big Red and Dr Pepper combined throughout all of 1984 would have had 57 feature ads; by contrast, Big Red alone in 1984 would have had only 6 feature ads. For 1985, Dr Pepper and Big Red combined actually would have had 80 feature ads; Big Red alone actually had only 43 feature ads. CCSW alone had 211 feature ads in each of 1984 and 1985; Pepsi alone had 62 feature ads in 1984 and 123 in 1985. Even these comparisons do not show the full extent of the decline for Big Red, but a look at the stores at which Big Red continued to obtain feature ads shows that they are the smaller retailers, not the larger ones like H.E.B.

³¹⁵ Bodnar, Tr. 1383-84.

³¹⁶ CX 2954 B indicates that, in 1985, for chain supermarkets, Big Red obtained promotions accounting for about 5.3% of all commodities volume, as compared to Coke's 46.9% and Pepsi's 20.9%. For the number of store weeks of ads in major independents, Big Red's share was somewhat higher -- 8.9%, as compared to Coke's 54.6% and Pepsi's 18.6%. However, for share of convenience store ad months, Big Red was practically shut out as was Pepsi -- 5.7% (Big Red) and 5.9% (Pepsi) as compared to Coke's 85.6%. For drugstores and mass merchandisers, Big Red had a 9.6% share of store weeks, compared with Coke's 49.4% and Pepsi's 41.1%. CX 3248 A-E shows that Big Red was able to obtain about 15-20% of promotional activity in the summer of 1985. RX 1678 lists some small independents that gave ad features to Big Red in 1988. A 1989 CCUSA survey found that, for total supermarket displays (not just ad features) in San Antonio, Big Red accounted for 13.6% of the total displays, compared to Coke's 55.4% and Pepsi's 26.6%; the document shows Big Red as totally shut out of convenience store displays. RX 256 B, C. Mr. Bodnar testified that Stop-N-Go ran only Coke features in 1987 and 1988, as did other convenience stores. Bodnar, Tr. 1381.

these economies of scale seem to have increased over time.³¹⁷ These economies of scale have been quantified in a study sponsored by the National Soft Drink Association ("NSDA") and executed by the Boston Consulting Group ("BCG").³¹⁸ The NSDA report indicates that economies of scale are present in at least three major aspects of bottler manufacturing operations: direct labor, equipment, and materials costs.³¹⁹ According to the NSDA study, decreasing bottling output from 4 million cases to 2 million cases, for example, would, on average, entail an increase in the total of these costs from roughly \$2.40 to \$2.60 per case.³²⁰ This represents an increase of about 8%.³²¹ In addition, as respondent admitted³²², the per case distribution costs for a bottler generally decrease as the volume or market share of the bottler increases.³²³

The acquisition in this case resulted in the transfer of approximately 42% of DP-SA volume to CCSW prior to the sale of the remaining franchises and assets to Grant-Lydick.³²⁴ Mr. Bodnar noted that it was not until 1989 that Grant-Lydick Beverage Company matched DP-SA's pre-acquisition sales volume level. This did not occur until after Grant-Lydick acquired a number of additional brands, including 7-Up, Dad's Root Beer, Squirt, and Yoo Hoo Chocolate and five more sales locations in 40 additional counties.³²⁵

In a March, 1987 letter to the Federal Trade Commission, Grant-Lydick Beverage Company supplied pre- and post-acquisition revenue and costs estimates on a per case basis.³²⁶ Grant-Lydick estimated that its average total cost per case increased from \$6.37 per case in 1984 to \$6.90 in 1985.³²⁷ Grant-Lydick further estimated that

³¹⁷ Hilke, Tr. 6054-58, 6042-43; CX 1671; CX 1696.

³¹⁸ Hilke, Tr. 6102-05; CX 1697.

³¹⁹ CX 1697 I-L

³²⁰ CX 1697 K.

³²¹ CX 1697 K.

³²² RRCCPFF paragraph 1465.

³²³ CX 3941 at 288 [Schmid]. *See also* RX 0867 (CCUSA study indicated that distribution typically accounts for about 35% of a bottler's overall costs).

³²⁴ CX 4079.

³²⁵ Bodnar, Tr. 1347; CX 3830.

³²⁶ CX 1697 E-G.

³²⁷ CX 1697 F.

its production labor cost per case increased from \$.12 in 1984 to \$.21 in 1985 and that its production overhead cost per case increased from \$.37 in 1984 to \$.45 in 1985.³²⁸ CCSW disputed these figures, claiming that Grant-Lydict did not sustain any substantial increase in total cost as a result of losing the Dr Pepper and Canada Dry franchises.³²⁹

However, even CCSW conceded that Grant-Lydict's operating costs increased 7.9% from 1983 to 1986, largely as a result of increased "promotional variable cost."³³⁰ Although respondent characterizes the increased costs of promotion as resulting from increased bottler competition producing higher rebates to retailers, we find it more likely that this substantial increase in promotional costs occurred because, without the Dr Pepper franchise, Big Red was being required to pay more for promotions.³³¹ Retailers expect better offers on ad features from bottlers whose products do not sell as much volume as those of other bottlers; as Mr. Kaiser of Kroger testified: "Generally Pepsi will offer more than Coke [on ad feature payments per case] because they don't sell as much product."³³² Thus, in addition to making it more difficult for Grant-Lydict to obtain ad features at all, the loss of the Dr Pepper franchise increased the cost to Grant-Lydict of competing against Coke and Pepsi in obtaining ad features -- the most significant means by which to obtain increased sales.³³³

c. The Likely Competitive Effects

The evidence demonstrates that CCSW's acquisition of the Dr Pepper franchise significantly impaired the ability of Big Red Bottling to compete with Coke and Pepsi for ad features, the form of competition that generates by far the largest volume of sales for branded CSD bottlers and retailers. This diminished ability to compete in such an important arena of branded CSD competition would

³²⁸ CX 1697 G.

³²⁹ Goode, Tr. 7424; RX 200; RX 201.

³³⁰ RRCCPFF paragraph 2047 (citing RX 200); CX 4056.

³³¹ The evidence that shows increased promotional costs for branded CSD bottlers relates to the post-1986 time period, not to the 1983-86 time frame. See, e.g., IDFF paragraph 172, 173, 309.

³³² Kaiser, Tr. 3210. See also CX 129, CX 3814 at 28-29 [Adams].

³³³ See Section IV.C.3 *supra*.

likely reduce Big Red Bottling's incentives and ability to contest any anticompetitive branded CSD price increases. Therefore, we focus next on whether the other evidence similarly indicates a likelihood of anticompetitive effects, or whether it provides sufficient grounds for rebutting the presumption of anticompetitive effects that has been created by the degree of increased concentration in the relevant market.

3. The Increased Likelihood of Tacit Collusion in All Branded CSD Channels

As we have previously noted, “[t]he effective coordination of price and output strategies requires developing a consensus concerning price and output levels, and a means of enforcing its terms.” *B.F. Goodrich*, 110 FTC at 294. However, collusion may occur without firms reaching complex terms concerning price and output levels.³³⁴ “Instead, the terms of coordination may be imperfect and incomplete -- inasmuch as they omit some market participants, omit some dimensions of competition, omit some customers, yield elevated prices short of monopoly levels, or lapse into episodic price wars -- and still result in significant competitive harm.” Merger Guidelines, Section 2.11.

Factors relevant to an evaluation of the likelihood of collusion include: the extent to which market information is available to market participants; whether there is a history of collusion in such markets; the number of market participants; the pricing and marketing practices used by market participants; the characteristics of sellers and buyers; and the heterogeneity (or lack thereof) of products and market participants.³³⁵ We begin with an examination of the availability of market information to branded CSD bottlers.

a. Availability of Pricing Information

The evidence in this record indicates that branded CSD bottlers have access to key information about their competitors' prices and

³³⁴ Merger Guidelines, Section 2.11. For example, coordinating firms may “follow simple terms such as a common price, fixed price differentials, stable market shares, or customer or territorial restrictions.” Merger Guidelines, Section 2.11.

³³⁵ Merger Guidelines, Section 2.1.

promotions, and that retailers provide such information. The availability of this information could facilitate collusion.

For example, bottlers are aware of their competitors' wholesale prices because they can obtain pricing information "from a retailer or from some other source." Clarke, Tr. 4424. CCSW obtained a copy of Pepsi's 1987 Cooperative Marketing Program for Independent Grocery chains in the San Antonio area.³³⁶ CCSW was shown a copy of Pepsi's proposed 1988 Ad Buy Program to J's Convenience Store chain by J's personnel.³³⁷ CCSW obtained a copy of a Pepsi-Cola eight-week summer 1988 promotion with the Payless convenience store chain.³³⁸ CCSW routinely collects and aggregates information regarding Pepsi's ad and instore retail prices.

One incident is particularly telling. In January, 1989, CCSW personnel obtained a copy of the carbonated soft drink promotional materials for National Convenience Stores, Inc. ("NCS"), which owns Stop-N-Go. CX 465; Hiller, Tr. 5367. Included in the materials was Pepsi's wholesale price to NCS in the San Antonio area. CX 465 B. When NCS confronted CCSW about the materials, James Doege of CCSW was quoted as stating that "all of my sales people bring [such] information in all of the time." CX 465 A.

Indeed, the day-to-day interactions with retailers that are necessitated by use of the DSD delivery system mean that branded CSD bottlers have the opportunity for almost immediate market information about their competitors, marketing, promotions, and pricing. The easy availability of such information suggests that any deviations from a collusive agreement could be quickly detected, thus enabling quick retaliatory action.

b. Branded CSD Pricing in San Antonio

Respondents contend that soft drink price competition in San Antonio has been fierce since the acquisition,³³⁹ and that we should

³³⁶ CX 87. CCSW admitted this, but denied any interference that it was obtained from Pepsi. RRCCPF paragraph 1874.

³³⁷ CX 2007D.

³³⁸ CX 87. CCSW admitted this, but denied any inference that it was obtained from Pepsi. RRCCPF paragraph 1872.

³³⁹ ABR-A at 74. Respondent cites evidence that: after adjustment for inflation, soft drink prices in San Antonio have declined "significantly" since 1984 [IDFF paragraph 307]; that this real decline in soft drink prices has occurred while production and promotion costs were increasing [IDFF paragraph

take such evidence as confirming that collusion is unlikely.³⁴⁰ We agree that the record does not contain any evidence of express collusion among branded CSD bottlers in the San Antonio market, and that the record shows a period of particularly deep discounting by both Pepsi and Coke in San Antonio in 1987.³⁴¹ However, this is not surprising, given the level of antitrust scrutiny that has been applied to the relevant market since the acquisition. In September, 1984, the Texas Attorney General's Office filed suit to challenge the transactions whereby CCSW acquired the Dr Pepper and Canada Dry franchises, alleging that the transactions violated Texas antitrust law.³⁴² On July 1, 1986, CCSW, DPUSA, and the Texas Attorney General entered into a settlement agreement applicable until July 1, 1993, which prohibited CCSW from certain activity -- such as seeking or accepting more than 65% of the shelf space "regularly allocated for the sale of soft drinks" in any store -- during that period of time.³⁴³ In 1987, the Federal Trade Commission began its investigation of the acquisition, and its original complaint was filed on July 29, 1988.³⁴⁴ In light of the intensive antitrust scrutiny at both the state and federal levels, it would be most surprising to find anything other than competitive conduct.

Moreover, although there is no evidence of express collusion, there is some evidence of the kind of price leadership that typifies an

309]; that the Shircliff Report, plus other evidence (Campbell, Tr. 1950-51; Turner, Tr. 979; Trebilcock, Tr. 5874-75), establish that soft drink prices in Texas are among the lowest in the United States [IDFF paragraph 313-14]; and that fierce price competition in San Antonio drove CCSW into financial difficulty [IDFF paragraph 322].

³⁴⁰ See ABR-A at 59.

³⁴¹ See Section IV.D.3 *supra*.

³⁴² CX 2 A-B; IDFF paragraph 67.

³⁴³ CX 2 E. Among other things, the Settlement Agreement also prohibited CCSW from "seeking or consenting to participate in, on the average, more than 65% of" promotional ads during any calendar year, or seeking or accepting "exclusive end-of-aisle display space" for "more than 65% of the weeks in any given calendar year." IDFF paragraph 68.

The ALJ found that the provisions of this Settlement Agreement imposed constraints on CCSW's use of marketing programs and practices in the San Antonio area, and that the Texas Attorney General's office had the authority and incentive "to deter any collusive price increase by CCSW." IDFF paragraph 462. In light of this, as well as his assessment of other evidence, the ALJ found that collusion seemed unlikely. ID 77.

We do not rely on the Settlement Agreement to constrain CCSW's market conduct, because it expired on July 1, 1993; although the Texas Attorney General is entitled to seek an extension of the order for a period of up to three years, CX 2-H, VIII, there is no record evidence to indicate that the Attorney General has sought and obtained such an extension.

³⁴⁴ IDFF paragraph 43.

oligopolistic market susceptible to tacit collusion.³⁴⁵ That is, as we discuss in detail below, it appears that each branded CSD-bottler in San Antonio, acting individually, has copied the price of the price leader in the market at certain times. As then-Judge (now Justice) Stephen Breyer has explained:

Courts have noted that the Sherman Act prohibits agreements, and they have almost uniformly held, at least in the pricing area, that such individual pricing decisions (even when each firm rests its own decision on its belief that competitors will do the same) do not constitute an unlawful agreement under Section 1 of the Sherman Act. . . . That is not because such pricing is desirable (it is not), but because it is close to impossible to devise a judicially enforceable remedy for 'interdependent' pricing. How does one order a firm to set its prices without regard to the likely reactions of its competitors?³⁴⁶

Based on the record before us, we have no reason to believe that the price leadership that we observe in the San Antonio branded CSD market -- as described below -- is anything other than legal. But we do not view such pricing as desirable, and an acquisition that may substantially increase the likelihood of interdependent pricing in a market that already appears susceptible to such pricing may have anticompetitive consequences.³⁴⁷

As CCSW itself recognizes, "Coke is typically the price leader in the San Antonio market." CX 3806 G.³⁴⁸ David Davis of Pepsi agrees: "Coke is usually the leader in the market. They go up, and then we usually follow, depending on our pricing structure." Davis,

³⁴⁵ See, e.g., *Clamp-All Corp. v. Cast Iron Soil Pipe Institute*, 851 F.2d 478 (1st Cir. 1988) (Breyer, J.), *cert. denied*, 488 U.S. 1007 (1989) (oligopolistic pricing, including price leadership, is not competitively desirable) ("Clamp-All"). One of the purposes of the Clayton Act Section 7 is to prevent markets from becoming oligopolistic and thus susceptible to coordinated interaction, which "includes tacit or express collusion, and may or may not be lawful in and of itself." Merger Guidelines, § 2.1.

³⁴⁶ *Clamp-All*, 851 F.2d at 484 (emphasis in original) [citations omitted].

³⁴⁷ The Merger Guidelines explain that a merger may diminish competition by enabling firms more likely, more successfully, or more completely to engage in coordinated interaction that harms consumers." Section 2.1. The Merger Guidelines define coordinated interaction as "actions by a group of firms that are profitable for each of them only as a result of the accommodating reactions of the others." *Id.* "This behavior includes tacit or express collusion, and may or may not be lawful in and of itself." *Id.* (emphasis added). Thus, the Merger Guidelines make clear that a merger may violate the FTC and the Clayton Acts because, among other things, it substantially increases the likelihood of tacit collusion that may be legal in and of itself.

³⁴⁸ This statement appears in a Texas Bottling Group ("TBG") presentation to its Credit Committee. CX 3806. While noting that "TBG encounters aggressive competition from Pepsi," the document notes Coke's price leadership as a "mitigator." CX 3806 G. The reference to price leadership is particularly telling, given the ALJ's observation that statements in this document were likely influenced by litigation considerations. ID 67.

Tr. 4532. Emery Bodnar of Grant-Lydick reports the same: "I would say from where I sat, my price increase was pretty much dictated on when Coke increased, I followed as quickly as possible." Bodnar, Tr. 1356.

The record contains examples of such price leadership. For example, in February 1989, CCSW initiated a 6% wholesale price increase.³⁴⁹ Big Red Bottling matched immediately in mid-February, followed by Pepsi on March 1.³⁵⁰ Texas Bottling Group, CCSW's owner, projected that CCSW's 1989 price increase would bring increased sales: "A 6.0% increase in net price per case coupled with a shift in production mix will yield a 10.8% increase in sales in 1989." CX 3806 Z-6.³⁵¹

It appears that such price leadership may have taken place even before this acquisition. Mr. Bodnar's testimony indicates that DPSA also followed Coke's lead on price increases.³⁵² After the acquisition, there was a substantially increased probability that Big Red Bottling Company would play the "follower" role, since it had lost the Dr Pepper franchise (and thus Dr Pepper sales volume) to CCSW.³⁵³ Indeed, the market might have become more competitive if the Dr Pepper franchise had remained combined with the RC franchise, the

³⁴⁹ CX 3806 Z-56.

³⁵⁰ CX 3806 Z-56.

³⁵¹ The ALJ stated that CCSW tried to raise list prices in 1989, but was forced to discount prices back to former levels due to lost sales. ID 69. We have not found any record evidence to show that CCSW rolled back its 1989 price increase. The ALJ also stated that the Pepsi COBO "unsuccessfully" tried to raise its prices in 1989, allegedly losing 19% of its Nielsen share during the first seven months of 1989. ID 69; IDFF paragraph 410. Again, we can find no record evidence that Pepsi ever rolled back its 1989 price increase. Thus, we have no basis on which to regard the price increase as "unsuccessful;" indeed, we presume that, if the Pepsi COBO stayed with the price increase for an extended period of time, it did so because it was profitable, despite any volume loss that might have been associated with it.

Finally, the ALJ looked to the profitability of CCSW's 1989 price increase as evidence indicating that the current market is competitive. The ALJ stated that, in 1989, CCSW raised its list price by \$.69 per case, but over the year had a net profit increase of only \$.01 per case, ID 69; IDFF paragraph 409, and that CCSW was unable to raise its prices as much as would have been necessary to account for cost increases. IDFF paragraph 409. But the issue is not whether the current market is competitive. Given the intense and ongoing antitrust scrutiny of this market, we would be surprised if it were not competitive. The issue here is whether this acquisition has taken place in a market susceptible to collusion. The price leadership shown in the 1989 price increase is one piece of evidence indicating that the market is susceptible to collusion.

³⁵² Bodnar, Tr. 1356.

³⁵³ See Section VI.C.2 *supra*.

combination that Mr. Bodnar described as giving DPSA critical mass.³⁵⁴

In sum, we find that the price leadership by CCSW evident in the relevant market supports an inference that the market is susceptible to interdependent pricing -- that is, tacit collusion -- and that the evidence concerning Big Red Bottling's diminished ability to compete with respect to ad features demonstrates that CCSW's acquisition of the Dr Pepper franchise substantially increased the likelihood that Big Red Bottling would continue to follow CCSW's price leadership.

c. Collusion by Branded CSD Bottlers

There have been over 40 price-fixing cases involving branded CSD bottlers in a number of local geographic markets.³⁵⁵ Complaint counsel offered evidence relating to these collusion cases, but the ALJ rejected it as irrelevant.³⁵⁶ We find the evidence to be relevant to the likelihood of collusion by branded CSD bottlers in the San Antonio market, because such cases suggest that there are local or regional branded CSD bottling markets that are conducive to collusion.³⁵⁷ The cases suggest that, in markets structured similarly

³⁵⁴ See Section VI.C.2.a *supra*.

³⁵⁵ See, e.g., Convictions: *United States v. Mid Atlantic Coca-Cola Bottling Co.*, 6 Trade Reg. Rep. (CCH) paragraph 45,090 (E.D. Va. 1990); *United States v. Allegheny Bottling Co.*, 695 F. Supp. 856 (E.D. Va. 1988), *aff'd*, 870 F.2d 656 (4th Cir. 1989); *United States v. Hartford*, [1988-21 Trade Cas. (CCH) paragraph 68,386 (4th Cir. 1989)]; *United States v. Gravely*, 840 F.2d 1156 (4th Cir. 1988). Guilty pleas: *United States v. Pepsi-Cola Bottling Co. of Walla Walla*, No. CR-89-394-01 (E.D. Wash., Jan. 16, 1990); *United States v. Coca-Cola Bottling Co., Yakima and Tri Cities*, No. CR 89-372-01 (E.D. Wash. Jan. 16, 1990); *United States v. Blue Mountain Bottling Co. of Walla Walla*, No. CR 89-392-01 (E.D. Wash. Jan. 16, 1990), *aff'd*, 929 F.2d 526 (9th Cir. 1991); *United States v. Rice Bottling Enterprises, Inc.*, No. 3-89-72 (E.D. Tenn., Oct. 16, 1989); *United States v. Pepsi-Cola Bottling of Petersburg, Inc.*, No. 89-00062 (E.D. Va., Oct. 11, 1989); *United States v. Atlantic Soft Drink Co.*, No. 3-88-77 (E.D. Tenn., Dec. 23, 1988); *United States v. Beverage South, Inc.*, No. 88-451 (D.S.C., Dec. 2, 1988); *United States v. All-American Bottling Corp.*, No. 88-00038 (W.D. Va., Apr. 12, 1988); *United States v. Coca-Cola Bottling Co. of Roanoke, Va.*, No. 88-00012 (W.D. Va., Apr. 15, 1988); *United States v. Akron Coca-Cola Bottling Co.*, No. CR 88-044 (N.D. Ohio, March 15, 1988); *United States v. Seven-Up/Dr Pepper Bottling Co.*, Beckley, W. Va., No. 88-00012 (W.D. Va., Feb. 1, 1988); *United States v. NEG Holding Co.*, No. CR 87-16-01 (N.D. Ga., Nov. 24, 1987); *United States v. Mid Atlantic Coca-Cola Bottling Co.*, No. 87-0420 (D.D.C., Oct. 14, 1987); *United States v. General Cinema Beverages of Washington, D.C.*, No. CR 86-0352 (D.D.C., Oct. 15, 1986).

³⁵⁶ RCX 3323-52; 3354; 3356-57; 3359-65; 3367-68; 3788; 3950; Tr. 114-17, 470-72, 4101-05, 4141, 6089-97, 6176, 6341-45, 6937-40, 8417-22.

³⁵⁷ See *Coca-Cola*, slip. op. at 48. In that case, we found evidence of branded CSD bottler collusion relevant to an assessment of the likelihood of collusion by a cartel of branded CSD concentrate companies, because it suggested that, if such a cartel raised concentrate prices nationally, bottlers could successfully pass on the price increase. *Id.*

to the San Antonio market,³⁵⁸ branded CSD bottlers have perceived that “the number of competitive dimensions involved posed no insuperable obstacle to collusion.” Coca-Cola Co., slip op. at 48.³⁵⁹ The bottler price-fixing cases also are relevant to and reinforce our conclusion that the relevant market in this case is branded CSDs in the San Antonio market.³⁶⁰

The branded CSD bottler collusion cases provide evidence of actual collusive conduct that negates the hypothetical difficulties in colluding that respondent raises. Respondent argues that “the variety of brands, packages, flavors, sweeteners, and advertising support” for soft drinks complicates the market sufficiently to deter collusion.³⁶¹ However, the same type of variety exists in the markets in which branded CSD bottler collusion took place and apparently did not deter that collusion.³⁶² Indeed, the bottler collusion cases and the bottler documents in the record here suggest that factors such as

³⁵⁸ As we found in Coca-Cola Co., “[m]ost local markets for carbonated soft drinks have a Coca-Cola bottler, a Pepsi-Cola bottler, and a so-called ‘third bottler,’ which carries various brands of soft drinks other than Coca-Cola or Pepsi-Cola brands.” Slip op. at 57. The record here similarly supports this finding. See also Lydick, Tr. 2937, 2943. “[A] record of price fixing or other antitrust violations is some evidence that the structure of the market is favorable to collusion.” R. Posner, *Antitrust Law: An Economic Perspective* 55-61 (1976).

³⁵⁹ Under the Merger Guidelines, “[p]revious express collusion in another geographic market will have the same weight [as express collusion in the same geographic market] when the salient characteristics of that other market at the time of the collusion are comparable to those in the relevant market.” Section 2.1. Here, the bottler collusion cases arose from a variety of areas in the United States, suggesting that the salient characteristics that facilitate collusion among branded CSD bottlers are not unique, but instead are present in typical local branded CSD bottling markets. This is not surprising, since the basic structure of local branded CSD bottling markets in the United States tends to be only three branded CSD bottlers using DSD delivery. Lydick, Tr. 2937, 2943. This trend follows a significant period of bottler consolidation. In 1960 there were 4,519 soft drink bottling operations in the United States, in 1970 there were 3,054, and in 1980 there were only 1,960 (CX 996 A), and in 1983 there were only 1,500. CX 3218 M.

Moreover, the branded CSD bottler price-fixing cases are far more relevant to this case than the discussion of the OPEC cartel permitted by the ALJ. See Strickland, Tr. 8283-85. Given the direct relevance of the bottler collusion cases to this market, we find that the ALJ erred in refusing to admit this evidence.

³⁶⁰ The colluders in these cases were bottlers of branded CSDs, and the actual price increases typically were maintained for over one year. See cases in note 355 *supra*; e.g., *Allegheny Bottling Co.*, 695 F. Supp. at 858. The cases usually identified discrete, local geographic markets of no more than twelve counties and as few as one, far less than the 107 counties proposed by respondent as the relevant geographic market in this matter. CX 4131; see IDFF paragraph 246.

³⁶¹ ABR-A at 63

³⁶² See generally Section IV.D.3.c *supra* (documents and testimony from national concentrate companies indicate same general competitive conditions in terms of brands, packages, flavors, sweeteners, and advertising support for all of their bottlers). See also Lydick, Tr. 2937, 2943.

standard packaging ease price comparisons, which can facilitate collusion.³⁶³

Respondent also argues that “[t]he putative colluders, in addition to devising a complicated set of list prices, net prices, and net, net prices, would also have to control promotional programs so that volume changes would not disrupt each colluder’s expectation of bottom-line profit.” ABR-A at 64. But participants to some of the collusive schemes have fixed prices successfully simply by agreeing not to offer discounts on various products.³⁶⁴

In sum, the branded CSD bottler price-fixing cases reinforce our previous conclusions that collusion need not be perfect to be successful and that the relevant market in this case is susceptible to collusion.

4. Respondent’s Arguments Against the Likelihood of Collusion

Respondent presents a variety of additional arguments that supposedly negate any inference of an increased likelihood of collusion, tacit or express, following CCSW’s acquisition of the Dr Pepper franchise. As we discuss below, we find these arguments unconvincing.

a. Differing Profit Incentives Among Bottlers

Respondent argues that CCSW, the Pepsi COBO, and Grant-Ly dick all have differing profit incentives, and that such differing incentives could hamper collusion. ABR-A 61. Respondent points out that the Pepsi COBO is owned by Pepsi USA, and that Pepsi USA makes a 96% gross profit on concentrate sales.³⁶⁵ By contrast, respondent states that CCSW makes no profit on CCUSA’s concen-

³⁶³ For example, RX 582, entitled “1987 Pricing Summary,” shows that price comparisons are relatively easy, given standardized packaging.

For the periods of November and December, we are at parity on in-store pricing and at parity on ad feature pricing for the 2 liter and 3 liter non-holiday and one price unit disadvantaged versus Pepsi on cans non-holiday. For the holidays of November and December, we were at parity on 2 liter. We are one price unit disadvantaged on cans. This document reflects quite simple comparisons, not complexity.

³⁶⁴ *Hartford*, 1988-2 Trade Cas. (CCH) paragraph 68,386 at 60,131; *Allegheny Bottling Co.*, 695 F. Supp. at 857.

³⁶⁵ CX 3913.

trate sales.³⁶⁶ Even CCSW and Grant-Lydick are dissimilar, in that Grant-Lydick purchases its cans from an independent packer,³⁶⁷ whereas CCSW provides its own cans.³⁶⁸

Respondent is correct that such differing profit incentives may operate to make collusion more difficult. However, we must evaluate the evidence as a whole, and we are not convinced that such differing profit incentives, even in combination with other factors present here, would be sufficient to deter collusion in this market. For example, Mr. Davis of Pepsi has acknowledged that Pepsi's strategy in San Antonio is now focused on profitability rather than on increasing market share, as was the case during the deep discounting period of 1987-88.³⁶⁹ An emphasis on profitability rather than market share may increase the likelihood of collusion.³⁷⁰

As to Grant-Lydick, the fact that Grant-Lydick's higher can costs provide it with a greater incentive than CCSW has to keep can prices high only suggests that it would favor a collusive agreement on can prices rather than another type of agreement. This argument alone does not demonstrate that collusion is unlikely in the relevant market; in fact, it might make collusion more likely.

b. Differing Size Firms

Respondent also asserts that the range of firm size in this case -- which may produce different cost structures for each firm -- renders collusion "highly improbable."³⁷¹ We agree that, in theory, differing cost functions among firms may make it more difficult for firms to agree on a consensus collusive price.³⁷² However, it would be a leap

³⁶⁶ Respondent cites R. Hoffman at Tr. 5577-78, but the citation does not support respondent's claim.

³⁶⁷ Turner, Tr. 1117; Bodnar, Tr. 1526-27.

³⁶⁸ Summers, Tr. 6403-04.

³⁶⁹ Davis, Tr. 4527-28.

³⁷⁰ Respondent notes that none of the bottler collusion cases tendered by complaint counsel involved a Pepsi COBO. ABR-A at 62 n.53. We do not find that this absence renders those cases irrelevant, however. We note that San Antonio is one of Pepsi's worst markets -- a market in which Pepsi's share increased only from 15% to 19% after a year and one-half of losing millions of dollars from offering extraordinarily low prices. Davis, Tr. 4548-4565. After such an experience, the Pepsi COBO could well become more interested in collusive -- and profitable -- price increases than in continuing vigorous price competition.

³⁷¹ ABR-A 60-61.

³⁷² See *B.F. Goodrich*, 110 FTC 207, 321 (1988).

of faith, given a lack of supporting analysis in the record, to decide that the different cost structures present here constitute a significant obstacle to collusion in this highly concentrated market. In addition, CCSW's apparent role as price leader and the possible benefits to reaching and maintaining a collusive agreement suggest that this dominance may be an offsetting force acting for rather than against collusion.

D. Unilateral Anticompetitive Conduct

An acquisition may diminish competition by making it profitable for a firm to alter its behavior unilaterally by elevating price and/or suppressing output.³⁷³ This phenomenon may occur in markets where products are differentiated by flavor, among other things.³⁷⁴ Thus, an acquisition may enable the acquiring firm to raise the price of either its original product, or the acquired product, or both above the premerger level. As explained in the Merger Guidelines, "[s]ome of the sales loss due to the price rise merely will merger partner and, depending sales loss through merger may even though it would not have success of this strategy will significant share of sales in be diverted to the product of the on relative margins, capturing such make the price increase profitable been premerger." Section 2.21. The success of this strategy will require that "there be a significant share of sales in the market accounted for by consumers who regard the products of the merging firms as their first and second choices, and that repositioning of the nonparties' product lines to replace the localized competition lost through the merger be unlikely." Merger Guidelines, Section 2.21.

In this case, CCSW may have been constrained from taking some anticompetitive actions due to concern about ongoing antitrust litigation and certain restrictions imposed as part of CCSW's settlement with the Texas Attorney General.³⁷⁵ Nonetheless, there is some evidence of unilateral effects that have occurred since the acquisition of the Dr Pepper franchise. We begin by examining this evidence --

³⁷³ Merger Guidelines, Section 2.2.

³⁷⁴ Merger Guidelines, Section 2.21.

³⁷⁵ For example, among other things, the Settlement Agreement prohibited CCSW from "seeking or consenting to participate in, on the average, more than 65% of" promotional ads during any calendar year. CX 2 E; IDFF paragraph 68. See also n. 343 *supra*.

which involves the elimination of take-home sales of Mr. PiBB and a lessening of competition in the vending channel -- and then briefly discuss the potential for further effects with respect to ad features based on CCSW's increased market power.

1. The Elimination of Competition Between Mr. PiBB and Dr Pepper

CCUSA and Dr Pepper Company are the only firms in the soft drink industry that have a viable "pepper" category soft drink.³⁷⁶ The Dr Pepper Company sells Dr Pepper concentrate; CCUSA sells concentrate for Mr. PiBB.³⁷⁷

Mr. PiBB was introduced by CCUSA in 1973. RX 888 D. As CCSW has admitted,³⁷⁸ CCUSA defined the consumer role of Mr. PiBB as the "Alternative to Dr Pepper."³⁷⁹ In 1984, CCUSA defined the business role of Mr. PiBB as "Competitor to Dr Pepper," CX 1895B, designed to "combat" the brand:

Mr. PiBB represents the only viable alternative to Dr Pepper in its flavor category. The brand is necessary, especially in cold drink, to enable bottlers to combat Pepper where it is strong.

CX 791 C. CCUSA targeted Dr Pepper consumers with its Mr. PiBB brand.³⁸⁰

Prior to CCSW's acquisition of the Dr Pepper franchise, Mr. PiBB was sold in San Antonio, as was Dr Pepper.³⁸¹ CCSW'S business records reveal that CCSW viewed Mr. PiBB as the closest substitute to and a direct competitor of Dr Pepper,³⁸² and considered Mr. PiBB to be one of its major sugar brands.³⁸³ San Antonio was a

³⁷⁶ CX 791C; CX 790.

³⁷⁷ CX 790 B; CX 791 B, S; RX 888 C-D.

³⁷⁸ RRCCPFF paragraph 2098.

³⁷⁹ CX 1895 A; CX 790; CX 791. Mr. PiBB is perceived in the marketplace as a "me-too" brand. CX 791 E.

³⁸⁰ CX 1885; CX 1898 B; CX 1896; CX 1894; RX 888 D; Turner, Tr. 954; Clarke, Tr. 4278, 4400-01; CX 1893.

³⁸¹ Turner, Tr. 996; Bodnar, Tr. 1361; Schwerdtfeger, Tr. 2327, 2344; Anderson, Tr. 3850.

³⁸² CX 596.

³⁸³ CX 510 R; CX 3480 E; CX 3481 E.

priority market for Mr. PiBB.³⁸⁴ CCSW's sales of Mr. PiBB were above the national average,³⁸⁵ and San Antonio accounted for 3% of all Mr. PiBB volume in the United States.³⁸⁶

In 1983, Mr. PiBB's market share was 2.1%, and Dr Pepper's share was 8.4%.³⁸⁷ After the acquisition, CCSW no longer sold Mr. PiBB in bottles and cans in the territory in which Dr Pepper was sold.³⁸⁸ Mr. Hoffman testified that the elimination of Mr. PiBB occurred because it was a competing flavor with Dr Pepper, and flavor restrictions from the Dr Pepper Company prohibited CCSW from selling a competitive flavor.³⁸⁹

Although there was testimony that CCUSA would consider licensing another distributor to distribute Mr. PiBB in San Antonio, this has not happened.³⁹⁰ After CCSW stopped distributing Mr. PiBB in the take home market in San Antonio, Dr Pepper's market share began increasing; but only in 1987 did Dr Pepper's market share come close to the combined 1983 share of Dr Pepper and Mr. PiBB.³⁹¹

Most significantly, after the acquisition, CCSW raised the wholesale price of Dr Pepper to parity with CCSW's other products.³⁹² Other data show that retail prices of Dr Pepper in San Antonio, which prior to the acquisition had been below the national average of Dr Pepper prices, after the acquisition rose to above the national average

³⁸⁴ CX 792 G.

³⁸⁵ CX 3837 B, G.

³⁸⁶ CX 792 L; CX 1897 E. San Antonio also accounted for 9.5% of the CCUSA PiBB brand funding in 1983 and 7.6% of funding in 1982. CX 792 L. In fact, Mr. PiBB's BDI (Brand Development Index [CX 591 Cl) in San Antonio was the highest in the nation. CX 792 O.

³⁸⁷ CX 1681 C. These market shares are based solely on sales of bottles and cans, since that is the channel of sales that was eliminated. See Hilke, Tr. 6030, 6033. (CX 1681 uses Nielsen data for soft drink sales in food stores in Bexar County, which includes San Antonio).

³⁸⁸ Anderson, Tr. 3879, 3859; CX 596 A-I; CX 2192; Atchison, Tr. 5252; CX 3221 A. CCSW has continued to sell Mr. PiBB postmix syrup. CCSW also sells Mr. PiBB outside of its Dr Pepper franchise area.

³⁸⁹ E. Hoffman, Tr. 324, 421; CX 122.

³⁹⁰ See Atchison, Tr. 5252-54.

³⁹¹ Data show the 1983 combined share of Dr Pepper (8.4%) and Mr. PiBB (2.1%) for bottle and can sales in San Antonio as about 10.5%. CX 1681 C. Dr Pepper's share for bottle and can sales reached 9.1% in San Antonio in 1987. CX 1681 C.

³⁹² CX 563 E.

for Dr Pepper retail prices.³⁹³ In 1989, in a telling memorandum from Mr. Summers to Messrs. E. and R. Hoffman, Mr. Summers stated: "We are pricing Dr Pepper one increment above other brands on in-stores, since it has no competition in its flavor segment." CX 2261; Summers, Tr. 686870.

Dr Pepper had no competition in its flavor channel -- and therefore was priced higher in 1989 than it otherwise would have been -- because Mr. PiBB had been eliminated as a competitive option for consumers in San Antonio, as a result of the acquisition at issue in this case. Consumers in the San Antonio area who preferred Mr. PiBB to other bottler or canned soft drinks were placed in the position of having to switch to less-desirable alternatives and, as a result, were made less well-off.

2. CCSW's Increased Market Power Over Vending Machine Sales

The record demonstrates that, post-acquisition, the choices available to consumers from vending machines were reduced, and the prices charged to third-party vendors increased. There was testimony that, prior to the acquisition, third-party vendors had been able to resist any attempt by a branded CSD bottler to force a vendor to take unwanted allied brands along with the desired brands.³⁹⁴ About three or four years after the acquisition, however, CCSW imposed a requirement that a third-party vendor cannot qualify for the best available discount unless 20% of its purchases are allied brands such as Sprite, Sunkist, and Hires.³⁹⁵ Ladd Little of LV Vending attributes CCSW's ability to impose the requirement to its acquisition of the Dr Pepper franchise.³⁹⁶ Because of this requirement, he purchases Sprite, Sunkist, and some other flavors from CCSW, while he would prefer to purchase 7-Up and Crush from Grant-Lydick and Slice from Pepsi.³⁹⁷ In addition, Mr. Little testified that, post-acquisition, Dr

³⁹³ CX 1685 A, E-H; Hilke, Tr. 6252-53, 6288-89.

³⁹⁴ Prior to the acquisition, CCSW did not require third-party vendors to accept allied brands in order to get the desired brands; Pepsi had attempted to impose such a requirement without success. Little, Tr. 667-68, 705.

³⁹⁵ Little, Tr. 665-66.

³⁹⁶ Little, Tr. 665, 705.

³⁹⁷ Little, Tr. 668-69, 704.

Pepper case prices increased to the level of the Coke case prices.³⁹⁸ The unilateral effect in this instance appears to be CCSW's ability to increase price either directly (by raising case prices of Dr Pepper) or indirectly (by tying purchases of other, less attractive products to discounts on attractive products).

3. CCSW's Increased Market Power Over Ad Features

As noted above, the acquisition of the Dr Pepper franchise increased CCSW's ability to obtain ad features and thus increased CCSW's market power.³⁹⁹ The evidence suggests that CCSW obtained more feature ads after its acquisition of the Dr Pepper franchise than it had previously.⁴⁰⁰ The increased "pull" of all of CCSW's brands gives CCSW the potential power to extract more favorable deals from retailers and to disadvantage both the Pepsi COBO and Big Red Bottling in their attempts to obtain ad features.⁴⁰¹ In addition, CCSW's increased market power may have contributed to its ability to raise Dr Pepper's price. See also Section VI.C.2 *supra*.

E. Power Buyers

Respondent argues that there are power buyers who could constrain any collusive or unilateral attempt by branded CSD bottlers to raise price. The ALJ agreed, stating that, in the face of a price rise among national CSD brands, retailers such as H.E.B., Kroger, and others who stock their own private label brands "could easily promote those brands in place of national brands." ID 76.⁴⁰²

³⁹⁸ Little, Tr. 669-70.

³⁹⁹ Market power includes the ability to "lessen competition on dimensions other than price, such as product quality, service, or innovation." Merger Guidelines, Section 0.1 & n

⁴⁰⁰ See CX 2954 H (in 1984, some of Dr Pepper's feature ads took place before the acquisition whereas all of Dr Pepper's feature ads are attributable to CCSW). DPUSA recognized the advantages of being advertised with Coke and advised that Dr Pepper should be advertised with Coke to build sales, RX 2825 C.

⁴⁰¹ The record shows that Pepsi already generally has to offer more ad feature payments to a retailer than Coke because Pepsi doesn't sell as much product. Kaiser, Tr. 3210; see also CX 129; CX 3814 at 28-29 [Adams].

⁴⁰² The ALJ also found that concentrate companies such as CCUSA, Pepsi USA, and DPUSA had "the power and the incentive to deter collusion at the bottler level." ID 76-77. We find that the numerous bottler collusion cases listed earlier, see note 355 *supra*, provide sufficient evidence to undermine any hope we might have that concentrate companies could prevent collusion in this market; the concentrate companies did not prevent collusion by the bottlers in those cases.

In analyzing the competitive effects of a merger, both the Commission and the federal courts have considered the possible power of buyers in deterring anticompetitive effects.⁴⁰³ The relevant market here does contain large buyers who are large food retailers. H.E.B., the largest buyer, accounts for approximately 25% of CCSW's take-home sales and approximately 20-25% of Pepsi's take-home sales.⁴⁰⁴ Kroger is the second largest customer of CCSW, purchasing from 9-12% of CCSW's total unit sales.⁴⁰⁵ Sam's Wholesale Clubs purchase 7-8% of CCSW's total unit sales.⁴⁰⁶ In addition to the leverage that may be provided by such sales volumes,⁴⁰⁷ retailers have some leverage over branded CSD bottlers because the retailers can control the availability of their own ad features and in-store displays, which can be important to the marketing of the branded CSDs of the bottlers.⁴⁰⁸

Just to note these facts does not demonstrate that retailers in this market could constrain any anticompetitive price increases, however. Rather, we must analyze the extent to which retailers facing an anticompetitive price increase could avail themselves of options other than paying the price increase and thereby force the branded CSD bottlers to return to a competitive price:

Consideration of large and sophisticated buyers generally focuses on the buyers' ability to exert countervailing power, even against a seller's oligopoly, by (1) shifting a large proportion of business to any firms that are willing to deviate from the coordinated behavior; (2) inducing new entry into the oligopolized market; or (3) through vertical integration.

⁴⁰³ See, e.g., *Adventist Health System/West*, Dkt. No. 9234 (Apr. 1, 1994), Concurring Opinion of Commissioner Owen and Commissioner Yao, slip op. at 16-19; *Owens-Illinois, Inc.*, Dkt. No. 9212, 5 Trade Reg. Rep. (CCH) paragraph 23,162 (FTC 1992); *Olin Corp.*, Dkt. No. 9196, 5 Trade Reg. Rep. (CCH) paragraph 22,857 (FTC 1990); *United States v. Baker Hughes, Inc.*, 908 F.2d 981 (D.C. Cir. 1990); *United States v. Syufy Enterprises*, 903 F.2d 659 (9th Cir. 1990); *United States v. Archer-Daniels-Midland Co.*, 1991-2 Trade Cas. (CCH) 1 69,647 (S.D. Iowa 1991); *United States v. Country Lake Foods, Inc.*, 754 F. Supp. 669 (D. Minn. 1990).

⁴⁰⁴ CX 3806 Z37; Summers, Tr. 6589; Davis, Tr. 4525; IDFF paragraph 432.

⁴⁰⁵ Summers, Tr. 6589; IDFF paragraph 433.

⁴⁰⁶ Summers, Tr. 6638; IDFF paragraph 435.

⁴⁰⁷ We note, however, that the size of these alleged "power buyers" falls far short of that in *Country Lake Foods*, where the three largest distributors accounted for more than 90% of sales. 754 F. Supp. at 674.

⁴⁰⁸ Coyne, Tr. 3449-52, 3487; Turner, Tr. 1130-31; IDFF paragraph 171, 445. As we discussed earlier, ad features and in-store displays are extremely important to increasing sales of branded CSDs. See Sections IV.C.3, VI.C.2 *supra*.

Adventist Health System/West, Dkt. No. 9234 (Apr. 1, 1994), slip op. at 16 (Concurring Opinion of Commissioner Owen and Commissioner Yao).⁴⁰⁹

As discussed below, we have considered these possibilities and have concluded that none appear to be realistic options for the retailers in this market. Moreover, we find that the instances of supposed buyer power cited by respondent and the ALJ do not suggest that the buyers in this market could successfully counter a collusive or unilateral price increase by branded CSD bottlers to retailers.

1. Shifting Purchases to Others

The ALJ found that H.E.B. and other retailers who sell their own private label soft drinks could switch to promoting those soft drinks instead of branded CSDs if confronted by a collusive price increase.⁴¹⁰ Our finding that private label soft drinks are not in the relevant market militates against this conclusion. As we have explained, the evidence shows that retailers depend on branded CSDs as a promotional item to draw in customers⁴¹¹ and would not switch to purchasing nonbranded CSDs in the face of an anticompetitive price increase.⁴¹²

The question then becomes whether H.E.B. and other retailers would switch to any firms within the market that would be willing to deviate from cartel conduct or undermine unilateral anticompetitive conduct. In this market, there are only three main bottlers making sales of branded CSDs to retailers: CCSW, Pepsi COBO, and Grant-Ly dick (Big Red Bottling). The branded CSD products of these firms are differentiated, however, and are not exact substitutes for each other. Thus, we would expect that switching among branded CSDs would not always be costless for a retailer, and that under certain circumstances retailers might be reluctant to try to substitute exclusive ad features on Pepsi or Big Red for all ad features on Coke, for example.

⁴⁰⁹ See also *Baker Hughes, Inc.*, 908 F.2d at 986-87; *Country Lake Foods, Inc.*, 754 F. Supp. at 679; *Olin Corp.*, 5 Trade Reg. Rep. (CCH) paragraph 22,857, at 22,553.

⁴¹⁰ ID 76.

⁴¹¹ E.g., CX 3806 Z37, ZSO; see Sections IV.C.3, VI.C.2 *supra*.

⁴¹² See Section IV *supra*.

In fact, the evidence indicates that, particularly with respect to Coke, retailers do not always regard branded CSDs as perfect substitutes. The assessment of TBG, owner of CCSW, was that although CCSW was dependent on the retail chains for increased volume of sales, "the chains are dependent on soft drinks as a promotional item to draw customers into their stores." CX 3806 Z37. And not just any "soft drink" would do. TBG noted that, although "H.E.B. has significant negotiating power," a "mitigating" factor is that "H.E.B. must buy Coke products from TBG in its franchise territories." CX 3806 G. According to TBG's own assessment, "[w]hile TBG may lose an occasional major ad to Pepsi, they believe that it is not in H.E.B.'s best interest, long term, to promote Pepsi products due to Pepsi's relatively weak market share (20% vs. 60% for TBG)." CX 3806 ZS 5.⁴¹³ Other evidence is consistent with TBG's analysis.⁴¹⁴

This market share dominance of Coke over Pepsi also applies to Big Red, whose market share in food stores in 1984 was roughly

⁴¹³ Similarly, in a 1987 antitrust suit against CCSW's parent, TBG, by Oneta Company, an independent Pepsi bottler in Corpus Christi, Texas, Toby Summers testified that CCSW made basically "take it or leave it" offers to accounts such as Albertson's:

- Q. But I can't tell what the terms of a counter offer or negotiated ultimate agreement was from the terms of your proposal.
- A. Well, whatever the ultimate agreement was would have been within the parameters of the proposal. These were not subject to negotiation. They were subject to, 'this is the offer.' And then it became incumbent on the account to --
- Q. They either took it, or they didn't.
- A. -- avail themselves of the offer, or not to avail themselves of the offer. It was not a matter of negotiation.

CX 4021 at 678 [Summers]. See *Oneta Company v. Texas Bottling Group, Inc.*, No. C-87-97 (S.D. Texas - Corpus Christi Div.).

⁴¹⁴ James Nicholson of RC believes that the Coca-Cola brand is so important to retailers such as H.E.B. and Kroger that the retailers are reluctant to take actions that concern Coca-Cola bottlers. Nicholson, Tr. 3813-15.

The ALJ pointed to evidence that, in 1988, rather than risk retribution from H.E.B., CCSW had complied with H.E.B.'s notice that it would not accept price increases for four months. Summers, Tr. 6769; IDFF paragraph 449. But this notice from H.E.B. went to vendors for all products (not just soft drinks) and was applicable for only a short time, Summers, Tr. 6769, so we do not find that it constitutes convincing evidence of H.E.B.'s ability to disrupt a branded CSD bottler cartel. Perhaps more telling is the history of CCSW's negotiations with Stop-N-Go, a leading convenience store chain in the San Antonio area, regarding promotional programs. In 1986, Stop-N-Go refused to feature Coca-Cola products in South Texas for six to nine months, because CCSW would not agree to Stop-N-Go's terms for promotional programs. Howell, Tr. 4061-63; IDFF paragraph 450. The terms that CCSW wanted were exclusive promotions for Coke products. Bodnar, Tr. 1381. In 1987, Coke received exclusivity in exchange for adhering to Stop-N-Go's promotional terms. Moreover, in 1988, Coke persuaded Stop-N-Go to drop its promotional terms while maintaining the Coke ad features schedule for 1988. Bodnar, Tr. 1381. This history indicates that Stop-N-Go gave in to CCSW's demands, not the reverse, and may reflect the leverage that Coke's market dominance in the San Antonio market gives to CCSW.

comparable to but smaller than Pepsi's,⁴¹⁵ and even more compellingly to the other branded CSD products sold by Grant-Lydick and the Espinoza companies, none of whose shares reach even the 20% mark.⁴¹⁶ In the face of such market share dominance by Coke, we are skeptical that H.E.B. (or any other retailer) would switch all purchases to another branded CSD, since such a switch might well have a large impact on the retailer's overall sales of branded CSDs.⁴¹⁷

Nor does it appear that H.E.B. (or any other retailer) has sufficient leverage over either Pepsi COBO or Grant-Lydick to force them to deviate from a possible collusive agreement. Mr. Davis of Pepsi COBO testified that H.E.B. does not have the clout to demand that Pepsi bottlers uniformly price their branded CSDs throughout H.E.B.'s sales territory, and that Albertson's had been unsuccessful in its attempts to convince Pepsi bottlers to price their branded CSDs uniformly throughout Albertson's sales territory.⁴¹⁸ Emery Bodnar testified that Grant-Lydick has never rolled back a wholesale price increase at the request of H.E.B., and that H.E.B. does not have the clout to force Grant-Lydick to rollback wholesale prices.⁴¹⁹

In addition, this market does not feature the types of sporadic, large, and not immediately observable orders that encourage cheating on a cartel.⁴²⁰ Although some retailers negotiate a promotion schedule of advertisements for an entire year, other large retailers -- such as H.E.B. -- decide on promotions in much smaller time periods.⁴²¹ Thus, the offers that branded CSD bottlers would make would involve a smaller profit potential and less incentive to cheat

⁴¹⁵ CX 1681 C. See Hilke, Tr. 6030, 6033 (CX 1681 used Nielsen data for food stores in Bexar County, which includes San Antonio).

⁴¹⁶ *Id.*

⁴¹⁷ This situation contrasts sharply with that in County Lake Foods, Inc., in which the three largest distributors accounted for 90% of sales and the product involved -- milk -- was not differentiated, so that distributors could credibly assert that a substantial increase in milk prices would prompt aggressive negotiations to seek a price reduction or an alternative supplier. See *County Lake Foods*, 754 F. Supp. at 679 ("Fluid milk processors face no significant product differentiation barrier. Therefore, a food distributor could change its supplier of fluid milk without losing sales due to brand loyalty.").

⁴¹⁸ Davis, Tr. 4495-97, 4499-501.

⁴¹⁹ Bodnar, Tr. 1488-90.

⁴²⁰ See, e.g., *Baker Hughes*, 908 F.2d at 986 (power buyers could decrease the likelihood of collusion where awards of lumpy orders -- sometimes exceeding \$1 million -- were made through confidential bidding by sophisticated buyers).

⁴²¹ Davis, Tr. 4512-13.

than if promotions were contracted on a long-term basis.⁴²² In addition, changes to ad features and low-priced ad features would be quickly observable by other branded CSD bottlers, whose DSD delivery personnel can easily observe new promotions.⁴²³

2. The Ability to Induce New Entry or Vertically Integrate

There is no record evidence that any of the retailers in this market would vertically integrate into the production of branded CSDs in order to avoid payment of a collusive price increase. In order to do so, a retailer would need a branded CSD franchise for a product such as Coke or Pepsi or Big Red, and there is no evidence to show that a retailer could wrest those franchises away from their current holders.

Nor is there any evidence that retailers would induce new entry by another branded CSD bottler as a remedy to anticompetitive price increases. Indeed, as we discuss below, the evidence demonstrates that entry into the bottling of branded CSDs is extremely difficult, because of the difficulty of obtaining a branded CSD franchise and associated problems. Thus, we find that this case is not comparable to those in which power buyers could decrease the likelihood of collusion because they could induce new entry or vertically integrate themselves to avoid succumbing to a collusive price increase.⁴²⁴

⁴²² Courts have noted that the possibility of a single large sale that is unlikely to be detected may tempt cheating by a cartel member. *E.g., FTC v. Elders Grain, Inc.*, 868 F.2d 901, 905 (7th Cir. 1989). It has also been noted that excess capacity can make it possible for a cartel cheater to supply a large quantity at little cost, thereby making the cartel cheating even more tempting. *Elders Grain*, 868 F.2d at 905-06.

In this case, the ALJ also found that the presence of excess capacity in this market reduced the likelihood of collusion. ID 74. We find that the existence of excess capacity in this particular market with its own set of distinctive market conditions would not significantly reduce the likelihood of collusion. If excess capacity were a major factor here, we would expect the record to show some pricing pressure effect from it; we have not seen any. In addition, product differentiation may mitigate the effect of excess capacity, since retailers would not necessarily find it profitable to substitute all of one branded CSD for sales of two others. *See* Section IV.C *supra*. In addition, we find the assertions of excess capacity to be somewhat inflated. Although the ALJ found that Grant-Lydick operates with 20-40% of unused capacity during the busiest time of the year, IDFF paragraph 134, the ALJ failed to note that this applies only to bottles, since Grant-Lydick contract packs its cans. Turner, Tr. 1117; Bodnar, Tr. 1526-27. The excess capacity listed for the Pepsi COBO -- IDFF paragraph 136 -- fails to note that sales of branded CSDs are highly seasonal, and that therefore excess capacity in February may be used capacity in July or December. Davis, Tr. 4513-14. Certain other citations to excess capacity involve bottlers that we have determined fall outside of the relevant market. *E.g.*, IDFF paragraph 135, 137, 138, 139. Thus, we are not convinced that there is a great deal of excess capacity in the relevant market in any case.

⁴²³ *See* CX 465 A.

⁴²⁴ *Cf. Country Lake Food, Inc.*, 754 F. Supp. at 679-80 (3 largest distributors had capability to vertically integrate, but court noted that possibility of vertical integration alone would not be sufficient to rebut presumption of market power).

3. Conduct by Retailers

Finally, we have examined whether conduct by any of the retailers suggests an ability to undermine a cartel among branded CSD bottlers. Although the evidence shows that H.E.B. and other large retailers have some bargaining power,⁴²⁵ they do not add up to the type of conduct indicative of retailer's ability to turn to alternatives and thereby defeat a branded CSD bottler cartel. Indeed, the evidence is consistent that neither H.E.B. nor Kroger have attempted the type of market conduct that might indicate oligopsony power over branded CSD bottlers.⁴²⁶

In any case, even if H.E.B. as a retailer accounting for significant portions of the sales of CCSW and Pepsi COBO could defeat a collusive price increase from branded CSD bottlers, that action may only protect H.E.B., not other retailers. The discounts (including payments for ads and displays) negotiated between branded CSD bottlers and retailers are individualized, so the fact that H.E.B. continued to receive a competitive price would not necessarily protect other retailers from supracompetitive prices. That an anti-competitive effect may pertain only to some portion of the market does not immunize it from antitrust liability.⁴²⁷

⁴²⁵ For example, H.E.B. and Kroger each have cancelled scheduled ads because they determined that the price was not competitive. Summers, Tr. 6626-27; Kaiser, Tr. 3218. H.E.B., Kroger, and Albertson all require that bottlers offer them their lowest net wholesale price. Brinkley, Tr. 2234; Bodnar, Tr. 1660-61; Chapman, Tr. 7245; Turner, Tr. 1200; Summers, Tr. 6646, CX 3700-D; Donald, Tr. 5320-21, 5327-28; Kaiser, Tr. 3264. These events reflect the ability of the large retailers to ensure that they are getting prices that are comparable to those offered other retailers, but they do not show that the retailers could counteract a branded CSD bottler cartel.

⁴²⁶ H.E.B. has never dictated the terms or conditions under which branded CSDs are sold in San Antonio or any other Texas market. Brinkley, Tr. 2235-36; Chapman, Tr. 7242; Gonzaba, Tr. 2100-01. Specifically, H.E.B. has never dictated or attempted to dictate package sizes or product lines, prohibited or attempted to prohibit any bottler from running a branded CSD advertisement with one of H.E.B.'s competitors, asked that a bottler stop selling a particular package size to an H.E.B. competitor, or used its advantage in one market to gain an advantage in another market. Brinkley, Tr. 2236-40; Chapman, Tr. 7242-44; Gonzaba, Tr. 2101-02.

Kroger has never dictated the terms and conditions under which branded CSDs may be sold in San Antonio or any other Texas market. Kaiser, Tr. 3215-16. Indeed, Kroger has threatened not to run ads unless they got an equal deal on price, but never got a better price than others. Kaiser, Tr. 3216.

⁴²⁷ See, e.g., *United States v. United Tote*, 768 F. Supp. 1064 (D. Del. 1991) (liability found where 52% of market would be affected); *FTC v. Bass Bros. Enters.*, 1984-1 Trade Cas. (CCH) paragraph 66,041 at 68,605 (N.D. Ohio 1984) (liability found where less than 1/3 of industry would have been affected).

VII. ENTRY

We have held that a “primary consideration in evaluating the likely competitive effects of a merger or acquisition is the ease or difficulty with which new competitors might enter the market in response to supracompetitive pricing.” *Owens-Illinois*, slip op. at 27-28. Under the Merger Guidelines, we recognize that if entry is “so easy that market participants, after the merger, could not profitably maintain a price increase above premerger levels,” then the merger is unlikely to lead to the exercise of market power. Merger Guidelines, Section 3.0. In such circumstances, the absence of barriers to entry “makes it highly unlikely that a merger or acquisition will have anticompetitive effects, because any effort to extract supracompetitive prices and profits will induce new entry, which will reduce prices to competitive levels.” *B.F. Goodrich*, 110 FTC at 295-96. On the other hand, “if prompt, effective entry is unlikely, customers may be exposed to sustained periods of anticompetitive harm.” *Owens-Illinois*, slip op. at 28.⁴²⁸

In this case, the issue is whether a new bottler of branded CSDs could enter or whether an existing branded CSD bottler could expand sufficiently to remedy the anticompetitive effects that we have identified as likely from the acquisition at issue.⁴²⁹ As we have recently noted, “[t]he Commission traditionally has assessed ease of entry by looking for identifiable barriers or impediments that could foreclose entry or prevent expansion by existing smaller firms sufficient to forestall anticompetitive conduct within the relevant market.” *Coca-Cola Co.*, Dkt. No. 9207, slip op. at 54. Entry barriers include “any condition that necessarily delays entry into a market for a significant period of time and thus allows market power to be exercised in the interim.” *Echlin Mfg. Co.*, 105 FTC 410, 486 (1985). We have

⁴²⁸ See also *United States v. Baker Hughes, Inc.*, 908 F.2d 981 (D.C. Cir. 1990); *United States v. Waste Management, Inc.*, 743 F.2d 976, 982 (2d Cir. 1984).

⁴²⁹ Under Section 1.32 of the Merger Guidelines, certain firms that participate in the market through supply-side response are included as participants in the market, and are therefore treated separately from other firms that may enter the market. Here, following the Merger Guidelines avdroach would lead to the same conclusion.

We have found that expansion by CCUSA and DPUSA in sales of post-mix fountain syrup would be unlikely to prevent or disrupt tacit collusion by branded CSD bottlers. See Section VI.C.1. *supra*. We also find that the record does not show that CCUSA and/or DPUSA would be likely to enter into bottling in order to disrupt price increases by branded CSD bottlers; the long list of cases in which collusion by branded CSD bottlers was not prevented or disrupted by entry by CCUSA and/or DPUSA supports our conclusion on this issue. See Section VI.C.3 *supra*.

pointed out that “[b]arriers or impediments need not be absolute; rather, they are assessed ‘in terms of the amount of time required for a motivated outsider to effect entry.’” *Coca-Cola Co.*, slip op. at 54, citing *Olin Corp.*, 113 FTC at 612; *Owens-Illinois*, slip op. at 28.⁴³⁰

We find that the evidence in the record demonstrates that entry by a new branded CSD bottler would be difficult. The ALJ agreed. Although the ALJ found that entry “as a soft drink distributor is easy,” he noted that, if the product and geographic markets asserted by complaint counsel were accepted, then entry barriers existed.⁴³¹ CCSW, the respondent, agrees. CCSW management has stated that “the bottling business is characterized by . . . high barriers to entry.”⁴³² TBG, the owner of respondent, also agrees. A TBG presentation to its Credit Committee stated that TBG operates in an industry with “strong barriers to entry/franchise monopolies/few competitors.”⁴³³

Some aspects of the soft drink bottling businesses do not present any obstacles to entry. We agree with the ALJ that the costs to lease delivery trucks and a warehouse are relatively small, and that a start-up distributor could purchase contract-packed bottled and canned soft drinks without any capital expenditures for equipment. IDFF paragraphs 378, 380. If we had included private label and warehouse-delivered CSDs in the relevant product market, we most likely would have agreed with the ALJ that entry into such a market would not be difficult.

But sales of branded CSDs are what concern us here, and entry as a branded CSD bottler is significantly more difficult. A branded CSD bottler must have a sufficient line of brands to be large enough to take advantage of various scale economies relating to the production, distribution, and marketing of CSDs. In *Coca-Cola Co.*, we found that “[a] bottler needs at least 8% to 15% of the local market for carbonated soft drinks to achieve minimum efficient scale.” Slip op. at 57. The record here indicates that even a higher market share -- perhaps over 20% where the bulk of the market is attributable to a single “flagship” brand -- may be necessary where one bottler such

⁴³⁰ The Merger Guidelines use a comparable analysis, assessing entry as “easy” if it is “timely, likely, and sufficient in its magnitude, character, and scope to deter or counteract the competitive effects of concern.” Section 3.0.

⁴³¹ ID 72 & n.22; IDFF paragraph 396.

⁴³² CX 1406 Z9.

⁴³³ CX 3806 I.

as CCSW dominates the market.⁴³⁴ Conversely, branded CSD companies look to place their franchises with bottlers that have large enough operations that they can take advantage of such economies.⁴³⁵

Certain of the most important requirements for successful operation as a branded CSD bottler interact, creating a situation in which each element is necessary in order to obtain the others. For example, a branded CSD bottler must have a sufficient line of brands to generate enough volume to justify the costs of DSD delivery.⁴³⁶ As we noted previously, the testimony is consistent that DSD delivery is critical for the success of a branded CSD bottling operation.⁴³⁷ Conversely, in order to obtain a branded CSD franchise, a bottler would need to show that it intended to use DSD delivery.⁴³⁸

Moreover, to provide effective competition sufficient to thwart any unilateral or collusive anticompetitive activity, a new branded CSD bottler would need a line of brands with name recognition and volume sufficient to induce retailers to agree to ad features, not just in-store or other, less effective promotional activities.⁴³⁹ As Mr. Kaiser of Kroger explained, in selecting a brand for an ad-buy program, “[t]he most important consideration we have is how strong the brand is [*i.e.*, name recognition] and how many cases we can sell of it [*i.e.*, volume].” Kaiser, Tr. 3231-32.

As this discussion of the evidence makes clear, a key to competitive effectiveness as a branded CSD bottler is to obtain a line of brands sufficient to generate volume that will support the use of DSD delivery and the achievement of minimum efficient scale, and a volume and market share sufficient to provide the name recognition and throughput necessary to “grow the brand” through ad features and other significant promotions. In particular, a “cola” is necessary

⁴³⁴ Both Mr. Bodnar and Mr. Turner testified that DP-SA had just reached critical mass in terms of ability to obtain ad features in 1983, when DP-SA had just reached a market share in food stores of 22.6%. CX 1681 C; *see also* Section VI.C.2.a *supra*.

⁴³⁵ *See, e.g.*, Amicus Brief of DPUSA at 6-9

⁴³⁶ CX 3941 at 288 [Schmid]; *see also* Sections IV.C.2, VI.C, D *supra*

⁴³⁷ *See* Section IV.C.2, VI.C, D *supra*.

⁴³⁸ *See* Section IV.C.2 *supra*.

⁴³⁹ *See* Section VI.C.2 *supra* (Grant-Lydick has not provided significant competition to CCSW and Pepsi COBO where Grant-Lydick could not obtain ad features).

to generate such volume.⁴⁴⁰ The fact that the branded CSD bottlers that obtain ad features are those whose concentrate companies invest millions of dollars in advertising for their brands also indicates that a brand backed by substantial advertising by its concentrate company is necessary to achieve a level of competitive effectiveness sufficient to prevent an anticompetitive price increase.⁴⁴¹

But it would be very difficult for a new entrant to obtain such a brand, much less a line of such brands. As we observed in Coca-Cola Co., “[m]ost local markets for carbonated soft drinks have a Coca-Cola bottler, a Pepsi-Cola bottler, and a so-called ‘third bottler,’ which carries various brands of soft drinks other than Coca-Cola or Pepsi-Cola brands.” Slip op. at 57.⁴⁴² The concentrate companies for branded CSDs are most interested in placing their brands with incumbents who have proven track records, not with new entrants who may or may not be able to reach minimum efficient scale.⁴⁴³

In light of these facts, it is not surprising that expansion by an incumbent branded CSD bottler to defeat an anticompetitive price increase would also be very difficult. The pattern of franchise transfers in the relevant market has been that branded CSD concentrate companies seek to move their franchises to the largest bottler that is not prohibited from having them due to flavor restrictions.⁴⁴⁴ Just as DPUSA moved its franchise to CCSW, so Dr Pepper/7-Up moved the 7-Up franchise from Texas Bottlers -- with a 3.2% total branded market share in 1986⁴⁴⁵ -- to Grant-Lydict, with approximately a 14.3% total branded market share in 1986.⁴⁴⁶ This pattern reveals franchise moves that cause increasing concentration in this market,

⁴⁴⁰ Bodnar, Tr. 1253-54.

⁴⁴¹ See Section IV.C.3 *supra*.

⁴⁴² See also Lydict, Tr. 2937, 2943.

⁴⁴³ See CX 3989 at 36 [Shanks].

⁴⁴⁴ Bottling franchises prohibit a bottler from selling more than one brand in a “flavor segment.” IDFF paragraph 105; CX 1668; RX 2938 C.

⁴⁴⁵ CX 1681 D.

⁴⁴⁶ See CX 1681 C (adjusting Grant-Lydict’s 1986 market share in food stores of 16.8%, CX 1681 C, for fountain based on an interpolation of .85 from data in CX 4146 H results in an approximate market share of 14.3% for Grant-Lydict in 1986). When Grant-Lydict acquired 7-Up, 7-Up had a market share of about 3%. (See 3.8% share in food stores shown in CX 1681 D, adjusted for fountain by .23 factor set forth in CX 4146 H, results in overall market share of 2.9%) The addition of this market share still was not sufficient to enable Grant-Lydict to reach the critical mass that DPUSA had just achieved in 1983 with the combination of Dr Pepper, RC, Canada Dry, and other branded CSD franchises. Bodnar, Tr. 1253-54.

not expansion that would defeat an anticompetitive price increase.⁴⁴⁷ Accordingly, we find that expansion by an existing incumbent as well as entry by a new branded CSD bottler would be unlikely to defeat anticompetitive conduct in this market.⁴⁴⁸

VIII. THE SOFT DRINK INTERBRAND COMPETITION ACT

In a separate argument, respondent maintains that the Soft Drink Interbrand Competition Act (“SDICA”), 15 U.S.C. 3501-03, governs this proceeding and mandates dismissal of the complaint.⁴⁴⁹ We disagree.

It is apparent from the very language of the SDICA that the statute is a narrow one that does no more than legalize exclusive territorial restrictions and transshipping prohibitions.⁴⁵⁰ The SDICA is thus solely concerned with legitimizing these vertical non-price restraints; it does not address horizontal acquisitions, which remain exclusively within the purview of the existing antitrust laws. Because the present case involves a horizontal acquisition and in no way

⁴⁴⁷ This pattern is consistent with a long-standing trend to bottler consolidation throughout the United States. *See* note 359 *supra*.

⁴⁴⁸ The Answering Brief of Respondent-Appellee did not assert any efficiencies that allegedly would outweigh any anticompetitive effects of the acquisition. Nonetheless, Respondent’s Proposed Findings of Fact contain certain facts labelled as efficiencies. *See, e.g.*, RPF paragraphs 527-531. To the extent that respondent relies on these facts on appeal, we find that such alleged efficiencies do not outweigh the likelihood of a substantial lessening of competition due to CCSW’s acquisition of the Dr Pepper franchise, and that respondent made no showing that its alleged efficiencies could not be achieved by means other than the acquisition at issue in this case. *See* Merger Guidelines, Section 4.0.

⁴⁴⁹ The SDICA provides as follows, in pertinent part:
Nothing contained in any antitrust law shall render unlawful the inclusion and enforcement in any trademark licensing contract or agreement, pursuant to which the licensee engages in the manufacture . . . , distribution, and sale of a trademarked soft drink product, of provisions granting the licensee the sole and exclusive right to manufacture, distribute and sell such product in a defined geographic area or limiting the licensee, directly or indirectly, to the manufacture, distribution, and sale of such product only for ultimate resale to consumers within a defined geographic area: Provided, that such product is in substantial and effective competition with other products of the same general class in the relevant market or markets.
15 U.S.C. Section 3501 (emphasis in original).

⁴⁵⁰ As the legislative history explains: “The Committee intends that [the SDICA] provide necessary relief [that is, legitimizing exclusive territorial agreements when not anticompetitive] without granting antitrust immunity and without establishing any precedent that would weaken our beleaguered antitrust laws.” H.R. Rep. No. 96-1118, 96th Cong., 2d Sess. 2, 5 (1980) (emphasis added), reprinted in 1980 U.S.C.C.A.N. 2373, 2378. *See also* *Commonwealth of Pennsylvania v. Pepsico, Inc.*, 836 F.2d 173, 175-79 (3d Cir. 1988); *Pepsi-Cola Metropolitan Bottling Co. v. Checkers, Inc.*, 754 F.2d 10, 18 (1st Cir. 1985); *Coca-Cola Co. v. FTC*, 642 F.2d 1387, 1389-90 (D.C. Cir. 1981) (recognizing that the SDICA’s sole purpose is to legitimize, under certain circumstances, the CSD industry’s system of exclusive territorial distributorships).

challenges the existence of vertical territorial limitations and customer restraints,⁴⁵¹ the SDICA is completely inapplicable.

IX. APPROPRIATE RELIEF

Complaint counsel sought an order requiring divestiture of the Dr Pepper and Canada Dry franchises and prior approval by the Commission of any future acquisition by CCSW in the relevant market for a period of ten years from the date the Commission's order in this matter becomes final. The Commission has "wide discretion in its choice of a remedy," and "the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist." *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 61, 613 (1946). The Commission has the authority to impose prior approval requirements in merger cases. *Abex Corp. v. FTC*, 420 F. 2d 928 (6th Cir. 1970), *cert. denied*, 400 U.S. 865 (1970). *See also Coca-Cola*, slip op. at 63-64.

[I]t is industry market structure and market conditions, not whether a 'knowing and deliberate violation' or a 'likelihood of repeated unlawful conduct' has been shown that determines the appropriateness of imposing a prior approval requirement in a particular case.

American Medical International, Inc., 104 FTC 1, 224 (1984).

We find that CCSW's acquisition of the Dr Pepper franchise in the San Antonio market is likely substantially to lessen competition among branded CSDs in that market, and we therefore order divestiture of the Dr Pepper franchise to a Commission-approved purchaser. Finding no anticompetitive effects from the acquisition of the Canada Dry franchise, we decline to order its divestiture.

In light of the highly concentrated market structure and the particular significance of increased market share in the branded CSD market in this case, we further order that CCSW must obtain Commission approval for any additional acquisitions in the relevant market for a period of ten years from the date on which the Commission's order in this matter becomes final.

⁴⁵¹ In reaching this conclusion, we reject respondent's efforts to characterize the horizontal acquisition of assets (e.g. franchise agreements) from a competing bottler as a vertical transaction merely because licenses from concentrate companies are involved. If this argument were accepted, it would immunize virtually all acquisitions by bottlers, including the acquisition of a major competitor, from antitrust scrutiny.

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

I agree that the acquisition of the franchise to produce and distribute Dr Pepper by the Coca-Cola Bottling Company of the Southwest ("CCSW") was likely to substantially lessen competition in the San Antonio market for branded carbonated soft drinks ("CSDs"). I therefore concur in the order to divest this franchise and to require prior approval for certain future acquisitions. I must nevertheless dissent from some of the reasoning accompanying the opinion of two Commissioners, which speculates on issues neither presented to the Commission, nor necessary to a decision.

The record is replete with evidence indicating a strong presumption that this merger created or enhanced market power or facilitated its exercise in the San Antonio market for branded CSDs, accompanied by a strong anticompetitive effects story and difficult entry. The discussions in the opinion of two Commissioners relating to (1) the unilateral exercise of market power and (2) certain pricing behavior are, given the strength of the basic case, unnecessary to a just resolution of this matter, and therefore contrary to accepted notions of judicial construction.

CONCURRING STATEMENT OF COMMISSIONER DENNIS A. YAO

I concur with the opinion of the majority that branded CSDs are an antitrust product market. The record supports both this conclusion and the existence of strong product differentiation between the take-home and cold drink segments of that market. With respect to the latter point, Section IV.C.1 of the opinion discusses evidence that (i) Coca-Cola bottlers divide their businesses into take-home and cold drink markets, (ii) bottles/cans are handled and marketed very differently than fountain products, and (iii) substantial price differences exist between equivalent-sized take-home versus cold drink branded CSDs. Such evidence of differentiation suggests the possibility that take-home branded CSDs also comprise an antitrust product market. My deliberations in this matter have led me to question whether, in the face of a price increase by branded CSD bottlers, retailers (other than convenience stores) could substitute cold drink individual can or fountain cup sales for take-home sales in 3-liter PET bottles or 6-packs of 12-ounce cans, or whether fountain vendors could substitute sales in 3-liter PET bottles for individual can sales.¹ If we had found a smaller relevant antitrust product market (take-home sales of branded CSDs) within a larger one (branded CSDs) in this case, that would not have been unique.² A take-home branded CSD market in the San Antonio area would be even more concentrated than the branded CSD market that we found.³ However, since neither com-

¹ We had no need to consider this issue in *Coca-Cola Co.*, Dkt. No. 9207 (June 28, 1994), where we were examining whether branded CSD bottlers could substitute concentrate or syrup for each other in the face of a price increase by a concentrate company. There, the evidence compelled the conclusion that branded CSDs were the smallest relevant product market, since concentrate and syrup are linked in that syrup can be manufactured from concentrate. Indeed, CCSW manufactures fountain syrup from concentrate. *Summers*, Tr. 6508-09.

² See *Olin Corp.*, 113 FTC 400, 598-600 (1990), *aff'd*, 986 F.2d 1295 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 1051 (1994) (competitive effects analyzed within both a broader antitrust product market including the premium-priced and less expensive products, and a smaller antitrust product market consisting of only the premium-priced product).

³ The pre- and post-acquisition HHIs would be:

Pre-acquisition HHI	3841
Post-acquisition HHI	4554
HHI Increase	713

CX 1681 A; *Hilke*, Tr. 6033. These HHIs are based on Nielsen data for soft drink sales in food stores in Bexar County (which includes San Antonio), comparing Oct./Nov. 1983 (pre-acquisition) with Aug./Sept. 1984 (post-acquisition) sales. *Hilke*, Tr. 6030. Since Nielsen data automatically exclude fountain and vending sales of branded CSDs, and since Bexar County accounts for 86% of the population in the 10-county relevant geographic market (*Hilke*, Tr. 6030, 6262; CX 4131 A), these data provide a reasonably accurate measure of take-home branded CSD sales in the San Antonio area.

plaint counsel nor respondent directly considered or briefed this possibility, we do not have a full record on which to decide this point, nor is it necessary, given the solid evidence of strong product differentiation within the branded CSD market.

FINAL ORDER

This matter having been heard on the appeal of complaint counsel from the initial decision, and on briefs and oral argument in support of, and in opposition, to the appeal; for the reasons stated in the attached opinion, the Commission has determined to grant the appeal in part, and reverse the initial decision. Accordingly,

It is ordered, That the following order be and the same hereby is ordered:

I. DEFINITIONS

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

A. "*CCSW*" means Coca-Cola Bottling Company of the Southwest, its directors, officers, employees, agents and representatives, its successors and assigns, its predecessors, subsidiaries, divisions, groups and affiliates controlled by CCSW, directly or indirectly, and their respective directors, officers, employees, agents and representatives, and their respective successors and assigns.

B. "*Affiliate*" means any firm in which there is 10% or more ownership or control, directly or indirectly, between firms.

C. "*Concentrate*" means the base element, flavors or essences mixed according to a formula which, when added to carbonated water and nutritive or non-nutritive sweetener, is a carbonated soft drink.

D. "*Syrup*" means the concentrate and nutritive or non-nutritive sweetener which, when added to carbonated water, is a carbonated soft drink.

E. "*Carbonated soft drink*" means a carbonated beverage that does not contain alcohol and is produced by combining carbonated water with a sweetener and concentrates or with syrup.

F. "*Branded carbonated soft drink*" means a carbonated soft drink identified with any nationally or regionally recognized label,

name, or trademark that is, in general, heavily advertised, widely available, and ordinarily distributed by the direct-store-door delivery method. This definition does not include a label, name, or trademark associated solely with a single grocery or restaurant retailer, or with a generic flavor.

G. "*Branded concentrate or syrup*" means concentrate or syrup used to produce branded carbonated soft drinks.

H. "*Direct-store-door delivery*" means a method of distribution whereby the producer or distributor delivers product directly to the retail outlet and ordinarily positions the product for sale to the retailer's customers.

I. "*Acquired Dr Pepper assets*" means the franchise to produce and distribute Dr Pepper products acquired by CCSW from San Antonio Dr Pepper Bottling Company on or about September 1984 and any franchises to produce and distribute Dr Pepper products in the San Antonio area acquired by CCSW after September 1984.

II.

It is further ordered, That within twelve (12) months after the date this order becomes final, CCSW shall divest the acquired Dr Pepper assets absolutely and in good faith, at no minimum price. The divestiture shall be only to an acquirer, and only in a manner, that receives the prior approval of the Commission. Pending any divestiture required by this order, CCSW shall take all measures necessary to maintain the acquired Dr Pepper assets in their present condition and shall not cause or permit impairment of the marketability or viability of such assets. The purpose of the divestiture is to remedy the lessening of competition found in the Commission's decision.

III.

It is further ordered, That:

A. If CCSW has not divested the acquired Dr Pepper assets, absolutely and in good faith and with the Commission's prior approval, within twelve (12) months after the date this order becomes final, CCSW shall be subject to the appointment by the Commission of a trustee to effect the divestiture. In the event the Commission or the Attorney General brings an action pursuant to Section 5(1) of the

Federal Trade Commission Act, 15 U.S.C. 45(1), or any other statute enforced by the Commission, CCSW shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a Commission decision not to appoint a trustee under this paragraph shall preclude the Commission or the Attorney General from seeking civil penalties and any other relief available, including a court-appointed trustee, pursuant to Section 5(1) of the Federal Trade Commission Act, 15 U.S.C. 45(1), or any other statute enforced by the Commission, for any failure by the CCSW to comply with this order.

B. If a trustee is appointed by the Commission or a court pursuant to this order, CCSW shall be subject to or, in the case of a court-appointed trustee, shall consent to the following terms and conditions regarding the trustee's powers, authority, duties, and responsibilities:

(1) The trustee shall be selected and appointed by the Commission or, in the case of a court-appointed trustee, by the court. The trustee shall be a person with experience and expertise in acquisitions and divestitures. The appointment shall be effective fifteen (15) days (the "effective date") after CCSW's receipt of written notifications of such appointment or, in the case of a court-appointed trustee, at such time as the court may order, unless CCSW has, on or before the effective date, presented substantial grounds for disqualification of the trustee. In the event of such objection to the appointment of the trustee, the effective date shall be stayed pending a determination by the Commission or, in the case of a court-appointed trustee, by the court.

(2) The trustee shall have the exclusive power and authority, subject to the prior approval of the Commission, to divest the acquired Dr Pepper assets. The trustee shall have twelve (12) months from the date of appointment to accomplish the divestiture. If, however, at the end of the twelve-month period, the trustee has submitted a plan of divestiture or believes that divestiture can be accomplished within a reasonable time, the divestiture period may be extended by the Commission or, in the case of a court-appointed trustee, by the court.

(3) The trustee shall have full and complete access to the personnel, books, records and facilities of CCSW concerning the acquired assets, and CCSW shall develop such financial or other

information relevant to the property to be divested as the trustee may reasonably request. CCSW shall cooperate with the trustee, and shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays in divestiture caused by CCSW shall extend the time for divestiture in an amount equal to the delay, as determined by the Commission or, for a court-appointed trustee, by the court.

(4) Subject to CCSW's absolute and unconditional obligation to divest at no minimum price and to the purpose of the divestiture as stated in paragraph II of this order, the trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission for approval. The divestiture shall be made in the manner set out in paragraph II, provided, however, that if the trustee receives bona fide offers from more than one prospective acquirer, and if the Commission approves more than one such acquirer, then the trustee shall divest to the acquirer selected by CCSW from among those approved by the Commission.

(5) The trustee shall serve, without bond or other security, at the cost and expense of CCSW on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have the authority to employ, at the cost and expense of CCSW, such consultants, attorneys, investment bankers, business brokers, accountants, appraisers, and other representatives and assistants as are reasonably necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the divestiture and for all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court of the account of the trustee (including fees for his or her services), all remaining monies shall be paid at the direction of CCSW, and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's divesting the acquired assets. CCSW shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, or liabilities arising in any manner out of, or in connection with, the trustee's duties under this order. Within forty-five (45) days after the appointment of the trustee and subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, CCSW shall execute a trust agreement that transfers to the

trustee all rights and powers necessary to permit the trustee to effect the divestiture required by this order.

(6) If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in this paragraph.

(7) The Commission (or, in the case of a court-appointed trustee, the court) may on its own initiative or at the request of the trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this order.

(8) The trustee shall report in writing to CCSW and to the Commission every sixty (60) days concerning his or her efforts to accomplish divestiture.

IV.

It is further ordered, That, within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until CCSW has fully complied with the provisions of paragraphs II and III of this order, CCSW shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying or has complied with those provisions. CCSW shall include in its compliance reports, among other things that are required from time to time, a full description of all substantive contacts or negotiations for the divestiture of the acquired Dr Pepper assets, including the identity of all parties that either contacted CCSW or were contacted by CCSW. CCSW also shall include in its compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning divestiture.

V.

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

A. The whole or any part of the stock, share capital, or equity interests in any company or firm:

(1) Engaged in the manufacture, distribution, or sale of branded concentrate or syrup or branded carbonated soft drinks; ~~or~~

(2) Engaged in the franchising or licensing of any brand, name or trademark used in connection with the manufacture, distribution, or sale of branded concentrate or syrup or branded carbonated soft drinks; or

(3) Holding an exclusive franchise or license of any branded concentrate company

in any geographic area in which CCSW is engaged in the manufacture, distribution, or sale of branded concentrate or syrup or branded carbonated soft drinks; or

B. Any franchise, license, brand, label, name or trademark associated with, or any assets engaged in, used for, or previously used for (and still suitable for) the manufacture, distribution, or sale of concentrate, syrup or carbonated soft drinks in any geographic area in which CCSW is engaged in the manufacture, distribution, or sale of branded concentrate or syrup or branded carbonated soft drinks. Provided, however, that this provision shall not apply to the purchase or acquisition of any assets worth less than \$100,000.

One (1) year after the date this order becomes final, and annually thereafter for the following nine (9) years and at such other times as the Commission or its staff may request, CCSW shall file with the Commission a verified written report of its compliance with paragraph V of this order.

VI.

It is further ordered, That, for the purpose of determining or securing compliance with this order, and subject to any legally recognized privilege, upon written request and on reasonable notice to CCSW made to its principal office, CCSW shall permit any duly authorized representatives 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 documents in the possession or under the control of CCSW relating to any matters contained in this order; and (B) upon five (5) days notice to CCSW and without restraint or interference from CCSW, to interview officers or employees of CCSW, who may have counsel present, regarding such matters.

VII.

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

Commissioner Azcuenaga and Commissioner Starek recused.¹

¹ Prior to leaving the Commission, former Commissioner Owen registered her vote in the affirmative for the Opinion of the Commission and the Final Order in this matter, with the notation that she dissented in part, as to discussions in the Opinion of the Commission relating to the unilateral exercise of market power and certain pricing behavior.

Complaint

118 F.T.C.

IN THE MATTER OF

NORTH AMERICAN PLASTICS CORPORATION, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3526. Complaint, Sept. 7, 1994--Decision, Sept. 7, 1994*

This consent order prohibits, among other things, an Illinois corporation and its officer from making unsubstantiated degradability or environmental benefit representations about their plastic bags in the future.

Appearances

For the Commission: *Brinley H. Williams, Phillip Broyles and Christian White.*

For the respondents: *Jeannie Lamar, Peterson & Ross, Chicago, IL.*

COMPLAINT

The Federal Trade Commission, having reason to believe that North American Plastics Corporation, a corporation, and Harold V. Engh, Jr., individually and as an officer of said corporation, hereinafter sometimes referred to as respondents, have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent North American Plastics Corporation is a Delaware corporation with its office and principal place of business at 921 Industrial Drive, Aurora, Illinois.

Respondent Harold V. Engh, Jr., is an officer of said corporation. In his capacity as an officer, he formulates, directs and controls the acts and practices of said corporation, and his business address is the same as that of the corporation.

PAR. 2. Respondents have advertised, offered for sale, sold and distributed plastic trash bags to the public under such trade names as "EnviroGard."

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

PAR. 4. Respondents have disseminated or caused to be disseminated advertisements and promotional materials for EnviroGard bags, including, but not necessarily limited to, the package label attached hereto as Exhibit A and the promotional materials attached hereto as Exhibits B and C.

The package labeling and promotional materials for EnviroGard plastic bags, attached hereto as Exhibits A, B and C, include one or all of the following statements on the package:

- BIODEGRADABLE [Exhibits A, B and C]
- Other degradable-type trash bags don't break down in landfills because they depend on harsh chemical additives that work only in sunlight. [Exhibit A]
- Works when other degradables don't! [Exhibit B]
- Naturally Biodegradable [Exhibit B]
- SAFE & NATURAL: EnviroGard Biodegradable trash bags are formulated with cornstarch. They degrade naturally upon contact with soil micro-organisms. Unlike our so called "Degradable" competition, EnviroGard degrades without sunlight. [Exhibit C]

PAR. 5. Through the statements referred to in paragraph four, and others in package labeling not specifically set forth herein, respondents have represented, directly or by implication, that:

(1) Compared to other plastic bags, EnviroGard bags offer a significant environmental benefit when consumers dispose of them as trash that is buried in a landfill; and

(2) EnviroGard bags will completely break down, decompose and return to nature in a reasonably short period of time after consumers dispose of them as trash that is buried in a landfill.

PAR. 6. Through the statements and representations referred to in paragraphs four and five, and others not specifically set forth herein, respondents have represented, directly or by implication, that at the time they made such representations, respondents possessed and relied upon a reasonable basis for such representations.

PAR. 7. In truth and in fact, at the time respondents made such representations, respondents did not possess and rely upon a reason-

able basis for such representations. Therefore, the representation set forth in paragraph six was, and is, false and misleading.

PAR. 8. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce, in violation of Section 5(a) of the Federal Trade Commission Act.



NEW!
EnviroGard

BIODEGRADABLE
Trash & Lawn Bags

By adding a little cornstarch to the plastic, we've come up with something exciting! New Biodegradable EnviroGard trash bags breakdown anywhere they come into contact with naturally occurring soil microorganisms. The cornstarch helps the microorganisms decompose the plastic. Other degradable-type trash bags don't breakdown in landfills because they depend on harsh chemical additives that work only in sunlight. So use the trash bag that works the natural way - Biodegradable EnviroGard! Mother Nature will thank you!

CAUTION! Danger of Suffocation. Do not leave these bags in areas accessible to small children.

Complaint

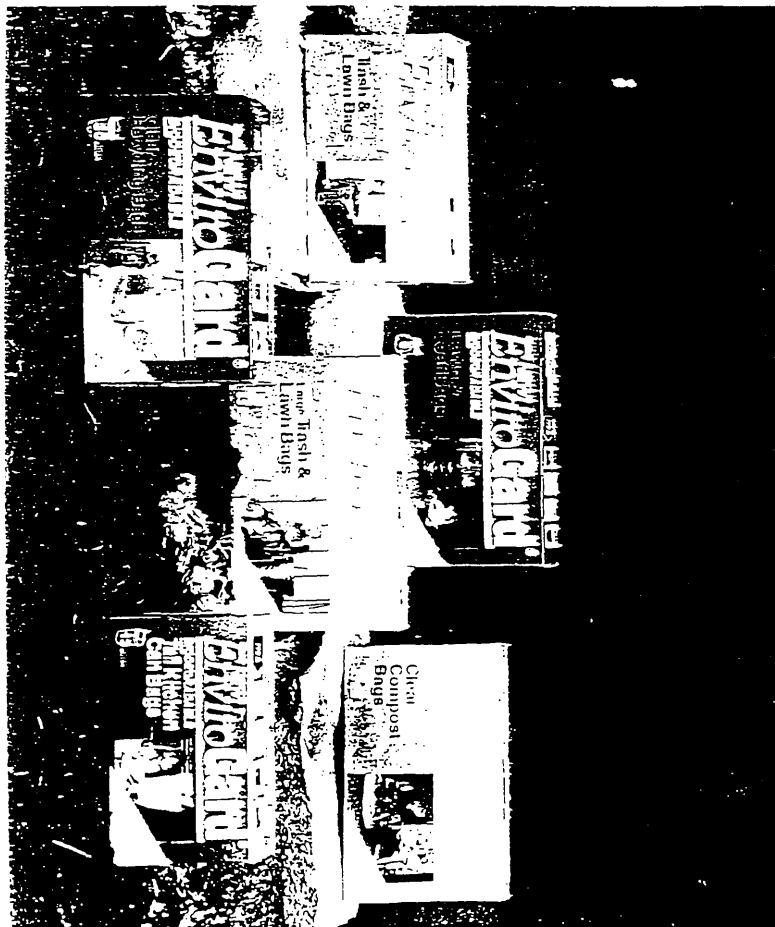
118 F.T.C.

EXHIBIT B

**GOOD
BUSINESS
For You & The
Environment**

- The more the consumer chooses your product, the more support you'll have to help the environment (A&P) they will pay more for them.
- Naturally Biodegradable
- Requires no sunlight
- Biodegradable
- Compostable with your lawn & garden
- 100% Recycled
- 100% Recycled

EnviroGard[®]
BIODEGRADABLE
Trash Bags



^{NEW!} EnviroGard™

BIODEGRADABLE Trash Bags

NATURALLY PROFITABLE!
and good for the environment too.

- **SAFE & NATURAL:** EnviroGard Biodegradable trash bags are formulated with cornstarch. They degrade naturally upon contact with soil micro-organisms. Unlike our so called "Degradable" competition, EnviroGard degrades without sunlight.
- **SUPPORTS RECYCLING:** EnviroGard products and packaging contain recycled materials and are themselves recyclable.
- **USES LESS PLASTIC:** EnviroGard contains cornstarch, so less plastic is used in its manufacture.
- **OUTSTANDING VALUE:** EnviroGard Biodegradable trash bags are profit makers, costing the same or less than several leading brands that are only degradable – Not BIODEGRADABLE.

EXHIBIT C

Stock #	Description	Pack- Case	Pack- Box	Ship Weight
22533	Full Gallon Bags 13 gallon - 24" x 30"	12	25	6.0
27033	Full Gallon Bags 13 gallon - 24" x 30"	1	20	3.7
71530	Trash & Lawn Bags 30 gallon - 30" x 36"	12	15	17.0
74030	Trash & Lawn Bags 30 gallon - 30" x 36"	1	40	3.47
70033	Large Trash & Lawn Bags 33 gallon - 33" x 40"	12	10	17.1
23033	Large Trash & Lawn Bags 33 gallon - 33" x 40"	1	30	3.37
70039	Lawn & Leaf Bags 6 barbed - 33" x 44"	12	8	15.4
72439	Lawn & Leaf Bags 6 barbed - 33" x 44"	1	24	3.11
70033	Compost Bags 33 gallon - 33" x 40"	12	8	16.5
71534	Clear Recycling Bags 30 gallon - 30" x 36"	12	15	17.0

The essential ingredient in EnviroGard Biodegradable trash bags, 012440 PCH, has been formulated exclusively for North American Plastics Corp. by Archer Daniels Midland Co.

NORTH AMERICAN PLASTICS CORP.
921 Industrial Drive
Aurora, IL 60506
Phone: 708/096 6200
Outside Illinois: 800/323 5964
Fax: 708/096 5127

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NORTH AMERICAN PLASTICS CORPORATION, ET AL.

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EXHIBIT C
Complaint

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 Cleveland Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents, their attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the 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 a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments received, 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 North American Plastics Corporation is a Delaware corporation with its office and principal place of business at 921 Industrial Drive, Aurora, Illinois.

Respondent Harold V. Engh, Jr., is an officer of said corporation. In his capacity as an officer, he formulates, directs and controls the acts and practices of said corporation, and his business address is the same as that of the corporation.

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

ORDER

DEFINITION

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

“*Plastic bag*” means any plastic grocery sack, or any plastic “disposer” bag, including, but not limited to, trash bags, lawn bags and kitchen bags, that is offered for sale, sold or distributed to the public by respondents, their successors and assigns, under the “North American Plastics” or “EnviroGard” brand name, or any other brand name of respondents, their successors and assigns; and also means any plastic bag sold or distributed to the public by third parties under private labeling agreements with respondents, their successors and assigns.

I.

It is ordered, That respondent North American Plastics Corporation, a corporation, its successors and assigns, and its officers, and Harold V. Engh, Jr., individually and as an officer of said corporation, and respondents’ representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, labeling, offering for sale, sale or distribution of any plastic bag, in or affecting commerce, as “commerce” is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, by words, depictions or symbols:

(A) That any such plastic bag is “degradable,” “biodegradable,” or “photodegradable,” or

(B) Through the use of “degradable,” “biodegradable,” or “photodegradable,” or any other substantially similar term or expression, that the degradability of any such plastic bag offers any environmental benefit when consumers dispose of them as trash that is buried in a sanitary landfill or incinerated,

unless at the time of making such representation, respondents possess and rely upon a reasonable basis for such representation, consisting of 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 North American Plastics Corporation, a corporation, its successors and assigns, and its officers, and Harold V. Engh, Jr., individually and as an officer of said corporation, and respondents' representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, labeling, offering for sale, sale or distribution of any North American Plastics Corporation product, including, but not limited to, any plastic bags and their packaging, in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, that any such product offers any environmental benefit, 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.

Nothing in this order shall prevent respondents from using any of the terms cited in Part I, or similar terms or expressions, if necessary to comply with any federal rule, regulation, or law governing the use of such terms in advertising or labeling.

IV.

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

(A) All materials relied upon to substantiate any representation covered by this order; and

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

V.

It is further ordered, That respondent North American Plastics Corporation shall distribute a copy of this order within sixty (60) days after service of this order upon it to each of its operating divisions and to each of its officers, agents, representatives or employees engaged in the preparation of labeling and advertising and placement of newspaper, periodical, broadcast and cable advertisements covered by this order.

VI.

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

VII.

It is further ordered, That respondent Harold V. Engh, Jr., shall promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. In addition, for a period of five (5) years from the service date of this order, he shall promptly notify the Commission of each affiliation with a new business or employment whose activities relate to the manufacture, sale or distribution of plastic products, or of his affiliation with a new business or employment in which his own duties and responsibilities relate to the manufacture, sale or distribution of plastic products. When so required under this paragraph, each such notice shall include the individual respondent's new

business address and a statement of the nature of the business or employment in which respondent is newly engaged, as well as a description of respondent's duties and responsibilities in connection with the business or employment. The expiration of the notice provision of this paragraph shall not affect any other obligation arising under this order.

VIII.

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

By the Commission.¹

¹ Prior to leaving the Commission, former Commissioner Owen registered her vote in the affirmative for the Complaint and Decision and Order in this matter.

IN THE MATTER OF

MACY'S NORTHEAST, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
THE MAGNUSON-MOSS WARRANTY ACT AND SEC. 5 OF
THE FEDERAL TRADE COMMISSION ACT

Docket C-3527. Complaint, Sept. 13, 1994--Decision, Sept. 13, 1994

This consent order requires, among other things, the New York-based retail department store subsidiaries to comply with the Pre-Sale Availability Rule under the Magnuson-Moss Warranty Act, to deliver a copy of the consent order to retail store managers involved in consumer sales, to inform their retail store managers of their compliance responsibilities, and to develop and implement a program for instructing their sales personnel about the availability and location of manufacturers' warranty information.

Appearances

For the Commission: *Jeffrey Klurfeld, Gerald Wright and Christian White.*

For the respondents: *Carol Hecht Katz, in-house counsel, New York, N.Y.*

COMPLAINT

Pursuant to the provisions of the Magnuson-Moss Warranty Act, 15 U.S.C. 2301 *et seq.*, and Rule 702, 16 CFR Part 702, promulgated thereunder, and the Federal Trade Commission Act, 15 U.S.C. 41 *et seq.*, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Macy's Northeast, Inc., Macy's South, Inc., Macy's California, Inc., and Bullock's, Inc., corporations ("respondents"), wholly-owned subsidiaries of R. H. Macy & Co., Inc., a Delaware corporation, have violated the provisions of said Acts and Rule 702 promulgated under the Magnuson-Moss Warranty Act, and it appearing to the Commission that a proceeding by it would be in the public interest, alleges:

PARAGRAPH 1. The definitions of terms contained in Section 101 of the Magnuson-Moss Warranty Act, 15 U.S.C. 2301, and in

Rule 702, 16 CFR 702.1 promulgated thereunder, shall apply to the terms used in this complaint.

PAR. 2. Respondent Macy's Northeast, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 151 W. 34th Street, New York, New York.

Respondent Macy's South, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 151 W. 34th Street, New York, New York.

Respondent Macy's California, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 50 O'Farrell Street, San Francisco, California.

Respondent Bullock's, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 50 O'Farrell Street, San Francisco, California.

PAR. 3. Respondents are now and have been engaged in the operation of retail department stores in New York, California and various other states. In the operation of their retail stores, respondents are now and have been distributing, advertising, offering for sale and selling, among other items, wearing apparel, consumer electronics, watches, home furnishings, housewares and small appliances, all of which are consumer products. Therefore, respondents are both suppliers and sellers of consumer products.

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

PAR. 5. In the ordinary course and conduct of their aforesaid business, respondents regularly sell or offer for sale consumer products for purposes other than resale or use in the ordinary course of the buyer's business. Therefore, respondents are sellers of consumer products.

PAR. 6. On or after March 12, 1987, respondents, in the ordinary course of their business as sellers of consumer products actually costing more than \$15 and manufactured on or after January 1, 1977, have failed to make the texts of written warranties readily available for examination by prospective buyers prior to sale through utiliza-

tion of one or both of the following methods required by 16 CFR 702.3(a), as amended:

1. Displaying the text of the warranty in close proximity to the warranted product;
2. Furnishing the text of the warranty upon request prior to sale and placing signs reasonably calculated to elicit the prospective buyer's attention in prominent locations in the store or department advising such prospective buyers of the availability of warranties upon request.

PAR. 7. Respondents' failures to comply with the provisions of 16 CFR 702, as amended, constituted and now constitute violations of the Magnuson-Moss Warranty Act and, pursuant to Section 110(b) thereof, unfair or deceptive practices under Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1).

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 San Francisco Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission would charge respondents with violation of the Federal Trade Commission Act; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and no comments having been filed

thereafter by interested parties pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Macy's Northeast, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 151 W. 34th Street, New York, New York.

Respondent Macy's South, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 151 W. 34th Street, New York, New York.

Respondent Macy's California, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 50 O'Farrell Street, San Francisco, California.

Respondent Bullock's, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 50 O'Farrell Street, San Francisco, California.

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

The definitions of terms contained in Section 101 of the Magnuson-Moss Warranty Act, 15 U.S.C. 2301, and in Rule 702, 16 CFR 702.1, promulgated thereunder, shall apply to the terms of this order.

I.

It is ordered, That respondents Macy's Northeast, Inc., Macy's South, Inc., Macy's California, Inc., and Bullock's, Inc., corporations, their successors and assigns, and their officers, representatives, agents and employees, directly or through any corporation, subsidiary, division or other device in connection with the sale or offering for sale of any consumer product in or affecting commerce, do forthwith cease and desist from failing to make a text of any written

warranty on a consumer product actually costing more than \$15 readily available for examination by prospective buyers prior to sale through utilization of one or more means specified in 16 CFR 702.3(a), as amended.

II.

It is further ordered, That respondents shall, within thirty (30) days of the date of service of this order, deliver to each current retail store manager and assistant or operations manager engaged in the sale of consumer products on behalf of respondents, a copy of this order to cease and desist.

III.

It is further ordered, That respondents shall, within thirty (30) days of the date of service of this order, instruct all current retail store managers and assistant or operations managers engaged in the sale of consumer products on behalf of respondents as to their specific obligations and duties under the Magnuson-Moss Warranty Act (15 U.S.C. 2301) and this order.

IV.

It is further ordered, That respondents shall, for a period of not less than four (4) years from the date of service of this order, instruct all future retail store managers and assistant or operations managers who will be engaged in the sale of consumer products on behalf of respondents, before they assume said responsibilities for respondents, as to their specific obligations and duties under the Magnuson-Moss Warranty Act (15 U.S.C. 2301) and this order.

V.

It is further ordered, That respondents shall, within thirty (30) days of the date of service of this order, develop and implement a program to instruct their sales personnel about the availability and location of warranty information.

VI.

It is further ordered, That respondents shall, for a period of not less than five (5) years from the date of service of the order, maintain and upon request make available to the Federal Trade Commission for inspection and copying (i) copies of all written instructions provided by respondents to their retail store managers and assistant and operations managers and sales personnel regarding their obligations and duties under the Magnuson-Moss Warranty Act (15 U.S.C. 2301) and this order; (ii) copies of signs posted by respondents in their retail store outlets designed to elicit prospective buyers' attention to the availability of the text of written warranties for review upon request; and (iii) copies of the text of written warranties made readily available by respondents' retail store outlets for examination by prospective buyers on request.

VII.

It is further ordered, That respondents, for a period of six (6) years from the date of service of this order, shall notify the Commission at least thirty (30) days prior to any dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation that may affect compliance obligations arising out of the order.

VIII.

It is further ordered, That respondents shall, within ninety (90) days after service of this order on them, file with the Commission a report in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

MONTGOMERY WARD & CO., INCORPORATED

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
THE MAGNUSON-MOSS WARRANTY ACT AND SEC. 5 OF
THE FEDERAL TRADE COMMISSION ACT

Docket C-3528. Complaint, Sept. 13, 1994--Decision, Sept. 13, 1994

This consent order requires, among other things, the Illinois-based retail department store to comply with the Pre-Sale Availability Rule under the Magnuson-Moss Warranty Act, to deliver a copy of the consent order to retail store managers involved in consumer sales, to inform their retail store managers of their compliance responsibilities, and to develop and implement a program for instructing their sales personnel about the availability and location of manufacturers' warranty information.

Appearances

For the Commission: *Jeffrey Klurfeld, Gerald Wright and Christian White.*

For the respondent: *Philip Delk*, in-house counsel, Chicago, IL.

COMPLAINT

Pursuant to the provisions of the Magnuson-Moss Warranty Act, 15 U.S.C. 2301 *et seq.*, and Rule 702, 16 CFR Part 702, promulgated thereunder, and the Federal Trade Commission Act, 15 U.S.C. 41 *et seq.*, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Montgomery Ward & Co., Incorporated, a corporation ("respondent"), has violated the provisions of said Acts and Rule 702 promulgated under the Magnuson-Moss Warranty Act, and it appearing to the Commission that a proceeding by it would be in the public interest, alleges:

PARAGRAPH 1. The definitions of terms contained in Section 101 of the Magnuson-Moss Warranty Act, 15 U.S.C. 2301, and in Rule 702, 16 CFR 702.1 promulgated thereunder, shall apply to the terms used in this complaint.

PAR. 2. Respondent Montgomery Ward & Co., Incorporated is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its principal office and place of business located at One Montgomery Ward Plaza, Chicago, Illinois.

PAR. 3. Respondent is now and has been engaged in the operation of a chain of retail department stores throughout the United States. In the operation of its retail stores, respondent is now and has been distributing, advertising, offering for sale and selling, among other items, wearing apparel, watches, consumer electronics, home furnishings, major and small appliances, power tools, auto parts and accessories, and lawn and garden equipment, all of which are consumer products. Therefore, respondent is both a supplier and seller of consumer products.

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

PAR. 5. In the ordinary course and conduct of its aforesaid business, respondent regularly sells or offers for sale consumer products for purposes other than resale or use in the ordinary course of the buyer's business. Therefore, respondent is a seller of consumer products.

PAR. 6. On or after March 12, 1987, respondent, in the ordinary course of its business as a seller of consumer products actually costing more than \$15 and manufactured on or after January 1, 1977, has failed to make the texts of written warranties readily available for examination by prospective buyers prior to sale through utilization of one or both of the following methods required by 16 CFR 702.3(a), as amended:

1. Displaying the text of the warranty in close proximity to the warranted product;
2. Furnishing the text of the warranty upon request prior to sale and placing signs reasonably calculated to elicit the prospective buyer's attention in prominent locations in the store or department advising such prospective buyers of the availability of warranties upon request.

PAR. 7. Respondent's failure to comply with the provisions of 16 CFR Part 702, as amended, constituted and now constitutes a violation of the Magnuson-Moss Warranty Act and, pursuant to Section 110(b) thereof, an unfair or deceptive practice under Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1).

DECISION AND ORDER

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

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and no comments having been filed thereafter by interested parties pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Montgomery Ward & Co., Incorporated is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Illinois, with its principal office and place of business located at One Montgomery Ward Plaza, Chicago, Illinois.

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

ORDER

The definitions of terms contained in Section 101 of the Magnuson-Moss Warranty Act, 15 U.S.C. 2301, and in Rule 702, 16 CFR 702.1, promulgated thereunder, shall apply to the terms of this order.

I.

It is ordered, That respondent Montgomery Ward & Co., Incorporated, a corporation, its successors and assigns, and its officers, representatives, agents and employees, directly or through any corporation, subsidiary, division or other device in connection with the sale or offering for sale of any consumer product in or affecting commerce, do forthwith cease and desist from failing to make a text of any written warranty on a consumer product actually costing more than \$15 readily available for examination by prospective buyers prior to sale through utilization of one or more means specified in 16 CFR 702.3(a), as amended.

II.

It is further ordered, That respondent shall, within thirty (30) days of the date of service of this order, deliver to each current retail store manager engaged in the sale of consumer products on behalf of respondent, a copy of this order to cease and desist.

III.

It is further ordered, That respondent shall, within thirty (30) days of the date of service of this order, instruct all current retail store managers engaged in the sale of consumer products on behalf of respondent as to their specific obligations and duties under the Magnuson-Moss Warranty Act (15 U.S.C. 2301) and this order.

IV.

It is further ordered, That respondent shall, for a period of not less than four (4) years from the date of service of this order, instruct all future retail store managers who will be engaged in the sale of consumer products on behalf of respondent, before they assume said responsibilities for respondent, as to their specific obligations and duties under the Magnuson-Moss Warranty Act (15 U.S.C. 2301) and this order.

V.

It is further ordered, That respondent shall, within thirty (30) days of the date of service of this order, develop and implement a program to instruct its sales personnel about the availability and location of warranty information.

VI.

It is further ordered, That respondent shall, for a period of not less than five (5) years from the date of service of the order, maintain and upon request make available to the Federal Trade Commission for inspection and copying (i) copies of all written instructions provided by respondent to its retail store managers and sales personnel regarding their obligations and duties under the Magnuson-Moss Warranty Act (15 U.S.C. 2301) and this order; (ii) copies of signs posted by respondent in its retail store outlets designed to elicit prospective buyers' attention to the availability of the text of written warranties for review upon request; and (iii) copies of the text of written warranties made readily available by respondent's retail store outlets for examination by prospective buyers on request.

VII.

It is further ordered, That respondent, for a period of six (6) years from the date of service of this order, shall notify the Commission at least thirty (30) days prior to any dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation that may affect compliance obligations arising out of the order.

VIII.

It is further ordered, That respondent shall, within sixty (60) days after service of this order on it, file with the Commission a report in writing, setting forth in detail the manner and form in which it has complied with this order.

IN THE MATTER OF

SEARS, ROEBUCK AND CO.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
THE MAGNUSON-MOSS WARRANTY ACT AND SEC. 5 OF
THE FEDERAL TRADE COMMISSION ACT

Docket C-3529. Complaint, Sept. 13, 1994--Decision, Sept. 13, 1994

This consent order requires, among other things, the Illinois-based retail department store to comply with the Pre-Sale Availability Rule under the Magnuson-Moss Warranty Act, to deliver a copy of the consent order to retail store managers involved in consumer sales, to inform their retail store managers of their compliance responsibilities, and to develop and implement a program for instructing their sales personnel about the availability and location of manufacturers' warranty information.

Appearances

For the Commission: *Jeffrey Klurfeld, Gerald Wright and Christian White.*

For the respondent: *Richard Barnett*, in-house counsel, Hoffman Estates, IL.

COMPLAINT

Pursuant to the provisions of the Magnuson-Moss Warranty Act, 15 U.S.C. 2301 *et seq.*, and Rule 702, 16 CFR 702, promulgated thereunder, and the Federal Trade Commission Act, 15 U.S.C. 41 *et seq.*, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Sears, Roebuck and Co., a corporation ("respondent"), has violated the provisions of said Acts and Rule 702 promulgated under the Magnuson-Moss Warranty Act, and it appearing to the Commission that a proceeding by it would be in the public interest, alleges:

PARAGRAPH 1. The definitions of terms contained in Section 101 of the Magnuson-Moss Warranty Act, 15 U.S.C. 2301, and in Rule 702, 16 CFR 702.1 promulgated thereunder, shall apply to the terms used in this complaint.

PAR. 2. Respondent Sears, Roebuck and Co. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 3333 Beverly Road, Hoffman Estates, Illinois.

PAR. 3. Respondent is now and has been engaged in the operation of a chain of retail department stores throughout the United States. In the operation of its retail stores, respondent is now and has been distributing, advertising, offering for sale and selling, among other items, wearing apparel, watches, consumer electronics, home furnishings, major and small appliances, power tools, and lawn and garden equipment, all of which are consumer products. Therefore, respondent is both a supplier and seller of consumer products.

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

PAR. 5. In the ordinary course and conduct of its aforesaid business, respondent regularly sells or offers for sale consumer products for purposes other than resale or use in the ordinary course of the buyer's business. Therefore, respondent is a seller of consumer products.

PAR. 6. On or after March 12, 1987, respondent, in the ordinary course of its business as a seller of consumer products actually costing more than \$15 and manufactured on or after January 1, 1977, has failed to make the texts of written warranties readily available for examination by prospective buyers prior to sale through utilization of one or both of the following methods required by 16 CFR 702.3(a), as amended:

1. Displaying the text of the warranty in close proximity to the warranted product;
2. Furnishing the text of the warranty upon request prior to sale and placing signs reasonably calculated to elicit the prospective buyer's attention in prominent locations in the store or department advising such prospective buyers of the availability of warranties upon request.

PAR. 7. Respondent's failure to comply with the provisions of 16 CFR Part 702, as amended, constituted and now constitutes a violation of the Magnuson-Moss Warranty Act and, pursuant to

Section 110(b) thereof, an unfair or deceptive practice under Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1).

DECISION AND ORDER

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

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and no comments having been filed thereafter by interested parties pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Sears, Roebuck and Co., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 3333 Beverly Road, Hoffman Estates, Illinois.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

The definitions of terms contained in Section 101 of the Magnuson-Moss Warranty Act, 15 U.S.C. 2301, and in Rule 702, 16 CFR 702.1, promulgated thereunder, shall apply to the terms of this order.

I.

It is ordered, That respondent Sears, Roebuck and Co., a corporation, its successors and assigns, and its officers, representatives, agents and employees, directly or through any corporation, subsidiary, division or other device in connection with the sale or offering for sale of any consumer product in or affecting commerce, do forthwith cease and desist from failing to make a text of any written warranty on a consumer product actually costing more than \$15 readily available for examination by prospective buyers prior to sale through utilization of one or more means specified in 16 CFR 702.3(a), as amended.

II.

It is further ordered, That respondent shall, within thirty (30) days of the date of service of this order, deliver to each current retail store manager engaged in the sale of consumer products on behalf of respondent, a copy of this order to cease and desist.

III.

It is further ordered, That respondent shall, within thirty (30) days of the date of service of this order, instruct all current retail store managers engaged in the sale of consumer products on behalf of respondent as to their specific obligations and duties under the Magnuson-Moss Warranty Act (15 U.S.C. 2301) and this order.

IV.

It is further ordered, That respondent shall, for a period of not less than four (4) years from the date of service of this order, instruct all future retail store managers who will be engaged in the sale of consumer products on behalf of respondent, before they assume said

responsibilities for respondent, as to their specific obligations and duties under the Magnuson-Moss Warranty Act (15 U.S.C. 2301) and this order.

V.

It is further ordered, That respondent shall, within thirty (30) days of the date of service of this order, develop and implement a program to instruct its sales personnel about the availability and location of warranty information.

VI.

It is further ordered, That respondent shall, for a period of not less than five (5) years from the date of service of the order, maintain and upon request make available to the Federal Trade Commission for inspection and copying (i) copies of all written instructions provided by respondent to its retail store managers and sales personnel regarding their obligations and duties under the Magnuson-Moss Warranty Act (15 U.S.C. 2301) and this order; (ii) copies of signs posted by respondent in its retail store outlets designed to elicit prospective buyers' attention to the availability of the text of written warranties for review upon request; and (iii) copies of the text of written warranties made readily available by respondent's retail store outlets for examination by prospective buyers on request.

VII.

It is further ordered, That respondent, for a period of six (6) years from the date of service of this order, shall notify the Commission at least thirty (30) days prior to any dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation that may affect compliance obligations arising out of the order.

VIII.

It is further ordered, That respondent shall, within sixty (60) days after service of this order on it, file with the Commission a report in writing, setting forth in detail the manner and form in which it has complied with this order.

IN THE MATTER OF

HOME OXYGEN & MEDICAL EQUIPMENT CO., ET AL.

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

Docket C-3530. Complaint, Sept. 14, 1994--Decision, Sept. 14, 1994

This consent order prohibits, among other things, a California supplier of oxygen systems prescribed for home use from acquiring or granting, for ten years, an ownership interest in a firm that sells or leases oxygen systems in the relevant geographic market, if more than 25 percent of the pulmonologists in that market would be affiliated with the firm, and requires the respondents to notify the Commission if they acquire more than one percent of a firm that sells or leases oxygen systems anywhere.

Appearances

For the Commission: *Linda K. Badger, Kerry O'Brien and Jeffrey A. Klurfeld.*

For the respondents: *David T. Alexander, Jackson, Tufts, Cole & Black, San Francisco, CA.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Home Oxygen & Medical Equipment Co., a limited partnership, Mitchell P. Tarkoff, M.D., Revels M. Cayton, M.D., Robert I. Deutsch, M.D., Leland G. Dobbs, M.D., Fredric N. Herskowitz, M.D., Jerrold A. Kram, M.D., R. Wayne Mall, M.D., Richard A. Nusser, M.D., Joel H. Richert, M.D., John E. Sailer, M.D., Herbert M. Schub, M.D., Jamil S. Sulieman, M.D., and T. Craig Williams, M.D., individually and as partners, trading and doing business as Home Oxygen & Medical Equipment Company, hereinafter sometimes referred to as the respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

DEFINITIONS

PARAGRAPH 1. For the purpose of this complaint, the following definitions shall apply:

A. "*Durable medical equipment*" or "*DME*" means medical equipment sold, rented, or leased to customers for home use. DME includes, but is not limited to, ambulatory aids, wheelchairs, walkers, hospital beds, commodes and respiratory therapy equipment, such as oxygen systems. "DME" encompasses all aspects of supplying DME, including, but not limited to, delivering and servicing the equipment, and rendering accompanying services to customers.

B. "*Oxygen systems*" means DME used to service individuals who are unable to obtain adequate oxygen through independent breathing. Oxygen systems include, but are not limited to, oxygen gas contained in tanks; liquid oxygen stored in reservoirs and smaller, portable containers; and electrically-operated oxygen concentrators. "Oxygen systems" encompasses all aspects of supplying these oxygen systems, including, but not limited to, delivering and servicing the equipment, supplying oxygen content, and rendering accompanying services to customers.

C. "*Discharge planner*" means any nurse, social worker, respiratory therapist, or other agent of a hospital or health care provider who arranges for the provision of DME or consults with or makes recommendations to patients being discharged from hospitals concerning potential suppliers of DME.

D. "*Hospital*" means a health facility, other than a federally-owned facility, having a duly organized governing body with overall administrative and professional responsibility and an organized professional staff that provides 24-hour inpatient care, and whose primary function is to provide inpatient services for medical diagnosis, treatment, and care of physically injured or sick persons with short-term or episodic health problems or infirmities. "Hospital" includes any affiliate, subsidiary, or partnership in which the hospital holds a ten (10) percent or greater interest.

E. "*Pulmonologist*" means a medical professional who specializes in the diagnosis and treatment of pulmonary disease, regardless of whether the medical professional has been certified as a specialist in pulmonary disease. "Pulmonologist" does not include medical professionals who specialize in the diagnosis and treatment of pa-

tients who would not use the type of oxygen systems defined herein, such as patients suffering from allergies and pediatric patients requiring oxygen systems specially designed for children.

F. "*Practicing*" means having staff privileges, including, but not limited to, active or courtesy staff privileges, at any hospital.

RESPONDENTS

PAR. 2. Respondent Home Oxygen & Medical Equipment Co., (hereinafter "Home Oxygen") is a limited partnership organized, existing and doing business under and by virtue of the laws of the State of California. It has its principal place of business at 2456 Verna Court, San Leandro, California.

Respondent Mitchell P. Tarkoff, M.D., is an individual who has been, and is now, a general partner of Home Oxygen. As such, he formulates, or participates in the formulation of, directs and controls the acts and practices of Home Oxygen, including the acts and practices set forth in this complaint. His place of business is located at 350 30th Street, Suite 526, Oakland, California.

Respondent Revels M. Cayton, M.D., is an individual who has been, and is now, a limited partner in Home Oxygen. His place of business is located at 400 29th Street, Suite 419, Oakland, California.

Respondent Robert I. Deutsch, M.D., is an individual who has been, and is now, a limited partner in Home Oxygen. His place of business is located at 2070 Clinton Avenue, Alameda, California.

Respondent Leland G. Dobbs, M.D., is an individual who has been, and is now, a limited partner in Home Oxygen. His place of business is located at 350 30th Street, Suite 520, Oakland, California.

Respondent Fredric N. Herskowitz, M.D., is an individual who has been, and is now, a limited partner in Home Oxygen. His place of business is located at 350 30th Street, Suite 520, Oakland, California.

Respondent Jerrold A. Kram, M.D., is an individual who has been, and is now, a limited partner in Home Oxygen. His place of business is located at 350 30th Street, Suite 520, Oakland, California.

Respondent R. Wayne Mall, M.D., is an individual who has been, and is now, a limited partner in Home Oxygen. His place of business is located at 2000 Mowry Avenue, Fremont, California.

Respondent Richard A. Nusser, M.D., is an individual who has been, and is now, a limited partner in Home Oxygen. His place of business is located at 365 Hawthorne Avenue, Suite 202, Oakland, California.

Respondent Joel H. Richert, M.D., is an individual who has been, and is now, a limited partner in Home Oxygen. His place of business is located at 2557 Mowry Avenue, Suite 12, Fremont, California.

Respondent John E. Sailer, M.D., is an individual who has been, and is now, a limited partner in Home Oxygen. His place of business was located at 13851 East 14th Street, Suite 302, San Leandro, California.

Respondent Herbert M. Schub, M.D., is an individual who has been, and is now, a limited partner in Home Oxygen. His place of business is located at 2070 Clinton Avenue, Alameda, California.

Respondent Jamil S. Sulieman, M.D., is an individual who has been, and is now, a limited partner in Home Oxygen. His place of business is located at 550 South Beretania Street, Honolulu, Hawaii.

Respondent T. Craig Williams, M.D., is an individual who has been, and is now, a limited partner in Home Oxygen. His place of business is located at 13851 East 14th Street, Suite 302, San Leandro, California.

PAR. 3. The relevant product market is the market for the sale, rental, or lease of oxygen systems.

PAR. 4. The relevant geographic market is Alameda County, California, excluding the southeast portion of Alameda County referred to as the "Tri-Valley" area. The Tri-Valley area includes the cities of Livermore, Dublin and Pleasanton.

PAR. 5. Since May 18, 1984, Home Oxygen has been engaged in the purchasing, offering for sale, rental or lease of DME, including oxygen systems and related products, to the public in the relevant geographic market.

PAR. 6. The respondents Mitchell P. Tarkoff, M.D., Revels M. Cayton, M.D., Robert I. Deutsch, M.D., Leland G. Dobbs, M.D., Fredric N. Herskowitz, M.D., Barry R. Horn, M.D., Jerrold A. Kram, M.D., R. Wayne Mall, M.D., Richard A. Nusser, M.D., Joel H. Richert, M.D., John E. Sailer, M.D., Herbert M. Schub, M.D., Jamil S. Sulieman, M.D., and T. Craig Williams, M.D., (collectively the

“pulmonologist respondents”) are now, or have been at times relevant to this complaint, pulmonologists practicing their profession within the relevant geographic market.

PAR. 7. The pulmonologist respondents have held staff positions or have had staff privileges at one or more of the following hospitals located in the relevant geographic market: Alameda Hospital, located in Alameda, California; Highland Hospital, located in Oakland, California; Humana Hospital, located in San Leandro, California; Merritt/ Peralta, located in Oakland, California; Physician’s Community Hospital, located in San Leandro, California; Providence, located in Oakland, California; or Washington Hospital, located in Fremont, California.

JURISDICTION

PAR. 8. The acts and practices of respondents alleged in this complaint are and have been in or affecting commerce, as “commerce” is defined in the Federal Trade Commission Act.

THE INDUSTRY

PAR. 9. Patients hospitalized with certain forms of lung, heart, and other disease are unable to obtain sufficient oxygen from their normal breathing. Upon discharge from a hospital, physicians may prescribe oxygen for these patients for home use. Because oxygen is considered a drug under Food and Drug Administration regulations, oxygen for medical use can be provided to patients only pursuant to a physician’s prescription.

PAR. 10. Oxygen systems vary in many respects, including, but not limited to: the type of system, the level and quality of service accompanying the equipment, and price. Patients requiring oxygen systems usually possess incomplete knowledge about oxygen systems or the companies that provide oxygen systems. As a result, patients seldom have a preference for a particular oxygen system supplier and rely on hospitals, discharge planners, health care professionals, and other individuals knowledgeable about DME to make a selection on their behalves.

PAR. 11. In general, patients requiring oxygen systems receive the services of pulmonologists or of hospital respiratory therapy departments under the supervision of pulmonologists. As a result,

pulmonologists have the ability to influence the choice of which oxygen systems supplier services these patients through a variety of means.

ACTS OR PRACTICES

PAR. 12. In 1984, Home Oxygen was formed to engage in the sale, rental or lease of oxygen systems to patients.

PAR. 13. Partnership interests in Home Oxygen were offered primarily to hospitals and pulmonologists.

PAR. 14. A majority of the pulmonologists practicing in the relevant geographic market joined as partners in Home Oxygen. In all, approximately sixty (60) percent of the pulmonologists in the relevant geographic market were investors in Home Oxygen or practiced in groups consisting of one or more of the pulmonologist respondents. Respondents' market position was further enhanced because several of the pulmonologist respondents served as medical directors of respiratory therapy departments at hospitals in the relevant geographic market.

EFFECTS

PAR. 15. Through the aggregation of competitors in the market for the provision of pulmonary services alleged in paragraphs twelve through fourteen, Home Oxygen has achieved a market share of approximately sixty (60) percent in the relevant market.

PAR. 16. As a consequence of the conduct alleged in paragraphs twelve through fourteen, a barrier to entry has been created in the relevant market.

PAR. 17. As a consequence of the conduct alleged in paragraphs twelve through fourteen, free and open competition has been inhibited in the relevant market.

VIOLATIONS

PAR. 18. Home Oxygen has acquired and maintained market power in the relevant market through the acts and practices set out and alleged in paragraphs twelve through fourteen. These alleged acts and practices of the respondents constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the

Federal Trade Commission Act, 15 U.S.C. 45. The acts or practices, or the effects thereof, are likely to continue or recur in the absence of appropriate relief.

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 San Francisco Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the respondents with violation of the Federal Trade Commission Act; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having received a comment from the respondents describing how the respondents divested assets in conformance with the terms of the proposed order and had received therefore a minority stock interest of less than one (1) percent of the outstanding voting stock in a publicly held company, and the Commission having determined that retention of the divestiture provisions would nonetheless require respondents to divest said stock interest, and also having determined that such divestiture of said stock interest is not necessary to effectuate the remedy in this matter and that the divestiture provisions therefore can be deleted, 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 Home Oxygen & Medical Equipment Co. (hereinafter "Home Oxygen") is a limited partnership organized, existing and doing business under and by virtue of the laws of the State of California. It has its principal place of business at 2456 Verna Court, San Leandro, California.

Respondent Mitchell P. Tarkoff, M.D., is an individual who has been, and is now, a general partner of Home Oxygen. His place of business is located at 350 30th Street, Suite 526, Oakland, California.

Respondent Revels M. Cayton, M.D., is an individual who has been, and is now, a limited partner in Home Oxygen. His place of business is located at 400 29th Street, Suite 419, Oakland, California.

Respondent Robert I. Deutsche, M.D., is an individual who has been, and is now, a limited partner in Home Oxygen. His place of business is located at 2070 Clinton Avenue, Alameda, California.

Respondent Leland G. Dobbs, M.D., is an individual who has been, and is now, a limited partner in Home Oxygen. His place of business is located at 350 30th Street, Suite 520, Oakland, California.

Respondent Fredric N. Herskowitz, M.D., is an individual who has been, and is now, a limited partner in Home Oxygen. His place of business is located at 350 30th Street, Suite 520, Oakland, California.

Respondent Jerrold A. Kram, M.D., is an individual who has been, and is now, a limited partner in Home Oxygen. His place of business is located at 350 30th Street, Suite 520, Oakland, California.

Respondent R. Wayne Mall, M.D., is an individual who has been, and is now, a limited partner in Home Oxygen. His place of business is located at 2000 Mowry Avenue, Fremont, California.

Respondent Richard A. Nusser, M.D., is an individual who has been, and is now, a limited partner in Home Oxygen. His place of business is located at 365 Hawthorne Avenue, Suite 202, Oakland, California.

Respondent Joel H. Richert, M.D., is an individual who has been, and is now, a limited partner in Home Oxygen. His place of business is located at 2557 Mowry Avenue, Suite 12, Fremont, California.

Respondent John E. Sailer, M.D., is an individual who has been, and is now, a limited partner in Home Oxygen. His place of business

was located at 13851 East 14th Street, Suite 302, San Leandro, California.

Respondent Herbert M. Schub, M.D., is an individual who has been, and is now, a limited partner in Home Oxygen. His place of business is located at 2070 Clinton Avenue, Alameda, California.

Respondent Jamil S. Sulieman, M.D., is an individual who has been, and is now, a limited partner in Home Oxygen. His place of business is located at 550 South Beretania Street, Honolulu, Hawaii.

Respondent T. Craig Williams, M.D., is an individual who has been, and is now, a limited partner in Home Oxygen. His place of business is located at 13851 East 14th Street, Suite 302, San Leandro, California.

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.

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

A. "*Durable medical equipment*" or "*DME*" means medical equipment sold, rented, or leased to customers for home use. DME includes, but is not limited to, ambulatory aids, wheelchairs, walkers, hospital beds, commodes and respiratory therapy equipment, such as oxygen systems. "DME" encompasses all aspects of supplying DME, including, but not limited to, delivering and servicing the equipment, and rendering accompanying services to customers.

B. "*Oxygen systems*" means DME used to service individuals who are unable to obtain adequate oxygen through independent breathing. Oxygen systems include, but are not limited to, oxygen gas contained in tanks; liquid oxygen stored in reservoirs and smaller, portable containers; and electrically-operated oxygen concentrators. "Oxygen systems" encompasses all aspects of supplying these oxygen systems, including, but not limited to, delivering and servicing the equipment, supplying oxygen content, and rendering accompanying services to customers.

C. "*Hospital*" means a health facility, other than a federally-owned facility, having a duly organized governing body with overall

administrative and professional responsibility and an organized professional staff that provides 24-hour inpatient care, and whose primary function is to provide inpatient services for medical diagnosis, treatment, and care of physically injured or sick persons with short-term or episodic health problems or infirmities. "Hospital" includes any affiliate, subsidiary, or partnership in which the hospital holds a ten (10) percent or greater interest.

D. "*Medical professional*" means any individual who is licensed by the State of California as a Medical Doctor.

E. "*Pulmonologist*" means a medical professional who specializes in the diagnosis and treatment of pulmonary disease, regardless of whether the medical professional has been certified as a specialist in pulmonary disease. "Pulmonologist" does not include medical professionals who specialize in the diagnosis and treatment of patients who would not use the type of oxygen systems defined herein, such as patients suffering from allergies and pediatric patients requiring oxygen systems specially designed for children.

F. "*Practicing*" means having staff privileges, including, but not limited to, active or courtesy staff privileges, at any hospital.

G. "*Relative*" means an individual who is related to the individual, as father, mother, son, daughter, brother, sister, uncle, aunt, great aunt, great uncle, first cousin, nephew, niece, husband, wife, grandfather, grandmother, grandson, granddaughter, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, stepfather, stepmother, stepson, stepdaughter, stepbrother, stepsister, half-brother, half-sister, or who is the grandfather or grandmother of the spouse of the individual.

H. "*Own*" or "*Ownership interest*" means any and all stock, share, capital, equity or other interest, asset, property, license, lease, or other right or privilege, tangible or intangible, whether obtained or held, directly or indirectly, through any relative, employee or agent, or through any corporate or other device.

I. "*Affiliated with*" means having an ownership interest in the entity or being a member of the same group practice as an investor in the entity.

J. "*Relevant geographic market*" means Alameda County, California, excluding the south-east portion of Alameda County referred to as the "Tri-Valley" area. The Tri-Valley area includes the cities of Livermore, Dublin and Pleasanton.

K. "*Service area*" means the geographic area in which an entity engages in the sale, rental, or lease of oxygen systems.

II.

It is ordered, That, for a period of ten (10) years from the date of this order, no respondent shall grant or acquire, with or without valuable consideration, an ownership interest in any entity engaged in the sale, rental, or lease of oxygen systems in the relevant geographic market if, after such grant or acquisition, more than twenty-five (25) percent of the pulmonologists who practice in the relevant geographic market would be affiliated with the entity.

III.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, the individual respondents shall notify the Commission within thirty (30) days after acquiring, either directly or indirectly, or through any corporate or other device, any ownership interest in an entity engaged in the sale, rental, or lease of oxygen systems. Such notification shall include:

- (a) An identification of all owners of the entity;
- (b) An identification of any pulmonologist practicing in the entity's service area or intended service area who has an ownership interest in the entity;
- (c) A list of all pulmonologists who practice in the entity's service area or intended service area;
- (d) A description of the products or services offered, or to be offered by the entity;
- (e) A copy of the entity's offering memorandum and/or prospectus; and
- (f) An identification of the entity's location, including the location of any and all of the entity's parent organizations, and subsidiaries.

Respondents shall comply with requests by the Commission staff for additional information within fifteen (15) days of service of such requests.

Provided, however, that nothing in this order shall require notice for acquisitions of voting securities of any publicly traded company involved in the sale, rental, or lease of oxygen systems unless, as a result of such acquisition, the respondent would hold more than one (1) percent of such company.

IV.

It is further ordered, That the respondent Home Oxygen shall:

A. Within thirty (30) days from the date this order becomes final, distribute a copy of the complaint and order to each managerial employee;

B. For a period of five (5) years from the date this order becomes final, distribute a copy of the complaint and order to each new managerial employee within thirty (30) days of the entrance of such employee to employment;

C. For a period of five (5) years from the date this order becomes final, distribute a copy of the complaint and order to each new partner within thirty (30) days of the entrance of such partner to the partnership.

V.

It is further ordered, That:

A. Within sixty (60) days from the date this order becomes final, each respondent shall file with the Commission a verified written report of compliance with this order;

B. One year from the date this order becomes final and annually thereafter for nine (9) years, each respondent shall file with the Commission a verified written report of compliance with this order.

VI.

It is further ordered, That respondent Home Oxygen, upon written request of the staff of the Federal Trade Commission, made to Home Oxygen, for the purpose of determining or securing compliance with this order, and subject to any legally recognized privilege, shall permit duly authorized representatives of the Commission:

A. Reasonable access during Home Oxygen's office hours, in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda, reports, and other records and documents in Home Oxygen's possession or control that relate to any matter contained in this order; and

B. An opportunity, subject to Home Oxygen's reasonable convenience, to interview general partners or employees of Home Oxygen, who may have counsel present, regarding such matters.

VII.

It is further ordered, That respondent Home Oxygen notify the Commission at least thirty (30) days prior to any proposed organizational change, such as dissolution, assignment or sale resulting in the emergence of a successor organization, or any other change in the organization that may affect compliance with the obligations arising out of the order.

Commissioner Azcuenaga and Commissioner Starek dissenting.¹

DISSENTING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

Today the Commission issues three consent orders minus the divestiture requirements that were in the orders as published for public comment. By way of explanation, the Commission states that the respondents, by letter, assert that they "divested assets in conformance with the terms of the proposed order[s]" and that the Commission has determined that retaining the divestiture requirement "is not necessary to effectuate the remedy" in these matters.¹ In fact, the respondents have not divested "in conformance" with the proposed orders, and the sale that the respondents made does not accomplish the remedy that the Commission sought or otherwise cure the alleged competitive problem. The revised orders are inconsistent with the complaints on which they are based, they are inconsistent with the proposed orders that were published for comment, and, finally, they are internally inconsistent. Although I voted for the

¹ Prior to leaving the Commission, former Commissioner Owen and former Commissioner Yao registered their votes in the affirmative for the Complaint and the Decision and Order in this matter.

¹ Decision and Order in each matter at 2.

proposed orders that were published for comment,² I do not join today's decision.

The theory of violation in each of the three Home Oxygen cases as alleged in the complaints is that ownership of a home oxygen supplier by the majority of pulmonologists in a particular market enables the home oxygen supplier to create barriers to entry (*i.e.*, through patient referrals by the owner-pulmonologists and the resulting inability of another oxygen supplier to obtain referrals from pulmonologists) and to inhibit competition in the home oxygen market.³ To remedy the alleged violations, the orders that were accepted for public comment required divestitures to reduce the number of pulmonologists owning interests in a single home oxygen company "such that no greater than 25% of the pulmonologists practicing in the relevant geographic market are affiliated with" any one home oxygen company.

During the public comment period, counsel for the respondent-pulmonologists informed the Commission that the doctors had sold their home oxygen companies to a large, publicly-held, medical supply company (which I will call Newco), in exchange for shares in that company.⁴ The pulmonologists in effect traded their interests in their local home oxygen partnerships for interests in a large corporation. The Commission today decides that the sale to Newco obviates the need for the divestitures that were required under the orders. The argument, as I understand it, is that the doctors hold a decidedly minor percentage of Newco (less than 1%) and that the small size of their ownership share somehow cures the competitive concerns described in the complaints.⁵ I disagree.

The theory of violation in these cases does not turn on control by the physicians of the home oxygen suppliers or on the percentage of each home oxygen supply company owned by the doctors. Instead,

² A copy of my concurring statement of November 1, 1993, is attached and incorporated by reference. The concerns I expressed in that statement continue.

³ Paragraphs 12-17 of the complaints.

⁴ Letter from David T. Alexander, Esq., to FTC, Jan. 18, 1994 (counsel for Home Oxygen & Medical Equipment Co. and individual doctors); letter from Robert J. Enders, Esq., to FTC, Jan. 14, 1994 (counsel for Homecare Oxygen & Medical Equipment Co. and individual doctors).

⁵ See letter from Robert J. Enders, Esq., to the FTC, Jan. 14, 1994, at 3. According to Mr. Enders, the sale of the home oxygen company to "a publicly traded company should alleviate concerns of the Commission and its staff about pulmonologist control, through ownership, in entities engaged in the sale, rental or lease of oxygen systems."

the concern was the aggregation in a single oxygen supply company of ownership interests of a majority of pulmonologists in the relevant geographic market. The required divestiture was to reduce the number of pulmonologists having an ownership interest in any one home oxygen supplier. The sale of the home oxygen companies to Newco is unresponsive to the concern underlying the complaints, because the ownership interests of some 60% or more of the pulmonologists in the market still are aggregated in a single company.⁶

The individual doctors may have reduced incentives to refer patients to Newco, if the financial rewards of stock ownership are less than those of partnership interests.⁷ The relative incentives might be important to a doctor who held both Newco shares and a home oxygen partnership, but, as I understand it, the doctors' entire partnership interests have been converted to Newco shares and the home oxygen partnerships no longer exist as separate entities. A doctor who owns an interest in Newco probably will have greater incentives to refer patients to Newco than to a company in which he or she does not own an interest.

The resolution accepted by the Commission today -- sale by the respondents of their companies to Newco in exchange for Newco shares, in lieu of divestiture to reduce the number of doctors affiliated by ownership with a single oxygen supply company -- is inconsistent with the theory of violation alleged in the complaints, because the sale to Newco does not reduce the number of doctors affiliated by ownership with a single oxygen supply company. For the same reason, the resolution accepted by the Commission is inconsistent with the remedial provisions of the orders that were published for comment and does not remedy the competitive problem.

The Commission's decision also is internally inconsistent, because each of the orders accepted today expressly bars the respondent-pulmonologists from granting or acquiring an interest in any home oxygen supplier -- if that would result in an affiliation with the supplier of more than 25% of pulmonologists in the geographic

⁶ Before Newco, a majority of pulmonologists in each of two adjacent markets owned interests in two different home oxygen supply companies. Now, a majority of pulmonologists in the two adjacent markets combined own interests in one home oxygen supply company, Newco. With its acquisition of the home oxygen companies, Newco has acquired the market power that the respondents allegedly had aggregated.

⁷ The home oxygen companies were partnerships, and Newco is a publicly held corporation. We have no information about actual gains to the doctors from either form of ownership on which to base a comparative analysis.

market⁸ -- at the same time that it accepts the sale to Newco, which is precisely the same conduct. As a result, in each of the orders accepted today, the Commission both sanctions the arrangement resulting from the sale to Newco (*i.e.*, a home oxygen company in which more than 25% of pulmonologists have an ownership interest) and prohibits any action to create the same arrangement in the future. The public will need the wisdom of Solomon to discern what these orders portend for future enforcement.

I dissent.

[The following statement was issued in November 1993, when the orders as then proposed were published for public comment.]

CONCURRING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

Although I have joined in the Commission's decision to accept these consent agreements for public comment, I have reservations about the usefulness of the orders to which the respondents have consented and about the advisability, on the basis of the information we have, of charting the new territory that these cases represent. Here, I believe, sufficient evidence exists to satisfy the statutory standard of reason to believe the law has been violated but precious little more. As I have said before, the truncated record on which consent agreements ordinarily are based leaves something to be desired as a basis for establishing new Commission policy.

Antitrust analysis, as we know it today, requires a search for understanding of markets, an understanding that, experience shows, may be founded on elements that lie well below the surface of what even those in a particular industry may readily comprehend. *See, e.g., Broadcast Music, Inc. v. CBS*, 441 U.S. 1 (1979). It is easy to underestimate the difficulty of showing justifications that are cognizable under the antitrust laws and sufficient to defend against the application of novel antitrust theories. The Commission may not be as well positioned as the parties to identify and understand justifications for the challenged conduct. Yet the parties may be ill-

⁸ Paragraph II of each of the orders bars the respondents from granting or acquiring "an ownership interest in any entity engaged in the sale, rental, or lease of oxygen systems . . . if . . . more than twenty-five percent of the pulmonologists practicing in the relevant geographic market would be affiliated with the entity." Thus, Paragraph II of the orders would bar the very transfer that the Commission today sanctions.

equipped to undertake the esoteric analytic endeavor that modern antitrust law may demand. When neither the parties nor the Commission fully comprehends the justifications, "ignorance leads straight to condemnation," *Chicago Professional Sports Limited Partnership v. NBA*, 961 F.2d. 667, 676 (7th Cir. 1992), and condemnation without understanding may lead to consumer harm.

It is useful, indeed, advisable for the Commission to continue to evaluate new factual situations and to develop new theories under Section 5 of the Federal Trade Commission Act to remedy anti-competitive effects. But it is well, in doing so, to keep in mind the admonition of the court in *Chicago Professional Sports Limited Partnership v. NBA*, 961 F.2d. at 676, that "[e]xplanations of problematic conduct take time to develop and more time to test. . . . Understanding novel practices may require years of study and debate."

I have voted to publish the consent agreements for comment but remain mindful of these concerns.

STATEMENT OF COMMISSIONER ROSCOE B. STAREK, III

Nearly eleven months ago, over my dissent, the Commission accepted consent agreements with three groups of pulmonologists practicing in two counties in the eastern San Francisco Bay Area. Further analysis of these matters in the intervening months has not provided me with reason to believe that respondents' conduct violated Section 5 of the Federal Trade Commission Act. Therefore, I cannot agree with the Commission's decision to issue the complaints and the modified final versions of the consent orders.

I have continued to evaluate these matters with great care and an open mind since the Commission accepted the consent agreements. Nevertheless, I remain unpersuaded of the theory on which these cases rely. That theory -- stated with breezy imprecision in paragraphs 12 through 18 of the complaints -- appears to be that:

- A majority (in fact, approximately 60 percent) of the pulmonologists in each relevant geographic market¹ were investors in Home Oxygen and Homecare Oxygen;

¹ The complaints define the geographic markets as most of Alameda County for Home Oxygen, and Contra Costa County and a portion of Alameda County for Homecare Oxygen.

- The "market position" of each respondent group was "further enhanced" because several Home and Homecare pulmonologists served as medical directors of the respiratory therapy departments at some hospitals in the relevant markets;
- The "aggregation of competitors" embodied by these pulmonologist-owned firms gave Home and Homecare some sort of power² in an allegedly relevant market for "the sale, rental, or lease of oxygen systems" in Alameda and Contra Costa Counties;
- This "conduct" -- by which I presume the Commission means the "aggregation of competitors" into Home and Homecare and the "further enhance[ment]" of "market position" stemming from departmental directorships -- resulted in the creation of barriers to entry into the oxygen systems market and the inhibition of "free and open competition" in that market; and
- The alleged "acts and practices" allowed Home and Homecare to acquire and maintain "market power" and constitute unfair methods of competition, in violation of Section 5.

When this chain of assertions is distilled, the essential claim -- the one on which liability under Section 5 is predicated -- is that ownership of an oxygen systems company by a majority of a county's pulmonologists sufficed to confer market power in the oxygen systems business. Yet as I noted in my earlier dissent in this case, "[m]arket power is not necessarily created when a majority share of a relevant market is attained. Market power is defined as 'the ability profitably to maintain prices above competitive levels for a significant period of time.'"³ One of my problems with the case is that neither the information gathered in this investigation nor the pro-

² Inconsistencies between the Home and Homecare complaints give rise to ambiguities about this claim. Whereas the Homecare complaint (paragraph 15) alleges that the "aggregation of competitors in the market for the provision of pulmonary services" gave Homecare "market power" in the market for oxygen systems, the complaint against Home (paragraph 15) and the separate complaint against certain Home pulmonologists (paragraph 15) merely assert that this "aggregation of competitors" gave Home "a market share of approximately sixty (60) percent" in that market. Only in paragraph 18 do the latter two complaints aver that Home somehow "acquired and maintained market power in the relevant market." (The Homecare complaint contains a similar paragraph.)

³ Statement of Commissioner Roscoe B. Starek, III ("Statement") at 2 (quoting U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines, Section 0.1, 4 Trade Reg. Rep. (CCH) paragraph 13,104 (1992)). That Statement, which is attached hereto, also noted the Commission's formulation of the test for market power in a previous Section 5 case: "The test for market power depends on all the relevant characteristics of a market: the strength and capacity of current competitors; the potential for entry; the historic intensity of competition; and the impact of the legal or natural environment, to name just a few." *General Foods Corp.*, 103 FTC 204, 345 (1984).

posed complaints themselves persuasively explain how a majority share of pulmonology practice in Alameda and Contra Costa Counties, as “enhanced” by certain owners’ leadership roles in some hospitals’ respiratory therapy departments, gave rise to market power in oxygen systems.

The complaints’ treatment of conditions of entry into oxygen systems illustrates (but by no means exhausts) the infirmities of the majority’s approach. Rather than set forth a credible theory of entry barriers, the complaints charge -- in tautological fashion -- that “a barrier to entry has been created” purely and simply “[a]s a consequence of” the ownership structure of Home and Homecare. This says nothing about the difficulties facing prospective entrants or about the success rates of firms that operate in the markets independently of the Home and Homecare organizations, and thus leaves unanswered the question whether Home or Homecare possesses market power.⁴

I also note that the consent orders do nothing to deal with the actual conduct that must constitute the other key component (in addition to “market power”) of the majority’s theory in this case. I allude, of course, to “self-referral,” a commonly encountered phenomenon in the medical field. Self-referral is a complex subject that requires considerable further analysis, and thus I am relieved that the orders do not prohibit self-referral but simply limit the market share of the respondent pulmonologists associated with an entity providing home oxygen. Although physician ownership of ancillary services may create an incentive to refer for services that are not medically necessary, I noted in my previous dissent that “it is critical to distinguish between the potential for anticompetitive harm and the potential for inappropriate or excessive referrals resulting from physician ownership. Regardless of market share or market power, physicians sometimes may make inappropriate treatment referrals to facilities in which they have a financial interest. While real consumer injury can

⁴ I noted in my previous dissent that “an exercise of market power [on the part of a joint venture such as Home or Homecare] is possible only when the coordination of activities within such a venture insulates the participating physicians from outside competition sufficiently that they are able to raise prices or reduce services. [paragraph] For example, in some cases, an exercise of market power may be possible if enough of the market is aggregated through the joint venture so that there is insufficient remaining market demand to sustain viable competitors. That clearly is not the case here.” Statement at 4. Indeed, my earlier dissent noted the substantial number of competing oxygen system firms outside the Home and Homecare organizations in Alameda and Contra Costa Counties and the absence of evidence that any of those competitors suffer from competitive weaknesses. *Id.* at 3.

result from such 'self-referral,' this behavior is not by itself actionable under the antitrust laws. . . . [W]e should be careful to distinguish anticompetitive behavior from other forms of imperfect market performance."⁵ In short, any injury involving self-referral that does not also flow from an exercise of market power is not "antitrust injury."⁶

I would of course support a challenge to an ancillary services joint venture if the facts unearthed in the investigation demonstrated that the venture was likely to have the requisite anticompetitive effects. In the matters before us, however, the complaints do not set forth a coherent theory of anticompetitive effects. I therefore respectfully dissent.⁷

ATTACHMENT

STATEMENT OF COMMISSIONER ROSCOE B. STAREK, III

I respectfully dissent from the Commission's decision to accept for public comment the consent orders in these matters. The challenged conduct does appear to have the potential to be anticompetitive. Under the rule of reason, however, the evidence presented does not indicate that the conduct of the respondents was anticompetitive or that it is likely to have been anticompetitive.¹ Therefore, I do not

⁵ *Id.* at 3-4 (footnote omitted). My dissent continued: "If patients seldom question their physicians' referrals, physicians could profit from directing patients to home oxygen providers in which they have an ownership interest. But any such 'vertical control' that physicians have does not necessarily result in any horizontal market power of the ancillary ventures in which they have an interest." *Id.* at 4.

⁶ *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334 (1990); *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 109-10 (1986); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977).

⁷ Notwithstanding my conclusion that no orders should be issued, I agree with the majority inasmuch as it decided to delete the divestiture requirements from the final orders, for the reasons set forth in the third paragraph of the preamble to each Decision and Order.

¹ The challenged conduct must be analyzed under the rule of reason. The arrangements at issue cannot be characterized as naked restraints of trade subject to summary condemnation, and thus the rule of reason applies. See *NCAA v. Board of Regents*, 468, U.S. 85, 103 (1984). The joint DOJ/FTC Health Care Enforcement Guidelines indicate that the antitrust agencies will apply a rule of reason to conduct falling outside of well defined "safety zones." Statements of Antitrust Enforcement Policy in the Health Care Area, Department of Justice and Federal Trade Commission, September 15, 1993, at 10-11, 36. The six policy statements of these Guidelines do not explicitly cover the type of conduct at issue here, *i.e.*, physician-owned ancillary joint ventures. In any case, the arrangements here most likely would fall outside of any safety zone similar to those defined in the Guidelines, because they appear to have market shares of about 60% in their respective markets.

have reason to believe that the respondents have violated Section 5 of the FTC Act, as the complaints allege.

The complaints name two limited partnerships and 28 pulmonologist partners in these ventures. The complaints allege that the respondents have “acquired and maintained market power” (paragraph 18) as a consequence of the fact that a “majority” of the pulmonologists in each of the two areas in which the two partnerships operate are partners in the ventures (paragraph 14). I am concerned that this might be read to imply that the Commission will take enforcement actions against physician-owned ancillary joint ventures simply because participating physicians constitute a majority of those practicing in the relevant market, without regard to the ventures’ effects or likely effects on the market.

The complaints do not challenge, and the consent agreements do not prohibit, “self-referral” of patients to entities owned by the respondent physicians.² However, the Analysis of Proposed Consent Order to Aid Public Comment states that the respondents were able to “acquire and maintain market power” because “pulmonologists have the ability to influence the choice of oxygen suppliers to service patients needing oxygen at home.” Because pulmonologists make referrals to providers of home oxygen services, they do have the ability to influence their patients’ choice of oxygen suppliers. But this “influence” does not necessarily equate to or result in any market power.

Market power is the focus of the Commission’s analysis of physician-owned ancillary joint ventures. In fact, the very violation alleged in the complaints in these matters is that the ventures “acquired and maintained market power.” Market power is not necessarily created when a majority share of a relevant market is attained. Market power is defined as “the ability profitably to maintain prices above competitive levels for a significant period of

² The President recently signed legislation prohibiting physicians from self-referral of Medicare patients for several categories of services, including those services provided by the respondents. Omnibus Budget Reconciliation Act of 1993, Pub. L. No 103-66, ch. 2, Section 5074. Because the vast majority of home oxygen services apparently are sold to Medicare patients, it may be the case that virtually no home oxygen provider would be willing to maintain physician ownership that would cut itself off from the vast majority of market demand. If that is the case, Commission action on this matter is moot. However, I am not certain that this is true, and more importantly, this case might be viewed as precedent for Commission actions outside of the services covered by the recent legislation.

time.”³ Within the context of a case under Section 5 of the FTC Act, the Commission has argued that:

The test for market power depends on all of the relevant characteristics of a market: the strength and capacity of current competitors; the potential for entry; the historic intensity of competition; and the impact of the legal or natural environment, to name just a few.⁴

Here, the two limited partnerships each have approximately 60% market shares in the respective counties in which they operate. Assuming, *arguendo*, that the alleged product and geographic markets are relevant antitrust markets, these market shares alone do not justify an inference of market power. In addition to the respondents, the evidence indicates that there are nine competing sellers of home oxygen in Alameda County, and eight competing sellers in Contra Costa County. Some of these firms have market shares of about 10%.

If these other firms suffer from substantial competitive weaknesses that prevent them from offering the same quality of services or the same low prices as the respondents, the respondents might be able to exercise market power through their joint ventures. I have not seen evidence that any of these competitors have such competitive weaknesses.⁵

Medicare patients, who apparently comprise the vast majority of patients purchasing home oxygen services, might be less price sensitive than third-party payers such as HMOs, and thus might appear to be vulnerable to anticompetitive behavior. Medicare's restrictive reimbursement policies may severely limit suppliers' potential ability to exercise market power. But it is doubtful that these policies eliminate the possibility of an exercise of market power in these markets.

It sometimes has been argued that physician ownership can create an incentive to refer for financial gain for services that are not

³ U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines (1992), reprinted in 4 Trade Reg. Rep. (CCH) paragraph 13104, Section 0.1 (“Sellers with market power also may lessen competition on dimensions other than price, such as product quality, service, or innovation.”)

⁴ *General Foods Corp.* 103 FTC 204, 345 (1984).

⁵ In fact, one major third-party payer in the region purchases home oxygen primarily from one of the respondents' ventures in one county, while in the other county it purchases home oxygen primarily from one of the respondents' competitors. While hardly dispositive on this issue, this suggests that this major customer considers the available services of the respondents' competitors to be of acceptable and comparable quality and price.

medically necessary. But it is critical to distinguish between the potential for anticompetitive harm and the potential for inappropriate or excessive referrals resulting from physician ownership. Regardless of market share or market power, physicians sometimes may make inappropriate treatment referrals to facilities in which they have a financial interest.⁶ While real consumer injury can result from such "self-referral," this behavior is not by itself actionable under the antitrust laws. Of course, this does not mean that anticompetitive behavior could not occur in these markets. But we should be careful to distinguish anticompetitive behavior from other forms of imperfect market performance.

If patients seldom question their physicians' referrals, physicians could profit from directing patients to home oxygen providers in which they have an ownership interest. But any such "vertical control" that physicians have does not necessarily result in any horizontal market power of the ancillary ventures in which they have an interest. An ancillary venture can enable the participating physicians to coordinate some of their competitive activities. But an exercise of market power is possible only when the coordination of activities within such a venture insulates the participating physicians from outside competition sufficiently that they are able to raise prices or reduce services.

For example, in some cases, an exercise of market power may be possible if enough of the market is aggregated through the joint venture so that there is insufficient remaining market demand to sustain viable competitors. That clearly is not the case here. The evidence is at best ambiguous as to whether these ventures, which have been in operation since 1984, have had any anticompetitive effect.

Physician-owned ancillary joint ventures have a potential to accomplish significant cost savings that can be passed on to consumers in the form of lower prices and higher quality of care. Physicians frequently may be in the best position to recognize a potential demand for an ancillary medical service in their community, to back

⁶ The potential problem of inappropriate referrals made for financial gain is not limited to instances in which physicians have financial interests in facilities, equipment, or service providers that are physically or legally separate from their primary practices. The potential problem is present whenever a physician performs both diagnosis and treatment. Patients and third-party payers have limited information about whether treatments are medically necessary, and thus physicians frequently have some degree of discretion to recommend treatments that are not necessary.

up this perception with their own capital, and to operate and monitor the venture's performance. Clearly physicians and hospitals could have more control over the quality of a service by owning a supplier of that service than by merely writing a prescription. Evidence that physician investors frequently are passive with respect to the operation of these companies does not dismiss the potential of these ventures to accomplish substantial efficiencies.

Of course, the respondents' large scale and market share may not be necessary to achieve the potential efficiencies of such arrangements. But even incontrovertible evidence that these firms did not gain additional efficiency by growing to their current size would be relevant only after a determination that the firms had acted anti-competitively.

The orders continue to allow self-referral, and only limit the market share of the respondent pulmonologists associated with an entity providing home oxygen. Thus, the remedy does not address any harm that might result from the mere fact of self-referral.⁷ The order also would allow efficiencies from self-referral to occur, but it is far from clear that the restructuring of the two ventures required under the orders would preserve all of the efficiencies that they may have been able to accomplish. Thus it may be the case that the orders reduce efficiency, do not reduce market power, and also fail to address any real harm to consumers that might result from self-referral.

The overriding reason to cast my vote against the acceptance of these consents is the precedential effect of discouraging physicians and hospitals from forming ancillary ventures, particularly in circumstances in which it may be important to achieve a high market share in order to gain efficiencies, or even to be able to introduce a service that benefits consumers in the area. Thus, enforcement actions should be limited to conduct for which anticompetitive harm is demonstrable or highly likely to occur. Because that burden has not been met, I respectfully dissent from the Commission's actions in these matters.

⁷ As I noted above, self-referral by itself is not actionable under the antitrust laws. Thus it is appropriate that any such perceived harm is not addressed, in an order resolving the allegations in these complaints.

IN THE MATTER OF

CERTAIN HOME OXYGEN PULMONOLOGISTS, ET AL.

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

Docket C-3531. Complaint, Sept. 14, 1994--Decision, Sept. 14, 1994

This consent order prohibits, among other things, four physicians who are partners in the Home Oxygen & Medical Equipment Co., a California supplier of oxygen systems prescribed for home use, from acquiring or granting, for ten years, an ownership interest in a firm that sells or leases oxygen systems in the relevant geographic market, if more than 25 percent of the pulmonologists in that market would be affiliated with the firm, and requires the respondents to notify the Commission if they acquire more than one percent of a firm that sells or leases oxygen systems anywhere.

Appearances

For the Commission: *Linda K. Badger, Kerry O'Brien, Erika Wodinsky, Mary Lou Steptoe and Jeffrey A. Klurfeld.*

For the respondents: *Francis Scarpulla, San Francisco, CA.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Barry R. Horn, M.D., Alan Lifshay, M.D., Gerald L. Meyers, M.D., and Oscar R. Scherer, M.D., individually and as limited partners, in a business known as Home Oxygen & Medical Equipment Company, hereinafter sometimes referred to as the respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

DEFINITIONS

PARAGRAPH 1. For the purpose of this complaint, the following definitions shall apply:

A. "*Home Oxygen & Medical Equipment Company*" or "*Home Oxygen*" is a limited partnership organized, existing and doing business under and by virtue of the laws of the State of California. It has its principal place of business at 2456 Verna Court, San Leandro, California.

B. "*Durable medical equipment*" or "*DME*" means medical equipment sold, rented, or leased to customers for home use. DME includes, but is not limited to, ambulatory aids, wheelchairs, walkers, hospital beds, commodes and respiratory therapy equipment, such as oxygen systems. "DME" encompasses all aspects of supplying DME, including, but not limited to, delivering and servicing the equipment, and rendering accompanying services to customers.

C. "*Oxygen systems*" means DME used to service individuals who are unable to obtain adequate oxygen through independent breathing. Oxygen systems include, but are not limited to, oxygen gas contained in tanks; liquid oxygen stored in reservoirs and smaller, portable containers; and electrically-operated oxygen concentrators. "Oxygen systems" encompasses all aspects of supplying these oxygen systems, including, but not limited to, delivering and servicing the equipment, supplying oxygen content, and rendering accompanying services to customers.

D. "*Discharge planner*" means any nurse, social worker, respiratory therapist, or other agent of a hospital or health care provider who arranges for the provision of DME or consults with or makes recommendations to patients being discharged from hospitals concerning potential suppliers of DME.

E. "*Hospital*" means a health facility, other than a federally-owned facility, having a duly organized governing body with overall administrative and professional responsibility and an organized professional staff that provides 24-hour inpatient care, and whose primary function is to provide inpatient services for medical diagnosis, treatment, and care of physically injured or sick persons with short-term or episodic health problems or infirmities. "Hospital" includes any affiliate, subsidiary, or partnership in which the hospital holds a ten (10) percent or greater interest.

F. "*Pulmonologist*" means a medical professional who specializes in the diagnosis and treatment of pulmonary disease, regardless of whether the medical professional has been certified as a specialist in pulmonary disease. "Pulmonologist" does not include medical professionals who specialize in the diagnosis and treatment of

patients who would not use the type of oxygen systems defined herein, such as patients suffering from allergies and pediatric patients requiring oxygen systems specially designed for children.

G “*Practicing*” means having staff privileges, including, but not limited to, active or courtesy staff privileges, at any hospital.

RESPONDENTS

PAR. 2. Respondent Barry R. Horn, M.D., is an individual who has been, and is now, a limited partner in Home Oxygen. His place of business is located at 3001 Colby Street, Berkeley, California.

Respondent Alan Lifshay, M.D., is an individual who has been, and is now, a limited partner in Home Oxygen. His place of business is located at 3001 Colby Street, Berkeley, California.

Respondent Gerald L. Meyers, M.D., is an individual who has been, and is now, a limited partner in Home Oxygen. His place of business is located at 3001 Colby Street, Berkeley, California.

Respondent Oscar R. Scherer, M.D., is an individual who has been, and is now, a limited partner in Home Oxygen. His place of business is located at 3001 Colby Street, Berkeley, California.

PAR. 3. The relevant product market is the market for the sale, rental, or lease of oxygen systems.

PAR. 4. The relevant geographic market is Alameda County, California, excluding the south-east portion of Alameda County referred to as the “Tri-Valley” area. The Tri-Valley area includes the cities of Livermore, Dublin and Pleasanton.

PAR. 5. Since May 18, 1984, Home Oxygen has been engaged in the purchasing, offering for sale, rental or lease of DME, including oxygen systems and related products, to the public in the relevant geographic market.

PAR. 6. The respondents are now, and have been at times relevant to this complaint, pulmonologists practicing their profession within the relevant geographic market.

PAR. 7. The respondents have staff positions or staff privileges at Alta Bates/Herrick Hospital, a hospital located in the relevant geographic market.

JURISDICTION

PAR. 8. The acts and practices of respondents alleged in this complaint are and have been in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

THE INDUSTRY

PAR. 9. Patients hospitalized with certain forms of lung, heart, and other disease are unable to obtain sufficient oxygen from their normal breathing. Upon discharge from a hospital, physicians may prescribe oxygen for these patients for home use. Because oxygen is considered a drug under Food and Drug Administration regulations, oxygen for medical use can be provided to patients only pursuant to a physician's prescription.

PAR. 10. Oxygen systems vary in many respects, including, but not limited to: the type of system, the level and quality of service accompanying the equipment, and price. Patients requiring oxygen systems usually possess incomplete knowledge about oxygen systems or the companies that provide oxygen systems. As a result, patients seldom have a preference for a particular oxygen system supplier and rely on hospitals, discharge planners, health care professionals, and other individuals knowledgeable about DME to recommend a supplier or to select a supplier on their behalves.

PAR. 11. In general, patients requiring oxygen systems receive the services of pulmonologists or of hospital respiratory therapy departments under the supervision of pulmonologists. As a result, pulmonologists have the ability to influence the choice of which oxygen systems supplier services these patients through a variety of means.

ACTS OR PRACTICES

PAR. 12. In 1984, Home Oxygen was formed to engage in the sale, rental or lease of oxygen systems to patients.

PAR. 13. Limited partnership interests in Home Oxygen were offered primarily to hospitals and pulmonologists.

PAR. 14. A majority of the pulmonologists practicing in the relevant geographic market joined as general or limited partners in Home Oxygen. The respondents were limited partners in Home

Oxygen. In all, approximately sixty (60) percent of the pulmonologists in the relevant geographic market were investors in Home Oxygen or practiced in groups consisting of one or more of the Home Oxygen pulmonologists. Home Oxygen's market position was further enhanced because several of the Home Oxygen pulmonologists served as medical directors of respiratory therapy departments at hospitals in the relevant geographic market.

EFFECTS

PAR. 15. Through the aggregation of competitors in the market for the provision of pulmonary services alleged in paragraphs twelve through fourteen, Home Oxygen has achieved a market share of approximately sixty (60) percent in the relevant market.

PAR. 16. As a consequence of the conduct alleged in paragraphs twelve through fourteen, a barrier to entry has been created in the relevant market.

PAR. 17. As a consequence of the conduct alleged in paragraphs twelve through fourteen, free and open competition has been inhibited in the relevant market.

VIOLATIONS

PAR. 18. Home Oxygen has acquired and maintained market power in the relevant market through the acts and practices set out and alleged in paragraphs twelve through fourteen. These alleged acts and practices of Home Oxygen and the Home Oxygen pulmonologists constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. The acts or practices, or the effects thereof, are likely to continue or recur in the absence of appropriate relief.

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 San Francisco Regional Office proposed to present to the Commission for its consideration and

which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having received a comment regarding the proposed consent with Home Oxygen & Medical Equipment Company describing how the respondents divested assets in conformance with the terms of the proposed order and had received therefore a minority stock interest of less than one (1) percent of the outstanding voting stock in a publicly held company, and the Commission having determined that retention of the divestiture provisions would nonetheless require respondents to divest said stock interest, and also having determined that such divestiture of said stock interest is not necessary to effectuate the remedy in this matter and that the divestiture provisions therefore can be deleted, 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 Barry R. Horn, M.D., is an individual who has been, and is now, a limited partner in Home Oxygen. His place of business is located at 3001 Colby Street, Berkeley, California.

Respondent Alan Lifshay, M.D., is an individual who has been, and is now, a limited partner in Home Oxygen. His place of business is located at 3001 Colby Street, Berkeley, California.

Respondent Gerald L. Meyers, M.D., is an individual who has been, and is now, a limited partner in Home Oxygen. His place of business is located at 3001 Colby Street, Berkeley, California.

Respondent Oscar R. Scherer, M.D., is an individual who has been, and is now, a limited partner in Home Oxygen. His place of business is located at 3001 Colby Street, Berkeley, California.

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.

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

A. "*Home Oxygen & Medical Equipment Company*" or "*Home Oxygen*" is a limited partnership organized, existing and doing business under and by virtue of the laws of the State of California. It has its principal place of business at 2456 Verna Court, San Leandro, California.

B. "*Durable medical equipment*" or "*DME*" means medical equipment sold, rented, or leased to customers for home use. DME includes, but is not limited to, ambulatory aids, wheelchairs, walkers, hospital beds, commodes and respiratory therapy equipment, such as oxygen systems. "DME" encompasses all aspects of supplying DME, including, but not limited to, delivering and servicing the equipment, and rendering accompanying services to customers.

C. "*Oxygen systems*" means DME used to service individuals who are unable to obtain adequate oxygen through independent breathing. Oxygen systems include, but are not limited to, oxygen gas contained in tanks; liquid oxygen stored in reservoirs and smaller, portable containers; and electrically-operated oxygen concentrators. "Oxygen systems" encompasses all aspects of supplying these oxygen systems, including, but not limited to, delivering and servicing the equipment, supplying oxygen content, and rendering accompanying services to customers.

D. "*Hospital*" means a health facility, other than a federally-owned facility, having a duly organized governing body with overall administrative and professional responsibility and an organized professional staff that provides 24-hour inpatient care, and whose primary function is to provide inpatient services for medical diagnosis, treatment, and care of physically injured or sick persons with

short-term or episodic health problems or infirmities. "Hospital" includes any affiliate, subsidiary, or partnership in which the hospital holds a ten (10) percent or greater interest.

E. "*Medical professional*" means any individual who is licensed by the State of California as a Medical Doctor.

F. "*Pulmonologist*" means a medical professional who specializes in the diagnosis and treatment of pulmonary disease, regardless of whether the medical professional has been certified as a specialist in pulmonary disease. "Pulmonologist" does not include medical professionals who specialize in the diagnosis and treatment of patients who would not use the type of oxygen systems defined herein, such as patients suffering from allergies and pediatric patients requiring oxygen systems specially designed for children.

G. "*Practicing*" means having staff privileges, including, but not limited to, active or courtesy staff privileges, at any hospital.

H. "*Relative*" means an individual who is related to the individual, as father, mother, son, daughter, brother, sister, uncle, aunt, great aunt, great uncle, first cousin, nephew, niece, husband, wife, grandfather, grandmother, grandson, granddaughter, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, stepfather, stepmother, stepson, stepdaughter, stepbrother, stepsister, half-brother, half-sister, or who is the grandfather or grandmother of the spouse of the individual.

I. "*Own*" or "*Ownership interest*" means any and all stock, share, capital, equity or other interest, asset, property, license, lease, or other right or privilege, tangible or intangible, whether obtained or held, directly or indirectly, through any relative, employee or agent, or through any corporate or other device.

J. "*Affiliated with*" means having an ownership interest in the entity or being a member of the same group practice as an investor in the entity.

K. "*Relevant geographic market*" means Alameda County, California, excluding the south-east portion of Alameda County referred to as the "Tri-Valley" area. The Tri-Valley area includes the cities of Livermore, Dublin and Pleasanton.

L. "*Service area*" means the geographic area in which an entity engages in the sale, rental, or lease of oxygen systems.

II.

It is ordered, That, for a period of ten (10) years from the date of this order, no respondent shall grant or acquire, with or without valuable consideration, an ownership interest in any entity engaged in the sale, rental, or lease of oxygen systems in the relevant geographic market if, after such grant or acquisition, more than twenty-five (25) percent of the pulmonologists who practice in the relevant geographic market would be affiliated with the entity.

III.

It is further ordered, That for a period of ten (10) years from the date this order becomes final, the respondents shall notify the Commission within thirty (30) days after acquiring, either directly or indirectly, or through any corporate or other device, any ownership interest in an entity engaged in the sale, rental, or lease of oxygen systems. Such notification shall include:

- (a) An identification of all owners of the entity;
- (b) An identification of any pulmonologist practicing in the entity's service area or intended service area who has an ownership interest in the entity;
- (c) A list of all pulmonologists who practice in the entity's service area or intended service area;
- (d) A description of the products or services offered, or to be offered by the entity;
- (e) A copy of the entity's offering memorandum and/or prospectus; and
- (f) An identification of the entity's location, including the location of any and all of the entity's parent organizations, and subsidiaries.

Respondents shall comply with requests by the Commission staff for additional information within fifteen (15) days of service of such requests.

Provided, however, that nothing in this order shall require notice for acquisitions of voting securities of any publicly traded company involved in the sale, rental, or lease of oxygen systems unless, as a

result of such acquisition, the respondent would hold more than one (1) percent of such company.

IV.

It is further ordered, That:

A. Within sixty (60) days from the date this order becomes final, each respondent shall file with the Commission a verified written report of compliance with this order;

B. One year from the date this order becomes final and annually thereafter for nine (9) years, each respondent shall file with the Commission a verified written report of compliance with this order.

Commissioner Azcuenaga and Commissioner Starek dissenting.¹

DISSENTING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

Today the Commission issues three consent orders minus the divestiture requirements that were in the orders as published for public comment. By way of explanation, the Commission states that the respondents, by letter, assert that they "divested assets in conformance with the terms of the proposed order[s]" and that the Commission has determined that retaining the divestiture requirement "is not necessary to effectuate the remedy" in these matters.¹ In fact, the respondents have not divested "in conformance" with the proposed orders, and the sale that the respondents made does not accomplish the remedy that the Commission sought or otherwise cure the alleged competitive problem. The revised orders are inconsistent with the complaints on which they are based, they are inconsistent with the proposed orders that were published for comment, and, finally, they are internally inconsistent. Although I voted for the proposed orders that were published for comment,² I do not join today's decision.

¹ Prior to leaving the Commission, former Commissioner Owen and former Commissioner Yao registered their votes in the affirmative for the Complaint and the Decision and Order in this matter.

¹ Decision and Order in each matter at 2.

² A copy of my concurring statement of November 1, 1993, is attached and incorporated by reference. The concerns I expressed in that statement continue.

The theory of violation in each of the three Home Oxygen cases as alleged in the complaints is that ownership of a home oxygen supplier by the majority of pulmonologists in a particular market enables the home oxygen supplier to create barriers to entry (*i.e.*, through patient referrals by the owner-pulmonologists and the resulting inability of another oxygen supplier to obtain referrals from pulmonologists) and to inhibit competition in the home oxygen market.³ To remedy the alleged violations, the orders that were accepted for public comment required divestitures to reduce the number of pulmonologists owning interests in a single home oxygen company "such that no greater than 25% of the pulmonologists practicing in the relevant geographic market are affiliated with" any one home oxygen company.

During the public comment period, counsel for the respondent-pulmonologists informed the Commission that the doctors had sold their home oxygen companies to a large, publicly-held, medical supply company (which I will call Newco), in exchange for shares in that company.⁴ The pulmonologists in effect traded their interests in their local home oxygen partnerships for interests in a large corporation. The Commission today decides that the sale to Newco obviates the need for the divestitures that were required under the orders. The argument, as I understand it, is that the doctors hold a decidedly minor percentage of Newco (less than 1%) and that the small size of their ownership share somehow cures the competitive concerns described in the complaints.⁵ I disagree.

The theory of violation in these cases does not turn on control by the physicians of the home oxygen suppliers or on the percentage of each home oxygen supply company owned by the doctors. Instead, the concern was the aggregation in a single oxygen supply company of ownership interests of a majority of pulmonologists in the relevant geographic market. The required divestiture was to reduce the number of pulmonologists having an ownership interest in any one home

³ Paragraphs 12-17 of the complaints.

⁴ Letter from David T. Alexander, Esq., to FTC, Jan. 18, 1994 (counsel for Home Oxygen & Medical Equipment Co. and individual doctors); letter from Robert J. Enders, Esq., to FTC, Jan. 14, 1994 (counsel for Homecare Oxygen & Medical Equipment Co. and individual doctors).

⁵ See letter from Robert J. Enders, Esq., to the FTC, Jan. 14, 1994, at 3. According to Mr. Enders, the sale of the home oxygen company to "a publicly traded company should alleviate concerns of the Commission and its staff about pulmonologist control, through ownership, in entities engaged in the sale, rental or lease of oxygen systems."

oxygen supplier. The sale of the home oxygen companies to Newco is unresponsive to the concern underlying the complaints, because the ownership interests of some 60% or more of the pulmonologists in the market still are aggregated in a single company.⁶

The individual doctors may have reduced incentives to refer patients to Newco, if the financial rewards of stock ownership are less than those of partnership interests.⁷ The relative incentives might be important to a doctor who held both Newco shares and a home oxygen partnership, but, as I understand it, the doctors' entire partnership interests have been converted to Newco shares and the home oxygen partnerships no longer exist as separate entities. A doctor who owns an interest in Newco probably will have greater incentives to refer patients to Newco than to a company in which he or she does not own an interest.

The resolution accepted by the Commission today -- sale by the respondents of their companies to Newco in exchange for Newco shares, in lieu of divestiture to reduce the number of doctors affiliated by ownership with a single oxygen supply company -- is inconsistent with the theory of violation alleged in the complaints, because the sale to Newco does not reduce the number of doctors affiliated by ownership with a single oxygen supply company. For the same reason, the resolution accepted by the Commission is inconsistent with the remedial provisions of the orders that were published for comment and does not remedy the competitive problem.

The Commission's decision also is internally inconsistent, because each of the orders accepted today expressly bars the respondent-pulmonologists from granting or acquiring an interest in any home oxygen supplier -- if that would result in an affiliation with the supplier of more than 25% of pulmonologists in the geographic market⁸ -- at the same time that it accepts the sale to Newco, which

⁶ Before Newco, a majority of pulmonologists in each of two adjacent markets owned interests in two different home oxygen supply companies. Now, a majority of pulmonologists in the two adjacent markets combined own interests in one home oxygen supply company, Newco. With its acquisition of the home oxygen companies, Newco has acquired the market power that the respondents allegedly had aggregated.

⁷ The home oxygen companies were partnerships, and Newco is a publicly held corporation. We have no information about actual gains to the doctors from either form of ownership on which to base a comparative analysis.

⁸ Paragraph II of each of the orders bars the respondents from granting or acquiring "an ownership interest in any entity engaged in the sale, rental, or lease of oxygen systems. . . if . . . more than twenty-five percent of the pulmonologists practicing in the relevant geographic market would be affiliated with the entity." Thus, paragraph II of the orders would bar the very transfer that the Commission today sanctions.

is precisely the same conduct. As a result, in each of the orders accepted today, the Commission both sanctions the arrangement resulting from the sale to Newco (*i.e.*, a home oxygen company in which more than 25% of pulmonologists have an ownership interest) and prohibits any action to create the same arrangement in the future. The public will need the wisdom of Solomon to discern what these orders portend for future enforcement.

I dissent.

[The following statement was issued in November 1993, when the orders as then proposed were published for public comment.]

CONCURRING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

Although I have joined in the Commission's decision to accept these consent agreements for public comment, I have reservations about the usefulness of the orders to which the respondents have consented and about the advisability, on the basis of the information we have, of charting the new territory that these cases represent. Here, I believe, sufficient evidence exists to satisfy the statutory standard of reason to believe the law has been violated but precious little more. As I have said before, the truncated record on which consent agreements ordinarily are based leaves something to be desired as a basis for establishing new Commission policy.

Antitrust analysis, as we know it today, requires a search for understanding of markets, an understanding that, experience shows, may be founded on elements that lie well below the surface of what even those in a particular industry may readily comprehend. *See, e.g., Broadcast Music, Inc. v. CBS*, 441 U.S. 1 (1979). It is easy to underestimate the difficulty of showing justifications that are cognizable under the antitrust laws and sufficient to defend against the application of novel antitrust theories. The Commission may not be as well positioned as the parties to identify and understand justifications for the challenged conduct. Yet the parties may be ill-equipped to undertake the esoteric analytic endeavor that modern antitrust law may demand. When neither the parties nor the Commission fully comprehends the justifications, "ignorance leads straight to condemnation," *Chicago Professional Sports Limited Partnership v. NBA*, 961 F.2d 667, 676 (7th Cir. 1992), and condemnation without understanding may lead to consumer harm.

It is useful, indeed, advisable for the Commission to continue to evaluate new factual situations and to develop new theories under Section 5 of the Federal Trade Commission Act to remedy anti-competitive effects. But it is well, in doing so, to keep in mind the admonition of the court in *Chicago Professional Sports Limited Partnership v. NBA*, 961 F.2d at 676, that “[e]xplanations of problematic conduct take time to develop and more time to test. . . . Understanding novel practices may require years of study and debate.”

I have voted to publish the consent agreements for comment but remain mindful of these concerns.

STATEMENT OF COMMISSIONER ROSCOE B. STAREK, III

Nearly eleven months ago, over my dissent, the Commission accepted consent agreements with three groups of pulmonologists practicing in two counties in the eastern San Francisco Bay Area. Further analysis of these matters in the intervening months has not provided me with reason to believe that respondents’ conduct violated Section 5 of the Federal Trade Commission Act. Therefore, I cannot agree with the Commission’s decision to issue the complaints and the modified final versions of the consent orders.

I have continued to evaluate these matters with great care and an open mind since the Commission accepted the consent agreements. Nevertheless, I remain unpersuaded of the theory on which these cases rely. That theory -- stated with breezy imprecision in paragraphs 12 through 18 of the complaints -- appears to be that:

- A majority (in fact, approximately 60 percent) of the pulmonologists in each relevant geographic market¹ were investors in Home Oxygen and Homecare Oxygen;
- The “market position” of each respondent group was “further enhanced” because several Home and Homecare pulmonologists served as medical directors of the respiratory therapy departments at some hospitals in the relevant markets;
- The “aggregation of competitors” embodied by these pulmonologist-owned firms gave Home and Homecare some sort of

¹ The complaints define the geographic markets as most of Alameda County for Home Oxygen, and Contra Costa County and a portion of Alameda County for Homecare Oxygen.

- power² in an allegedly relevant market for “the sale, rental, or lease of oxygen systems” in Alameda and Contra Costa Counties;
- This “conduct” -- by which I presume the Commission means the “aggregation of competitors” into Home and Homecare and the “further enhance[ment]” of “market position” stemming from departmental directorships -- resulted in the creation of barriers to entry into the oxygen systems market and the inhibition of “free and open competition” in that market; and
 - The alleged “acts and practices” allowed Home and Homecare to acquire and maintain “market power” and constitute unfair methods of competition, in violation of Section 5.

When this chain of assertions is distilled, the essential claim -- the one on which liability under Section 5 is predicated -- is that ownership of an oxygen systems company by a majority of a county’s pulmonologists sufficed to confer market power in the oxygen systems business. Yet as I noted in my earlier dissent in this case, “[m]arket power is not necessarily created when a majority share of a relevant market is attained. Market power is defined as the ability profitably to maintain prices above competitive levels for a significant period of time.”³ One of my problems with the case is that neither the information gathered in this investigation nor the proposed complaints themselves persuasively explain how a majority share of pulmonology practice in Alameda and Contra Costa Counties, as “enhanced” by certain owners’ leadership roles in some hospitals’ respiratory therapy departments, gave rise to market power in oxygen systems.

² Inconsistencies between the Home and Homecare complaints give rise to ambiguities about this claim. Whereas the Homecare complaint (paragraph 15) alleges that the “aggregation of competitors in the market for the provision of pulmonary services” gave Homecare “market power” in the market for oxygen systems, the complaint against Home (paragraph 15) and the separate complaint against certain Home pulmonologists (paragraph 15) merely assert that this “aggregation of competitors” gave Home “a market share of approximately sixty (60) percent” in that market. Only in paragraph 18 do the latter two complaints aver that Home somehow “acquired and maintained market power in the relevant market.” (The Homecare complaint contains a similar paragraph.)

³ Statement of Commissioner Roscoe B. Starek, III (“Statement”) at 2 (quoting U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines, Section 0.1, 4 Trade Reg. Rep. (CCH) paragraph 13,104 (1992)). That Statement, which is attached hereto, also noted the Commission’s formulation of the test for market power in a previous Section 5 case: “The test for market power depends on all the relevant characteristics of a market: the strength and capacity of current competitors; the potential for entry; the historic intensity of competition; and the impact of the legal or natural environment, to name just a few.” *General Foods Corp.*, 103 FTC 204, 345 (1984).

The complaints' treatment of conditions of entry into oxygen systems illustrates (but by no means exhausts) the infirmities of the majority's approach. Rather than set forth a credible theory of entry barriers, the complaints charge -- in tautological fashion -- that "a barrier to entry has been created" purely and simply "[a]s a consequence of" the ownership structure of Home and Homecare. This says nothing about the difficulties facing prospective entrants or about the success rates of firms that operate in the markets independently of the Home and Homecare organizations, and thus leaves unanswered the question whether Home or Homecare possesses market power.⁴

I also note that the consent orders do nothing to deal with the actual conduct that must constitute the other key component (in addition to "market power") of the majority's theory in this case. I allude, of course, to "self-referral," a commonly encountered phenomenon in the medical field. Self-referral is a complex subject that requires considerable further analysis, and thus I am relieved that the orders do not prohibit self-referral but simply limit the market share of the respondent pulmonologists associated with an entity providing home oxygen. Although physician ownership of ancillary services may create an incentive to refer for services that are not medically necessary, I noted in my previous dissent that "it is critical to distinguish between the potential for anticompetitive harm and the potential for inappropriate or excessive referrals resulting from physician ownership. Regardless of market share or market power, physicians sometimes may make inappropriate treatment referrals to facilities in which they have a financial interest. While real consumer injury can result from such 'self-referral,' this behavior is not by itself actionable under the antitrust laws [W]e should be careful to distinguish anticompetitive behavior from other forms of imperfect market

⁴ I noted in my previous dissent that "an exercise of market power [on the part of a joint venture such as Home or Homecare] is possible only when the coordination of activities within such a venture insulates the participating physicians from outside competition sufficiently that they are able to raise prices or reduce services. [paragraph] For example, in some cases, an exercise of market power may be possible if enough of the market is aggregated through the joint venture so that there is insufficient remaining market demand to sustain viable competitors. That clearly is not the case here." Statement at 4. Indeed, my earlier dissent noted the substantial number of competing oxygen system firms outside the Home and Homecare organizations in Alameda and Contra Costa Counties and the absence of evidence that any of those competitors suffer from competitive weaknesses. *Id.* at 3.

performance.”⁵ In short, any injury involving self-referral that does not also flow from an exercise of market power is not “antitrust injury.”⁶

I would of course support a challenge to an ancillary services joint venture if the facts unearthed in the investigation demonstrated that the venture was likely to have the requisite anticompetitive effects. In the matters before us, however, the complaints do not set forth a coherent theory of anticompetitive effects. I therefore respectfully dissent.⁷

ATTACHMENT

STATEMENT OF COMMISSIONER ROSCOE B. STAREK, III

I respectfully dissent from the Commission’s decision to accept for public comment the consent orders in these matters. The challenged conduct does appear to have the potential to be anticompetitive. Under the rule of reason, however, the evidence presented does not indicate that the conduct of the respondents was anticompetitive or that it is likely to have been anticompetitive.¹ Therefore, I do not have reason to believe that the respondents have violated Section 5 of the FTC Act, as the complaints allege.

⁵ *Id.* at 3-4 (footnote omitted). My dissent continued: “If patients seldom question their physicians’ referrals, physicians could profit from directing patients to home oxygen providers in which they have an ownership interest. But any such ‘vertical control’ that physicians have does not necessarily result in any horizontal market power of the ancillary ventures in which they have an interest.” *Id.* at 4.

⁶ *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334 (1990); *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 109-10 (1986); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977).

⁷ Notwithstanding my conclusion that no orders should be issued, I agree with the majority inasmuch as it decided to delete the divestiture requirements from the final orders, for the reasons set forth in the third paragraph of the preamble to each Decision and Order.

¹ The challenged conduct must be analyzed under the rule of reason. The arrangements at issue cannot be characterized as naked restraints of trade subject to summary condemnation, and thus the rule of reason applies. See *NCAA v. Board of Regents*, 468 U.S. 85, 103 (1984). The joint DOJ/FTC Health Care Enforcement Guidelines indicate that the antitrust agencies will apply a rule of reason to conduct falling outside of well defined “safety zones.” Statements of Antitrust Policy in the Health Care Area, Department of Justice and Federal Trade Commission, September 15, 1993, at 10-11, 36. The six policy statements of these Guidelines do not explicitly cover the type of conduct at issue here, *i.e.*, physician-owned ancillary joint ventures. In any case, the arrangements here most likely would fall outside of any safety zone similar to those defined in the Guidelines, because they appear to have market shares of about 60% in their respective markets.

The complaints name two limited partnerships and 28 pulmonologist partners in these ventures. The complaints allege that the respondents have “acquired and maintained market power” (paragraph 18) as a consequence of the fact that a “majority” of the pulmonologists in each of the two areas in which the two partnerships operate are partners in the ventures (paragraph 14). I am concerned that this might be read to imply that the Commission will take enforcement actions against physician-owned ancillary joint ventures simply because participating physicians constitute a majority of those practicing in the relevant market, without regard to the ventures’ effects or likely effects on the market.

The complaints do not challenge, and the consent agreements do not prohibit, “self-referral” of patients to entities owned by the respondent physicians.² However, the Analysis of Proposed Consent Order to Aid Public Comment states that the respondents were able to “acquire and maintain market power” because “pulmonologists have the ability to influence the choice of oxygen suppliers to service patients needing oxygen at home.” Because pulmonologists make referrals to providers of home oxygen services, they do have the ability to influence their patients’ choice of oxygen suppliers. But this “influence” does not necessarily equate to or result in any market power.

Market power is the focus of the Commission’s analysis of physician-owned ancillary joint ventures. In fact, the very violation alleged in the complaints in these matters is that the ventures “acquired and maintained market power.” Market power is not necessarily created when a majority share of a relevant market is attained. Market power is defined as “the ability profitably to maintain prices above competitive levels for a significant period of time.”³ Within

² The President recently signed legislation prohibiting physicians from self-referral of Medicare patients for several categories of services, including those services provided by the respondents. Omnibus Budget Reconciliation Act of 1993, Pub. L. No 103-66, ch. 2, Section 5074. Because the vast majority of home oxygen services apparently are sold to Medicare patients, it may be the case that virtually no home oxygen provider would be willing to maintain physician ownership that would cut itself off from the vast majority of market demand. If that is the case, Commission action on this matter is moot. However, I am not certain that this is true, and more importantly, this case might be viewed as precedent for Commission actions outside of the services covered by the recent legislation.

³ U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines (1992), reprinted in 4 Trade Reg. Rep. (CCH) paragraph 13104, Section 0.1 (“Sellers with market power also may lessen competition on dimensions other than price, such as product quality, service, or innovation.”)

the context of a case under Section 5 of the FTC Act, the Commission has argued that:

The test for market power depends on all of the relevant characteristics of a market: the strength and capacity of current competitors; the potential for entry; the historic intensity of competition; and the impact of the legal or natural environment, to name just a few.⁴

Here, the two limited partnerships each have approximately 60% market shares in the respective counties in which they operate. Assuming, *arguendo*, that the alleged product and geographic markets are relevant antitrust markets, these market shares alone do not justify an inference of market power. In addition to the respondents, the evidence indicates that there are nine competing sellers of home oxygen in Alameda County, and eight competing sellers in Contra Costa County. Some of these firms have market shares of about 10%.

If these other firms suffer from substantial competitive weaknesses that prevent them from offering the same quality of services or the same low prices as the respondents, the respondents might be able to exercise market power through their joint ventures. I have not seen evidence that any of these competitors have such competitive weaknesses.⁵

Medicare patients, who apparently comprise the vast majority of patients purchasing home oxygen services, might be less price sensitive than third-party payers such as HMOs, and thus might appear to be vulnerable to anticompetitive behavior. Medicare's restrictive reimbursement policies may severely limit suppliers' potential ability to exercise market power. But it is doubtful that these policies eliminate the possibility of an exercise of market power in these markets.

It sometimes has been argued that physician ownership can create an incentive to refer for financial gain for services that are not medically necessary. But it is critical to distinguish between the potential for anticompetitive harm and the potential for inappropriate or excessive referrals resulting from physician ownership. Regardless of market share or market power, physicians sometimes may make

⁴ *General Foods Corp.* 103 FTC 204, 345 (1984).

⁵ In fact, one major third-party payer in the region purchases home oxygen primarily from one of the respondents' ventures in one county, while in the other county it purchases home oxygen primarily from one of the respondents' competitors. While hardly dispositive on this issue, this suggests that this major customer considers the available services of the respondents' competitors to be of acceptable and comparable quality and price.

inappropriate treatment referrals to facilities in which they have a financial interest.⁶ While real consumer injury can result from such "self-referral," this behavior is not by itself actionable under the antitrust laws. Of course, this does not mean that anticompetitive behavior could not occur in these markets. But we should be careful to distinguish anticompetitive behavior from other forms of imperfect market performance.

If patients seldom question their physicians' referrals, physicians could profit from directing patients to home oxygen providers in which they have an ownership interest. But any such "vertical control" that physicians have does not necessarily result in any horizontal market power of the ancillary ventures in which they have an interest. An ancillary venture can enable the participating physicians to coordinate some of their competitive activities. But an exercise of market power is possible only when the coordination of activities within such a venture insulates the participating physicians from outside competition sufficiently that they are able to raise prices or reduce services.

For example, in some cases, an exercise of market power may be possible if enough of the market is aggregated through the joint venture so that there is insufficient remaining market demand to sustain viable competitors. That clearly is not the case here. The evidence is at best ambiguous as to whether these ventures, which have been in operation since 1984, have had any anticompetitive effect.

Physician-owned ancillary joint ventures have a potential to accomplish significant cost savings that can be passed on to consumers in the form of lower prices and higher quality of care. Physicians frequently may be in the best position to recognize a potential demand for an ancillary medical service in their community, to back up this perception with their own capital, and to operate and monitor the venture's performance. Clearly physicians and hospitals could have more control over the quality of a service by owning a supplier of that service than by merely writing a prescription. Evidence that physician investors frequently are passive with respect to the opera-

⁶ The potential problem of inappropriate referrals made for financial gain is not limited to instances in which physicians have financial interests in facilities, equipment, or service providers that are physically or legally separate from their primary practices. The potential problem is present whenever a physician performs both diagnosis and treatment. Patients and third-party payers have limited information about whether treatments are medically necessary, and thus physicians frequently have some degree of discretion to recommend treatments that are not necessary.

tion of these companies does not dismiss the potential of these ventures to accomplish substantial efficiencies.

Of course, the respondents' large scale and market share may not be necessary to achieve the potential efficiencies of such arrangements. But even incontrovertible evidence that these firms did not gain additional efficiency by growing to their current size would be relevant only after a determination that the firms had acted anticompetitively.

The orders continue to allow self-referral, and only limit the market share of the respondent pulmonologists associated with an entity providing home oxygen. Thus, the remedy does not address any harm that might result from the mere fact of self-referral.⁷ The order also would allow efficiencies from self-referral to occur, but it is far from clear that the restructuring of the two ventures required under the orders would preserve all of the efficiencies that they may have been able to accomplish. Thus it may be the case that the orders reduce efficiency, do not reduce market power, and also fail to address any real harm to consumers that might result from self-referral.

The overriding reason to cast my vote against the acceptance of these consents is the precedential effects of discouraging physicians and hospitals from forming ancillary ventures, particularly in circumstances in which it may be important to achieve a high market share in order to gain efficiencies, or even to be able to introduce a service that benefits consumers in the area. Thus, enforcement actions should be limited to conduct for which anticompetitive harm is demonstrable or highly likely to occur. Because that burden has not been met, I respectfully dissent from the Commission's actions in these matters.

⁷ As I noted above, self-referral by itself is not actionable under the antitrust laws. Thus it is appropriate that any such perceived harm is not addressed in an order resolving the allegations in these complaints.

IN THE MATTER OF

HOMECARE OXYGEN & MEDICAL EQUIPMENT
COMPANY, ET AL.CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3532. Complaint, Sept. 14, 1994--Decision, Sept. 14, 1994

This consent order prohibits, among other things, a California supplier of oxygen systems prescribed for home use from acquiring or granting, for ten years, an ownership interest in a firm that sells or leases oxygen systems in the relevant geographic market, if more than 25 percent of the pulmonologists in that market would be affiliated with the firm, and requires the respondents to notify the Commission if they acquire more than one percent of a firm that sells or leases oxygen systems anywhere.

Appearances

For the Commission: *Linda K. Badger, Kerry O'Brien and Jeffrey A. Klurfeld.*

For the respondents: *Robert J. Enders, Weissburg & Aronson, Inc., Los Angeles, CA.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Homecare Oxygen & Medical Equipment Company, a limited partnership, Michael L. Cohen, M.D., Harry J. MacDannald, M.D., Gerald R. Del Rio, M.D., Ravinder N. Gupta, M.D., Gregory D. Anderson, M.D., David S. Safianoff, M.D., Richard S. Kops, M.D., Richard A. Bordow, M.D., Herman R. Bruch, M.D., Frederick J. Nachtwey, M.D., and Jorge A. Salazar-Suero, M.D., individually and as partners, trading and doing business as Homecare Oxygen & Medical Equipment Company, hereinafter sometimes referred to as the respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

DEFINITIONS

PARAGRAPH 1. For the purpose of this complaint, the following definitions shall apply:

A. "*Durable medical equipment*" or "*DME*" means medical equipment sold, rented, or leased to customers for home use. DME includes, but is not limited to, ambulatory aids, wheelchairs, walkers, hospital beds, commodes and respiratory therapy equipment, such as oxygen systems. "DME" encompasses all aspects of supplying DME, including, but not limited to, delivering and servicing the equipment, and rendering accompanying services to customers.

B. "*Oxygen systems*" means DME used to service individuals who are unable to obtain adequate oxygen through independent breathing. Oxygen systems include, but are not limited to, oxygen gas contained in tanks; liquid oxygen stored in reservoirs and smaller, portable containers; and electrically-operated oxygen concentrators. "Oxygen systems" encompasses all aspects of supplying these oxygen systems, including, but not limited to, delivering and servicing the equipment, supplying oxygen content, and rendering accompanying services to customers.

C. "*Discharge planner*" means any nurse, social worker, respiratory therapist, or other agent of a hospital or health care provider who arranges for the provision of DME or consults with or makes recommendations to patients being discharged from hospitals concerning potential suppliers of DME.

D. "*Hospital*" means a health facility, other than a federally-owned facility, having a duly organized governing body with overall administrative and professional responsibility and an organized professional staff that provides 24-hour inpatient care, and whose primary function is to provide inpatient services for medical diagnosis, treatment, and care of physically injured or sick persons with short-term or episodic health problems or infirmities. "Hospital" includes any affiliate, subsidiary, or partnership in which the hospital holds a ten (10) percent or greater interest.

E. "*Pulmonologist*" means a medical professional who specializes in the diagnosis and treatment of pulmonary disease, regardless of whether the medical professional has been certified as a specialist in pulmonary disease. "Pulmonologist" does not include medical professionals who specialize in the diagnosis and treatment of

patients who would not use the type of oxygen systems defined herein, such as patients suffering from allergies and pediatric patients requiring oxygen systems specially designed for children.

F. "*Practicing*" means having staff privileges, including, but not limited to, active or courtesy staff privileges, at any hospital.

RESPONDENTS

PAR. 2. Respondent Homecare Oxygen & Medical Equipment Company (hereinafter "Homecare") is a limited partnership organized, existing and doing business under and by virtue of the laws of the State of California. It has its principal place of business at 4041 Pike Lane, Suite C, Concord, California.

Respondent Michael L. Cohen, M.D., is an individual who has been, and is now, a general partner of Homecare. As such, he formulates, or participates in the formulation of, directs and controls the acts and practices of Homecare, including the acts and practices set forth in this complaint. His place of business is located at 130 La Casa Via, Building 2, Suite 208, Walnut Creek, California.

Respondent Harry J. MacDannald, M.D., is an individual who has been, and is now, a general partner of Homecare. As such, he formulates, or participates in the formulation of, directs and controls the acts and practices of Homecare, including the acts and practices set forth in this complaint. His place of business is located at 130 La Casa Via, Building 2, Suite 208, Walnut Creek, California.

Respondent Gerald R. Del Rio, M.D., is an individual who has been, and is now, a limited partner in Homecare. His place of business is located at 2220 Gladstone, No. 3, Pittsburg, California.

Respondent Ravinder N. Gupta, M.D., is an individual who has been, and is now, a limited partner in Homecare. His place of business is located at 3741 Sunset Lane, Antioch, California.

Respondent Gregory D. Anderson, M.D., is an individual who has been, and is now, a limited partner in Homecare. His place of business is located at 130 La Casa Via, Building 2, Suite 208, Walnut Creek, California.

Respondent David S. Safianoff, M.D., is an individual who has been, and is now, a limited partner in Homecare. His place of business is located at 2222 East Street, Suite 300, Concord, California.

Respondent Richard S. Kops, M.D., is an individual who has been, and is now, a limited partner in Homecare. His place of business is located at 2222 East Street, Suite 300, Concord, California.

Respondent Richard A. Bordow, M.D., is an individual who has been, and is now, a limited partner in Homecare. His place of business is located at 2000 Vale Road, San Pablo, California.

Respondent Herman R. Bruch, M.D., is an individual who has been, and is now, a limited partner in Homecare. His place of business is located at 2000 Vale Road, San Pablo, California.

Respondent Frederick J. Nachtwey, M.D. is an individual who has been, and is now, a limited partner in Homecare. His place of business is located at 2000 Vale Road, San Pablo, California.

Respondent Jorge A. Salazar-Suero, M.D., is an individual who has been, and is now, a limited partner in Homecare. His place of business is located at 2211 East Street, Concord, California.

PAR. 3. The relevant product market is the market for the sale, rental, or lease of oxygen systems.

PAR. 4. The relevant geographic market is Contra Costa County, California, including the southeast portion of Alameda County referred to as the "Tri-Valley" area. The Tri-Valley area includes the cities of Livermore, Dublin and Pleasanton.

PAR. 5. Since January 1, 1984, Homecare has been engaged in the purchasing, offering for sale, rental or lease of DME, including oxygen systems and related products, to the public in the relevant geographic market.

PAR. 6. The respondents, Michael L. Cohen, M.D., Harry J. MacDannald, M.D., Gerald R. Del Rio M.D., Ravinder N. Gupta, M.D., Gregory D. Anderson, M.D., David S. Safianoff, M.D., Richard S. Kops, M.D., Richard A. Bordow, M.D., Herman R. Bruch, M.D., Frederick J. Nachtwey, M.D., and Jorge A. Salazar-Suero, M.D., (collectively the "pulmonologist respondents") are now, and have been at all times relevant to this complaint, pulmonologists practicing their profession within the relevant geographic market.

PAR. 7. The pulmonologist respondents hold staff positions or have staff privileges at one or more of the following hospitals located in the relevant geographic market: Mount Diablo Medical Center, located in Concord, California; John Muir Medical Center, located in Walnut Creek, California; Los Medanos Community Hospital, located in Pittsburg, California; Delta Memorial Hospital, located in Antioch, California; Brookside Hospital, located in San Pablo,

California; Merrithew Memorial, located in Martinez, California; and Doctors' Hospital of Pinole, located in Pinole, California.

JURISDICTION

PAR. 8. The acts and practices of respondents alleged in this complaint are and have been in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

THE INDUSTRY

PAR. 9. Patients hospitalized with certain forms of lung, heart, and other disease are unable to obtain sufficient oxygen from their normal breathing. Upon discharge from a hospital, physicians may prescribe oxygen for these patients for home use. Because oxygen is considered a drug under Food and Drug Administration regulations, oxygen for medical use can be provided to patients only pursuant to a physician's prescription.

PAR. 10. Oxygen systems vary in many respects, including, but not limited to: the type of system, the level and quality of service accompanying the equipment, cost, and price. Patients requiring oxygen systems usually possess incomplete knowledge about oxygen systems or the companies that provide oxygen systems. As a result, patients seldom have a preference for a particular oxygen system supplier and rely on hospitals, discharge planners, health care professionals, and other individuals knowledgeable about DME to recommend a supplier or to select a supplier on their behalves.

PAR. 11. In general, patients requiring oxygen systems receive the services of pulmonologists or of hospital respiratory therapy departments under the supervision of pulmonologists. As a result, pulmonologists have the ability to influence the choice of which oxygen system and which supplier will be used by these patients through a variety of means.

ACTS OR PRACTICES

PAR. 12. In 1984, Homecare was formed to engage in the sale, rental or lease of oxygen systems to patients.

PAR. 13. Partnership interests in Homecare were offered primarily to hospitals and pulmonologists.

PAR. 14. A majority of the pulmonologists practicing in the relevant geographic market joined as partners in Homecare. In all, approximately sixty (60) percent of the pulmonologists in the relevant geographic market were investors in Homecare or practiced in groups consisting of one or more of the pulmonologist respondents. Respondents' market position was further enhanced because several of the pulmonologist respondents served as medical directors of respiratory therapy departments at hospitals in the relevant geographic market. The pulmonologist respondents, therefore, collectively possessed market power in the market for the provision of pulmonary services.

EFFECTS

PAR. 15. Through the aggregation of competitors in the market for the provision of pulmonary services alleged in paragraphs twelve through fourteen, Homecare has obtained market power in the relevant market.

PAR. 16. As a consequence of the conduct alleged in paragraphs twelve through fourteen, a barrier to entry has been created in the relevant market.

PAR. 17. As a consequence of the conduct alleged in paragraphs twelve through fourteen, free and open competition has been inhibited in the relevant market.

VIOLATIONS

PAR. 18. Homecare has acquired and maintained market power in the relevant market through the acts and practices set out and alleged in paragraphs twelve through fourteen. These alleged acts and practices of the respondents constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. The acts or practices, or the effects thereof, are likely to continue or recur in the absence of appropriate relief.

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 San Francisco Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having received a comment from the respondents describing how the respondents divested assets in conformance with the terms of the proposed order and had received therefore a minority stock interest of less than one (1) percent of the outstanding voting stock in a publicly held company, and the Commission having determined that retention of the divestiture provisions would nonetheless require respondents to divest said stock interest, and also having determined that such divestiture of said stock interest is not necessary to effectuate the remedy in this matter and that the divestiture provisions therefore can be deleted, 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 Homecare Oxygen & Medical Equipment Company (hereinafter "Homecare") is a limited partnership organized, existing and doing business under and by virtue of the laws of the State of California. It has its principal place of business at 4041 Pike Lane, Suite C, Concord, California.

Respondent Michael L. Cohen, M.D., is an individual who has been, and is now, a general partner of Homecare. His place of

business is located at 130 La Casa Via, Building 2, Suite 208, Walnut Creek, California.

Respondent Harry J. MacDannald, M.D., is an individual who has been, and is now, a general partner of Homecare. His place of business is located at 130 La Casa Via, Building 2, Suite 208, Walnut Creek, California.

Respondent Gerald R. Del Rio, M.D., is an individual who has been, and is now, a limited partner in Homecare. His place of business is located at 2220 Gladstone, No. 3, Pittsburg, California.

Respondent Ravinder N. Gupta, M.D., is an individual who has been, and is now, a limited partner in Homecare. His place of business is located at 3741 Sunset Lane, Antioch, California.

Respondent Gregory D. Anderson, M.D., is an individual who has been, and is now, a limited partner in Homecare. His place of business is located at 130 La Casa Via, Building 2, Suite 208, Walnut Creek, California.

Respondent David S. Safianoff, M.D., is an individual who has been, and is now, a limited partner in Homecare. His place of business is located at 2222 East Street, Suite 300, Concord, California.

Respondent Richard S. Kops, M.D., is an individual who has been, and is now, a limited partner in Homecare. His place of business is located at 2222 East Street, Suite 300, Concord, California.

Respondent Richard A. Bordow, M.D., is an individual who has been, and is now, a limited partner in Homecare. His place of business is located at 2000 Vale Road, San Pablo, California.

Respondent Herman R. Bruch, M.D., is an individual who has been, and is now, a limited partner in Homecare. His place of business is located at 2000 Vale Road, San Pablo, California.

Respondent Frederick J. Nachtwey, M.D., is an individual who has been, and is now, a limited partner in Homecare. His place of business is located at 2000 Vale Road, San Pablo, California.

Respondent Jorge A. Salazar-Suero, M.D., is an individual who has been, and is now, a limited partner in Homecare. His place of business is located at 2211 East Street, Concord, California.

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.

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

A. "*Durable medical equipment*" or "*DME*" means medical equipment sold, rented, or leased to customers for home use. DME includes, but is not limited to, ambulatory aids, wheelchairs, walkers, hospital beds, commodes and respiratory therapy equipment, such as oxygen systems. "DME" encompasses all aspects of supplying DME, including, but not limited to, delivering and servicing the equipment, and rendering accompanying services to customers.

B. "*Oxygen systems*" means DME used to service individuals who are unable to obtain adequate oxygen through independent breathing. Oxygen systems include, but are not limited to, oxygen gas contained in tanks; liquid oxygen stored in reservoirs and smaller, portable containers; and electrically-operated oxygen concentrators. "Oxygen systems" encompasses all aspects of supplying these oxygen systems, including, but not limited to, delivering and servicing the equipment, supplying oxygen content, and rendering accompanying services to customers.

C. "*Hospital*" means a health facility, other than a federally-owned facility, having a duly organized governing body with overall administrative and professional responsibility and an organized professional staff that provides 24-hour inpatient care, and whose primary function is to provide inpatient services for medical diagnosis, treatment, and care of physically injured or sick persons with short-term or episodic health problems or infirmities. "Hospital" includes any affiliate, subsidiary, or partnership in which the hospital holds a ten (10) percent or greater interest.

D. "*Medical professional*" means any individual who is licensed by the State of California as a Medical Doctor.

E. "*Pulmonologist*" means a medical professional who specializes in the diagnosis and treatment of pulmonary disease, regardless of whether the medical professional has been certified as a specialist in pulmonary disease. "Pulmonologist" does not include medical professionals who specialize in the diagnosis and treatment of patients who would not use the type of oxygen systems defined here-

in, such as patients suffering from allergies and pediatric patients requiring oxygen systems specially designed for children.

F. "*Practicing*" means having staff privileges, including, but not limited to, active or courtesy staff privileges, at any hospital.

G. "*Relative*" means an individual who is related to the individual, as father, mother, son, daughter, brother, sister, uncle, aunt, great aunt, great uncle, first cousin, nephew, niece, husband, wife, grandfather, grandmother, grandson, granddaughter, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, stepfather, stepmother, stepson, stepdaughter, stepbrother, stepsister, half-brother, half-sister, or who is the grandfather or grandmother of the spouse of the individual.

H. "*Own*" or "*Ownership interest*" means any and all stock, share, capital, equity or other interest, asset, property, license, lease, or other right or privilege, tangible or intangible, whether obtained or held, directly or indirectly, through any relative, employee or agent, or through any corporate or other device.

I. "*Affiliated with*" means having an ownership interest in the entity or being a member of the same group practice as an investor in the entity.

J. "*Relevant geographic market*" means Contra Costa County, California, including the south-east portion of Alameda County referred to as the "Tri-Valley" area. The Tri-Valley area includes the cities of Livermore, Dublin and Pleasanton.

K. "*Service area*" means the geographic area in which an entity engages in the sale, rental, or lease of oxygen systems.

L. "*Intended service area*" means the service area that the entity plans to have the capacity to service during its first several years of operation.

II.

It is ordered, That, for a period of ten (10) years from the date of this order, no respondent shall grant or acquire, with or without valuable consideration, an ownership interest in any entity engaged in the sale, rental, or lease of oxygen systems in the relevant geographic market if, after such grant or acquisition, more than twenty-five (25) percent of the pulmonologists practicing in the relevant geographic market would be affiliated with the entity.

III.

It is further ordered, That for a period of ten (10) years from the date this order becomes final, the individual respondents shall notify the Commission within thirty (30) days after acquiring, either directly or indirectly, or through any corporate or other device, any ownership interest in an entity engaged in the sale, rental, or lease of oxygen systems. Such notification shall include:

- (a) An identification of all owners of the entity;
- (b) An identification of any pulmonologist practicing in the entity's service area or intended service area who has an ownership interest in the entity;
- (c) A list of all pulmonologists practicing in the entity's service area or intended service area;
- (d) A description of the products or services offered, or to be offered by the entity;
- (e) A copy of the entity's offering memorandum and/or prospectus; and
- (f) An identification of the entity's location, including the location of any and all of the entity's parent organizations, and subsidiaries.

Respondents shall comply with requests by the Commission staff for additional information within fifteen (15) days of service of such requests.

Provided, however, that nothing in this order shall require notice for acquisitions of voting securities of any publicly traded company involved in the sale, rental, or lease of oxygen systems unless, as a result of such acquisition, the respondent would hold more than one (1) percent of such company.

IV.

It is further ordered, That the respondent Homecare shall:

A. Within thirty (30) days from the date this order becomes final, distribute a copy of the complaint and order to each managerial employee;

B. For a period of five (5) years from the date this order becomes final, distribute a copy of the complaint and order to each new managerial employee within thirty (30) days of the entrance of such employee to employment;

C. For a period of five (5) years from the date this order becomes final, distribute a copy of the complaint and order to each new partner within thirty (30) days of the entrance of such partner to the partnership.

V.

It is further ordered, That:

A. Within sixty (60) days from the date this order becomes final, each respondent shall file with the Commission a verified written report of compliance with this order;

B. One year from the date this order becomes final and annually thereafter for nine (9) years, each respondent shall file with the Commission a verified written report of compliance with this order.

VI.

It is further ordered, That respondent Homecare, upon written request of the staff of the Federal Trade Commission, made to Homecare, for the purpose of determining or securing compliance with this order, and subject to any legally recognized privilege, shall permit duly authorized representatives of the Commission:

A. Reasonable access during Homecare's office hours, in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda, reports, and other records and documents in Homecare's possession or control that relate to any matter contained in this order; and

B. An opportunity, subject to Homecare's reasonable convenience, to interview general partners or employees of Homecare, who may have counsel present, regarding such matters.

VII.

It is further ordered, That respondent Homecare notify the Commission at least thirty (30) days prior to any consummation of an organizational change, such as dissolution, assignment or sale resulting in the emergence of a successor organization, or any other change in the organization that may affect compliance with the obligations arising out of the order.

Commissioner Azcuenaga and Commissioner Starek dissenting.¹

DISSENTING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

Today the Commission issues three consent orders minus the divestiture requirements that were in the orders as published for public comment. By way of explanation, the Commission states that the respondents, by letter, assert that they “divested assets in conformance with the terms of the proposed order[s]” and that the Commission has determined that retaining the divestiture requirement “is not necessary to effectuate the remedy” in these matters.¹ In fact, the respondents have not divested “in conformance” with the proposed orders, and the sale that the respondents made does not accomplish the remedy that the Commission sought or otherwise cure the alleged competitive problem. The revised orders are inconsistent with the complaints on which they are based, they are inconsistent with the proposed orders that were published for comment, and, finally, they are internally inconsistent. Although I voted for the proposed orders that were published for comment,² I do not join today’s decision.

The theory of violation in each of the three Home Oxygen cases as alleged in the complaints is that ownership of a home oxygen supplier by the majority of pulmonologists in a particular market enables the home oxygen supplier to create barriers to entry (*i.e.*, through patient referrals by the owner-pulmonologists and the resulting inability of another oxygen supplier to obtain referrals from

¹ Prior to leaving the Commission, former Commissioner Owen and former Commissioner Yao registered their votes in the affirmative for the Complaint and the Decision and Order in this matter.

¹ Decision and Order in each matter at 2.

² A copy of my concurring statement of November 1, 1993, is attached and incorporated by reference. The concerns I expressed in that statement continue.

pulmonologists) and to inhibit competition in the home oxygen market.³ To remedy the alleged violations, the orders that were accepted for public comment required divestitures to reduce the number of pulmonologists owning interests in a single home oxygen company “such that no greater than 25% of the pulmonologists practicing in the relevant geographic market are affiliated with” any one home oxygen company.

During the public comment period, counsel for the respondent-pulmonologists informed the Commission that the doctors had sold their home oxygen companies to a large, publicly-held, medical supply company (which I will call Newco), in exchange for shares in that company.⁴ The pulmonologists in effect traded their interests in their local home oxygen partnerships for interests in a large corporation. The Commission today decides that the sale to Newco obviates the need for the divestitures that were required under the orders. The argument, as I understand it, is that the doctors hold a decidedly minor percentage of Newco (less than 1%) and that the small size of their ownership share somehow cures the competitive concerns described in the complaints.⁵ I disagree.

The theory of violation in these cases does not turn on control by the physicians of the home oxygen suppliers or on the percentage of each home oxygen supply company owned by the doctors. Instead, the concern was the aggregation in a single oxygen supply company of ownership interests of a majority of pulmonologists in the relevant geographic market. The required divestiture was to reduce the number of pulmonologists having an ownership interest in any one home oxygen supplier. The sale of the home oxygen companies to Newco is unresponsive to the concern underlying the complaints, because the ownership interests of some 60% or more of the pulmonologists in the market still are aggregated in a single company.⁶

³ Paragraphs 12-17 of the complaints.

⁴ Letter from David T. Alexander, Esq., to FTC, Jan. 18, 1994 (counsel for Home Oxygen & Medical Equipment Co. and individual doctors); letter from Robert J. Enders, Esq., to FTC, Jan. 14, 1994 (counsel for Homecare Oxygen & Medical Equipment Co. and individual doctors).

⁵ See letter from Robert J. Enders, Esq., to the FTC, Jan. 14, 1994, at 3. According to Mr. Enders, the sale of the home oxygen company to “a publicly traded company should alleviate concerns of the Commission and its staff about pulmonologist control, through ownership, in entities engaged in the sale, rental or lease of oxygen systems.”

⁶ Before Newco, a majority of pulmonologists in each of two adjacent markets owned interests in two different home oxygen supply companies. Now, a majority of pulmonologists in the two adjacent

The individual doctors may have reduced incentives to refer patients to Newco, if the financial rewards of stock ownership are less than those of partnership interests.⁷ The relative incentives might be important to a doctor who held both Newco shares and a home oxygen partnership, but, as I understand it, the doctors' entire partnership interests have been converted to Newco shares and the home oxygen partnerships no longer exist as separate entities. A doctor who owns an interest in Newco probably will have greater incentives to refer patients to Newco than to a company in which he or she does not own an interest.

The resolution accepted by the Commission today -- sale by the respondents of their companies to Newco in exchange for Newco shares, in lieu of divestiture to reduce the number of doctors affiliated by ownership with a single oxygen supply company -- is inconsistent with the theory of violation alleged in the complaints, because the sale to Newco does not reduce the number of doctors affiliated by ownership with a single oxygen supply company. For the same reason, the resolution accepted by the Commission is inconsistent with the remedial provisions of the orders that were published for comment and does not remedy the competitive problem.

The Commission's decision also is internally inconsistent, because each of the orders accepted today expressly bars the respondent-pulmonologists from granting or acquiring an interest in any home oxygen supplier -- if that would result in an affiliation with the supplier of more than 25% of pulmonologists in the geographic market⁸ -- at the same time that it accepts the sale to Newco, which is precisely the same conduct. As a result, in each of the orders accepted today, the Commission both sanctions the arrangement resulting from the sale to Newco (*i.e.*, a home oxygen company in which more than 25% of pulmonologists have an ownership interest)

markets combined own interests in one home oxygen supply company, Newco. With its acquisition of the home oxygen companies, Newco has acquired the market power that the respondents allegedly had aggregated.

⁷ The home oxygen companies were partnerships, and Newco is a publicly held corporation. We have no information about actual gains to the doctors from either form of ownership on which to base a comparative analysis.

⁸ Paragraph II of each of the orders bars the respondents from granting or acquiring "an ownership interest in any entity engaged in the sale, rental, or lease of oxygen systems . . . if . . . more than twenty-five percent of the pulmonologists practicing in the relevant geographic market would be affiliated with the entity." Thus, paragraph II of the orders would bar the very transfer that the Commission today sanctions.

and prohibits any action to create the same arrangement in the future. The public will need the wisdom of Solomon to discern what these orders portend for future enforcement.

I dissent.

[The following statement was issued in November 1993, when the orders as then proposed were published for public comment.]

CONCURRING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

Although I have joined in the Commission's decision to accept these consent agreements for public comment, I have reservations about the usefulness of the orders to which the respondents have consented and about the advisability, on the basis of the information we have, of charting the new territory that these cases represent. Here, I believe, sufficient evidence exists to satisfy the statutory standard of reason to believe the law has been violated but precious little more. As I have said before, the truncated record on which consent agreements ordinarily are based leaves something to be desired as a basis for establishing new Commission policy.

Antitrust analysis, as we know it today, requires a search for understanding of markets, an understanding that, experience shows, may be founded on elements that lie well below the surface of what even those in a particular industry may readily comprehend. *See, e.g., Broadcast Music, Inc. v. CBS*, 441 U.S. 1 (1979). It is easy to underestimate the difficulty of showing justifications that are cognizable under the antitrust laws and sufficient to defend against the application of novel antitrust theories. The Commission may not be as well positioned as the parties to identify and understand justifications for the challenged conduct. Yet the parties may be ill-equipped to undertake the esoteric analytic endeavor that modern antitrust law may demand. When neither the parties nor the Commission fully comprehends the justifications, "ignorance leads straight to condemnation," *Chicago Professional Sports Limited Partnership v. NBA*, 961 F.2d 667, 676 (7th Cir. 1992), and condemnation without understanding may lead to consumer harm.

It is useful, indeed, advisable for the Commission to continue to evaluate new factual situations and to develop new theories under Section 5 of the Federal Trade Commission Act to remedy anticompetitive effects. But it is well, in doing so, to keep in mind the

admonition of the court in *Chicago Professional Sports Limited Partnership v. NBA*, 961 F.2d at 676, that “[e]xplanations of problematic conduct take time to develop and more time to test. . . . Understanding novel practices may require years of study and debate.”

I have voted to publish the consent agreements for comment but remain mindful of these concerns.

STATEMENT OF COMMISSIONER ROSCOE B. STAREK, III

Nearly eleven months ago, over my dissent, the Commission accepted consent agreements with three groups of pulmonologists practicing in two counties in the eastern San Francisco Bay Area. Further analysis of these matters in the intervening months has not provided me with reason to believe that respondents’ conduct violated Section 5 of the Federal Trade Commission Act. Therefore, I cannot agree with the Commission’s decision to issue the complaints and the modified final versions of the consent orders.

I have continued to evaluate these matters with great care and an open mind since the Commission accepted the consent agreements. Nevertheless, I remain unpersuaded of the theory on which these cases rely. That theory -- stated with breezy imprecision in paragraphs 12 through 18 of the complaints -- appears to be that:

- A majority (in fact, approximately 60 percent) of the pulmonologists in each relevant geographic market¹ were investors in Home Oxygen and Homecare Oxygen;
- The “market position” of each respondent group was “further enhanced” because several Home and Homecare pulmonologists served as medical directors of the respiratory therapy departments at some hospitals in the relevant markets;
- The “aggregation of competitors” embodied by these pulmonologist-owned firms gave Home and Homecare some sort of

¹ The complaints define the geographic markets as most of Alameda County for Home Oxygen, and Contra Costa County and a portion of Alameda County for Homecare Oxygen.

- power² in an allegedly relevant market for “the sale, rental, or lease of oxygen systems” in Alameda and Contra Costa Counties;
- This “conduct” -- by which I presume the Commission means the “aggregation of competitors” into Home and Homecare and the “further enhance[ment]” of “market position” stemming from departmental directorships -- resulted in the creation of barriers to entry into the oxygen systems market and the inhibition of “free and open competition” in that market; and
- The alleged “acts and practices” allowed Home and Homecare to acquire and maintain “market power” and constitute unfair methods of competition, in violation of Section 5.

When this chain of assertions is distilled, the essential claim -- the one on which liability under Section 5 is predicated -- is that ownership of an oxygen systems company by a majority of a county’s pulmonologists sufficed to confer market power in the oxygen systems business. Yet as I noted in my earlier dissent in this case, “[m]arket power is not necessarily created when a majority share of a relevant market is attained. Market power is defined as ‘the ability profitably to maintain prices above competitive levels for a significant period of time.’”³ One of my problems with the case is that neither the information gathered in this investigation nor the proposed complaints themselves persuasively explain how a majority share of pulmonology practice in Alameda and Contra Costa Counties, as “enhanced” by certain owners’ leadership roles in some hospitals’ respiratory therapy departments, gave rise to market power in oxygen systems.

² Inconsistencies between the Home and Homecare complaints give rise to ambiguities about this claim. Whereas the Homecare complaint (paragraph 15) alleges that the “aggregation of competitors in the market for the provision of pulmonary services” gave Homecare “market power” in the market for oxygen systems, the complaint against Home (paragraph 15) and the separate complaint against certain Home pulmonologists (paragraph 15) merely assert that this “aggregation of competitors” gave Home “a market share of approximately sixty (60) percent” in that market only in paragraph 18 do the latter two complaints aver that Home somehow “acquired and maintained market power in the relevant market.” (The Homecare complaint contains a similar paragraph.)

³ Statement of Commissioner Roscoe B. Starek, III (“Statement”) at 2 (quoting U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines, Section 0.1, 4 Trade Reg. Rep. (CCH) paragraph 13,104 (1992)). That Statement, which is attached hereto, also noted the Commission’s formulation of the test for market power in a previous Section 5 case: “The test for market power depends on all the relevant characteristics of a market: the strength and capacity of current competitors; the potential for entry; the historic intensity of competition; and the impact of the legal or natural environment, to name just a few.” *General Foods Corp.*, 103 FTC 204, 345 (1984).

The complaints, treatment of conditions of entry into oxygen systems illustrates (but by no means exhausts) the infirmities of the majority's approach. Rather than set forth a credible theory of entry barriers, the complaints charge -- in tautological fashion -- that "a barrier to entry has been created" purely and simply "[a]s a consequence of" the ownership structure of Home and Homecare. This says nothing about the difficulties facing prospective entrants or about the success rates of firms that operate in the markets independently of the Home and Homecare organizations, and thus leaves unanswered the question whether Home or Homecare possesses market power.⁴

I also note that the consent orders do nothing to deal with the actual conduct that must constitute the other key component (in addition to "market power") of the majority's theory in this case. I allude, of course, to "self-referral," a commonly encountered phenomenon in the medical field. Self-referral is a complex subject that requires considerable further analysis, and thus I am relieved that the orders do not prohibit self-referral but simply limit the market share of the respondent pulmonologists associated with an entity providing home oxygen. Although physician ownership of ancillary services may create an incentive to refer for services that are not medically necessary, I noted in my previous dissent that "it is critical to distinguish between the potential for anticompetitive harm and the potential for inappropriate or excessive referrals resulting from physician ownership. Regardless of market share or market power, physicians sometimes may make inappropriate treatment referrals to facilities in which they have a financial interest. While real consumer injury can result from such 'self-referral,' this behavior is not by itself actionable under the antitrust laws [W]e should be careful to distinguish anticompetitive behavior from other forms of imperfect

⁴ I noted in my previous dissent that "an exercise of market power [on the part of a joint venture such as Home or Homecare] is possible only when the coordination of activities within such a venture insulates the participating physicians from outside competition sufficiently that they are able to raise prices or reduce services. [paragraph] For example, in some cases, an exercise of market power may be possible if enough of the market is aggregated through the joint venture so that there is insufficient remaining market demand to sustain viable competitors. That clearly is not the case here." Statement at 4. Indeed, my earlier dissent noted the substantial number of competing oxygen system firms outside the Home and Homecare organizations in Alameda and Contra Costa Counties and the absence of evidence that any of those competitors suffer from competitive weaknesses. *Id.* at 3.

market performance.”⁵ In short, any injury involving self-referral that does not also flow from an exercise of market power is not “antitrust injury.”⁶

I would of course support a challenge to an ancillary services joint venture if the facts unearthed in the investigation demonstrated that the venture was likely to have the requisite anticompetitive effects. In the matters before us, however, the complaints do not set forth a coherent theory of anticompetitive effects. I therefore respectfully dissent.⁷

ATTACHMENT

STATEMENT OF COMMISSIONER ROSCOE B. STAREK, III

I respectfully dissent from the Commission’s decision to accept for public comment the consent orders in these matters. The challenged conduct does appear to have the potential to be anti-competitive. Under the rule of reason, however, the evidence presented does not indicate that the conduct of the respondents was anticompetitive or that it is likely to have been anticompetitive.¹ Therefore, I do not have reason to believe that the respondents have violated Section 5 of the FTC Act, as the complaints allege.

⁵ *Id.* at 3-4 (footnote omitted). My dissent continued: “If patients seldom question their physicians’ referrals, physicians could profit from directing patients to home oxygen providers in which they have an ownership interest. But any such ‘vertical control’ that physicians have does not necessarily result in any horizontal market power of the ancillary ventures in which they have an interest.” *Id.* at 4.

⁶ *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334 (1990); *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 109-10 (1986); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977).

⁷ Notwithstanding my conclusion that no orders should be issued, I agree with the majority inasmuch as it decided to delete the divestiture requirements from the final orders, for the reasons set forth in the third paragraph of the preamble to each Decision and Order.

¹ The challenged conduct must be analyzed under the rule of reason. The arrangements at issue cannot be characterized as naked restraints of trade subject to summary condemnation, and thus the rule of reason applies. See *NCAA v. Board of Regents*, 468, U.S. 85, 103 (1984). The joint DOJ/FTC Health Care Enforcement Guidelines indicate that the antitrust agencies will apply a rule of reason to conduct falling outside of well defined “safety zones.” Statements of Antitrust Enforcement Policy in the Health Care Area, Department of Justice and Federal Trade Commission, September 15, 1993, at 10-11, 36. The six policy statements of these Guidelines do not explicitly cover the type of conduct at issue here, *i.e.*, physician-owned ancillary joint ventures. In any case, the arrangements here most likely would fall outside of any safety zone similar to those defined in the Guidelines, because they appear to have market shares of about 60% in their respective markets.

The complaints name two limited partnerships and 28 pulmonologist partners in these ventures. The complaints allege that the respondents have “acquired and maintained market power” (paragraph 18) as a consequence of the fact that a “majority” of the pulmonologists in each of the two areas in which the two partnerships operate are partners in the ventures (paragraph 14). I am concerned that this might be read to imply that the Commission will take enforcement actions against physician-owned ancillary joint ventures simply because participating physicians constitute a majority of those practicing in the relevant market, without regard to the ventures’ effects or likely effects on the market.

The complaints do not challenge, and the consent agreements do not prohibit, “self-referral” of patients to entities owned by the respondent physicians.² However, the Analysis of Proposed Consent Order to Aid Public Comment states that the respondents were able to “acquire and maintain market power” because “pulmonologists have the ability to influence the choice of oxygen suppliers to service patients needing oxygen at home.” Because pulmonologists make referrals to providers of home oxygen services, they do have the ability to influence their patients’ choice of oxygen suppliers. But this “influence” does not necessarily equate to or result in any market power.

Market power is the focus of the Commission’s analysis of physician-owned ancillary joint ventures. In fact, the very violation alleged in the complaints in these matters is that the ventures “acquired and maintained market power.” Market power is not necessarily created when a majority share of a relevant market is attained. Market power is defined as “the ability profitably to maintain prices above competitive levels for a significant period of time.”³ Within the context of a case under Section 5 of the FTC Act, the Commission has argued that:

² The President recently signed legislation prohibiting physicians from self-referral of Medicare patients for several categories of services, including those services provided by the respondents. Omnibus Budget Reconciliation Act of 1993, Pub. L. No 103-66, ch. 2, Section 5074. Because the vast majority of home oxygen services apparently are sold to Medicare patients, it may be the case that virtually no home oxygen provider would be willing to maintain physician ownership that would cut itself off from the vast majority of market demand. If that is the case, Commission action on this matter is moot. However, I am not certain that this is true, and more importantly, this case might be viewed as precedent for Commission actions outside of the services covered by the recent legislation.

³ U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines (1992), reprinted in 4 Trade Reg. Rep. (CCH) paragraph 13104, Section 0.1 (“Sellers with market power also may lessen competition on dimensions other than price, such as product quality, service, or innovation.”)

The test for market power depends on all of the relevant characteristics of a market: the strength and capacity of current competitors; the potential for entry; the historic intensity of competition; and the impact of the legal or natural environment, to name just a few.⁴

Here, the two limited partnerships each have approximately 60% market shares in the respective counties in which they operate. Assuming, *arguendo*, that the alleged product and geographic markets are relevant antitrust markets, these market shares alone do not justify an inference of market power. In addition to the respondents, the evidence indicates that there are nine competing sellers of home oxygen in Alameda County, and eight competing sellers in Contra Costa County. Some of these firms have market shares of about 10%.

If these other firms suffer from substantial competitive weaknesses that prevent them from offering the same quality of services or the same low prices as the respondents, the respondents might be able to exercise market power through their joint ventures. I have not seen evidence that any of these competitors have such competitive weaknesses.⁵

Medicare patients, who apparently comprise the vast majority of patients purchasing home oxygen services, might be less price sensitive than third-party payers such as HMOs, and thus might appear to be vulnerable to anticompetitive behavior. Medicare's restrictive reimbursement policies may severely limit suppliers, potential ability to exercise market power. But it is doubtful that these policies eliminate the possibility of an exercise of market power in these markets.

It sometimes has been argued that physician ownership can create an incentive to refer for financial gain for services that are not medically necessary. But it is critical to distinguish between the potential for anticompetitive harm and the potential for inappropriate or excessive referrals resulting from physician ownership. Regardless of market share or market power, physicians sometimes may make inappropriate treatment referrals to facilities in which they have a

⁴ *General Foods Corp.*, 103 FTC 204, 345 (1984).

⁵ In fact, one major third-party payer in the region purchases home oxygen primarily from one of the respondents' ventures in one county, while in the other county it purchases home oxygen primarily from one of the respondents' competitors. While hardly dispositive on this issue, this suggests that this major customer considers the available services of the respondents, competitors to be of acceptable and comparable quality and price.

financial interest.⁶ While real consumer injury can result from such "self-referral," this behavior is not by itself actionable under the anti-trust laws. Of course, this does not mean that anticompetitive behavior could not occur in these markets. But we should be careful to distinguish anticompetitive behavior from other forms of imperfect market performance.

If patients seldom question their physicians' referrals, physicians could profit from directing patients to home oxygen providers in which they have an ownership interest. But any such "vertical control" that physicians have does not necessarily result in any horizontal market power of the ancillary ventures in which they have an interest. An ancillary venture can enable the participating physicians to coordinate some of their competitive activities. But an exercise of market power is possible only when the coordination of activities within such a venture insulates the participating physicians from outside competition sufficiently that they are able to raise prices or reduce services.

For example, in some cases, an exercise of market power may be possible if enough of the market is aggregated through the joint venture so that there is insufficient remaining market demand to sustain viable competitors. That clearly is not the case here. The evidence is at best ambiguous as to whether these ventures, which have been in operation since 1984, have had any anticompetitive effect.

Physician-owned ancillary joint ventures have a potential to accomplish significant cost savings that can be passed on to consumers in the form of lower prices and higher quality of care. Physicians frequently may be in the best position to recognize a potential demand for an ancillary medical service in their community, to back up this perception with their own capital, and to operate and monitor the venture's performance. Clearly physicians and hospitals could have more control over the quality of a service by owning a supplier of that service than by merely writing a prescription. Evidence that physician investors frequently are passive with respect to the opera-

⁶ The potential problem of inappropriate referrals made for financial gain is not limited to instances in which physicians have financial interests in facilities, equipment, or service providers that are physically or legally separate from their primary practices. The potential problem is present whenever a physician performs both diagnosis and treatment. Patients and third-party payers have limited information about whether treatments are medically necessary, and thus physicians frequently have some degree of discretion to recommend treatments that are not necessary.

tion of these companies does not dismiss the potential of these ventures to accomplish substantial efficiencies.

Of course, the respondents' large scale and market share may not be necessary to achieve the potential efficiencies of such arrangements. But even incontrovertible evidence that these firms did not gain additional efficiency by growing to their current size would be relevant only after a determination that the firms had acted anti-competitively.

The orders continue to allow self-referral, and only limit the market share of the respondent pulmonologists associated with an entity providing home oxygen. Thus, the remedy does not address any harm that might result from the mere fact of self-referral.⁷ The order also would allow efficiencies from self-referral to occur, but it is far from clear that the restructuring of the two ventures required under the orders would preserve all of the efficiencies that they may have been able to accomplish. Thus it may be the case that the orders reduce efficiency, do not reduce market power, and also fail to address any real harm to consumers that might result from self-referral.

The overriding reason to cast my vote against the acceptance of these consents is the precedential effect of discouraging physicians and hospitals from forming ancillary ventures, particularly in circumstances in which it may be important to achieve a high market share in order to gain efficiencies, or even to be able to introduce a service that benefits consumers in the area. Thus, enforcement actions should be limited to conduct for which anticompetitive harm is demonstrable or highly likely to occur. Because that burden has not been met, I respectfully dissent from the Commission's actions in these matters.

⁷ As I noted above, self-referral by itself is not actionable under the antitrust laws. Thus it is appropriate that any such perceived harm is not addressed in an order resolving the allegations in these complaints.

IN THE MATTER OF

THE DOW CHEMICAL COMPANY, ET AL.

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

Docket C-3533. Complaint, Sept. 23, 1994--Decision, Sept. 23, 1994

This consent order requires, among other things, Marion Merrell Dow Inc. to license its dicyclomine formulations and production technology to a third party within twelve months, and to contract manufacture dicyclomine for the third party while that party awaits Food and Drug Administration approval to sell its own dicyclomine. The consent order also prohibits, for ten years, acquisition of any dicyclomine manufacturing, production or distribution capabilities without prior Commission approval.

Appearances

For the Commission: *Ann B. Malester, Claudia R. Higgins, James Egan and Mary Lou Steptoe.*

For the respondents: *Michael Malina, Kaye, Scholer, Fierman, Hays & Handler, New York, N.Y. Edward H. Stratemeier, in-house counsel for Marion Merrell Dow Inc., Kansas City, MO.*

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that respondents, The Dow Chemical Company ("Dow"), a corporation subject to the jurisdiction of the Commission, and Marion Merrell Dow Inc. ("MMD"), a subsidiary of Dow and a corporation subject to the jurisdiction of the Commission, acquired certain stock of the Rugby-Darby Group Companies, Inc. ("Rugby"), a corporation also subject to the jurisdiction of the Commission, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, ("FTC Act"), 15 U.S.C. 45; and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint pursuant to Section 11 of the Clayton Act, as amended, 15 U.S.C. 21, and Section 5(b) of the FTC Act, as amended, 15 U.S.C. 45(b), stating its charges as follows:

I. DEFINITIONS

1. For the purposes of this complaint, the following definitions apply:

(a) "*Respondent Dow*" or "*Dow*" means The Dow Chemical Company, a corporation organized and doing business under the laws of the state of Delaware, its predecessors, subsidiaries, divisions, groups and affiliates controlled by Dow and their respective directors, officers, employees, agents and representatives acting on behalf of Dow, and their successors and assigns.

(b) "*Respondent MMD*" or "*MMD*" means Marion Merrell Dow Inc., a corporation organized and doing business under the laws of Delaware, its predecessors, subsidiaries, divisions, groups and affiliates controlled by MMD and their respective directors, officers, employees, agents and representatives acting on behalf of MMD, and their successors and assigns.

(c) "*Rugby*" means Rugby Group, Inc.

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

(e) "*Acquisition*" means the acquisition by MMD of certain stock of Rugby relating to the production of generic pharmaceutical products, which stock is the subject of a stock purchase agreement dated October 4, 1993.

II. THE RESPONDENTS

2. Respondent Dow, which controls MMD and holds a majority of MMD's stock, is a corporation organized and existing under the laws of the state of Delaware, with its principal place of business located at 2030 Dow Center, Midland, Michigan.

3. Respondent MMD, a subsidiary of Dow, is a corporation organized and existing under the laws of the state of Delaware, with its principal place of business located at 9300 Ward Parkway, Kansas City, Missouri.

4. MMD manufactures and sells pharmaceutical products and products for hospital use, including cardiovascular products, respiratory products, smoking cessation products and gastrointestinal products, such as Bentyl[®] (the branded dicyclomine hydrochloride), an antispasmodic drug used for the treatment of functional or irritable bowel syndrome.

5. Respondents at all times relevant herein have been engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and are corporations whose business affects commerce as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

III. THE ACQUIRED COMPANY

6. Rugby is a corporation organized and existing under the laws of the state of New York, with its principal offices located at 100 Banks Avenue, Rockville Centre, New York.

7. Rugby manufactures and sells pharmaceutical products, including generic dicyclomine hydrochloride used for the treatment of irritable bowel syndrome.

8. Rugby is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business affects commerce as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

IV. THE ACQUISITION

9. On October 4, 1993, MMD and Rugby signed a stock purchase agreement whereby MMD acquired certain stock of Rugby for approximately \$300 million.

V. THE RELEVANT MARKET

10. The relevant line of commerce in which to analyze MMD's acquisition is the market for dicyclomine hydrochloride capsules and tablets.

11. The relevant section of the country is the United States.

12. The relevant market is highly concentrated. MMD and Rugby are the only United States Food and Drug Administration approved manufacturers of dicyclomine hydrochloride capsules and tablets.

VI. ENTRY CONDITIONS

13. Entry into the relevant market is difficult and time consuming.

VII. COMPETITION

14. Prior to the acquisition, MMD and Rugby were actual competitors in the relevant market.

VIII. EFFECTS OF THE ACQUISITION

15. The effect of the acquisition may be substantially to lessen competition or tend to create a monopoly in the relevant market in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. 45, in the following ways, among others:

- (a) The acquisition eliminated actual, direct and substantial competition between MMD and Rugby;
- (b) The acquisition increased the likelihood that MMD will exercise market power in the relevant market; and
- (c) The acquisition created a monopoly in the manufacture and sale of dicyclomine hydrochloride capsules and tablets.

IX. VIOLATIONS CHARGED

16. The acquisition described in paragraph nine constitutes a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of the consummated acquisition of certain stock of Rugby-Darby Group Companies, Inc. ("Rugby") by Marion Merrell Dow Inc. ("MMD"), a subsidiary of The Dow Chemical Company ("Dow") (collectively referred to as "respondents"), and respondents having been furnished thereafter with a copy of a draft of complaint that the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure described 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 Dow is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Delaware, with its principal place of business located at 2030 Dow Center, Midland, Michigan.
2. Respondent MMD is a subsidiary of Dow, and is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Delaware, with its principal place of business located at 9300 Ward Parkway, Kansas City, Missouri.
3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

I.

It is ordered, That, as used in this order, the following definitions shall apply:

A. "*Dow*" means The Dow Chemical Company, its predecessors, subsidiaries, divisions, groups and affiliates controlled by Dow, and

its respective directors, officers, employees, agents and representatives, and their respective successors and assigns.

B. "*MMD*" means Marion Merrell Dow Inc., its predecessors, subsidiaries, divisions, groups and affiliates controlled by MMD, and its respective directors, officers, employees, agents and representatives, and their respective successors and assigns.

C. "*Rugby*" means Rugby Group, Inc., its predecessors, subsidiaries, divisions, groups and affiliates controlled by Rugby, and its respective directors, officers, employees, agents and representatives, and their respective successors and assigns.

D. "*Respondents*" means Dow and MMD.

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

F. "*Acquisition*" means the acquisition by respondents of certain Rugby stock that is the subject of a stock purchase agreement dated October 4, 1993.

G. "*Rugby intangible dicyclomine assets*" means those assets relating to the manufacture and sale of dicyclomine tablets and capsules acquired in the Acquisition that are not part of Rugby's physical facilities or other tangible assets, including but not limited to all formulations, patents, trade secrets, technology, know-how, specifications, designs, drawings, processes, quality control data, research materials, technical information, management information systems, software, the Drug Master file, and all information relating to United States Food and Drug Administration ("FDA") approvals.

H. "*Potential New Entrant*" means the person(s) for whom MMD shall contract manufacture, and to whom MMD shall sell, dicyclomine tablets and capsules and license the Rugby intangible dicyclomine assets. The Potential New Entrant must be a generic or a branded pharmaceutical manufacturer with manufacturing facilities approved by the FDA for the manufacture of generic or branded pharmaceutical products in the United States.

I. "*Dicyclomine tablets and capsules*" means pharmaceutically acceptable finished tablets and capsules consisting of either 10mg or 20mg of dicyclomine hydrochloride U.S.P. manufactured under an approved New Drug Application ("NDA") or an approved Abbreviated New Drug Application ("ANDA") for sale in the United States and that have received at least an AB rating by the FDA.

J. "*Contract manufacture*" means the manufacture of an unlimited volume of dicyclomine tablets and capsules by MMD for sale

to a Potential New Entrant in finished packaged form suitable for commercial sale in the United States.

K. "*Finished packaged form*" means packaged in all forms required by the Potential New Entrant so as to optimize sales and distribution of the product, including but not limited to inscribing the name and identification codes of the Potential New Entrant on the packaging of dicyclomine capsules or tablets, and packaging the dicyclomine tablets and capsules in units required by the Potential New Entrant, as permitted by Rugby's existing ANDA.

L. "*Formulation*" means any and all information, including both patent and trade secret information, technical assistance and advice, relating to the manufacture of dicyclomine tablets and capsules that meet United States Food and Drug Administration approved specifications therefore.

II.

It is further ordered, That:

A. Within twelve (12) months from the date this order becomes final, MMD shall enter into an agreement (hereinafter "agreement"), in good faith:

1. To license to the Potential New Entrant in perpetuity a non-exclusive right to the Rugby intangible dicyclomine assets at no minimum price; and

2. To contract manufacture and deliver in a timely manner the volume of dicyclomine tablets and capsules requested by the Potential New Entrant, at a price not to exceed 48% of the Average Wholesale Price of Rugby's dicyclomine tablets and capsules in effect as of July 2, 1993.

MMD shall enter into such agreement to license and contract manufacture only with a Potential New Entrant that receives the prior approval of the Commission, and only in a manner that receives the prior approval of the Commission and that is consistent with the purposes of this order. The purposes of this order are: (a) to provide the means for establishing an ongoing, viable enterprise to replace the competition in the dicyclomine tablet and capsule market alleged in the Commission's complaint to have been eliminated by the

Acquisition; and (b) to remedy the lessening of competition alleged in the Commission's complaint to have resulted from the Acquisition.

B. The agreement shall require the Potential New Entrant to submit to the Commission a certification attesting to the Potential New Entrant's good faith intention and actual plan to obtain FDA approval of its own NDA or ANDA for the manufacture and sale of dicyclomine tablets and capsules in an expedited manner. The agreement shall terminate in the event that the Potential New Entrant fails to sell or discontinues the sale of contract manufactured dicyclomine tablets and capsules prior to obtaining FDA approval, or abandons its efforts or fails to obtain FDA approval of its own NDA or ANDA for dicyclomine tablets and capsules within seven (7) years from the date the Commission approves the agreement.

C. The agreement shall require the Potential New Entrant to submit to the Commission a verified written report setting forth in detail its efforts to sell contract manufactured dicyclomine tablets and capsules and to obtain FDA approvals necessary for manufacturing its own dicyclomine tablets and capsules. The agreement shall require such report to be submitted one (1) year from the date the agreement becomes effective and annually thereafter until contract manufacturing ceases. The agreement shall also require the Potential New Entrant to report to the Commission at least thirty (30) days prior to its discontinuing the sale of contract manufactured dicyclomine tablets and capsules or abandoning its efforts to obtain FDA approvals necessary for manufacturing its own dicyclomine tablets and capsules.

D. MMD shall deliver dicyclomine tablets and capsules to the Potential New Entrant within two (2) months from the date the Commission approves the Potential New Entrant and the agreement. The Potential New Entrant shall have the right to continue to purchase dicyclomine tablets and capsules from MMD pursuant to the agreement until six (6) months after the date that the Potential New Entrant obtains FDA approval of its own NDA or ANDA for the manufacture and sale of dicyclomine tablets and capsules in the United States.

E. MMD shall make representations and warranties to the Potential New Entrant that the contract manufactured dicyclomine tablets and capsules meet the United States Food and Drug Administration approved specifications therefore and are not adulterated or misbranded within the meaning of the Food, Drug and Cosmetic Act,

21 U.S.C. 321, *et seq.* MMD shall agree to indemnify, defend and hold the Potential New Entrant harmless from any and all suits, claims, actions, demands, liabilities, expenses or losses alleged to result from the failure of the manufactured dicyclomine tablets and capsules to meet the specifications. This obligation shall be contingent upon the Potential New Entrant giving MMD prompt, adequate notice of such claim, cooperating fully in the defense of such claim, and permitting MMD to assume the sole control of all phases of the defense and/or settlement of such claim, including the selection of counsel. This obligation shall not require MMD to be liable for any negligent act or omission of the Potential New Entrant or for any representations and warranties, express or implied, made by the Potential New Entrant that exceed the representations and warranties made by MMD to the Potential New Entrant.

F. Upon reasonable notice from and at the option of the Potential New Entrant, MMD shall provide information, technical assistance and advice sufficient to assist the Potential New Entrant in obtaining FDA approval for the manufacture and sale of dicyclomine tablets and capsules. Such assistance shall include reasonable consultation with knowledgeable employees of MMD and training at the Potential New Entrant's facility for a period of time sufficient to satisfy the Potential New Entrant's management that its personnel are appropriately trained in the manufacture of dicyclomine tablets and capsules.

G. While the obligations imposed by paragraphs II.A, II.D or paragraph III of this order are in effect, respondents shall take such actions as are necessary to maintain the viability and marketability of the Rugby intangible dicyclomine assets and the tangible assets needed to contract manufacture and sell dicyclomine tablets and capsules and to prevent the destruction, removal, wasting, deterioration or impairment of any of the Rugby intangible and tangible assets relating to the manufacture of dicyclomine tablets and capsules except in the ordinary course of business and except for ordinary wear and tear that does not affect the viability and marketability of the Rugby intangible and tangible assets.

III.

It is further ordered, That:

A. MMD shall consent to the appointment of a trustee by the Commission to terminate MMD's prior agreement, if any, and to enter into a new agreement on behalf of MMD with a Potential New Entrant selected by the trustee if:

1. MMD has not entered into an agreement to contract manufacture dicyclomine tablets and capsules and to license the Rugby intangible dicyclomine assets to a Potential New Entrant within twelve (12) months as provided for in paragraph II of this order; or

2. The Potential New Entrant terminates the agreement to contract manufacture, fails to sell, or discontinues the sale of contract manufactured dicyclomine tablets and capsules in the United States prior to obtaining FDA approval of its own NDA or ANDA for the manufacture and sale of dicyclomine tablets and capsules; or

3. The Potential New Entrant abandons its efforts or fails to obtain FDA approval of its own NDA or ANDA for dicyclomine tablets and capsules within seven (7) years from the date the Commission approves the agreement.

In the event the Commission or the Attorney General brings an action against respondents to enforce this order pursuant to Section 5(1) of the Federal Trade Commission Act, 15 U.S.C. 45(1), or any other statute enforced by the Commission, MMD shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it for any failure by respondents to comply with this order.

B. If a trustee is appointed by the Commission or a court pursuant to paragraph III.A of this order, MMD shall consent to the following terms and conditions regarding the trustee's powers, duties, authorities, and responsibilities:

1. The Commission shall select the trustee, subject to the consent of MMD, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acqui-

sitions and divestitures. If MMD has not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after notice by the staff of the Commission to MMD of the identity of any proposed trustee, MMD shall be deemed to have consented to the selection of the proposed trustee.

2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to enter into an agreement as specified in paragraph II of this order.

3. Within ten (10) days after appointment of the trustee, MMD shall execute a trust agreement that, subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, transfers to the trustee all rights and powers necessary to permit the trustee to enter into the agreement required by paragraph II of this order.

4. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in paragraph III.B.3 to terminate any prior agreement and to enter into the agreement specified in paragraph II of this order, which agreement shall be subject to the prior approval of the Commission. If, however, at the end of the twelve (12) month period the trustee has submitted a plan or believes that the agreement required by paragraph II of this order can be entered into within a reasonable time, the twelve (12) month period may be extended by the Commission, or, in the case of a court-appointed trustee, by the court; provided, however, the Commission may extend the twelve (12) month period only two (2) times and for no longer than twelve (12) months each time.

5. The trustee shall have full and complete access to the personnel, books, records, facilities and technical information related to the manufacture of dicyclomine tablets and capsules and to the Rugby intangible dicyclomine assets, or to any other relevant information, as the trustee may reasonably request. Respondents shall cooperate with any reasonable request of the trustee. Respondents shall take no action to interfere with or impede the trustee's ability to enter into the agreement required by paragraph II of this order. Any delays in entering into the agreement required by paragraph II of this order caused by respondents shall extend the time under paragraph III.B.4 for entering into the agreement required by paragraph II of this order in an amount equal to the delay, as determined by the Commission or, for the court-appointed trustee by the court.

6. The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to MMD's absolute and unconditional obligation to enter into the agreement required by paragraph II of this order at no minimum price. The agreement shall be made in the manner and with a Potential New Entrant as set out in paragraph II of this order; provided, however, if the trustee receives bona fide offers from more than one Potential New Entrant, and if the Commission determines to approve more than one such Potential New Entrant, the trustee shall enter into an agreement as required by paragraph II of this order with the Potential New Entrant selected by MMD from among those approved by the Commission.

7. The trustee shall serve, without bond or other security, at the cost and expense of MMD, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have authority to employ, at the cost and expense of MMD, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers and other representatives and assistants as are reasonably necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the agreement required by paragraph II of this order and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of MMD and the trustee's power shall be terminated.

8. Respondents shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparations for, or defense of any claim whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from the misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.

9. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in paragraph III.A of this order.

10. The Commission or, in the case of a court-appointed trustee, the court, may on its own initiative or at the request of the trustee

issue such additional orders or directions as may be necessary or appropriate to enter into the agreement required by paragraph II of this order.

11. The trustee shall report in writing to MMD and to the Commission every sixty (60) days concerning the trustee's efforts to enter into the agreement required by paragraph II of this order.

IV.

It is further ordered, That for a period of ten (10) years from the date this order becomes final, respondents shall not acquire, without the prior approval of the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise:

(a) Any stock, share capital, equity, leasehold or other interest in any concern, corporate or non-corporate, presently engaged in, or within the two years preceding such acquisition engaged in, the manufacture, production, distribution or sale of dicyclomine tablets and capsules in the United States; or

(b) Any assets currently used for or previously used for (and still suitable for use for) the manufacture and production of dicyclomine tablets and capsules in the United States from any concern, corporate or noncorporate, presently engaged in, or within the two years preceding the acquisition engaged in the manufacture, production, distribution or sale of dicyclomine tablets and capsules in the United States.

Provided, however, that the obligations imposed by this paragraph shall not terminate while the obligations of paragraphs II or III are in effect.

V.

It is further ordered, That:

A. Within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until the Commission has approved a Potential New Entrant, MMD shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, or has complied

with paragraphs II and III of the order. MMD shall include in its compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with paragraphs II and III of this order, including a description of all substantive contacts or negotiations for entering into the agreement required by this order, including the identity of all parties contacted. MMD shall include in its compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning the agreement required by paragraph II of this order.

B. One (1) year from the date this order becomes final and annually for the next nine (9) years on the anniversary of the date this order becomes final, and at such other times as the Commission may require, respondents shall file a verified written report with the Commission setting forth in detail the manner and form in which they have complied and are complying with paragraphs II, III and IV of this order.

Provided, however, that the obligations imposed by this paragraph shall not terminate while the obligations of paragraphs II or III are in effect.

VI.

It is further ordered, That, for the purpose of determining or securing compliance with this order, and subject to any legally recognized privilege, upon written request and on reasonable notice to respondents, respondents shall permit any duly authorized representatives 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 respondents, relating to any matters contained in this consent order; and

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

VII.

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

Commissioner Azcuenaga dissenting.

DISSENTING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

Today, the Commission accepts a consent agreement settling charges that Marion Merrell Dow's consummated acquisition of certain stock in the Rugby-Darby Group Companies, Inc. would substantially lessen competition in the United States market for dicyclomine hydrochloride capsules and tablets. I support the allegations in the complaint that the acquisition created a monopoly in the manufacture and sale of dicyclomine hydrochloride capsules and tablets, and I have reason to believe the acquisition violated the law. I dissent because I find the remedy insufficient.

Ideally, the Commission would have sought to enjoin the transaction. Although it did not seek a preliminary injunction, the Commission still should seek through administrative litigation divestiture of assets sufficient to create a viable, independent dicyclomine business. Administrative litigation takes time but affords a much higher likelihood of obtaining effective relief by divestiture of an ongoing enterprise than does a technology license designed to induce new entry.

The order requires Marion Merrell Dow to grant a nonexclusive license to certain intangible dicyclomine assets, including patents and technology, and for up to seven years to sell to the person acquiring the license dicyclomine tablets and capsules at a price not exceeding 48 percent of the average wholesale price on July 2, 1993. Technology licenses tend to be highly regulatory and less effective than divestitures in restoring competition. Further, because of the great difficulty government agencies have in specifying competitive market prices, it is highly questionable whether requiring sales of dicyclomine at a Commission-specified maximum price will provide con-

sumers with interim relief from the monopoly. Indeed, since the Commission granted early termination of the Hart-Scott-Rodino waiting period on July 12, 1993, it seems entirely possible that the price on July 2 reflected the impending merger to monopoly and was already supra-competitive.

Complaint

118 F.T.C.

IN THE MATTER OF

STOUFFER FOODS CORPORATION

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

Docket 9250. Complaint, Oct. 28, 1991--Final Order, Sept. 26, 1994

This final order prohibits Stouffer Foods Corporation, the manufacturer and advertiser for Lean Cuisine frozen entrees, from misrepresenting, in any manner, the existence or amount of sodium or any other nutrient or ingredient in any of its frozen-food products.

Appearances

For the Commission: *Theodore H. Hoppock* and *Nancy S. Warder*.

For the respondent: *Hugh Latimer, Wiley, Rein & Fielding*, Washington, D.C.

COMPLAINT

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

PARAGRAPH 1. Stouffer is a Pennsylvania corporation with its offices and principal place of business at 5750 Harper Road, Solon, Ohio.

PAR. 2. Stouffer has advertised, offered for sale, sold, and distributed Stouffer's Lean Cuisine, a "food" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

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

PAR. 4. Respondent has disseminated or caused to be disseminated advertisements for Stouffer's Lean Cuisine, including but not

necessarily limited to, the advertisement attached hereto as Exhibit A. The headline of Exhibit A contains the following statement:

OF ALL THE THINGS WE MAKE, WE MAKE SENSE!

(Emphasis added.)

The text of Exhibit A contains the following statements:

Of all the things we at Stouffer's pack into our 34 Lean Cuisine entrees - the freshest ingredients, the ripest vegetables and the perfect blend of herbs and spices - there are some things we skimp on: Calories. Fat. Sodium. With less than 300 calories, controlled fat and always less than 1 gram of sodium* per entree, we make good sense taste great.

In a footnote next to a second asterisk Exhibit A states in fine print as follows:

*All Lean Cuisine entrees have been reformulated to contain less than 1 gram (1000 mg.) of sodium.

PAR. 5. Through the use of the statements contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisement attached as Exhibit A, respondent has represented, directly or by implication, that Stouffer's Lean Cuisine entrees are low in sodium.

PAR. 6. In truth and in fact, in many cases, Stouffer's Lean Cuisine entrees are not low in sodium. Therefore, the representation set forth in paragraph five was and is false and misleading.

PAR. 7. In its advertising for Stouffer's Lean Cuisine entrees, respondent has represented, directly or by implication, that the entrees contain less than 1 gram of sodium. This advertising has failed to disclose adequately that 1 gram is equivalent to 1000 milligrams, which is the commonly used unit of measurement for sodium. This fact would be material to consumers in their purchase or use decisions regarding the product. In light of the representation made, the failure to disclose adequately this fact is likely to lead reasonable consumers to underestimate the level of sodium in the entrees and is a deceptive practice.

PAR. 8. The acts and practices 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.

Complaint

118 F.T.C.

EXHIBIT A



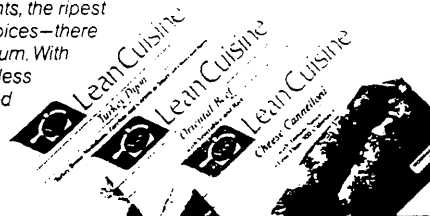
Exhibit A



OF ALL THE THINGS WE MAKE,
WE MAKE **SENSE!**

Of all the things we at Stouffer's pack into our 34 Lean Cuisine® entrees—the freshest ingredients, the ripest vegetables and the perfect blend of herbs and spices—there are some things we skip on: Calories. Fat. Sodium. With less than 300 calories, controlled fat and always less than 1 gram of sodium* per entree, we make good sense taste great.*

*All Lean Cuisine entrees have been reformulated to contain less than 1 gram (1000 mg) of sodium



LEAN ON LEAN CUISINE

INITIAL DECISION

BY JAMES P. TIMONY, ADMINISTRATIVE LAW JUDGE
AUGUST 6, 1993

INTRODUCTION

On October 28, 1991, the Federal Trade Commission issued an administrative complaint charging Stouffer Food Corporation with violations of Section 5 of the Federal Trade Commission Act in connection with claims made by Stouffer in the advertising and sale of its Lean Cuisine brand of frozen entrees.

After pleading and discovery, the case came on for evidentiary hearings commencing on February 8, 1993, and closing on March 8, 1993. The transcript of the hearings consists of 1662 pages. About 580 exhibits, some of which were deposition transcripts, were admitted into evidence. Proposed findings were completed by June 21, 1993, and indexes to the proposed findings were filed on July 14, 1993.

SUMMARY OF COMPLAINT ALLEGATIONS

The complaint alleged (1) that respondent's ads falsely represented that Lean Cuisine entrees are low in sodium through "statements contained in the advertisements," including that they "skimp on: Calories. Fat. Sodium. With less than 300 calories, controlled fat and always less than 1 gram of sodium per entree, we make good sense taste great." The complaint quoted a footnote "in fine print" from the ads: "All Lean Cuisine entrees have been formulated to contain less than 1 gram (1000 mg.) of sodium." (Paragraphs 4 and 5 of complaint.) The complaint also alleged (2) that the ads failed to disclose adequately the material fact that "1 gram is equivalent to 1000 milligrams, which is the commonly used unit of measurement for sodium." (Paragraph 7 of complaint.)

FINDINGS OF FACT

Respondent and Jurisdiction

1. Stouffer Foods Corporation, Inc., (Stouffer) is a corporation organized, existing and doing business under and by virtue of the

laws of the State of Pennsylvania, with its offices and principal place of business located at 5750 Harper Road, Solon, Ohio. (Answer paragraph 1.)

2. Stouffer manufactures and sells frozen entrees consisting of two product lines: the Stouffer "Red Box" line and the Lean Cuisine line. (Annett, Tr. 875, 931.)

3. For the purposes of Section 12 of the Federal Trade Commission Act, 15 U.S.C. 52, Lean Cuisine is a "food," as defined in Section 15 of the Act, 15 U.S.C. 55. (Compl. paragraph 2; Answer paragraph 2.)

4. During all times relevant, including the years 1990-91, Stouffer has advertised, offered for sale, sold, and distributed Stouffer's Lean Cuisine. (Answer paragraph 2.)

5. At all times relevant to the complaint, the acts and practices of respondent alleged in the complaint have been in or affecting commerce. (Answer paragraph 3.)

6. Stouffer is a subsidiary of Nestle U.S.A. which is owned by Nestle S.A. of Switzerland. (Annett, Tr. 925.)

Lean Cuisine and Frozen Entrees

7. Lean Cuisine is a line of frozen entrees. (Block, Tr. 775.)

8. As an entree, Lean Cuisine is packaged in a tray as a single serving item. (Annett, Tr. 876.)

9. During 1990-91, the Lean Cuisine line averaged 850 milligrams of sodium per entree. (CX-523-T-Z.) There were Lean Cuisine entrees that contained more than 1000 milligrams of sodium. (Annett, Tr. 909.)

10. During 1990-1991, annual sales for the Lean Cuisine line were over two hundred million dollars. (CX-523-Z-1, Z-2.)

11. Stouffer also manufactures and sells the "Red Box" line. (Annett, Tr. 875, 931; CX 84.)

12. Beginning in October, 1989, Stouffer also manufactured and sold another line of frozen entrees, the Right Course line. (CX-382 at 21 [Audette Dep.]; Annett, Tr. 880.) These products were promoted on their lower levels of fat, cholesterol, and sodium compared to the Stouffer Red Box line and the Lean Cuisine line. (Annett, Tr. 880, 890, 931; CX-96; CX-88.) The average sodium content for Right Course was under 600 milligrams. (Annett, Tr. 880.)

In the fall of 1990, the Right Course line was dropped. (Annett, Tr. 880-81.)

13. The Lean Cuisine line was introduced in 1981. (Block, Tr. 775.) The brand featured calorie-control (under 300 calories per entree) and taste. (*Id.*)

14. In the mid-1980's, new "healthy" frozen food products entered the market, including Weight Watcher's, Budget Gourmet, and later, ConAgra's Healthy Choice. (Annett, Tr. 874, 878.)

15. Lean Cuisine began losing market share. (*Id.* at 864; CX-84). In 1989, Lean Cuisine had 33% of the calorie-controlled entree market; that figure dropped to 25% in 1990. (CX-84.)

16. During this time, consumers became concerned about nutrition, including the fat, cholesterol, and sodium in food. (Annett, Tr. at 864, 902, 914; Block, Tr 777; CX-84.)

17. Consumers were confused about the Lean Cuisine line, particularly the sodium content. (Block, Tr. 785.) Many consumers viewed Lean Cuisine's sodium content as high. (Annett, Tr. 917-18; Block, Tr. 809; CX-58-G; CX-65; CX-139-62.)

18. Responding to consumer's new nutritional awareness, Stouffer reformulated Lean Cuisine with new recipes and seasonings, diminished the importance of low calories and reduced the fat and sodium. (Block, Tr. 781.) In order to counteract the perception that Lean Cuisine was high in sodium, and because it was becoming a health issue in the media, Stouffer asked Irene Block of Tatham/RSCG (Tatham), Stouffer's advertising agency, to develop ads stating the facts on the sodium content of the product. (Block, Tr. 785-86.)

19. In March of 1987, Richard B. Annett, the group marketing manager for Lean Cuisine, sent a letter to the National Advertising Division (NAD) of the Council of Better Business Bureaus concerning an ad disseminated by a competitor, Budget Gourmet, in the Miami, Florida area. (CX-24; Annett, Tr. 894-95.) The ad claimed that the Budget Gourmet Slim Selects were:

"At Around \$1.89, Under 300 Calories, And Under 1 Gram of Sodium, One of Man's Lighter Creations."

(CX-24-A-B.)

20. The letter to the NAD was about Budget Gourmet's sodium claim (CX-24):

Print advertising for Budget Gourmet's "Slim Select" entrees has come to our attention . . . which, as you will note, has prominently displayed the representation that the Slim Select entrees contain "Under 1 Gram of Sodium." We draw this matter to your attention as we view this statement as blatantly misleading to the consuming public and one which contravenes the industry-wide practice of utilizing the descriptor of sodium content in terms of milligrams and not grams. In essence the producers of Budget Gourmet Slim Select entrees have intentionally misrepresented the sodium content in this product by quantifying sodium content in grams.

21. The Budget Gourmet ad did not mention milligrams. (CX-24-A-B.)

22. On April 8, 1987, NAD wrote to Mr. Annett that there was "no basis to believe that the accurate statement 'Under 1 Gram of Sodium,' is misleading to consumers." (RX-12-A.) Mr. Annett had no consumer research showing that use of the phrase "under 1 gram of sodium" was misleading to consumers. (Annett, Tr. 870, 926-27.)

23. Sue Lally, manager of regulatory affairs for Stouffer, informed Mr. Annett that the U.S. Department of Agriculture permitted sodium disclosure statements on labels in terms of grams as well as milligrams. (Annett, Tr. 872, 927-28.)

24. Stouffer then determined that it would be appropriate to use the 1 gram terminology in its new Lean Cuisine ads. (Annett, Tr. 872-73.)

25. When the "Lean on Lean Cuisine" campaign was launched in late 1989 with "Lean on Lean Cuisine" and "Taste Like A Million," there was no reference to sodium in the ads. (Block, Tr. 783-84.) After Lean Cuisine had been reformulated, sodium content was included in the two ads. (Block, Tr. 784-85.)

26. Mr. Annett informed Tatham-Laird personnel working on the campaign that the use of "lower" sodium or "controlled" sodium was acceptable for the advertising but that "low" was not. (RX-8-A-B; Block, Tr. 788-90; Annett, Tr. 887-89.)

27. In the early 1990's ConAgra's Healthy Choice became the market leader on the low end of the nutritional spectrum for frozen entrees. (Annett, Tr. 878.) Healthy Choice products competed successfully with low sodium, low cholesterol and low fat. (Annett, Tr. 878-79; RX-58.)

28. Stouffer, in 1989-90, was marketing three lines of frozen food, each to different dietary needs. Lean Cuisine occupied middle ground. (CX-88; Annett, Tr. 878-92.) Stouffer marketed its Red Box frozen products to consumers who did not control their fat, sodium

or cholesterol intake. (CX-88; Annett, Tr. 878-79, 890.) Stouffer marketed its Right Course entrees, as a healthier product line than Lean Cuisine, with less than 600 milligrams of sodium and lower levels of cholesterol and fat. (CX-88; Annett, Tr. 880, 889-93.)

29. The Chairman and CEO of Nestle Enterprises, Inc., did not permit Lean Cuisine to use "health-oriented" advertising, since he felt it might interfere with the marketing of the Right Course line of products. (CX-45-A; Annett, Tr. 890-93, 928-30.)

30. Stouffer reduced the cholesterol, fat and sodium in the Right Course line, but in late 1990 the Right Course line of products was discontinued. (Annett, Tr. 880-81.)

31. Stouffer then embarked on a second reformulation of the Lean Cuisine line. The sodium was again reduced, to a maximum of 600 milligrams per entree, and the fat and cholesterol content also was reduced. (Block, Tr. 803; RX-9-D-F.)

32. In July 1991, Stouffer and Tatham-Laird ran a singing radio commercial known as "Anniversary/Turkey Rev." (CX-7; Block, Tr. 803.)

The Ads

33. From January 1990 through August 1991, Stouffer ads featured Lean Cuisine entrees. (CX-523-M-Q; CX-527; CX-528-F-Z-116.) This campaign cost three million dollars (CX-523-S; CX-527-A, CX-528-G), and reached millions of consumers nationwide. (CX-79.)

34. The Lean on Lean Cuisine ad is a two-page magazine ad. (CX-1.) The ad, at 64% of its size, is attached as Appendix A.

35. The Lean on Lean Cuisine ad ran in magazines from January through February, 1990. (CX-523-M-Q.) The magazines were Cosmopolitan, Redbook, Bon Appetit, Shape, New Woman, Glamour, Working Mother, and Working Woman, all directed primarily to women. (Zinkhan, Tr. 486.)

36. The 300 Like a Million ad (CX-2) is attached as Appendix B.

37. The 300 Like a Million ad ran in magazines from June, 1990 through January, 1991. (CX-523-M-Q.) These magazines included Moxie, Eating Well, Glamour, Business Woman, Family Circle, Newsweek Woman, Working Woman, Ladies' Home Journal and New Woman, directed primarily to women. (Zinkhan, Tr. 486.)

38. The Make Sense ad (CX-4) is attached as Appendix C.

39. The Make Sense ad ran in Good Housekeeping, Glamour, Family Circle, Cosmopolitan, People, Shape, and New Woman, directed primarily to women. (CX-523-M-Q; Zinkhan, Tr. 486; Annett, Tr. 919-20.) This ad ran from January through March, 1991. (CX-523-M-Q.)

40. A version of the Make Sense ad (CX-5) ran in Military Lifestyle, People, and Health (CX-523-N), with different text:

95% fat free. Never more than a gram of sodium.* Always less than 300 calories. Lean Cuisine makes great food and good sense. . . .

(CX-5.) This ad ran from February through April, 1991. (CX-523-N.)

41. The Ole, O'lean ad is a two page ad promoting both Stouffer's "Red Box" and Lean Cuisine New Mexican entrees. (CX-6.) The left-hand side of the ad presents claims for the "Red Box" line. The right-hand side promotes Lean Cuisine. (*Id.*) The ad, at 64% size is attached as Appendix D.

42. The Ole, O'lean ad ran in People, Cosmopolitan, Working Mother, Redbook, and New Woman, directed primarily to women, and also in Newsweek. (CX-527; Zinkhan, Tr. 486; Annett, Tr. 919-20.) This ad ran from April through May, 1990. (CX-527.)

43. The radio advertisement, Anniversary Turkey, was sixty seconds long. (CX-7.) This ad stated:

Ten new tenth anniversary entrees from--you guessed it--Stouffer's Lean Cuisine. These babies are healthier than ever. Lower in sodium, fat and cholesterol. Read those boxes, people, these numbers are low.

The ad concluded with singers singing "Stouffer's Lean Cuisine . . . Taste you can love for life." (*Id.*)

44. The Anniversary Turkey ad went over 230 radio stations from June through August, 1991. (CX-528-G to Z-116.)

Facial Analysis of Ads

45. One message of the challenged print ads is healthy eating: Lean Cuisine has large quantities of healthy ingredients, and small amounts of undesirable nutrients. (CX-1-6.)

46. The Make Sense ads' headlines state "Of all the things we make, we make SENSE!" (CX-4, CX-5.) The ad describes all the

good ingredients in Lean Cuisine entrees in contrast to the undesirable nutrients that are present only in minimal amounts (CX-4):

Of all the things we at Stouffer's pack into our 34 Lean Cuisine entrees--the freshest ingredients, the ripest vegetables and the perfect blend of herbs and spices--there are some things we skimp on: Calories. Fat. Sodium. With less than 300 calories, controlled fat and always less than 1 gram of sodium* per entree, we make good sense taste great.

47. CX-4 states that Stouffer "skimp[s]" on sodium, a description virtually synonymous with a low amount of sodium.

48. CX-2 and CX-3 state in a footnote that "All Lean Cuisine entrees are currently being reformulated to contain less than 1 gram (1000 mg.) of sodium."

49. CX-4 and CX-5 state in a footnote that "All Lean Cuisine entrees have been reformulated to contain less than 1 gram (1000 mg.) of sodium."

50. The radio spot, Anniversary Turkey, (CX-7) describes Lean Cuisine as follows:

These babies are healthier than ever. Lower in sodium, fat and cholesterol. Read those boxes, people, these numbers are low.

51. The first low sodium statement in the radio spot claims that the entrees are "healthier than ever" because, among other things, they are now "[l]ower in sodium." The ad then refers to the nutritional information on the packages and states, in absolute terms, that "these numbers are low," for the undesirable nutrients including sodium. (Block, Tr. 823-24.)

ZINKHAN COPY TEST

52. U.S. Research Company ("USR") did a copy test of three of the print ads to determine whether they conveyed the low sodium claim. (CX-374.) USR is experienced in such copy tests. (Kloc, Tr. 304-05, 313-14.) The questionnaire USR used was designed by Dr. Zinkhan, a professor of marketing at the University of Houston. (CX-373; Zinkhan, Tr. 475; Kloc, Tr. 312.)

53. Dr. Zinkhan's questionnaire used open-ended and close-ended questions. (CX-374-Z-29, Z-30.) An open-ended question provides copy test participants with little context in order to obtain unprompt-

ed answers phrased in their own words. (Zinkhan, Tr. 478; Kloc, Tr. 306.) A structured, close-ended question asks about a specific issue and provides the answers. Consumers select one of the answers. (Zinkhan, Tr. 478; Kloc, Tr. 307; CX-522.)

54. Dr. Zinkhan's copy test asked open-ended questions followed by close-ended questions. (Zinkhan, Tr. 499-508.) It used a control question, regarding the sugar content of Lean Cuisine, to find any bias from the use of close-ended questions. (*Id.* at 513-14.)

55. The three print ads tested were Lean on Lean Cuisine, 300 Like a Million and We Make Sense. (Kloc, Tr. 331-32; Zinkhan, Tr. 522-24; CX-1, CX-3-4.) One hundred participants viewed these three ads at four shopping malls. (Kloc, Tr. 339-40; CX-374-B-C; Zinkhan, Tr. 539.)

56. From 43 to 60% of participants answering open-ended questions stated that the ads claimed that Lean Cuisine frozen entrees are low in sodium and, after subtraction of the control question responses, from 78 to 86% gave that response to close-ended questions. (Zinkhan, Tr. 523-26; CX-374-Z-11, Z-20-21; CX-526.)

57. The copy test was conducted in four shopping malls located in Poughkeepsie, NY; Orlando, FL; Houston, TX; and Mission Viejo, CA. (CX-374B; Kloc, Tr. 320.) The interviewing was done by USR. (Kloc, Tr. 308-09.) Dr. Zinkhan approved the mall sites. (Zinkhan, Tr. 539.)

58. The copy test consisted of a screener and the main questionnaire. (CX-374-Z-25 to Z-52.) USR employees screened consumers in the shopping malls. (Kloc, Tr. 323.)

59. Qualified consumers were asked to view some ads. (CX-374-Z-28; Zinkhan, Tr. 497-98.) These participants read one of the three ads and were questioned by trained interviewers. (Kloc, Tr. 328-33; Zinkhan, Tr. 498-501; CX-374-Z-29.)

60. The interviews were supervised by Mr. Kloc of USR. (Kloc, Tr. 320.)

61. Dr. Zinkhan observed the interviewer training and interviews at the Houston mall facility. (Zinkhan, Tr. 522, 535-36.) The training and interviews were conducted professionally. (*Id.* at 535-36.)

62. A pretest of the main questionnaire was conducted prior to the copy test. (Kloc, Tr. 312.)

63. As a result of the pretest, the wording of Question 3 of the main questionnaire was changed to eliminate the misinterpretation by

participants. (Kloc, Tr. 316-18.) Dr. Zinkhan gave his approval of this change. (Zinkhan, Tr. 534-35; Kloc, Tr. 318.)

64. USR interviewed 300 participants, 100 for each of the three ads. (Kloc, Tr. 339; CX-374-B.)

65. USR creates code categories into which responses are placed. (Kloc, Tr. 340-41.) Based on their review of one-third of the questionnaires, USR created a preliminary set of coding categories. (*Id.* at 341.)

66. Dr. Zinkhan suggested changes including a separate coding category for "low sodium" responses. (*Id.*) Dr. Zinkhan's changes were used by the coders to categorize the responses to each of the three open-ended questions. (*Id.* at 538; Kloc, Tr. 344.)

67. Two experienced coders, coded each of the 300 questionnaires. (Kloc, Tr. 344-45.) The coders did not know that the FTC was the client or that the issue of interest was whether the ad conveyed a low sodium claim. (*Id.* at 346.)

Universe

68. The universe of Dr. Zinkhan's copy test was comprised of the consumers Stouffer intended to persuade to purchase the product by disseminating the challenged ads. (Zinkhan, Tr. 475, 479, 481; Popper, Tr. 1509; Annett, Tr. 919.)

69. The universe consisted of women who were the principal food shoppers for their household, between the ages of 25 and 54, who had purchased a frozen entree in the last three months and who were not following a medically supervised diet. (CX-374-Z-27 to Z-29; Zinkhan, Tr. 481-97.) Participants who wore glasses to read needed to have those glasses to qualify. (CX-374-Z-26; Zinkhan, Tr. 488.)

70. In determining the universe, Dr. Zinkhan relied on Stouffer's description of its target audience (CX-523-Z-7 to Z8), Stouffer consumer surveys (CX-65-Z-3 to Z-25; CX-524) and his own judgment. (Zinkhan, Tr. 479-97.) He reviewed consumer research (CX-69-W), consumer correspondence with Stouffer (CX-140; CX-181; CX-182; CX-221; CX-276) and an analysis of the magazines in which the ads appeared. (Zinkhan, Tr. 485-86, 490-93, 495-97.)

71. Stouffer described the target audience for Lean Cuisine ads as primarily female although not exclusively, without specifying the percentage of men. (Zinkhan, Tr. 484; CX-523-Z-7 to Z-8.) Dr. Zinkhan did not include males in his sample. (Zinkhan, Tr. 484.)

During 1990-91, 15.5 to 17% of regular Lean Cuisine purchasers were men. (RX-37-B; Ross, Tr. 1101-03.) Stouffer also described the age of its target audience as "25-54, with an opportunity in the under 25 segment." (CX-523-Z-8.) Of those who regularly bought Lean Cuisine in 1990-91, 9% were under 25; 25% were over 54. (RX-37-B.)

72. Most of the magazines in which the ads appeared were women's magazines. (Zinkhan, Tr. 486.) People, the magazine with the largest circulation, is read "primarily" by women. (Annett, Tr. 920.)

Funneling Questions

73. Funneling of questions in a copy test refers to proceeding from general questions to more narrow questions on specific issues. (Zinkhan, Tr. 476; Popper, Tr. 1505; Ross, Tr. 1251.) Funneling reveals the participants' unaided response to the ads. (Zinkhan, Tr. 476; Kloc, Tr. 307; Popper, Tr. 1505.)

74. Funneling is the best way to ask questions on a copy test. (Zinkhan, Tr. 476; Popper, Tr. 1506; Ross, Tr. 1251-53.)

75. Dr. Zinkhan's copy test used funneling. (Zinkhan, Tr. 499.) It began with an open-ended question designed to get participants to state:

1. What point or points does the Lean Cuisine ad make about the product?
2. What reason or reasons does the ad mention or suggest for you to buy Lean Cuisine?
3. Is there anything else you can recall about the ad?

(CX-374-Z-29 to Z-30.)

76. The remaining questions in Dr. Zinkhan's copy test were close-ended questions. (Dr. Zinkhan, Tr. 500-01.) The test (CX-374-Z-30) asks: "Does the ad say or suggest anything about the amount of calories [or sugar] [or sodium] in Lean Cuisine, entrees?" If "yes," it asks: "Does the ad say or suggest that Lean Cuisine entrees are..."

1. High in calories [or sugar] [or sodium]
2. Low in calories [or sugar] [or sodium]
3. Neither high nor low in calories [or sugar] [or sodium]."

Open-ended Questions.

77. In designing a copy test, the collection of data must occur as soon as possible after exposure to the ad. (Ross, Tr. 1233.) The first question in Dr. Zinkhan's copy test obtained data within seconds of when respondents read the ad. (*Id.*)

78. Question 1, the first open-ended question in Dr. Zinkhan's copy test does not prompt participants for any specific response. (Zinkhan, Tr. 502; Kloc, Tr. 336; CX-536-Z-24.)

79. Question 1 permits participants to give one answer, multiple answers, or no answer at all. (*Id.* at 501-02; Kloc, Tr. 336.) It permits responses to be based upon the text or pictures in the ad and the visual depictions in the ad. (Zinkhan, Tr. 503-04; Kloc, Tr. 337.) There is a reasonable likelihood that participants would answer Question 1 truthfully. (Zinkhan, Tr. 503; Kloc, Tr. 336-37.)

80. Question 1 is an unbiased open-ended question. (Zinkhan, Tr. 501; Kloc, Tr. 335.)

81. Questions 2 and 3 in Dr. Zinkhan's copy test are also unbiased open-ended questions. (Zinkhan, Tr. 504-05; Kloc, Tr. 337-38.) They do not prompt participants for any specific response nor give any context to answer the questions except the ad. (Zinkhan, Tr. 505-06.) They permit one answer, multiple answers, or no answer. (Zinkhan, Tr. 504-05; Kloc, Tr. 337-38.) There is reasonable likelihood that participants would answer these questions truthfully. (Zinkhan, Tr. 505; Kloc, Tr. 336-38.)

82. A "control" in a copy test seeks bias in the question or in the participant. (CX-536-Z-33.) A control "group" is a group of participants who see a different stimulus than the challenged ad. (*Id.*)

83. Dr. Zinkhan did not use a control group for the open-ended questions in his copy test. (Zinkhan, Tr. 506-07.) Open-ended questions do not prompt participants toward a particular attribute in the ad (F. 78-81), and a control group is not required to make the results reliable evidence. (Zinkhan, Tr. 507; Kloc, Tr. 368-70.)

84. Both of Stouffer's expert witnesses in marketing research have in litigation based expert opinions on the results of open-ended questions for which there was no control group. (Popper, Tr. 1489-91; Ross, Tr. 1297, 1303.)

85. Dr. Popper designed for the Commission staff a copy test in which he did not use a control group for the open-ended questions. (*Id.* at 1491-92.)

86. Dr. Ross has given expert testimony based on the results of open-ended questions for which no control group existed. (Ross, Tr. 1288.)

87. There is little evidence that consumers had a pre-existing belief that Lean Cuisine was low in sodium. Irene Block, of respondent's advertising agency, testified that the Lean Cuisine advertising campaign was directed at correcting consumers' misconceptions about the amount of sodium in the product. She testified that many consumers thought Lean Cuisine had more sodium than it actually had, and that perception was exacerbated by the issue being played up in the media; she also testified that some consumers thought Lean Cuisine had less sodium than it actually had. (Block, Tr. 786-87.)

88. Consumer research, done to assist Stouffer's advertising agency in the development of the challenged ads and not for litigation, determined that consumers' "general perception was that the [sodium] level [of Lean Cuisine entrees] was high." (CX-58-G; Block, Tr. 809-10.)

89. Most consumers believed that the sodium content of the entire frozen food category was high. (*Id.*) At the time the challenged ads were developed most consumer's pre-existing belief about the sodium content of Lean Cuisine and similar products was that sodium was high. (*Id.*)

90. Sodium information was included in the challenged ads to inform consumers that Lean Cuisine's sodium content was lower than consumers believed it to be. (Block, Tr. 820-21.) The challenged ads were the first ads to mention the sodium content of Lean Cuisine. (*Id.* at 784-85, 787.)

91. When consumers read ads, they use their beliefs in their interpretations of the ad. (Zinkhan, Tr. 725-26; Shimp, Tr. 1563; Ross, Tr. 1258; Popper, Tr. 1447.) They do not read ads in a vacuum, disregarding their experience and knowledge. (Shimp, Tr. 1563; Zinkhan, Tr. 726.)

92. If an ad takes advantage of the reader's prior beliefs, the reader's perception of the ad may be attributed to the ad. (Ross, Tr. 1325-26; Popper, Tr. 1502-03.)

Close-ended Questions

93. The close-ended questions mentioned specific attributes. (Zinkhan, Tr. 500-01.) The purpose of such close-ended questions is to probe participants' recollection of the ad. (*Id.* at 512.)

94. Prior to answering the close-ended questions, participants were instructed to answer them “[b]ased on reading this ad. . . .” (CX-374-Z-30; Kloc, Tr. 333-34.) The close-ended questions sought responses based on what the ad suggested. (CX-374-Z-30; Zinkhan, Tr. 507.)

95. Close-ended questions asked if the ad suggested anything about the amount of sodium, calories, or sugar in Lean Cuisine entrees. (CX-374-Z-30.)

96. Participants were asked whether the amount of the attribute in Lean Cuisine was “high,” “low,” or “neither high nor low,” or “don’t know/don’t remember.” (Kloc, Tr. 331-32; CX-374-Z-30.)

Response Categories

97. If participants thought the ad asked whether the attribute was reduced or lower but not “low” they would select “neither high nor low.” (Kloc, Tr. 417, 444; Popper, Tr. 1487- 88.) If participants believed that none of the three responses were correct, they could respond “don’t know.” (Kloc, Tr. 444.)

Rotation of Close-ended Questions

98. The order in which copy test questions are asked can affect the results. (Zinkhan, Tr. 551-52; Ross, Tr. 1172.) Rotating the order of close-ended questions controls order bias. (Zinkhan, Tr. 552; Kloc, Tr. 323; Ross, Tr. 1173.)

99. The close-ended questions in Dr. Zinkhan’s copy test were rotated. (Kloc, Tr. 322-23, 333.) Order bias was controlled in Dr. Zinkhan’s copy test. (Kloc, Tr. 333; Ross, Tr. 1173, 1295-96; Zinkhan, Tr. 554.)

Sugar Control

100. When a close-ended question calls for a yes or no answer, some participants may answer by “yea saying,” the tendency to give

the answer they think the interviewer is seeking. (Zinkhan, Tr. 513, 642, 744; Popper, Tr. 1411; RX-30-C.) Some participants may give an inattentive response. (Zinkhan, Tr. 513, 642, 744; RX-30-C.)

101. A close-ended question may also have a halo effect. (Zinkhan, Tr. 513, 642, 744.) A participant with a favorable opinion of the product formed before taking the test may answer based on that opinion rather than what was in the ad. (*Id.* at 513-14.) Such responses to close-ended questions are based on "noise" factors. (RX-30-C.)

102. Because some close-ended questions may result from yea saying, inattention, or other noise factors, they require a control. (Zinkhan, Tr. at 641, 671, 742.) One control is the use of a control question. (Zinkhan, Tr. 513-14, 744; Ross, Tr. 968-69; CX-536-Z-35 to Z-36.)

103. A control question asks about a product attribute reasonably associated with the advertised product, or product category, but not closely linked with explicit claims in the ad. (Zinkhan, Tr. 514-15, 744-45; Ross, Tr. 1198-99; Popper, Tr. 1470.)

104. The control question measures the participants who answered based on yea saying, inattention, halo effect, or other noise factors. (Zinkhan, Tr. 513-14; Ross, Tr. 969.) To eliminate the effect of such external factors, the results of the test question are reduced by the control question results. (Zinkhan, Tr. 514, 520-21, 526-26; CX-536-Z-35 to Z-36; Ross, Tr. 969-70.)

105. The control attribute must not be too closely linked with explicit claims in the ad. (Zinkhan, Tr. 514-15, 744-45; Popper, Tr. 1470; Ross, Tr. 1198-99.) If the control attribute can be reasonably inferred from the ad, responses to the control question may be based on that inference. (Popper, Tr. 1472; Zinkhan, Tr. 744-45.)

106. Dr. Zinkhan selected sugar as the attribute for the control question in his copy test. (Zinkhan, Tr. 514.) Participants were asked whether the ad suggested anything about the amount of sugar in Lean Cuisine. (CX-374-Z-30.) The percentage who answered yes was subtracted from the percentage who said that the sodium content was low. (Zinkhan, Tr. 514, 520-21, 524-26.) This eliminated external factors from the final results. (*Id.*; CX-526.)

107. Dr. Zinkhan based the choice of sugar as the control because Lean Cuisine contained sugar and it is reasonably associated with Lean Cuisine, yet is not in the ads. (Zinkhan, Tr. 515-19.)

108. The choice of sugar as a control is supported by Stouffer's data. (*Id.* at 517.)

109. One study asked whether consumers controlled nutrients or ingredients in the food they buy. (CX-68-E; Zinkhan, Tr. 517.) Fat, calories, cholesterol, sodium, and sugar were “the five most frequent targets for dietary limitation or control.” (CX-69-Z-17.)

110. Some purchasers of Lean Cuisine entrees wrote letters to Stouffer raising concerns about the sugar content of the product. (CX-273; CX-301; CX-356-362; Zinkhan, Tr. 519.)

111. Calories or fat could not be used in a control question because they were used in the ads. (Zinkhan, Tr. 514-15; Popper, Tr. 1484; Ross, Tr. 969.) Because consumers link cholesterol in a product to its fat content, it should not be used in a control question. Implied cholesterol claims were created from the mention of fat content in one of the ads. (Zinkhan, Tr. 514-15, 654; Popper, Tr. 1484.) Red meat should not be used in a control question because it is not contained in many Lean Cuisine products. (Zinkhan, Tr. 667.)

112. Of the attributes considered and avoided by purchasers of frozen entrees, the most frequently mentioned attribute suitable for use in a control question was sugar. (Zinkhan, Tr. 667.)

113. Sugar is in all but one of Stouffer’s Lean Cuisine entrees. (CX-409-506.) It is listed as an ingredient on the Lean Cuisine package. (*Id.*; Zinkhan, Tr. 518.)

114. Controlling sugar is important to Lean Cuisine consumers, and it was a proper attribute for the control question. (CX-69-Z-18; Zinkhan, Tr. 517.)

Results of Zinkhan Copy Test

115. Close-ended questions will generate higher response levels for an implied claim than open-ended ones. (Zinkhan, Tr. 533-34.) Stouffer’s expert witness testified that often a researcher must rely on open-ended responses of 8 to 10% as being meaningful. (Ross, Tr. 1299.) Open-ended responses of 16% constitute a substantial number of participants taking a claim from a tested ad. (*Id.*)

116. The following percentage of participants in Dr. Zinkhan’s copy test responded to the open-ended questions that the ad communicated that Lean Cuisine entrees are low in sodium:

Initial Decision

118 F.T.C.

Make Sense (CX-4)	60%
300 Like a Million (CX-3)	45%
Lean on Lean Cuisine (CX-1)	43%

(CX-374-Z-11; Zinkhan, Tr. 523.)

117. The following percentage of participants in Dr. Zinkhan's copy test gave the low sodium response to the close-ended questions:

Make Sense (CX-4)	88%
300 Like a Million (CX-3)	90%
Lean on Lean Cuisine (CX-1)	83%

(CX-374-Z-21; CX-526; Zinkhan, Tr. 524).

118. The following percentage of participants in Dr. Zinkhan's copy test answered the control question by stating that the ad said something about the sugar content of Lean Cuisine:

Make Sense (CX-4)	5%
300 Like a Million (CX-3)	4%
Lean on Lean Cuisine (CX-1)	5%

(CX-374-Z-21; CX-526; Zinkhan, Tr. 525).

119. The following percentage of participants stated that the ad communicated that Lean Cuisine was low in sodium in response to the sodium close-ended question after deducting the percentage who answered yes to the control question:

Make Sense (CX-4)	83%
300 Like a Million (CX-3)	86%
Lean on Lean Cuisine (CX-1)	78%

(CX-526; Zinkhan, Tr. 525-26).

ROSS COPY TEST

120. Respondent Stouffer introduced a mall intercept copy test of the same three ads tested in Dr. Zinkhan's copy test. (RX-30.) The test was designed by Dr. Ross, a professor of marketing at the University of Minnesota. (RX-31.) Due to methodological defi-

ciencies, the results of Stouffer's copy test do not rebut the findings of Dr. Zinkhan's copy test.

Universe

121. The universe for Stouffer's copy test consisted of potential purchasers of Lean Cuisine, regardless of whether they were in the target audience for the ads. (Ross, Tr. 998-1000, 1094-96.) The universe was four-ninths women from 18 to 45 years, two-ninths women of any age over 45, two-ninths men from 18 to 45 and one-ninth men of any age over 45. (*Id.* at 1003.)

122. The target audience for the challenged ads was limited by Stouffer to people from 25 to 54 years old, "with an opportunity in the under 25 segment." (Zinkhan, Tr. 541; CX-523-Z-8.) Yet a large percentage of the participants in the Ross test were older. About 25% of those who buy Lean Cuisine are 55 and older. (RX-37-B.) The use of participants over the age limitations of the target audience makes the universe of the Stouffer copy test unduly broad. (Zinkhan, Tr. 541-42.)

123. The percentage of men in the copy test is twice as large as the percentage of male purchasers of Lean Cuisine. (RX-37-38; Zinkhan, Tr. 541-43.)

124. Dr. Ross intended to include in the universe purchasers of all frozen entrees with which Lean Cuisine competed. (Ross, Tr. 1110-11.) The market in which Lean Cuisine competed included Stouffer's own "Red Box" brand entrees. (Annett, Tr. 877-78.)

125. Dr. Ross improperly excluded purchasers of Stouffer's "Red Box" from the universe in his copy test. (Ross, Tr. 1111-12.)

Funneling Questions

126. The best method to determine consumer understanding of an ad is "to use a series of increasingly focused, but starting out with open-end very unstructured questions about what consumers get as main ideas and then as other ideas from a commercial. . . ." (Ross, Tr. 1249-50.) This describes the funneling approach of asking questions. (Ross, Tr. 1251; Popper, Tr. 1505; Zinkhan, Tr. 476.)

127. The copy test Dr. Ross designed for Stouffer did not begin with open-ended questions. (Ross, Tr. 1232; Zinkhan, Tr. 543; RX-30-Z-7.) Instead, it began with a close-ended question, "Did you get

any understanding about the fat content of the product from the advertisement?" (RX-30-Z-7.) Each other attribute question (sodium, calories, cholesterol and vitamins) in Stouffer's copy test also began with a close-ended question. (*Id.* at Z-7-11.) These questions "run the risk of imparting ideas ... or thoughts." (Ross, Tr. 1250; Zinkhan, Tr. 543-45; RX-30-Z-7.)

128. The form of these questions prompts participants to think about the attribute rather than their uncoached reactions to the ad. (Zinkhan, Tr. 544.) It is not appropriate to start a copy test with such questions. (Kloc, Tr. 436-37; Ross, Tr. 1250, 1252-53; Zinkhan, Tr. 543-45.)

Order Bias

129. Stouffer's copy test asked five questions, each having four subparts. (RX-30-Z-7 to Z-11.) Each of the five questions asked about an attribute, fat, sodium, calories, cholesterol, or vitamins. (*Id.*) The questions about fat were asked first, calories were third and cholesterol was fourth. (*Id.*) In half of the questionnaires, the questions about sodium were second and the questions about vitamins were asked last. The other half reversed the order of the sodium and vitamin questions. (Ross, Tr. 1179.)

130. When asking close-ended questions, researchers rotate the order to minimize order bias. (Zinkhan, Tr. 552; Ross, Tr. 1295-96.)

131. Order bias is especially important in the first and last close-ended questions. (Zinkhan, Tr. 553-54; Ross, Tr. 1038-39, 1173.) The first question sets up the survey. (Zinkhan Tr. 553; Ross Tr. 1038-39.) The results of the last question may be affected by fatigue or boredom. (Zinkhan, Tr. 553-54.)

132. The sodium question was asked last half of the time. (Ross, Tr. 1179; RX-30-F.) Because proper rotation of the questions would have placed this question in the last position one-fifth of the time, this was not a proper control for order bias. (Zinkhan, Tr. 554.)

133. The results of the sodium close-ended question for the Make Sense ad in the Stouffer copy test shows that when the question was asked in the second position (Question 2a), 22% answered "no," but when it was asked in the last position (Question 5a) 42% responded "no." (CX-539-F; Ross, Tr. 1181-82.) Since nearly twice as many participants answered "no" to the sodium question when it was in the

last position, the low sodium results may be based on order bias rather than participants' impressions of the ad. (Zinkhan, Tr. 553-54.)

Cleansed Ads

134. Stouffer's copy test used two controls. First participants were shown "cleansed" versions of the three challenged ads. (RX-30-M, O, Q.) A cleansed ad eliminates from the challenged ad all elements believed to convey the challenged claim. (Ross, Tr. 1009; Popper, Tr. 1430-33.) The theory is that any low sodium responses then obtained from the cleansed ad are the result of the participant's prior beliefs that Lean Cuisine or products in its product category are low in sodium, rather than the result of any message conveyed by the ad. (Ross, Tr. 1016-17.) The cleansed ad low sodium answers were subtracted from the low sodium results obtained from viewers of the challenged ad to control for these purported prior beliefs. (*Id.*)

135. Stouffer's copy test used cholesterol as a control question just as Dr. Zinkhan used sugar. (RX-30-C.)

136. Dr. Ross testified that a "cleansed" ad is the only appropriate control ad. (Ross, Tr. 1008-09, 1014-15, 1089-90; RX-30-B-C.) A cleansed ad can only function as a control ad if it does not convey the claim the tested ad is alleged to convey -- the low sodium claim in this case. (Zinkhan, Tr. 561-62; Ross, Tr. 961, 1008-09, 1274; Popper, Tr. 1454.)

137. In cleansing the ads, Dr. Ross changed the phrase "less than one gram" to "less than 1000 milligrams." (RX-30-M, O, Q.) With regard to the Make Sense ad, cleansing removed the phrase "there are some things we skimp on: Calories. Fat. Sodium." (RX-30-M.)

138. Dr. Ross assumed that the cleansed ads did not convey the low sodium claim. (Ross, Tr. 1274.) Dr. Popper, Stouffer's other expert witness, stated that he would need empirical evidence to make that determination. (Popper, Tr. 1448.)

139. Stouffer's "cleansed" ads contain elements likely to convey the low sodium claim. (Zinkhan, Tr. 563-66, 569-73; Shimp, Tr. 1560-61, 1567-68, 1571-73, 1577, 1580-81.) Those ads fail as controls.

140. The challenged ads and the cleansed ads relate to sensible, healthy eating. (Shimp, Tr. 1566-68; Zinkhan, Tr. 563-66, 569-73, 690-92.) The cleansed ads link the phrase "less than 300 calories" with the phrase "less than 1000 milligrams of sodium." (Shimp, Tr.

1572, 1577, 1580; RX-30-M, O, Q; Zinkhan, Tr. 564, 571-73.) These aspects of the cleansed ads contribute to conveying a low sodium claim to consumers. (Shimp, Tr. 1566-68, 1571-73, 1577, 1580-81; Zinkhan, Tr. 563-66, 569-73.)

141. The 1000 milligrams of sodium information is ambiguous information to consumers. (Shimp, Tr. 1567-68.) Because the cleansed ads have made readers think about sensible, healthy eating, consumers relate the “less than 1000 milligrams of sodium” statement to the “less than 300 calories” statement. This results in the sodium information as part of the sensible, healthy eating. (Shimp, Tr. 1566-68; Zinkhan Tr. 565.) Thus, consumers interpret the cleansed ads to make the challenged low sodium claim. (Shimp, Tr. 1568.)

142. Consumers understand that an entree with less than 300 calories is low in calories. (Shimp, Tr. 1600-02.) Relating the phrases “less than 300 calories” and “less than 1000 milligrams of sodium,” reasonable consumers therefore interpret “less than 1000 milligrams of sodium” as meaning Lean Cuisine is also low in sodium. (*Id.*)

143. The phrase “less than” as a modifier of 1000 milligrams of sodium by itself contributes to a low sodium claim. (Zinkhan, Tr. 564, 570-71, 691.)

144. In CX-3 (300 Like a Million), the statement “less than 300 calories and most with less than 1 gram of sodium” is in bold print. The cleansed version of this ad changes “1 gram” to “1000 milligrams” but retains the bold print for the entire phrase. (RX-30-O.) The accentuation of this information contributes to a low sodium claim. (Zinkhan, Tr. 572, 691; Shimp, Tr. 1578-81.)

145. The bold print linking calories and sodium content of Lean Cuisine, and the headline, lead reasonable consumers to a low sodium claim in the ad. (Shimp, Tr. 1578-81.)

146. In creating a cleansed control ad, only the language causing the challenged claim should be removed. (Zinkhan, Tr. 566; Ross, Tr. 1014; Popper, Tr. 1453.) All other elements must be held constant. (Zinkhan, Tr. 566-67; Ross, Tr. 1014; Popper, Tr. 1453)

147. The cleansed Make Sense ad (CX-4) did not adhere to that principle. (Ross, Tr. 1286.) The cleansing of this ad did not “hold as much constant as possible.” (*Id.* at 1285.)

148. In the opinion of Stouffer’s experts, all that was required to create the cleansed version of CX-1 (Lean on Lean Cuisine) was to change “1 gram” to “1000 milligrams” and to delete the footnote.

(Ross, Tr. 1274-75; Popper, Tr. 1469-70.) However, besides those changes, Dr. Ross deleted the first two lines, as well as some other phrases, in creating the cleansed version. (Ross, Tr. 1276; CX-1; RX-30-Q.) Dr. Ross could give no reason why these deletions were made. (Ross, Tr. 1276-77.)

Cholesterol Control

149. The Stouffer copy test used cholesterol as a control question. (Ross, Tr. 1031; RX-30-C.)

150. Cholesterol is so closely related in consumers' minds to fat that it is likely that consumers will take an implied cholesterol claim from the reference to fat in the tested ads. (Zinkhan, Tr. 557, 657). As a result, the cholesterol question in the Stouffer copy test is not valid. (*Id.* at 557-58, 745; Popper, Tr. 1470; Ross, Tr. 1199.)

151. Consumers believe there is an association between fat and cholesterol. (Zinkhan, Tr. 559; Levy, Tr. 168; Ross, Tr. 1205-06.) The 1990 Health and Diet Survey conducted for the FDA asked those who had heard of high blood cholesterol to state if certain actions "would," "might," or "would not" help control high cholesterol. (CX-365-C.) One of the actions was "Eating less fat." (*Id.*) Nearly 86% answered that eating less fat would help control high cholesterol. (Levy, Tr. 167-68; CX-39-4-A.)

152. If consumers think a food is low in fat, they are likely to think it is low in cholesterol. (Levy, Tr. 169.) One of the tested ads made an express fat content claim for Lean Cuisine, while the others did so by implication. (Zinkhan, Tr. 559, 657.)

DECEPTION OF LOW SODIUM CLAIM

Amount of Sodium

153. While the challenged ads ran, Lean Cuisine entrees averaged 850 milligrams of sodium. (F. 9; CX-409-506.) This exceeded regulatory and public health organizations' guidelines for low sodium. (21 CFR 101.13(a)(3) (1992); CX-114; CX-520.)

154. For eight years, the FDA has defined low sodium as 140 milligrams or less for "single serving foods" (a bowl of soup, a piece of pizza, a cup of macaroni and cheese). (21 CFR 101.13(a)(3) (1992).)

155. In 1990 and 1991, Lean Cuisine entrees contained about twice that amount of sodium. (CX-523-T-Z.)

156. The USDA has an informal policy of 140 milligrams per component for meal-type products such as frozen dinners and entrees. (Brewington, Tr. 265.) Most frozen dinners and entrees have two, three, or four components. (*Id.* at 266.) For a three component food item, low sodium would be defined as 420 milligrams (3 times 140); for a two component food item, it would be 280 milligrams (2 times 140). (*Id.*)

157. By the USDA definition, Lean Cuisine entrees consist of two or three components. (Brewington, Tr. 285.) Low sodium for a two-component entree is 280 milligrams (2 times 140). (*Id.* at 266.)

Recommended Maximum Daily Intake for Sodium

158. In 1989, the National Academy of Sciences recommended that Americans should limit their total daily intake of sodium to 2400 milligrams or less. (CX-117-C.)

159. The Lean Cuisine line average of approximately 850 milligrams of sodium during the time in which the ads appeared represents over one-third of the recommended maximum daily intake. (FDA Food Regulations, 58 Fed. Reg. at 2227 [to be codified at 21 CFR 101.9(c)(9)]; USDA Food Regulations, 58 Fed. Reg. at 645; CX-117.)

Consumer Perceptions of Low Sodium

160. Because of Stouffers' loss of sales of Lean Cuisine, Tatham conducted research in the spring of 1989. (Shimp at 1581; CX-58-A.) The report stated as follows (CX-58-G):

The sodium content of Lean Cuisine products was frequently commented upon. Few respondents had a sense of what percentage of an average daily requirement of salt would be found in a Lean Cuisine entree, but the general perception was that the level was high.

161. Another report of four focus groups conducted in the fall of 1988 examined a proposed line of frozen entrees similar to Lean Cuisine. (Shimp at 1583; CX-102-A.) That report stated (CX-102-I; CX-104):

[J]ust laying out the levels [of cholesterol, fat, and sodium] adds confusion because many don't know how to evaluate them. Providing a comparison of the product's levels along with the recommended daily level ... seemed to satisfy their desire for the facts and allows them to understand how the product could fit into an entire day's diet.

162. Stouffer knew in September 1988 that (CX-102-K):

Consumers are confused by the vast difference in acceptable levels of sodium vs. those of fat and cholesterol. Therefore, actual sodium levels should only be utilized when a reference to the recommended daily level is also shown.

163. Studies of food labels show that consumers have difficulty understanding sodium information stated numerically and would likely interpret 1 gram of sodium as being less than 1000 milligrams of sodium. (Levy, Tr. 155.)

164. FDA label format studies show that consumers think that saturated fat levels are low because their numbers tend to be low (e.g., 2, 3, 4, 5, etc. grams of saturated fat); however, consumers tend to assess sodium levels as high because their numbers are high (e.g., 120, 660, 910 milligrams). (Levy, Tr. 155.)

165. One FDA labeling study had a food label with a nutrient claim of low sodium on the front panel and asked consumers whether the claim was true based on the nutritional information on the back panel. (Levy, Tr. 137.) Two claims involved low sodium: a cake with 115 milligrams of sodium and a frozen dessert with 20 milligrams of sodium, both true under FDA regulations. (CX-364-A.)

166. For the frozen dessert with 20 milligrams of sodium, 75% of respondents perceived the "low sodium" claim as true; however, this percentage dropped to 57% for the cake with 115 milligrams of sodium. (CX-364-A.) This supports the conclusion that consumers look at absolute numbers in assessing claims. (Levy, Tr. 139.)

167. Dr. Levy of the Food and Drug Administration credibly testified that consumers perceive the actual sodium content of the Lean Cuisine line averaging 850 milligrams of sodium as high. (Levy, Tr. 149.) However, he stated that consumers viewing a less than 1 gram of sodium claim would view that claim as low. (*Id.* at 156.)

Stouffer's Knowledge

168. Stouffer knew that its products were not low in sodium. (Block, Tr. 789; Annett, Tr. 888-89, 916-17; CX-44.) Mr. Annett, Stouffer's manager in charge of the Lean Cuisine line at the time the ads ran, testified that a low sodium claim could not be used in Lean Cuisine advertising because "Lean Cuisine did not meet the FDA and USDA requirements for low sodium." (Annett, Tr. 916-17; CX-44-A; Block, Tr. 800.)

169. Mr. Brewington of the Department of Agriculture, testified that he had been involved in the labeling approval process for Stouffer's Right Course line of frozen entrees during 1989. (Brewington, Tr. 270.) At that time, the Right Course product line averaged under 600 milligrams of sodium, less than the Lean Cuisine line average of 850 milligrams, and Stouffer was seeking approval for a low sodium labeling claim for Right Course. (*Id.*) That request was never granted, according to Mr. Brewington, because the sodium level (600 milligrams) was too high. (*Id.* at 272.)

170. Stouffer knew that a low sodium claim was inappropriate for Lean Cuisine. (*Id.*; Annett, Tr. 916-17; Block, Tr. at 789.)

Materiality of Low Sodium Claims

171. The sodium claims challenged in this proceeding constitute health claims that are important to consumers. Based on medical evidence supporting a link between sodium consumption and high blood pressure, the National Academy of Sciences, the American Heart Association, and the Surgeon General of the United States recommend that people limit their daily sodium intake. (CX-117, CX-131, and CX-116.)

172. Stouffer's copy test, to the extent that it is reliable, showed that 68% of the participants considered sodium to be important in making purchase decisions about frozen entrees. (Zinkhan, Tr. 584; CX-513.)

173. Stouffer's consumer research in the spring of 1991 studied why people buy frozen dinners. (CX-65; CX-383 at 56-57 [DeVries Dep.].) The things considered were: brand name; cholesterol, fat, calories from fat; price; vitamins and minerals; and sodium. (CX-65-R; CX-383 at 58-59 [DeVries Dep.].)

174. The result reported was (CX-65-S) (emphasis in original):

[The] analysis revealed that sodium level is the dominant factor. Respondents clearly favor products with the lowest level of sodium possible.

The analysis found a strong negative reaction to products with 1000 milligrams of sodium (CX-65-S; CX-383 at 60-61 [DeVries Dep].)

175. Stouffer's consumer research in 1988 showed the importance of information about sodium to consumers. A report on focus groups conducted in the fall of 1988 stated as follows under the heading cholesterol, fat and sodium levels (CX-102-I):

These consumers are information hungry. They are serious about their problem and therefore want to know the precise cholesterol, fat, and sodium levels.

As a result of this research, Stouffer was also aware that a frozen entree containing 600 or more milligrams of sodium "could turn consumers off." (*Id.* at h; CX-382 at 48-49 [Audette Dep].)

176. Stouffer began to develop a line of nutritionally-oriented entrees in the latter part of 1988. (CX-382 at 13 [Audette Dep].)

177. Stouffer began a new line of frozen entrees called Right Course in the fall of 1989. (*Id.* at 19.) The strategic positioning for Right Course emphasized its levels of sodium, fat, and cholesterol. (*Id.* at 29.)

178. The ad agency personnel assigned to the Lean Cuisine account were aware of the importance to consumers of claims about sodium. (Block, Tr. 774, 808; CX-379 at 48 [Wood Dep.]; CX-381 at 47 [Blim Dep.]; CX-378 at 98-99 [Crain Dep.].)

179. Stouffer's ad agency documents regarding brand positioning for Lean Cuisine in June 1990, stated that science and the media have been evaluating the consequences of eating habits and contained a list of six nutritional issues, the first of which was "Sodium Awareness." (CX-77-E.)

180. In a presentation to Stouffer in November of 1990, the agency said that acceptable levels of sodium, fat, and cholesterol had become a "price of entry," to get consumers to try the product (CX-378 at 67-68, 98-99 [Crain Dep.]; CX-80-C), and that people want "no bad stuff," that is, nutrients like sodium which are thought to be unhealthy, in the foods they eat. (CX-80-D; CX-378 at 96, 99 [Crain Dep.].)

181. In January of 1990 Mr. Annett, the marketing manager for Lean Cuisine, sent a memorandum to Tatham instructing the agency to put health related executions "on a fast track." (CX26-A.) The memorandum also suggested using "hot buttons" or "strong 'buzz words'" about limiting sodium, fat, and cholesterol. (CX-26.)

182. Health and Diet Surveys (for the National Heart, Lung, and Blood Institute, the National Cancer Institute, the Centers for Disease Control, and the USDA) evaluate consumer awareness of nutrition. (Levy, Tr. 106, 120-21.)

183. The Health and Diet Survey in the early fall of 1990, shows consumer awareness about sodium. (Levy, Tr. 122.)

184. The survey asked if the participant had heard of anything that people eat or drink being related to high blood pressure. (CX-365.)

185. Of the participants, 44% answered sodium or salt (CX-364), the most frequently given response. (Levy, Tr. 125-26.)

186. Other questions show that 15% of the population were on a professionally recommended sodium reduction diet, 25.1% were on a self-prescribed sodium avoidance diet, and 40% of the adult population aged 18 years and over are on a sodium reduction diet, making it the most common diet restriction. (Levy, Tr. 131; CX-346-D.)

Disclosure of Milligrams

187. The print ads in this case state that Stouffer's Lean Cuisine entrees contain less than 1 gram of sodium, providing the metric equivalent in milligrams in a footnote. (CX-1-6; CX-519 and CX-525.)

188. Dr. Muehling, a professor of marketing at Washington State University, tested five ads for a fictional camera. Some of the ads had fine print footnotes, others had large print footnotes. (CX-385-89; Muehling, Tr. 27-28.) Each of the ads contained information about attributes of the camera. (CX-385-89; Muehling, Tr. 28-29.)

189. The survey was conducted on a "convenient sample of college students." (Muehling, Tr. 72.)

190. The students were tested on their recall of statements made in the ad. (Muehling, Tr. 33-34.) According to Dr. Muehling, the results indicate that individuals were generally able to recall points that are made in the body of an ad much better than the points that are

made in the fine print or the footnote statements contained in the ad. (Muehling, Tr. 36, 44.)

191. The footnotes Dr. Muehling tested in his study contained between 25 and 38 more words and more information than the footnotes in the Lean Cuisine ads. (Muehling, Tr. 67-68.)

192. The text of the camera ad was more lengthy than the texts of the Lean Cuisine ads. After reading a lengthy ad, consumers may not pay attention to footnotes. (Muehling, Tr. 82-83.)

193. To determine whether specific footnotes are comprehended, conducting a test on those ads "would be a most effective way of answering that question." (Muehling, Tr. 66-67.)

194. Most consumers do not read or recall the footnotes in the Lean Cuisine ads. Responding to open-ended questions on the Zinkhan Copy Test, for the Made Sense ad (CX-4), none of the 100 participants recalled footnoted information. For the 300 Like a Million, nine of 100 participants recalled footnoted information. And, for the Lean on Lean Cuisine ad, two of 100 participants recalled footnoted information. (Zinkhan, Tr. 532; CX-374-Z-12.)

195. The preponderance of the credible evidence shows that the footnotes in the ads in this case did not adequately disclose that 1 gram equals 1000 milligrams. (*Id.*)

196. The sodium content of food is commonly, although not uniformly, measured for consumers in milligrams. (F. 20, 23; RX-24-E; RX-25-I, J.) Although consumers are generally aware of the need to restrict sodium in their diet (F. 185-86), many are unaware of the precise recommended daily allowance for sodium (F. 160), in milligrams or grams. The failure to disclose adequately the sodium content in milligrams is, therefore, immaterial.

DISCUSSION

I. INTRODUCTION

Respondent Stouffer, a subsidiary of the Swiss corporation Nestle SA, manufactures and markets frozen foods, primarily frozen entrees. Stouffer's frozen entree products consist of two product lines: a full calorie product, "Red Box," and a reduced, low calorie product line, Lean Cuisine. Lean Cuisine sales were about two hundred million dollars in 1990-91. (F. 10.)

During the late 1980's, Lean Cuisine's leadership of frozen entrees was challenged by Weight Watchers and new brands of Budget Gourmet. Despite a growing market, Lean Cuisine's business declined 24% in four years. (CX-58-A.)

During the fall of 1989, Stouffer started a new advertising campaign for Lean Cuisine. Stouffer's advertising agency, Tatham RSCG (Tatham), found that consumers worried less about calories but had an increasing interest in nutrition and the adverse health consequences of sodium and fat, and that consumers viewed Lean Cuisine and frozen entrees in general as high in sodium. (F. 17-19, 88-89; CX-58-B, G.) Tatham created the ads at issue in this case. These ads included two, two-page print ads entitled "Lean Cuisine." (CX-1, CX-519, CX-525) and "Ole! O'lean!" (CX-6); two, one-page print ads entitled "Who can make under 300 taste like a MILLION?" (CX-2-3) and "Of all the things we make, we make SENSE!" (CX-4-5); and a radio ad entitled "Anniversary/Turkey Rev." (CX-7.)

The complaint alleged that the ads falsely represented that Lean Cuisine entrees are low in sodium through "statements contained in advertisements." (Complaint, paragraphs 4, 5.) The complaint also alleged that the ads failed to disclose adequately the material fact that "1 gram is equivalent to 1000 milligrams, which is the commonly used unit of measurement for sodium." (Complaint, paragraph 7.)

Respondent argues that its ad campaign stressed Lean Cuisine's great taste and controlled fat, calories and sodium, and that the representations about sodium content were meant to be relative, showing a reduction in the amount of sodium but not implying low sodium, which consumers associate with bland taste.

II. THE CHALLENGED ADS

A. *The Legal Standard*

The standard by which advertising is judged is whether it is likely to mislead reasonable consumers; proof of actual deception is not required. The issue is whether consumers, acting reasonably under the circumstances, would interpret the message of the advertisement to have made the alleged claims. *Kraft, Inc.*, D. 9208, slip op. at 5-8, 21 (Jan. 30, 1991), *aff'd*, 970 F.2d 311 (7th Cir. 1992), *cert. denied*,

113 S. Ct. 1254 (1993). An ad can be deceptive even though other reasonable, truthful interpretations are just as possible. (*Id.* at n. 8.)

The Commission may rely on its own reasoned analysis to determine what “reasonably clear” implied claims are conveyed by examining the “overall net impression of an ad.” *Kraft*, 970 F.2d at 314, 319. The analysis looks at the net impression created by the interaction of all of the different elements in the ad, rather than the impact of each or a few elements. *Thompson Medical Co., Inc.*, 104 FTC 648, 793 (1984), 791 F.2d 189 (D.C. Cir. 1986).¹ The Commission does not have a license to go on a fishing expedition to pin liability on advertisers for barely imaginable, barely discernable claims. *Id.* at 319-20. But when implied claims are conspicuous, self-evident, or reasonably clear on the face of the ad, consumer surveys or other evidence beyond the ad are not required in reaching the decision. *Id.* at 320. If the implied claims may not be determined with confidence from the face of the ad, extrinsic evidence must be examined, including consumer surveys and expert testimony. *Kraft*, 970 F.2d at 318.

B. The Low Sodium Claim

1. Facial analysis of Stouffer’s print ads

The headline of the Make Sense ads (CX-4, CX-5) states “Of all the things we make, we make SENSE!” which evokes sensible eating. The ads describe the healthy ingredients in Lean Cuisine and note:

there are some things we skimp on: Calories. Fat. Sodium. With less than 300 calories, controlled fat and always less than 1 gram of sodium* per entree, we make good sense taste great.

A footnote states “All Lean Cuisine entrees have been reformulated to contain less than 1 gram (1000 mg.) of sodium.” If the footnote is overlooked by a consumer, the ad explicitly describes the sodium content of Lean Cuisine as “1” gram, a low number. The sodium is

¹ No first amendment concerns are raised when facially apparent implied claims are found without resort to extrinsic evidence. *Zauderer v. Ohio*, 471 U.S. 626, 652-53 (1985). A facial analysis involves the net impression conveyed by the ads and does not involve the effect of individual words, phrases, or visual images. *Thompson Medical*, 104 FTC at 793. Contrary elements in the ads must be effective to dispel the net impression of the challenged claim. *Kraft*, slip op. at 10.

described as “less than” 1 gram, diminishing the quantity.² The ads state that Lean Cuisine “skimp[s] on” sodium and other undesirable ingredients. The phrase “We make good sense taste good” reinforces the sensible eating message.

The net impression of all of the elements of the ads is that Lean Cuisine entrees are low in sodium. The ad contains nothing to give a contrary impression. *Thompson Medical*, 104 FTC at 793. The footnote that a gram equals 1000 milligrams, assuming that consumers notice it,³ is ambiguous unless consumers knew their recommended daily allowance. The footnote in some of the ads stated that the product is being reformulated. This is consistent with the low sodium message. Thus, a facial analysis of the challenged ads shows that they convey the low sodium claim to reasonable consumers.⁴

2. Radio ads

The challenged radio ad described Lean Cuisine entrees (CX-77):

These babies are healthier than ever. Lower in sodium, fat and cholesterol. Read those boxes, people, these numbers are low.

“Lower in sodium” is a comparative statement, but it is consistent with, and does not contradict, the flat, absolute statement that “these numbers are low.” To prevent facial analysis and require extrinsic proof, a conflicting statement in the ad must be effective. *Kraft*, FTC slip opinion at 10. Here, the comparative statement does not conflict with “these numbers are low,” and does not derogate from the net impression that the radio ad carries the message that Lean Cuisine entrees are low in sodium.

² The phrase “less than 300 calories and most less than 1 gram* of sodium” in the 300 Like a Million ad (CX-2 and CX-3) appears in bold print. (F. 144.)

³ The footnote did not adequately disclose that 1 gram equals 1000 milligrams. (F. 195.)

⁴ The other print ads are similar although they do not use the phrase “skimp on” as the Make Sense ad does. The above analysis applies to those ads as well.

C. Extrinsic Evidence

1. Zinkhan copy test

Consumer surveys are the best extrinsic evidence of what words in an ad mean to consumers. *Kraft, Inc.*, slip op. at p. 11 n. 11, p. 13 n. 13. Copy tests must use a sound method, with a valid sample, questions that minimize bias, and correct analysis. *Thompson Medical*, 104 FTC at 790.

a. Universe

The universe for the copy test is a valid sample from the “appropriate population.”⁵ The target audience here is the group of people Stouffer tried to persuade to purchase its product with its advertising. (F. 70-71.)

Stouffer’s target audience consisted of “primarily females, though not exclusively” who were “age 25 to 54 with an opportunity in the under 25 segment.” (CX-523-Z-7 to Z-8.) Based upon data from Stouffer, Dr. Zinkhan included women ages 25 to 54, and excluded women under 25 and over 54, and men,⁶ people who had not purchased frozen dinners or entrees within the last three months, people who were on medically supervised diets, and people who wore glasses but did not have them with them at the time. (F. 69, 71.)

The “central anchor” of Lean Cuisine consists of purchases by women age 25 to 54. (Block, Tr. 792-93.) Dr. Zinkhan limited his sample to those women. (F. 71.) While omission of men and women under 25 and over 54 may diminish the certitude of the results, there is no evidence to show that the results would have differed if they would have been included, and there is no doubt that those surveyed were the bull’s eye of the target at which the ads were aimed.⁷ The test results may therefore be relied on despite this defect. *Thompson Medical Co. Inc.*, 104 FTC at 806-08.

⁵ *Thompson Medical Co., Inc.*, 104 FTC at 790.

⁶ Stouffer did not specify the percentage of men included in its target audience.

⁷ The Ross copy test, by contrast, included many who were off the edge of the target. (F. 121-22.)

b. Funneling

The copy test began by asking three open-ended questions. (F. 75; CX-374-Z-29 to Z-30.) It then asked three close-ended questions, each asking if the ad made any claim about one specific ingredient. (F. 76; CX-374-Z-30.) This pattern of questioning, called funneling, avoids suggesting answers that bias the results. *National Football League Properties, Inc. v. New Jersey Giants, Inc.*, 637 F. Supp. 507, 515 (D.N.J. 1986).⁸

Dr. Zinkhan's copy test asks "appropriate questions in ways that minimize bias . . ." *Thompson Medical*, 104 FTC at 790. Funneling questions, as used by Dr. Zinkhan,⁹ provide unbiased evidence of claims conveyed to consumers.¹⁰ *Id.* at 808.

c. Open-ended questions

Respondent argues that Dr. Zinkhan's copy test did not use a control ad to eliminate external factors affecting consumers. There is, however, no requirement of a control ad for open-ended questions. *Thompson Medical*, 104 FTC at 804-08.¹¹

⁸ Stouffer's expert witness, Dr. Ross, endorsed the funneling approach. (Ross, Tr. 172; F. 126.) He designed a copy test for Stouffer, however, with a leading opening question asking about specific ingredients. (RX 30-Z-7.)

⁹ Those questions asked (CX-374-Z-29, Z-30):

1. What point or points does the Lean Cuisine ad make about the product?
2. What reason or reasons does the ad mention or suggest for you to buy Lean Cuisine?
3. Is there anything else you can recall about the ad?

¹⁰ Open-ended questions sometimes fail to elicit all of the claims an ad conveys. *Kraft, Inc.*, slip op. at 13 n.13. Close-ended questions with a control can also provide unbiased results, and may probe deeper into consumers' memories than open-ended questions. *Thompson Medical*, 104 FTC 804-06.

¹¹ There is precedent to show that a control ad (not a cleansed ad) may be helpful. In *Thompson Medical*, the Commission approved two copy tests: the "FRC" copy test and the "ASI Theater Test." 104 FTC at 804-08. The FRC copy test did not use a control ad. *Id.* at 804. It used control questions (regarding whether Ben-Gay or Mentholatum contained aspirin) for the close-ended question "does the product in the commercial contain aspirin." *Id.* at 804. The Commission discounted responses to the open question ("name the ingredient") supporting Thompson, with only 3% recalling aspirin as an ingredient in Aspercreme; the Commission relied instead on the leading questions which showed 22% recalling Aspercreme containing aspirin while the leading control questions showed that only 6% thought aspirin was an ingredient in Ben Gay and less than 5% perceived aspirin in mentholatum. *Id.* at 804-05.

The ASI Theater Test in *Thompson Medical* did include a control ad for a competing product, Mobisyl. *Id.* at 806. Responses to open-ended questions were that aspirin was an ingredient in Aspercreme (17%) and Mobisyl (1%). The test also had control ingredients for the leading question. Despite the yea saying bias indicated by the large percentage of participants who thought the control ingredients (hydrocortisone, lanolin and menthol) were ingredients in Aspercreme and the control product, Mobisyl, the Commission relied on the result of the leading recall results indicating that the much larger percentage of those who believed Aspercreme contained aspirin than did those who saw the

Marketing experts have found that credible evidence comes in response to open-ended questions, just as in trials where the unbiased testimony comes after direct, non-leading questions. The drawback of open-ended questions is that they are not as effective when the issue is the consumer's memory rather than the consumer's reaction. That is where close-end questions are effective, since they, like leading questions at trial, suggest the desired answer. They also tend to elicit bias.

Respondent argues that using a control ad for open-ended questions eliminates the influence of participants' preconceptions about the product. Even if some participants in the copy test had a prior belief that Lean Cuisine was low in sodium, that does not mean that the ads did not convey a low sodium claim. (Kloc, Tr. 442; Zinkhan, Tr. 725, 729.) An ad that reinforces an inaccurate pre-existing notion is deceptive. (F. 91-92.) Not all consumers' pre-existing beliefs need to be removed from copy test results. *Simeon Management Corp. v. FTC*, 579 F.2d 1137, 1146 (9th Cir. 1978) (That the false belief "is attributable in part to factors other than the advertisement itself does not preclude the advertisement from being deceptive").¹²

There is no precedent mandating a control ad for open questions for a valid survey. Respondent's citations to the contrary are not persuasive.¹³ A control ad was not needed for the open-ended questions in the Zinkhan copy test. (F. 83.) There was no credible evidence that bias affected the results elicited by those questions.

Mobisyl commercial. The Commission did not subtract the control responses in its analysis of the test ad. *Id.* at 807-08. The analysis dealt with responses to both leading and open questions, comparing the percentage of respondents who said Aspercreme contained aspirin (untrue) (17%) to those who said it contained salicyin (true) (4%). *Id.* at 808.

In Kraft, Inc. the Commission discussed the results of the CWI test done for Kraft. The question suggested that a comparison had been made ("was anything 'said or shown [in the ad] that makes you think KRAFT Singles is different from other brands of individually wrapped cheese slices'"). *Id.* at 19 n.18. Refusing to rely on the results of that close-ended question, the Commission criticized the CWI copy test for not using any control. *Id.* at n. 19, citing Thompson Medical where the ASI Theater Test used controls with close-ended and open-ended questions.

¹² Most consumers' pre-existing belief about the sodium content of Lean Cuisine was that it was higher than in fact was true. (F. 87-89.) If the challenged ads changed this belief to a low sodium belief, then they must have communicated that low sodium claim. (Ross, Tr. 1260-69.)

¹³ Respondent discerns the required use of a control ad by dissecting scattered statements in the footnotes of Thompson Medical and Kraft. Reply brief at pp. 23-25. This inferred "new learning" is based, however, on misconception. Complaint counsel's reply brief at pp. 26-29.

d. Close-ended questions

The close-ended questions in Dr. Zinkhan's copy test asked whether the ads suggested anything about the amount of three ingredients: sodium, calories, and sugar. The sugar question was a control question. (F. 106.) Close-ended questions direct participants to an aspect of the ad. Some may respond based on yea saying, inattention, or preconceptions. (F. 100-04.) Close-ended questions require the use of a control. *Thompson Medical*, 104 FTC at 804-06. The results of the control question are deducted from the results of the close-ended question to eliminate such bias. *Id.* Sugar is an appropriate control ingredient. (F. 106-114.) It is not mentioned in the ad, but is associated with Lean Cuisine in consumers' minds, and is an incorrect answer. (Zinkhan, Tr. 745.)

The sequence of the close-ended questions was rotated. (F. 98-99.) Controlling for order bias is necessary to make the results of close-ended questions reliable evidence of ad communication. *R.J. Reynolds Tobacco Co. v. Loew's Theaters, Inc.*, 511 F. Supp. 867, 872 (S.D.N.Y. 1980) at 872; CX-536-Z-25 to Z-26. The close-ended questions designed by Dr. Zinkhan minimized bias.

e. Results of Zinkhan copy test

Dr. Zinkhan's copy test shows that from 43 to 60% of the participants found the low sodium claim in response to open-ended questions.¹⁴ (F. 116.) Dr. Zinkhan's close-ended questions, after the control is deducted, show from 78 to 83% of the participants took the low sodium claim from the challenged ads. (F. 119.)

2. Ross copy test

Stouffer's copy test uses two controls to show that the claim was not communicated. The issue is whether these control procedures biased the results of the copy test in Stouffer's favor.

¹⁴ In *Thompson Medical* the claims were conveyed to 16 to 18%. *Id.* at 805. Those results were derived from close-ended questions. 104 FTC at 805. Smaller percentages are sufficient to establish that a claim is conveyed when based on open-ended results. *The Gillette Co. v. Wilkinson Sword, Inc.*, 89 CV 3586 (KMW) (S.D.N.Y. 1991), slip op. at 17 (10%); Ross, Tr. 1299 (8-10%).

a. Stouffer's cleansed control ad

Stouffer used "cleansed" ads to control: participant's prior knowledge or beliefs (Ross, Tr. 961), the manner in which the close-ended question is written (Ross, Tr. 1171-72), yea saying (Popper, Tr. 1477-79), and inattention (Popper, Tr. 1477-78). The theory is that the cleansed ad removes the elements that falsely affect the low sodium claim. Dr. Ross assumed that the cleansed ads did not convey the low sodium claim. (Ross, Tr. 1274; F. 138.)

The cleansed ads themselves, however, conveyed a low sodium claim. (F. 139-45.) The failure fully to cleanse the challenged ads, makes them invalid. The responses to those ads cannot properly be used to reduce the responses to open-ended or close-ended questions in the copy test. (Zinkhan, Tr. 573.) By using control ads that were likely to convey the challenged claim, Stouffer assured its "control over the study's outcome by the use of the control ads." *Weight Watchers Int'l v. Stouffer Corp.*, 744 F. Supp. 1259, 1275 (S.D.N.Y. 1990).

Dr. Ross' removal of the sodium content modifier "less than 1 gram," and the phrase "skimp on," fails to consider that:

[i]n evaluating advertising representations, we are required to look at the complete advertisements and formulate our opinions on them on the basis of the net general impression conveyed by them and not on isolated excerpts.

Standard Oil Co. of Calif., 84 FTC 1401, 1471 (1974), *aff'd as modified*, 577 F.2d 653 (9th Cir. 1978), *cited in*, Deception Statement, 103 FTC at 179 n. 32. "The entire mosaic should be viewed, rather than each tile separately." *FTC v. Sterling Drug, Inc.*, 317 F.2d 669, 674 (2d Cir. 1963). Analysis of one or two isolated words or phrases does not result in a proper understanding of whether an implied claim is communicated. Deception Statement, 103 FTC 176 & n. 7, 179 & n. 31-32.¹⁵

b. Cholesterol control

Stouffer employed a control using cholesterol. The attribute in the control question must be relevant to the advertised product, but not closely enough linked with claims in the ad to convey an implied

¹⁵ Consumers "perceive the commercial in its totality." (CX-540-B.)

claim about the attribute. (Zinkhan, Tr. 514-15, 744-45.) Cholesterol is linked to fat as used in the ads. (F. 150-52.) Readers infer cholesterol claims from fat claims.¹⁶ (F. 150.)

c. Results of the Ross copy test

With cholesterol, as it did with the control ads, Stouffer selected a control that assured the outcome. Furthermore, the universe was defective (F. 122), and the questions were not properly rotated. (F. 129-33.) The Ross copy test is unreliable.

III. THE DECEPTION OF THE LOW SODIUM CLAIM

During the period in which the challenged advertising ran, the Lean Cuisine line averaged 850 milligrams of sodium. (CX-6-B; CX-409-506.) This exceeds public health guidelines for "low sodium." 21 CFR 101.13(a)(3)(1992); CX-114; CX-520; F. 153-57; *Simeon Management Corp.*, 87 FTC 1184, 1230 (1976), *aff'd*, 579 F.2d 1137 (1978); *Thompson Medical*, 104 FTC at 826.

Stouffer knew that its products were not "low in sodium." (F.168-70.) Stouffer's manager in charge of the Lean Cuisine line at the time the ads ran, testified that a "low sodium" claim was not possible because "Lean Cuisine did not meet the FDA and USDA requirements for low sodium." (F. 168.)

In the context of this market, these ads convey a low sodium message. Knowing that many consumers feel that Lean Cuisine frozen entrees contained high sodium (F. 89, 160), and that most do not know the recommended daily consumption for sodium (160-62), Stouffer took an unreasonable risk in using these ads. The healthy images and statements in the ads minimizing unhealthy ingredients, and the ambiguous "less than 1 gram of sodium," and "skimp"¹⁷ -- all lead to the impression of a low sodium message.

The disclosure in a footnote, that "All Lean Cuisine entrees have been reformulated to contain less than 1 gram (1000 mg.) of sodi-

¹⁶ The Make Sense ad expressly mentioned Lean Cuisine's fat content. Twenty-one percent of the participants (25 of 120), responded to a close-ended question that Lean Cuisine is low in cholesterol. (RX-30-Z-17.) Less than three percent gave that response for the 300 Like a Million ad which does not mention fat. (Zinkhan, Tr. 745-46.)

¹⁷ The definition of "skimp" is "scrimp," which is defined as "to be sparing or restrictive of or in; limit severely. . . ." Random House Dictionary of the English Language (2d Ed. 1987).

um,”¹⁸ was not noticed by most consumers (F. 195), and would not be effective to dispel the net impression. Kraft slip opinion at p. 10. Reformulation and low sodium are consistent. It is not the clear contradictory element which would change the net impression of the ad. *Thompson Medical*, 104 FTC at 799. The net message was not that sodium content was lower than it used to be, but, by clear implication, that the amount of sodium was healthfully low.¹⁹

IV. LOW SODIUM CLAIMS ARE MATERIAL

Claims that “significantly involve health, safety, or other areas with which reasonable consumers would be concerned,” are presumed material. *Kraft, Inc. v. FTC*, 970 F.2d at 322-23. The calcium content claim for Kraft Singles was material because it was a health claim important to the audience. Slip op. at 24-25.

Because sodium consumption may cause high blood pressure, public health organizations recommend that Americans limit their sodium intake. The recommended daily intake of sodium is 2400 milligrams or less. (F. 158.) The sodium in a Lean Cuisine entree has one-third of that amount. (F. 159.) The low sodium claim is presumptively material to consumers of Lean Cuisine.

Most consumers consider sodium important in buying frozen entrees. (F. 172.)²⁰ Sodium content is the dominant factor consumers consider in buying frozen entrees. (F. 173-75.) Consumers want precise information about negative nutritional attributes, including sodium, in frozen foods.²¹ Over 40% of consumers are aware of the link between sodium and high blood pressure (F. 185) and they reduce their consumption of sodium. (F. 186.) Consumers relate low sodium claims to health. (F. 182-86.) A low sodium claim in a food is material to consumers and affects their purchase of frozen entrees.

¹⁸ To some consumers who read the footnote, “1000 milligrams” may connote high sodium, or, because they do not know the recommended daily allowance, it is ambiguous. (F. 160, 167, 174-75.) To other consumers, who read the full context of the ad, it apparently has a low sodium message. (F. 140-45.)

¹⁹ The other ads in the campaign also used the “less than 1 gram of sodium” language, and elements of some of the other ads may reinforce this claim of low sodium; e.g., bold type of the phrase “less than 300 calories and most with less than 1 gram* of sodium.” (CX-2; CX-3.)

²⁰ This is direct evidence of the importance to consumers of claims about sodium. *Kraft, Inc.*, slip op. at 23-24; *Thompson Medical*, 104 FTC at 817.

²¹ Stouffer developed a line of frozen entrees that were promoted as having nutritionally appropriate levels of sodium. (F. 176-81.) This evidence supports the conclusion that the low sodium claim is material. *Kraft, Inc.*, slip op. at 23-28.

V. MILLIGRAMS DISCLOSURE

The complaint charges as unfair and deceptive, and as a separate violation, the failure to disclose adequately the fact that a gram equals 1000 milligrams. The sodium content of food is commonly measured in milligrams. (F. 20, 196.) The print ads in this case state that Stouffers' Lean Cuisine entrees contain less than 1 gram of sodium, with footnotes explaining that 1 gram equals 1000 mg. of sodium.²² The type size of the footnotes is smaller than the rest of the ad. Fine print disclosures generally may not cure a misimpression created by the text of an advertisement. *Giant Food, Inc.*, 61 FTC 326, 348 (1962).

Dr. Darrel Muehling's research tested the effect of print size on footnote information. (F. 188.) The footnotes in the ads he tested were more complex and contained more information than the single footnotes in the challenged ads. (F. 191-92.) This survey was insufficient evidence to support the assertion that the footnotes in the challenged ads were ineffective in communicating the information that 1 gram equals 1000 milligrams. There was some evidence in the Zinkhan survey, however, that few consumers notice or read the footnotes in the Lean Cuisine ads. (F. 194.)²³

Notwithstanding that finding, I do not believe that the failure to disclose adequately the sodium content in milligrams was unfair or deceptive. While the sodium content in milligrams is presumptively material information, the facts show that most consumers are unaware of the recommended daily allowance for sodium (F. 160-62), and knowing the precise milligrams²⁴ of sodium in an entree would be of little use. More sophisticated consumers, who are on a medically supervised diet and need precise information about sodium in milligrams, presumably read ads more carefully and would find the information in the footnote.

²² The manager for Lean Cuisine complained to the Council of Better Business Bureaus about a competitor's ad stating sodium content in grams. That ad did not mention milligrams. (F. 21.) The Lean Cuisine ads at least went a step in the right direction.

²³ The Zinkhan survey excluded those on a medically supervised diet. (F. 69.) Those persons are more knowledgeable about the sodium content in food and would read the ad more carefully.

²⁴ There is evidence that many consumers do want precise information on milligrams of sodium. (F. 175.)

VI. SCOPE OF RELIEF

Whether a broad, "fencing-in" order bears a reasonable relationship to a violation depends on: "(1) the deliberateness and seriousness of the violation, (2) the degree of transferability of the violation to other products, and (3) any history of prior violations." *Kraft, Inc.*, 970 F.2d 311 at 326. Whether a violation is serious and deliberate, depends on the cost, size, and duration of the advertising campaign, and knowledge that the challenged ads were misleading. *Kraft*, 970 F.2d at 326; *Bristol-Myers Co. v. FTC*, 738 F.2d 554, 561 (2nd Cir. 1984), *cert. denied*, 469 U.S. 1189 (1985).

While the respondent knew that the low sodium claim was deceptive (F. 168-70), the Lean Cuisine ads were not part of a long-running television campaign. The print ads and one radio spot ran one to two times over seventeen months. The "Lean on Lean Cuisine" campaign cost \$3 million (CX-523, CX-527-A, CX-528-G), far less than amounts in *Bristol-Myers*, *American Homes Products*, and *Kraft*.²⁵

Stouffer only makes frozen food products and markets one other line -- the "Red Box" line -- for which nutritional claims are not made. "Transferability" of the violation by itself is not sufficient to justify a broad fencing-in order. *Chrysler Corp. v. FTC*, 561 F.2d 357 (D.C. Cir. 1977); *Fedders Corp. v. FTC*, 529 F.2d 1398 (2nd Cir. 1976), *cert. denied*, 429 U.S. 818 (1976).

A broad fencing-in order is "reasonably related" to the violation when the respondent has a history of prior violations. *American Home Products*, 695 F.2d at 707; *Bristol-Myers*, 738 F.2d at 561-62; *In re Sterling Drug, Inc.*, 102 FTC 395, 735 (1983). Stouffer has no history of prior violations.

This was a miscalculation rather than a blatant disregard for law. Therefore, a broad order need not issue in this case. *Standard Oil Co. of Calif. v. FTC*, 577 F.2d at 662-63.

²⁵ In *Thompson Medical*, the company spent \$5 million in five years advertising Aspercreme. *Thompson Medical*, 104 FTC at 687. In *Kraft*, the company spent \$15 million a year for two and one-half years on national television of the challenged ads. *Kraft*, 970 F.2d at 325-26. In *American Home Products*, the advertising cost \$210 million over ten years. *American Home Products*, 695 F.2d at 707-08, 781.

CONCLUSIONS OF LAW

1. The Federal Trade Commission has jurisdiction over the advertising of Lean Cuisine entrees under Sections 5 and 12 of the Federal Trade Commission Act.

2. Respondent's false, misleading, and deceptive statements as herein found were likely to mislead reasonable consumers into believing that such statements were true.

3. These acts and practices were to the injury of the public and constitute false and deceptive advertisements in or affecting commerce in violation of Sections 5 and 12 of the Federal Trade Commission Act.

4. While respondent failed to disclose adequately that 1 gram equals 1000 milligrams, that fact is immaterial.

ORDER

I.

It is ordered, That respondent Stouffer Foods Corporation, a corporation, its successors and assigns, and its officers, representatives, agents, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, labeling, offering for sale, sale, or distribution of any frozen food product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Misrepresenting the sodium content of any such product.

B. Describing the sodium content of any such product except by comparing it with "low sodium," and/or the recommended daily allowance for sodium, as defined by the United States Department of Agriculture or the United States Food and Drug Administration.

II.

It is further ordered, That respondent Stouffer Foods Corporation shall, for three years make available to the Federal Trade Commission all advertisements covered by this order.

III.

It is further ordered, That respondent Stouffer Foods Corporation shall distribute a copy of this order to its operating divisions, and its officers, managers, agents, representatives, or employees engaged in advertising covered by this order and shall secure from each such person a signed statement acknowledging receipt of this order.

IV.

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

V.

It is further ordered, That respondent Stouffer Foods Corporation shall, within 60 days after service upon it of this order and at such other times as the Commission may require, file with the Commission a written report describing how it has complied with this order.

APPENDIX A

D-9250
B143468

(a smart, intelligent, sensible way to eat)

Lean.



(extraordinary tastes with style, daring, and WOW!)

Cuisine.

The advertisement is a black and white promotional image for Lean Cuisine. It features a woman in a dark suit and white blouse standing behind a counter. On the counter are two plates of food: one with a salad and another with a meat and vegetable dish. To the right, there is a large, dark, textured block of food. In the foreground, several boxes of Lean Cuisine are displayed, with one box prominently showing the brand name and a picture of a meal. The background is a plain, light color. The overall composition is clean and professional, emphasizing the variety and quality of the food products.

LEAN ON LEAN CUISINE

ST
7 in
0058

Appendix A



Who can make under 300
taste like a MILLION?

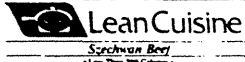
D-9250
B143468



2



Only Stouffer's Lean Cuisine® meats and nobody else knows how to create such great tasting entrees, all with **less than 300 calories and most with less than 1 gram* of sodium.** But we'll gladly share the secret with you. Stouffer's recipes use only the finest ingredients, at their natural peak of perfection, combined in exciting and imaginative ways. That's why our 33 different entrees taste as great as they do. So, if you're looking for something smart and sensible to eat that tastes extraordinary, too, you know where to lean.



LEAN ON LEAN CUISINE

X 2

0.12

Appendix B

FEDERAL TRADE COMMISSION DECISIONS

Initial Decision

APPENDIX B

118 F.T.C.



D-9250
B143468



Who can make under 300
taste like a MILLION?



Only Stouffers Lean Cuisine® can help you lose weight. We use only the finest ingredients and no artificial flavors or preservatives. Our recipes are low in fat and calories, and most with less than 1 gram of sodium. But we're glad to share the secret with you. Stouffers recipes use only the finest ingredients at their natural peak of perfection, combined in exciting and imaginative ways. That's why our 33 different entrees taste as great as they do. So, if you're looking for smart, sensible meals that taste extraordinary, too, you know where to lean.



LEAN ON LEAN CUISINE

Appendix

APPENDIX C



D-9250
B143468

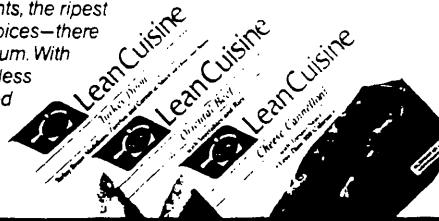


OF ALL THE THINGS WE MAKE,
WE MAKE **SENSE!**

Of all the things we at Stouffer's pack into our 34 Lean Cuisine® entrees—the freshest ingredients, the ripest vegetables and the perfect blend of herbs and spices—there are some things we skimp on: Calories. Fat. Sodium. With less than 300 calories, controlled fat and always less than 1 gram of sodium per entree, we make good sense taste great.*

*All Lean Cuisine entrees have been reformulated to contain less than 1 gram (1000 mg) of sodium.

© 1991 Stouffer Foods Corporation



LEAN ON LEAN CUISINE

4 00011
Appendix C

APPENDIX C



D-9250
B143468



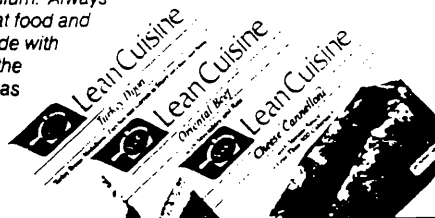
OF ALL THE THINGS WE MAKE,
WE MAKE **SENSE!** Turkey with Spaghetti

Exh 6

95% fat free. Never more than a gram of sodium*. Always less than 300 calories. Lean Cuisine® makes great food and good sense. And since all our 34 entrees are made with the freshest ingredients. Ripest vegetables. With the perfect blend of herbs and spices. Good sense has never tasted so great.

*All Lean Cuisine entrees have been reformulated to contain less than 1 gram (1000 mg.) of sodium.

© 1991 Stouffer Foods Corporation



95% FAT FREE Lean Cuisine.

CV 15

00013
Appendix

STOUFFER FOODS CORPORATION
Initial Decision
APPENDIX C

Ole!

Max!

Stouffer's

Max!

Ole!

8145488
9250-9

Stouffer's rice is a long-grain, white rice that is soft and fluffy. It is perfect for use in a variety of dishes, including casseroles, soups, and salads. Stouffer's rice is also a good source of fiber and protein.

Stouffer's rice is available in a variety of sizes, including 1 lb., 2 lb., and 5 lb. bags. It is also available in a variety of flavors, including plain, garlic, and herb.

Stouffer's rice is a versatile ingredient that can be used in a variety of ways. It can be served as a side dish, or it can be used as the base for a variety of dishes. Stouffer's rice is also a good choice for those who are looking for a healthy and delicious meal.

Stouffer's rice is a long-grain, white rice that is soft and fluffy. It is perfect for use in a variety of dishes, including casseroles, soups, and salads. Stouffer's rice is also a good source of fiber and protein.

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Stouffer's rice is a versatile ingredient that can be used in a variety of ways. It can be served as a side dish, or it can be used as the base for a variety of dishes. Stouffer's rice is also a good choice for those who are looking for a healthy and delicious meal.

OPINION OF THE COMMISSION

BY STEIGER, *Chairman*:

Stouffer Foods Corporation, Inc. (Stouffer) appeals from the Administrative Law Judge (ALJ) James P. Timony's Initial Decision and Order holding Stouffer liable for misrepresentations regarding the sodium content of its Lean Cuisine entrees in violation of Sections 5 and 12 of the Federal Trade Commission Act (FTCA), 15 U.S.C. 45, 52. Complaint counsel cross appeal the scope of the order's coverage. We affirm liability under Sections 5 and 12 of the FTCA and modify the ALJ's order.

On October 28, 1991, the Federal Trade Commission issued an administrative complaint charging Stouffer with violating Sections 5 and 12 of the FTCA by falsely representing in its ads the sodium content of its Lean Cuisine entrees.¹ Specifically, the complaint alleged that certain of Stouffer's Lean Cuisine ads falsely represented, among other things, that Lean Cuisine entrees are low in sodium. Paragraph 4 of the complaint quoted language from an ad, attached to the complaint (CX-4),² which stated that Lean Cuisine "skimp[s] on Calories. Fat. Sodium. With less than 300 calories, controlled fat and always less than 1 gram of sodium* per entree, we make good sense taste great." Paragraph 4 also quoted a footnote that appeared in the same ad which stated: "*All Lean Cuisine entrees have been formulated to contain less than 1 gram (1000 mg.) of sodium." Paragraph 7 of the complaint alleged that Stouffer's advertising for Lean Cuisine entrees failed to disclose adequately the material fact that

¹ The conduct challenged in this complaint occurred before the effective date of the Nutrition Labeling and Education Act of 1990, Pub. L. No. 101-535, 104 Stat. 2353 (codified in part at 21 U.S.C. 343(i), (q) and (r)).

² References to the record are abbreviated as follows:

IDF	Initial Decision Finding
ID	Initial Decision
Tr.	Transcript of Testimony
CX	Complaint Counsel's Exhibit
RX	Respondent's Exhibit
RAB	Respondent's Appeal Brief
CAB	Complaint Counsel's Answering and Cross-appeal Brief
RRAB	Respondent's Reply and Answering Brief
CRB	Complaint Counsel's Reply Brief

“1 gram is equivalent to 1000 milligrams, which is the commonly used unit of measurement for sodium.”

The evidentiary hearings before ALJ Timony began on February 8, 1993, and ended on March 8, 1993. Proposed findings were completed on June 21, 1993, and the Initial Decision and Order were filed on August 6, 1993. The ALJ found that the net impression of all the elements in each of the ads³ is that Lean Cuisine entrees are low in sodium and that the low sodium claims are presumptively material to consumers because they involve health, safety, or other areas with which reasonable consumers would be concerned. ID at 29, 37, citing *Thompson Medical Co.*, 104 FTC 648, 788-89 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987). The ALJ concluded that Stouffer failed to disclose adequately that 1 gram of sodium equals 1000 milligrams, but found that fact to be immaterial. ID at 39.

The ALJ's order prohibits Stouffer from misrepresenting the sodium content of any frozen food product and from describing the sodium content of any frozen food product except by comparing it with “low sodium,” and/or the recommended daily allowance for sodium, as defined by the Food and Drug Administration or the United States Department of Agriculture. The ALJ declined to extend the scope of the order beyond sodium to all ingredients and nutrients because he concluded that Stouffer did not blatantly disregard the law and had no history of prior violations. ID at 39.

Stouffer's principal argument on appeal is that the ALJ erred in relying on his own analysis of the challenged ads and complaint counsel's consumer survey to conclude that the ads conveyed a low sodium message. Complaint counsel do not appeal the dismissal of the milligram disclosure allegation, but cross appeal the scope of the order's coverage.

We affirm liability under Sections 5 and 12 of the FTCA. We agree with the ALJ's findings and conclusions to the extent that they are consistent with those set forth in this opinion, and, except as noted herein, adopt them as our own. Based on our consideration of the record in this case and the arguments of counsel for both parties, we deny Stouffer's appeal and grant complaint counsel's cross appeal.

³ The ALJ's findings of fact described five print ads (CX-1, CX-2, CX-3, CX-5, CX-6) in addition to the one attached to the complaint (CX-4) and one radio ad (CX-7). IDF 33-51. The ALJ analyzed the ad attached to the complaint (CX-4) and statements that appeared in other ads (CX-2, CX-3, CX-5, CX-7). ID at 28-29.

The order we adopt includes a provision for coverage of all nutrients and ingredients in Stouffer's frozen food products.

I. FACTUAL BACKGROUND

Stouffer is a subsidiary of the Swiss corporation Nestle SA and manufactures and markets frozen foods. There are two product lines for Stouffer's frozen entree products: a full calorie product, "Red Box," and a reduced, low calorie product, "Lean Cuisine." Responding to consumers' nutritional awareness, Stouffer twice reformulated Lean Cuisine in the late 1980's and early 1990's with new recipes and seasonings and reduced the sodium and fat content of the products. IDF 18, 31. In order to counteract the perception that Lean Cuisine was high in sodium, and because sodium was becoming a health issue in the media, Stouffer asked its advertising agency, Tatham/RSCG (Tatham), to develop ads stating the facts of the sodium content of the product. IDF 18.

II. THE CHALLENGED REPRESENTATIONS

A. *Legal Framework*

The Commission will find deception if there is a representation or omission of fact that is likely to mislead consumers acting reasonably under the circumstances, and that representation or omission is material.⁴ The first step in a deception analysis is to identify the claims made by looking at the ad itself.⁵ If, after examining the interaction of all the different elements in the ad, the Commission can conclude with confidence that an ad can reasonably be read to contain a particular claim, a facial analysis is sufficient basis to conclude that the ad conveys the claim. *See Kraft*, 114 FTC at 121; *Thompson Medical*, 104 FTC at 789.

If, after a facial analysis, the Commission cannot conclude with confidence that a particular ad can reasonably be read to contain a

⁴ *See Kraft, Inc.*, 114 FTC 40, 120 (1991). *aff'd*, 970 F.2d 311 (7th Cir. 1992). *cert. denied*, 113 S. Ct. 1254 (1993); *Cliffdale Associates, Inc.*, 103 FTC 110, 164-66, 175-76 (1984).

⁵ Advertising claims are generally categorized as either express or implied. Express claims directly state the representation at issue, while implied claims, which encompass all claims that are not express, can range from those that are virtually synonymous with express claims to very subtle language where only relatively few consumers discern that particular claim. *Kraft*, 114 FTC at 120; *Thompson Medical*, 104 FTC at 788-89.

particular implied message, we will not find the ad to have made the claim unless extrinsic evidence allows us to conclude that such a reading of the ad is reasonable. *Kraft*, 114 FTC at 121; *Thompson Medical*, 104 FTC at 789. The Commission will carefully consider any extrinsic evidence that is introduced, taking into account the quality and reliability of the evidence. *See Kraft*, 114 FTC at 122. Extrinsic evidence includes, but is not limited to, reliable results from methodologically sound consumer surveys. *Kraft*, 114 FTC at 121; *Cliffdale*, 103 FTC at 164-66. In determining whether a consumer survey is methodologically sound, the Commission will look to whether it “draws[s] valid samples from the appropriate population, ask[s] appropriate questions in ways that minimize bias, and analyze[s] results correctly.” *Thompson Medical*, 104 FTC at 790. The Commission does not require methodological perfection before it will rely on a copy test or other type of consumer survey, but looks to whether such evidence is reasonably reliable and probative. *See Bristol-Myers Co.*, 85 FTC 688, 743-44 (1975). Flaws in the methodology may affect the weight that is given to the results of the copy test or other consumer survey.

Whether examining the ad itself, extrinsic evidence, or both, the Commission considers the overall, net impression made by the ad in determining what claims may reasonably be ascribed to it. *Kraft*, 114 FTC at 122; *Thompson Medical*, 104 FTC at 790. To be considered reasonable, however, an interpretation need not be the only interpretation as long as the subset of consumers making it is representative of the group of consumers to whom the ad is addressed. *Kraft*, 114 FTC at 120-21 n.8; *Thompson Medical*, 104 FTC at 789 n.7.

The second step in a deception analysis is to determine if the claim is likely to mislead a consumer acting reasonably under the circumstances. *Cliffdale*, 103 FTC at 164-65, 175-76. Where more than one meaning is conveyed by an ad, one of which is false, the seller is liable for the false claim. *Kraft*, 114 FTC at 120-21 n.8; *Thompson Medical*, 104 FTC at 789 n.7.

The final step in a deception analysis is to determine whether the claim is material. *Cliffdale*, 103 FTC at 164-65. Information is material if it is likely to affect a consumer’s choice of or conduct regarding a product. *Id.* at 165; *Kraft*, 114 FTC at 134. There are several types of claims that the Commission presumes to be material: express claims; implied claims where there is evidence that the seller intended to make the claim; and claims or omissions involving health,

safety, or other areas with which reasonable consumers would be concerned. *Kraft*, 114 FTC at 134; *Thompson Medical*, 104 FTC at 816-17; *Cliffdale*, 103 FTC at 182-83.

B. Respondent's Advertising

From January 1990 through August 1991, Stouffer ran a series of ads, including the Make Sense ad attached to the complaint (CX-4), as well as five other print ads: Lean on Lean Cuisine (CX-1), 300 Like a Million (CX-2), another version of 300 Like a Million (CX-3), another version of Make Sense (CX-5), and Ole O'Lean (CX-6). In addition, Stouffer ran a radio ad, Anniversary Turkey (CX-7).

The Make Sense ads (CX-4 and CX-5) show a plate of chicken, vegetables, and pasta, and a man and a woman on a bicycle. The headlines state:

OF ALL THE THINGS WE MAKE, WE MAKE SENSE!

In the first Make Sense Ad (CX-4), smaller print follows this headline which states:

Of all the things we at Stouffers pack into our 34 Lean Cuisine entrees -- the freshest ingredients, the ripest vegetables and the perfect blend of herbs and spices -- there are some things we skimp on: Calories. Fat. Sodium. With less than 300 calories, controlled fat and always less than 1 gram of sodium* per entree, we make good sense taste great.⁶

The footnote in both of the Make Sense ads (CX-4 and CX-5) states in even smaller print lower in the page:

All Lean Cuisine entrees have been reformulated to contain less than 1 gram (1000 mg.) of sodium.

The radio ad, Anniversary Turkey (CX-7), contains explicit language regarding low sodium: "These babies are healthier than ever. Lower in sodium, fat and cholesterol. Read those boxes, people, these numbers are low."

⁶ The text in the other version of the Make Sense ad (CX-5) states:
95% fat free. Never more than a gram of sodium.* Always less than 300 calories. Lean Cuisine makes great food and good sense. And since all our 34 entrees are made with the freshest ingredients. Ripest vegetables. With the perfect blend of herbs and spices. Good sense has never tasted so great.

We agree with the ALJ that a facial analysis of the ads (CX-1 through CX-7) permits us to conclude with confidence that the ads can reasonably be read to convey a low sodium message.⁷ Several elements of the ads communicate this message, including the headlines, the language used, and the footnotes.

One message from the print ads (CX-1 through CX-6) is that Lean Cuisine has large quantities of healthy ingredients and small quantities of undesirable nutrients. IDF 45. The ALJ concluded, and we agree, that the words “We Make Sense” in the headline (CX-4 and CX-5) condition the reader to think that Lean Cuisine is a healthy product.⁸ The text in the body of the Make Sense ads (CX-4 and CX-5), for example, further emphasizes sensible eating with language such as: “the freshest ingredients, the ripest vegetables and the perfect blend of herbs and spices” which are “packed” into the Lean Cuisine entrees. The text in the body of the Lean on Lean Cuisine and 300 Like a Million ads (CX-1 through CX-3) also expresses the sensible eating message with such language as: “Stouffer’s recipes use only the finest ingredients at their natural peak of perfection, combined in exciting and imaginative ways.”

The ads also represent that there are low levels of undesirable nutrients. IDF 46. For example, the Make Sense ad (CX-4) represents that the negative attributes, such as “Calories. Fat. Sodium.” are “skimp[ed] on.” The additional language in the Make Sense ad (CX-4) “With less than 300 calories, controlled fat and always less than 1 gram of sodium* per entree...” also reinforces the low sodium message. These representations communicate that the negative attributes have been reduced to meager quantities. ID at 28. Similarly, the text in another version of the Make Sense ad (CX-5) provides “Never more than a gram of sodium.*”⁹

In addition, we agree with the ALJ that describing sodium as “less than” 1 gram reinforces the impression that sodium is present

⁷ The ALJ concluded that all of the print ads are similar and that the same analysis applied to them. ID at 29 n.4. The ALJ also found that the radio ad, Anniversary Turkey (CX-7), contained a low sodium message. ID at 29.

⁸ Similarly, the headline “Lean. (a smart, intelligent, sensible way to eat.)” in the Lean on Lean Cuisine ad (CX-1) evokes sensible eating.

⁹ The Lean on Lean Cuisine ad (CX-1) represents that “[e]ach of our 30 entrees has less than 300 calories and most have less than a gram* of sodium.” The 300 Like a Million ads (CX-2 and CX-3) claim that “[n]obody else knows how to create such great tasting entrees, all with less than 300 calories and most with less than 1 gram* of sodium.” The Ole O’Lean ad (CX-6) states that “[s]o each has less than 300 calories and less than one gram* of sodium.”

in only a minimal quantity.¹⁰ The language “less than” (CX-1 through CX-4 and CX-6) minimizes the sodium content, and the number “1” appears in context to be a low number. Indeed, as the ALJ noted, in the 300 Like a Million ads (CX-2 and CX-3) the phrase “and most with less than 1 gram* of sodium” was emphasized in bold print. IDF 144.

Accordingly, we find, as the ALJ did, that the net impression of the elements in each of the print ads is that Lean Cuisine products are low in sodium. ID at 29. Moreover, we find that the radio ad, Anniversary Turkey, (CX-7) also communicates that Lean Cuisine’s sodium content is low. The ad (CX-7) expressly states that Lean Cuisine products are “[l]ower in sodium, fat and cholesterol . . . these numbers are low.”

On appeal Stouffer argues that the ALJ ignored elements in the challenged ads (1) which are contrary to a “low” sodium message, and (2) which reasonably convey that the reformulated Lean Cuisine products have a “reduced” or “lower” quantity of sodium, rather than an absolute “low” amount.¹¹ RAB at 17. We have carefully reviewed the ads in their entirety, including the elements referred to by Stouffer. We conclude that the low sodium claim is made.

Stouffer argues that since great taste was a key element in the campaign and the perceptions associated with low sodium are those of poor taste, then the taste component of the ads contradicts the low sodium message. RAB at 21. We do not disagree with respondent that the ads convey a superior taste message. Where we disagree is over respondent’s unsupported contention that such a message necessarily contradicts a low sodium claim or that the existence of a nondeceptive message precludes our finding an implied deceptive claim. RRAB at 1-3. Stouffer relies on the testimony of Irene Block, a partner at Tatham, its advertising agency, who provided conclusory testimony that the perceptions associated with low sodium are those of poor taste and that this would contradict any low sodium message. Tr. 787. Ms. Block offered no empirical support for her conclusion and her testimony. As stated above, it is well settled that an ad can

¹⁰ The ALJ concluded that the preponderance of the evidence shows that the footnotes in the ads did not adequately disclose that one gram equals 1000 milligrams. IDF 195; ID at 29. We agree with this conclusion.

¹¹ Stouffer does not appeal the ALJ’s findings that a low sodium claim was false and misleading. ID at 39. Stouffer also does not challenge the materiality of a low sodium claim. ID at 39.

convey more than one claim and that not all of the claims need be deceptive in order for the ad itself to be deceptive. *Cliffdale*, 103 FTC at 178.¹² Therefore, we see nothing inherently inconsistent between a low sodium message and a superior taste message. For those concerned about sodium consumption, a product with low sodium and great taste would be attractive.

In addition, Stouffer argues that the relative nature of the terminology used in the ads conveys a reduced, rather than low sodium claim. RAB at 23. Even putting aside the fact that much of the terminology used in the ads is absolute, not relative,¹³ we see no basis for concluding that reduced and low sodium claims are mutually exclusive. Indeed, reducing the amount of an element will often result in diminishing that element to a low level.¹⁴

Stouffer also argues that the alleged low sodium claim is neither “conspicuous” nor “self-evident” from the face of the challenged ads¹⁵ and that to find a violation premised on a facial analysis of the ads would unreasonably chill Stouffer’s exercise of its commercial speech rights. Accordingly, Stouffer argues that a methodologically valid consumer survey demonstrating that a substantial number of consumers take away the alleged low sodium claim is constitutionally required under the First Amendment. RAB at 28-29. We hold that there are no First Amendment concerns raised where, as here, facially apparent deceptive implied claims can be found without resort to extrinsic evidence.¹⁶

¹² Further, the Commission has held that an ad can make a deceptive implied claim even if the ad contains contrary elements, as long as those contrary elements do not effectively negate or qualify the implied claim. *See Kraft*, 114 FTC at 124; *Removatron Int’l Corp.*, 111 FTC 206, 294 (1988), *aff’d*, 884 F.2d 1489 (1st Cir. 1989).

¹³ *See, e.g.*, CX-2 through CX-4, CX-6; (“less than 1 gram of sodium”); CX-5 (“never more than a gram of sodium”); CX-7 (“these numbers are low”).

¹⁴ This conclusion is confirmed by the copy test results introduced by complaint counsel which specifically indicate that only a relative minority of consumers stated that the ads conveyed a reduced sodium claim. There was a specific coding category for open-ended questions in the copy test for less/lower/reduced sodium. Between 5 percent and 14 percent of the respondents to the open-ended questions stated that the ad conveyed a less/lower/reduced sodium message. As noted *infra*, 43 percent to 60 percent of respondents responded that the ad conveyed a low sodium message. CX-374z-11.

¹⁵ Stouffer appears to argue, citing *Kraft* and *Thompson*, that the absence of a visual image coupled with a written or verbal message prevents the Commission from finding an implied message in ads. RAB at 25-27. Although the Commission determines ad meaning from the ad taken as a whole, the Commission has never required a visual image before making such a determination. In addition, Stouffer argues that the ALJ erred in finding a low sodium claim on a facial analysis of the radio ad, *Anniversary Turkey* (CX-7). RAB at 30-32. In light of the express nature of the language in this ad and because of its similarity to the other ads, we reject this argument.

¹⁶ *See Zauderer v. Ohio*, 471 U.S. 626, 652-53 (1985); *Kraft*, 970 F.2d at 321.

From a facial analysis of the ads themselves we conclude that they convey a low sodium message. It would be, therefore, unnecessary to resort to extrinsic evidence. Nevertheless, consistent with our practice we have examined the extrinsic evidence offered on this issue by complaint counsel and find that it corroborates our conclusions regarding ad meaning. We turn next to a consideration of the extrinsic evidence.

C. Extrinsic Evidence

Both complaint counsel and Stouffer proffered the results of copy tests conducted for this adjudication. The ALJ found that Stouffer's copy test was unreliable. IDF at 35. Stouffer does not appeal the ALJ's rejection of its copy test evidence. Instead, Stouffer appeals the attribution of probative value to the methodologies employed in complaint counsel's copy test.

Complaint counsel engaged U.S. Research Company to conduct a copy test of three of the print ads¹⁷ to determine if they conveyed the low sodium claim. The questionnaire used was designed by Dr. George Zinkhan, a professor of marketing at the University of Houston. IDF 52. Dr. Zinkhan determined an appropriate universe for the copy test¹⁸ by relying on Stouffer's description of its target audience. IDF 70. The questionnaire contained six questions using both open-ended and closed-ended formats. An open-ended question provides copy test participants with an opportunity to provide answers phrased in their own words.¹⁹ A closed-ended question asks about a specific issue and provides a choice of answers from which the consumer selects.²⁰ IDF 53. Here, the questionnaire used a funneling approach which began with general, open-ended questions and led to more narrow, closed-ended questions on specific issues. IDF 73. The experts for both Stouffer and complaint counsel agree that funneling is the best way to ask questions on a copy test. IDF 74.

¹⁷ The three print ads tested were Lean on Lean Cuisine (CX-1), 300 Like a Million (CX-3), and Make Sense (CX-4). One hundred participants viewed each of the three ads at four shopping malls across the country. IDF 55, 57-64; CX-374b.

¹⁸ That universe consisted of women who were the principal food shoppers for their household, were between the ages of 25 and 54, had purchased a frozen entree in the last three months and were not following a medically supervised diet. IDF 69; CX-374c.

¹⁹ Zinkhan, Tr. at 478.

²⁰ Zinkhan, Tr. at 478.

The open-ended questions²¹ asked consumers what general point or points the ads made. These questions were designed so as not to prompt participants for any particular response, or to give any context in which to answer the questions. The questions permitted participants to give one answer, multiple answers or no answer. IDF 79. No control group or control question was included in this portion of the survey. IDF 77-83; CX-374.

A majority of the copy test participants responded to the open-ended questions in a way that indicated that they received a low sodium message from the ad. Specifically, 43 percent to 60 percent stated that the ad communicated that the Lean Cuisine entrees are low in sodium. IDF 116; CX-374z-11. This response rate is quite high. The Commission has found far lower response rates from open-ended questions to be significant. In Thompson Medical, for example, the Commission found that the ASI Theater test results, in which 17 percent of the Aspercreme ad viewers responded that the product contained aspirin in response to the unaided recall questions, was a sizable percentage of participants who did not perceive or remember the disclosure that Aspercreme does not contain aspirin. 104 FTC at 808. We note that even Dr. Ivan Ross, one of Stouffer's experts, testified that often a researcher must rely on open-ended responses in the magnitude of 8 percent to 10 percent as being meaningful. Tr. 1299.

The closed-ended questions²² designed by Dr. Zinkhan asked if the ad suggested anything about the amount of sodium, calories or sugar in Lean Cuisine entrees. Participants were asked specifically whether the amount of the attribute was high, low, neither high nor low, or whether they did not know or remember. The order of the closed-ended questions was rotated to minimize bias. IDF 99.

²¹ The following three open-ended questions were asked:

1. What point or points does the Lean Cuisine ad make about the product?
 2. What reason or reasons does the ad mention or suggest for you to buy Lean Cuisine?
 3. Is there anything else you can recall about the ad?
- CX-374z-29 - 30.

²² The following closed-ended questions were asked in rotating order:

1. Does the ad say or suggest anything about the amount of calories [or sugar] [or sodium] in Lean Cuisine entrees? If yes,
2. Does the ad say or suggest that Lean Cuisine entrees are:
 - high in calories [or sugar] [or sodium]
 - low in calories [or sugar] [or sodium]
 - neither high nor low in calories [or sugar] [or sodium]
 - don't know, don't remember.

See CX-374z-30.

Dr. Zinkhan incorporated several mechanisms in the design of the closed-ended question section of the copy test to minimize bias. One form of bias is “order bias,” meaning that the sequence in which the questions are asked can affect the results.²³ IDF 98. The Zinkhan copy test minimized “order bias” by rotating the order of the closed-ended questions. IDF 99. Other forms of bias include “yea saying,” which is the tendency to give the answer the participant believes the interviewer is seeking, and “halo effect,” where the participant has a favorable opinion of the product before taking the test and therefore answers questions with that favorable impression in mind. IDF 100-101. In an effort to control for yea saying, inattention, halo effect or other noise factors, Dr. Zinkhan used a control question by repeating the questions relating to sodium, and substituting the word sugar for the word sodium.²⁴ IDF 104, 106. In using a control question, the percentage of participants who responded affirmatively to the control question is deducted from the percentage of participants who responded affirmatively to the tested claim. IDF 106. In the Zinkhan copy test, after deducting the percentage of respondents who answered yes to the control question, 78 percent to 83 percent of the respondents found a low sodium claim from the ad. IDF 119. These results are unusually high and consistent with the responses to the open-ended questions.

We find that the Zinkhan copy test provides reliable and probative evidence and is methodologically sound. The results appear to be strikingly high for both the open and closed-ended questions and confirm the conclusion that we reached based on our facial examination of the ads. Indeed, Stouffer’s experts have previously relied on copy test results with much lower response rates. *See supra* at 11. Further, the Commission has likewise relied on copy test results with lower response rates. *See Thompson Medical*, 104 FTC at 808.

Stouffer contends that the methodology employed in the Zinkhan copy test is so fundamentally flawed that the ALJ erred in relying upon the test results. RAB at 33. Specifically, Stouffer argues that some number of survey respondents may have come to the test with the preexisting belief that Lean Cuisine frozen entrees are low in sodium. According to Stouffer, these “biased” participants may have

²³ The first question sets up the survey, and the results of the last question may be affected by fatigue or boredom. Zinkhan, Tr. 553-554.

²⁴ An appropriate control question asks about a product attribute that is relevant to and reasonably associated with the product, but is not too closely linked to a claim in the ad. IDF 105.

responded to the various survey questions on the basis of their pre-existing opinions, and without regard to the actual content of the advertisements. Specifically, Stouffer made this argument with regard to open-ended questions (e.g., "What point or points does the Lean Cuisine ad make about the product?"). RAB at 33, RRAB at 18. Stouffer contends that the copy test could have employed a control group exposed to a control ad in order to quantify and eliminate the effects of participants' preexisting bias.²⁵ RAB at 36. Stouffer also argues that the use of the control question in the closed-ended questions was inadequate. RAB at 41. Since there were no adequate controls, Stouffer concludes, the Zinkhan copy test may not be given any weight whatsoever. To support its arguments, Stouffer relies on Thompson Medical and Kraft.

Perfection is not the prevailing standard for determining whether a copy test may be given any weight. The appropriate standard is whether the evidence is reliable and probative. See *Bristol-Myers*, 85 FTC at 744. The Kraft decision instructs that, in all cases involving contested issues of ad interpretation, "the Commission will carefully consider any extrinsic evidence that is introduced, taking into account the quality and reliability of the evidence." 114 FTC at 122. "The quality of any consumer research offered as evidence will be evaluated in the totality of the circumstances . . ." *Id.* at 127 n.13. A study may be flawed, that is, harbor one or more sources of potential error or bias, and still be probative.²⁶ The nature and seriousness of any deficiencies will affect the weight that the Commission assigns to that piece of evidence. On the other hand, if the methodology of a consumer survey is fundamentally unsound, then that survey cannot assist the Commission in deciding whether an advertisement communicates a particular claim to consumers. *Thompson Medical*, 104 FTC at 794-95; *Sterling Drug*, 102 FTC 395, 754 (1983), *aff'd*, 741 F.2d 1146 (9th Cir. 1984). The Commission's practice is, in this

²⁵ A control group is a group of participants who see a stimulus different from the challenged ad -- i.e., a "cleansed" Lean Cuisine ad that does not convey the hypothesized low sodium claim. The control group is then asked the same series of questions as the test group. The control group's low sodium answers are subtracted from the low sodium results obtained from viewers of the challenged ad to control for the purported preexisting belief.

²⁶ See *Kraft*, 114 FTC at 126-27 n.13 ("Although we agree with respondent that the design of the MOR survey questionnaire is not without flaws, and that alternative or additional means could have been used to better minimize the potential for yea-saying bias inherent in using a closed-ended question format, on balance, we find the MOR survey results to be of some probative value."); *Thompson Medical*, 104 FTC at 796-97 (survey that has "several potential sources of bias" nonetheless deemed to be "reasonably reliable extrinsic evidence").

regard, consistent with that of most federal courts when evaluating surveys purporting to assess the meaning that consumers take from ads.²⁷

As discussed below, we find that the survey offered by complaint counsel was reliable and probative. Accordingly, it was proper for the ALJ to rely upon this extrinsic evidence, together with the facial analysis, in concluding that a low sodium claim is present in the Stouffer Lean Cuisine ads.

The ALJ found that there is nothing in Commission precedent mandating a control ad for open-ended questions, that Stouffer's reliance on Thompson and Kraft is misplaced, and that there was no credible evidence that bias affected the responses elicited by those questions. ID at 33.

We agree with the ALJ. There is nothing in Commission precedent that requires the use of a control ad for open-ended questions. The Zinkhan open-ended questions properly attempted to elicit unprompted responses in a consumer's own words describing what he or she took away from the ad.²⁸ In addition, the Zinkhan open-ended questions properly continued to probe for more responses. We therefore reject Stouffer's argument that the responses to the open-ended questions are fatally flawed because of the absence of a control ad.

We also agree with the ALJ with regard to Stouffer's argument concerning the requirement of a control ad in closed-ended questions. The Commission has long recognized that a control of some kind is necessary for closed-ended questions, and has noted, for example, that there is a potential for yea-saying inherent in the closed-ended question format. *Kraft*, 114 FTC at 126 n.13; see *Thompson Medical*, 104 FTC at 804-08. The Commission, however, has never dictated the type of control necessary in a copy test. There is nothing in Commission precedent that requires the use of a control ad for closed-

²⁷ See, e.g., McCarthy, *Trademarks and Unfair Competition*, Section 32.50 (3d. ed. 1992) ("In an extreme case, an improperly conducted survey with slanted questions or serious methodological defects may be excludable as 'irrelevant' of the true state of mind of potential purchasers. But the majority rule is that while technical deficiencies can reduce a survey's weight, they will not prevent the survey from being admitted into evidence. As one court correctly observed, 'No survey is perfect' and flaws in questions and methodology should only affect the weight accorded survey results.") (footnotes omitted) (quoting *Selchow & Righter Co. v. Decipher, Inc.*, 598 F. Supp. 1489 (E.D. Va. 1984).

²⁸ The claim at issue, low sodium, is both a simple claim and a primary one, making it particularly well suited to the open-ended format. On the other hand, open-ended questions are likely to understate secondary implied claims, particularly where, as in *Kraft*, those claims are also rather complex by virtue of being both compound and comparative.

ended questions. Dr. Zinkhan's closed-ended questions were designed in a way that minimized bias through the use of a control question and by rotating the sequence of the questions. We find that the use of sugar in a control question was appropriate.²⁹

Stouffer argues that the failure to control for preexisting beliefs is necessarily such an extreme error that a copy test that is flawed in this respect is entitled to no weight. However, the expert testimony cited by Stouffer is unconvincing, and the case law is to the contrary. Stouffer's two expert witnesses, Edward T. Popper and Ivan Ross, did opine that a control ad is needed in order to account for and eliminate the effects of preexisting beliefs. Yet, the basis for this conclusion is unclear. Neither witness cited evidence that this sort of bias is common or significant in advertising copy tests. Both admitted that they had previously designed copy tests for litigation purposes that did not include a control ad group. Both further acknowledged that they had given sworn testimony regarding ad claims based upon the results of tests that did not employ a control group. IDF 83-86. Finally, there is no record evidence that, among experts in advertising or consumer research, the use of a control group is considered a *sine qua non* of a valid copy test. In this regard, we note that complaint counsel's expert witnesses testified that the Zinkhan copy test is valid and reliable evidence of what claims the Stouffer ads communicated, without the need for a control group. IDF 81.

Copy tests are frequently evaluated by federal courts in the context of Lanham Act cases and other litigation. Stouffer has cited no case concluding that a study will not be deemed reasonably reliable unless it controls for preexisting bias. In fact, there are numerous cases relying on copy tests without any discussion of the use of a control group or the need to factor out pre-existing beliefs.³⁰ Similarly, the Commission has often relied on copy tests that did not employ a control group. *E.g.*, *Thompson Medical*, 104 FTC at 796-97; *American Home Products Corp.*, 98 FTC 136, 394 (1981), *enforced*

²⁹ Stouffer also challenges the use of a control question as insufficient to correct for those who base their responses on pre-existing belief. RAB at 41, RRAB at 5. Complaint counsel has not argued that the use of a control question is appropriate where it is necessary to control for pre-existing beliefs. Further, as noted *infra*, the record fails to establish that pre-existing beliefs affected the Zinkhan copy test results.

³⁰ *E.g.*, *McNeilab, Inc. v. American Home Products Corp.*, 675 F. Supp. 819, 825 (S.D.N.Y. 1987), *aff'd*, 848 F.2d 34 (2d Cir. 1988); *Stiffel Co. v. Westwood Lighting Group*, 658 F. Supp. 1103, 1112-14 (D.N.J. 1987); *American Home Products Corp. v. Johnson & Johnson*, 654 F. Supp. 568, 588-89 (S.D.N.Y. 1987).

as modified, 695 F.2d 681 (3d Cir. 1982); *Bristol-Myers Co.*, 85 FTC at 744 (1975).

The only Commission decision that directly addresses the issue of pre-existing beliefs is *Kraft*, and it is on this case that Stouffer principally relies. RAB at 42-43. The record in *Kraft* included reason to be concerned about the possible influence of pre-existing bias upon copy tests. The Commission evaluated two series of ads for Kraft Singles processed cheese. The "Skimp" ads were the first to be disseminated, and contained the explicit (but deceptive) representation that Kraft Singles contain more calcium than do most imitation cheese slices (a superiority claim). The "Class Picture/5 ounce" series of ads was introduced 15 months later, and "contained no explicit comparison between Kraft Singles and non-dairy slices." 114 FTC at 130. As evidence that the "Class Picture/5 ounce" ads contained an implied superiority claim, complaint counsel offered a copy test that did not control for consumers' preexisting beliefs regarding the relative calcium content of Kraft Singles. The Commission concluded that this test was not reasonably reliable, explaining that "[t]he apparent 45 percent response rate suggesting that an imitation superiority message was taken by survey participants may well be attributable to consumers' prior exposure to the 'Skimp' ads, which did contain an explicit comparison to imitation slices, and which were disseminated extensively prior to the 'Class Picture/5 ounce' ads." *Kraft*, 114 FTC at 131 n.19.

This passage must be read in light of the Commission's other pronouncements on copy testing, and in particular the admonition to evaluate the "totality of the circumstances" bearing on the reliability of any consumer research. The case does not hold that consumer surveys must invariably control for preexisting beliefs.³¹ Instead, *Kraft* teaches that the failure of a consumer survey to control for preexisting beliefs about the alleged advertising claim introduces a potential for bias, and indeed that this may be a critical defect.

In any event, there must be evidence of preexisting bias to find that failure to control for such bias is a critical defect. In *Kraft*, there was evidence that (i) a large portion of consumers had a preexisting belief with regard to the superiority claim, and (ii) this preexisting belief had likely biased the consumer survey results relied upon by

³¹ Indeed, it is established that respondents may be held liable for dissemination of ads that capitalize on preexisting consumer beliefs. *Simeon Management Corp. v. FTC*, 579 F.2d 1137, 1146 (9th Cir. 1978).

complaint counsel. In the present case, the preponderance of the evidence indicates that, to the extent that consumers have any pre-existing beliefs about the sodium content of Lean Cuisine entrees, they likely believe that such products are high in sodium, not low. IDF 87-89. Further, Stouffer cites no evidence that preexisting beliefs affected the survey results attained by Dr. Zinkhan; respondent's objections to the study are wholly theoretical.

On the present record, it appears that the Zinkhan test was sufficiently reliable to constitute probative evidence on the issue of ad meaning. We therefore find that reliable and probative extrinsic evidence corroborates our conclusion, based on our facial analysis of the ads, that the Stouffer Lean Cuisine ads communicate a low sodium message.

III. ORDER COVERAGE

It is well settled that the Commission can issue orders containing fencing-in requirements. *See, e.g., FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952). This discretion is limited by two constraints. First, the order must be sufficiently clear and precise to be understood. *See, e.g., FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 394-95 (1965). Second, the order must bear a reasonable relationship to the unlawful practices. *See, e.g., Jacob Siegel Co. v. FTC*, 327 U.S. 608, 612-13 (1946).

Complaint counsel argue in their cross appeal that the ALJ erred in narrowing the notice order's claim coverage because he improperly weighed and evaluated the evidence of the seriousness and deliberateness of the violations and failed to consider the transferability of the type of claims made. CAB at 73-74.

The three criteria used by the Commission to determine whether order coverage bears a reasonable relationship to a particular violation of Section 5 include: (1) the seriousness and deliberateness of the violation; (2) the ease with which the violative claim may be transferred to other products; and (3) whether the respondent has a history of prior violations.³² All of the three elements need not be present to warrant fencing-in relief. *See, e.g., Kraft*, 114 FTC at 142 (lack of history of prior violations did not make fencing-in improper).

In considering these three elements, the Commission looks both to the presence or absence of a particular element and to the circum-

³² *See Kraft*, 114 FTC at 139, 970 F.2d 311 at 326; *Thompson Medical*, 104 FTC at 833.

stances as a whole.³³ Consideration of the three elements leads us to conclude that two of them -- (1) the deliberateness and seriousness of the violations and (2) the transferability of the unlawful practices to other products -- combined with the overall circumstances justify extending the order beyond the products for which the challenged claims were made.³⁴

The ALJ articulated the proper standard for deciding whether fencing-in relief was appropriate, listing the criteria identified above. The ALJ determined that Stouffer knew that its low sodium claim was deceptive. He appears to have found more compelling, however, his assessment of the campaign as one of not long duration that cost far less than the amounts spent on other campaigns where the Commission has found serious violations, such as those in Kraft and Bristol-Myers.³⁵ Finding, in addition, that "Stouffer only makes frozen food products and markets one other line . . . for which nutritional claims are not made . . ." (ID at 39) and that "[t]ransferability of the violation by itself is not sufficient to justify a broad fencing-in order" (*Id.*), the ALJ concluded, "[t]his was a miscalculation rather than a blatant disregard for law. Therefore, a broad order need not issue in this case." *Id.* We disagree.

The seriousness of the claim stems from the overall health ramifications of any sodium claim and, particularly, of a claim that a product is low in sodium when it is in actuality relatively high in that ingredient. The seriousness of the violations here is enhanced by the fact that consumers cannot readily judge for themselves the truth or falsity of a low sodium claim. *See Kraft*, 114 FTC at 140. The seriousness of the violation is further increased by the health-related nature of the low sodium claim. There is medical evidence supporting a link between sodium consumption and high blood pressure, for some people, on which basis such organizations as the National Academy of Sciences, the American Heart Association, and the Surgeon General of the United States recommend that consumers limit their daily sodium intake. *See IDF* 171.

The cost and extensiveness of the ad campaign are not determinative, but they too may be relevant in assessing the seriousness and

³³ *Sears, Roebuck & Co.*, 95 FTC 406 (1980), *aff'd*, 676 F.2d 385, 392 (9th Cir. 1982).

³⁴ Stouffer does not have a history of prior violations.

³⁵ *Bristol-Myers Co.*, 102 FTC 21 (1983), *aff'd*, 738 F.2d 554 (2d Cir. 1984), *cert. denied*, 469 U.S. 1189 (1985).

deliberateness of a violation. The Stouffer ad campaign that the Commission finds to be deceptive ran from January 1990 through August 1991. This campaign cost three million dollars and reached millions of consumers nationwide. IDF 33. The print ads at issue, (CX-1 through CX-6) appeared in eighteen different magazines from January 1990 through the first four months of 1991, including such nationally distributed periodicals as *People*, *Newsweek*, *Good Housekeeping*, and *Ladies Home Journal*. IDF 37, 39, 42. The radio advertisement, *Anniversary Turkey* (CX-7), was played on over 230 radio stations from June through August 1991. IDF 44. Such a distribution scheme would have reached approximately 70 percent of the population of the United States. Block, Tr. 797-798. While not necessarily expensive when compared to campaigns that included television advertising, the campaign was far-reaching. Both the cost and the length of an ad campaign are measures of how widely the ads were disseminated, but they are not the only such measures. Here, the publication of print ads in magazines of nationwide distribution and the broad distribution of the radio ad brought the objectionable ads to large numbers of consumers.³⁶ We believe that the ads' exposure contributed significantly to the seriousness of the violations before us. The evidence as to the success of the campaign in reaching consumers, therefore, weighs in favor of a broader order.

As the ALJ found, the record also shows that Stouffer was aware of the potential risks and benefits of focusing on sodium in its ads. As the campaign began in 1990, a Tatham memorandum reporting on a telephone conference with Richard B. Annett, Stouffer's Group Marketing Manager for Lean Cuisine, noted that Stouffer "informed [Tatham] that 'lower' sodium or 'controlled' sodium were acceptable terms but 'low sodium' was not possible." CX-44a. It appears, therefore, that Stouffer was well aware that a low sodium claim was inappropriate for Lean Cuisine (IDF 169-170) and that the characterization of sodium was a delicate matter.

Despite the delicate nature of the sodium message, however, the message projected consistently throughout the ad campaign stressed what Mr. Annett described to Tatham in a memorandum of January 26, 1990, as the "buzz words" used by competitors, such as "health" and ingredients with negative connotations like sodium, fat and cholesterol. CX-26. Mr. Annett instructed Tatham:

³⁶ See *Thompson Medical*, 104 FTC at 833-34 (analyzing dissemination of certain claims that ran only in print ads in finding that broad fencing-in was warranted).

NOTE THE STRONG 'BUZZ WORDS' [our competitor] USES IN THEIR PRINT:

HELPS YOU LIMIT CHOLESTEROL, SODIUM, AND FAT.
NO MORE THAN 10G OF FAT.
FOR SODIUM WATCHERS.

THESE ARE THE TYPES OF HOT BUTTONS WE MUST USE. THEY [competitors] HAVE TAKEN NEGATIVES AND TURNED THEM INTO POSITIVES.

Id. Mr. Annett's memorandum also critiques one of Tatham's suggested ads for the Lean Cuisine campaign, saying:

IT DOESN'T SCREAM HEALTH ENOUGH. . . . THE USE OF 'LEAN' IS EXCELLENT, *I.E.*, LEAN ON CALORIES, FAT, AND CHOLESTEROL, BUT SODIUM SHOULD ALSO BE INCLUDED.

Id. Mr. Annett's directions to Tatham provide context for the implied low sodium claims we have found deceptive and, in doing so, they enhance the seriousness of the claims by reinforcing their relationship to good health.

For these reasons, we find Stouffer knew or should have known that the ads were likely, through their words and images, to communicate a false low sodium claim. ID at 36, 39. We find that under these circumstances, Stouffer's action was deliberate. *See Thompson Medical*, 104 FTC at 835.

We also find that the risk of transferability of the violation justifies broader order coverage. False nutrient content claims regarding the amount of sodium in frozen food appear to be readily transferable to claims for other nutrients and ingredients. In *Kraft*, 114 FTC at 141, the Commission noted that "[T]he violations in this case are readily transferable to other Kraft cheese products," citing *Thompson Medical*, 104 FTC at 837, and *American Home Products*, 98 FTC 136, (1981), *aff'd*, 695 F.2d 681 (3rd Cir. 1982), where the Commission noted that "The effort to misrepresent the nature of ...[an] ingredient is a technique that could easily be applied to advertising of OTC drug products other than [this one]."³⁷ The same could be said in the present matter. Stouffer's false sodium claims could

³⁷ *Thompson Medical*, 104 FTC at 837; *American Home Products Corp.*, 98 FTC at 405.

easily be transferred to any nutrient or ingredient in its frozen food products.

Although Stouffer has no history of prior violations before the Commission, that factor alone is insufficient to overcome the factors discussed above. On balance, therefore, we believe that broader order coverage is warranted and that the order should apply to all nutrients and ingredients in Stouffer's frozen food products.

CONCURRING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

The Commission today issues a final order and opinion holding that Stouffer Foods Corporation ("Stouffer") violated Sections 5 and 12 of the Federal Trade Commission Act, 15 U.S.C. 45 and 52 ("FTC Act"), by making false and deceptive advertising claims concerning the sodium content of its Lean Cuisine frozen entrees. I concur in the order and, as far as it goes, in the opinion.

As the majority properly states, a decision to impose fencing-in relief ordinarily rests on consideration of three criteria, although not all three need be present to warrant fencing-in relief. Slip op. at 28. These criteria are: (1) the seriousness and deliberateness of the violation; (2) the transferability of the unlawful conduct to other products; and (3) any history of past violations. *Thompson Medical Co.*, 104 FTC 648, 833 and n.78 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987); *see also*, *Kraft, Inc.*, 114 FTC 40 (1991), *aff'd*, 970 F.2d 311 (7th Cir. 1992), *cert. denied*, 113 S.Ct. 1254 (1993) (absence of history of past violations did not make fencing-in improper). The majority has concluded, and I agree, that Stouffer's violations of the FTC Act are readily transferable and that they are serious and deliberate. Based on these findings, the Commission imposes broad fencing-in relief.

I write separately because I believe that it is necessary to address an issue not addressed by my colleagues before finding that the violation was deliberate and, therefore, before imposing fencing-in relief. In particular, I think it necessary to weigh the evidence surrounding Stouffer's complaint to an industry self-regulatory organization about advertisements similar to those of Stouffer that were run by one of its competitors and the organization's response to that complaint. I also rely on additional documentary evidence

reflecting Stouffer's intentions regarding sodium claims in its advertising campaign.¹

The facts cited in the majority opinion (*Id.* at 30-33) provide tenuous support for the conclusion that Stouffer's violations were deliberate. I need not decide, however, whether the evidence cited by the majority is sufficient, because additional facts in the record persuade me that Stouffer's violations were deliberate.

The majority asserts, with little explanation, that Stouffer understood the "delicate nature of the sodium message" and that, despite this delicacy, the company strongly urged Tatham/RSCG ("Tatham"), its advertising agency, to "note the strong buzz words" used by competitors, make liberal use of "hot buttons" like "HELPS YOU LIMIT . . . SODIUM" and "FOR SODIUM WATCHERS" and make sure that advertisements for Lean Cuisine "SCREAM HEALTH" by including references to the products' being "LEAN" on sodium. Slip op. at 32-33 and CX-26. A mere direction to use words and phrases likely to capture a consumer's attention, even in a sensitive context, however, does not necessarily warrant a conclusion that any misleading impressions those words and phrases might convey are deliberate. Identifying catchy language to attract the attention of consumers is fundamental to the development of an effective advertisement.

The record contains additional facts not discussed by the majority that support the Commission's finding that Stouffer's violations were deliberate. It is important to address these facts both for the purpose of supporting the Commission's decision to impose fencing-in relief and because Stouffer argues that these same facts show a lack of intention rather than a deliberate effort to mislead. Reply and Answering Br. at 5-6.²

¹ I also would reverse the conclusion of the Administrative Law Judge that "the failure to disclose adequately the sodium content in milligrams" was not "unfair or deceptive" and that "while respondent failed to disclose adequately that 1 gram equals 1000 milligrams, that fact is immaterial" (ID at 38-39), that is, important to consumers in making their decisions to purchase Stouffer's product.

Judge Timony found that Stouffer's consumer research in 1988 showed the importance of information about sodium to consumers, showing them to be "information hungry" and interested in knowing "the precise cholesterol, fat, and sodium levels." IDF 175. He also found that Stouffer knew that "a frozen entree containing 600 or more milligrams of sodium could turn consumers off." *Id.* and exhibits cited therein. In my view, this evidence demonstrates that although some consumers might not know at what level sodium consumption might be harmful, they consider information about sodium content material to their purchasing decisions and some were likely to consider levels of over 600 milligrams unhealthy.

² For example, Stouffer argues that "[i]n a transparent distortion of the record, complaint counsel omit the fact that the NAD expressly responded to Stouffer by advising that there was no basis to believe that the use of grams rather than milligrams of sodium was misleading." *Id.*

Stouffer's directions to its advertising agency did not occur in a vacuum. They followed the rejection, in April 1987, by the National Advertising Division ("NAD")³ of a complaint drafted by Stouffer's in-house counsel and submitted by Stouffer's Marketing Manager, Richard Annett, about a competitor's similar claim. Stouffer argued to NAD that a competitor's advertisements for a frozen entree were "blatantly misleading to the consuming public" because (like Stouffer's later Lean Cuisine advertisements) the competitor's advertisements stated the product's sodium content in grams rather than milligrams. Stouffer further complained that the rival firm had "intentionally misrepresented the sodium content in this product." CX-24.

NAD declined to act on Stouffer's complaint, finding "no basis to believe" that the claim "is misleading to consumers." RX-12A. NAD asked Stouffer to submit any consumer research that would support the complaint. IDF 22. Stouffer denied having any such empirical support for its complaint, and it produced none in response to NAD's invitation. It seems reasonable to assume, however, that Stouffer and its counsel would not have filed such a strongly worded complaint with NAD as a frivolous exercise and that with or without empirical basis, Stouffer must have been seriously concerned about the potential effects of the challenged claim.

Despite the concern, Mr. Annett subsequently sent the memorandum to Tatham, instructing it to emphasize the healthful aspects of Stouffer's product, particularly its "lean" sodium content. CX-26. Stouffer appears to have decided, in light of NAD's rejection of its complaint, to meet the competition and to use and capitalize on the phrase "less than 1 gram of sodium" that the company previously had argued was misleading. The advertisements at issue here were created after the memorandum was conveyed to Tatham and the instructions in the memorandum had been reinforced by discussions between Stouffer and Tatham during the development of the campaign. *See, e.g.*, CX-40.⁴

³ The National Advertising Division of the Council of Better Business Bureaus examines and issues decisions on complaints made to it by industry members against their competitors. NAD often is successful in getting advertisers to withdraw or modify claims that it has found unsubstantiated or otherwise misleading.

⁴ The record shows that in the new Lean Cuisine advertisements, Stouffer intended the "less than 1 gram of sodium" claim, which it had argued to NAD was misleading, to have a "disclaimer" (CX-40) with respect to the health-related sodium claim made in the body of the advertisements. The disclaimer presumably was intended to limit the message conveyed by the rest of the advertisement, which the Commission has found was a message of "low sodium." Tatham's conference report on one of its discussions of the disclaimer with Mr. Annett records an agreement that the disclaimer ("All Lean

Stouffer's argument on appeal suggests that it relied on NAD's decision that the "less than 1 gram of sodium" claim was not deceptive.⁵ Not only is reliance on NAD's response misplaced, but the fact that Stouffer had considered the competitor's claim sufficiently misleading to challenge it with NAD tends to show that Stouffer was on notice that, regardless of NAD's decision, a "significant minority of reasonable consumers" (*Cliffdale*, 103 FTC at 164-66) might well take a misleading "low sodium" claim from the competitor's advertisement and, more importantly, from its own advertisements for Lean Cuisine.⁶

On the basis of the evidence discussed in the Commission's opinion and this separate statement, I find that Stouffer's violation was deliberate and, therefore, that the fencing-in relief is appropriate.

FINAL ORDER

This matter has been heard by the Commission upon the appeals of respondent Stouffer Foods Corporation and complaint counsel and upon briefs and oral argument in support of and in opposition to the appeals. For the reasons stated in the accompanying Opinion, the Commission has determined to affirm the Initial Decision of the Administrative Law Judge, except as otherwise noted, and enter the following order. Accordingly,

I.

It is ordered, That respondent Stouffer Foods Corporation, a corporation, its successors and assigns, and its officers, representatives, agents, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the adver-

Cuisine entrees have been reformulated to contain less than 1 gram (1,000 mg.) of sodium") would be "place[d] in mouse type." *Id.* The deliberate decision to put the explanatory material in "mouse type" suggests an intention to undermine the disclaimer's effectiveness and to leave virtually intact the overall message conveyed by the advertisement of low sodium content. This intention is further strengthened by the language in the report stating the additional agreement to "[p]lace in bold type 'Less than 1 gram of sodium.'" *Id.*

⁵ Although the Commission often agrees with the decisions of industry self-regulatory organizations such as NAD regarding whether particular claims are misleading, the decisions of such organizations are not controlling in cases before the Commission.

⁶ In both *Kraft*, 114 FTC at 140, and *Thompson*, 104 FTC at 834-35, the Commission relied on the fact that the companies had received warning from others regarding the potential that the advertisement at issue might not be true. Here, the warning originated within the respondent company and should be given at least as much weight by the Commission, if not more.

tising, labeling, offering for sale, sale, or distribution of any frozen food product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting in any manner, directly or by implication, through numerical or descriptive terms or units of measurement, or by any other means, the existence or amount of sodium or salt or any other nutrient or ingredient in any such product. Provided, however, that if any representation covered by this part either directly or by implication conveys any nutrient content claim defined (for purposes of labeling) by any regulation promulgated by the United States Food and Drug Administration or, if applicable, by the United States Department of Agriculture, compliance with this part shall be governed by the qualifying amount for such term as set forth in that regulation. Provided, further, however, that nothing in this part shall prohibit any representation as to the amount of sodium or salt or any other nutrient or ingredient in any frozen food product if such representation is specifically permitted in labeling, for the serving size advertised or promoted for such product, by any regulation promulgated by the United States Food and Drug Administration or, if applicable, by the United States Department of Agriculture.

II.

It is further ordered, That respondent Stouffer Foods Corporation, its successors and assigns shall, for three (3) years after the date of the last dissemination of the representation to which they pertain, maintain and upon request make available to the Federal Trade Commission for inspection and copying all advertisements containing any representation covered by Part I of this order.

III.

It is further ordered, That respondent Stouffer Foods Corporation shall distribute a copy of this order to its operating divisions, to each of its managerial employees, and to each of its officers, agents, representatives, or employees engaged in the preparation or placement of advertising or other material covered by this order and shall secure from each such person a signed statement acknowledging receipt of this order.

IV.

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

V.

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

By the Commission.¹

¹ Prior to leaving the Commission, former Commissioner Owen and former Commissioner Yao each registered a vote in the affirmative for the Final Order and the Opinion of the Commission in this matter.

Summary Decision

IN THE MATTER OF

TRANS UNION CORPORATION

FINAL ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF
THE FAIR CREDIT REPORTING ACT

Docket 9255. Complaint, Dec. 15, 1992--Final Order, Sept. 28, 1994*

This final order prohibits the Illinois-based credit bureau from distributing or selling target marketing lists based on consumer credit data, except under specific circumstances permitted by federal law. In addition, the final order requires the respondent to deliver a copy of this order to all present and future management officials having responsibilities with respect to the subject matter of this order.

Appearances

For the Commission: *Arthur B. Levin, Stephanie Flanigan and Donald E. D'Entremont.*

For the respondent: *Roger L. Longtin, Stephen L. Agin, Sharon R. Barner and Tracy E. Donner, Keck, Mahin & Cate, Chicago, IL.*

SUMMARY DECISION

BY LEWIS F. PARKER, ADMINISTRATIVE LAW JUDGE
SEPTEMBER 20, 1993

I. HISTORY OF THE PROCEEDING

On December 15, 1992, the Commission issued a complaint charging respondent Trans Union Corporation ("Trans Union") with violating the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. 1681 *et seq.*

The complaint alleges that Trans Union is a consumer reporting agency as defined in Section 603(f) of the FCRA, that it regularly provides consumer reports in the form of prescreened lists to credit grantors, that it fails to require or monitor that credit grantors that receive such lists make a firm offer of credit to each person on the list (para. 3), and that it has therefore violated Sections 604 and 607 of the FCRA by furnishing consumer reports to persons it did not have

* Complaint previously published at 116 FTC 1334 (1993).

reason to believe intended to use the reports for a Permissible Purpose under Section 604 (para. 4).

The complaint also alleges that Trans Union illegally furnishes consumer reports in the form of target marketing lists to persons who do not intend to make a firm offer of credit to all those consumers on the list and who intend to use the information for purposes not authorized by Section 604 of the Act (para. 5).

On June 1, 1993, the portion of this matter relating to Trans Union's prescreening service was certified to the Secretary for withdrawal from adjudication so that the Commission could consider a consent agreement settling the charges in paragraphs three and four of the complaint. The Secretary did so on June 3, 1993.

Complaint counsel have now moved for summary decision as to that portion of the complaint challenging Trans Union's sale of its target marketing lists, and they have filed documents and a memorandum in support of their motion.¹ Respondent has filed a response, together with supporting affidavits, in opposition to this motion.

After analyzing the documents filed by the parties, I find that no genuine issue exists with respect to the findings of fact adopted in this decision. Rules of Practice, Section 3.24.

II. FINDINGS OF FACT

A. *Trans Union's Business*

1. Trans Union is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 555 West Adams Street, Chicago, Illinois (Cplt paragraph 1; Ans paragraph 1).²

2. Trans Union is, and has been, regularly engaged in the practice of procuring and assembling information on consumers for the purpose of furnishing, for monetary fees, consumer reports to subscribers

¹ Although the parties have filed *in camera* versions of their memoranda, I have ignored this designation since the parties did not seek, and I did not grant, *in camera* status to any documents. Rules of Practice, Section 3.45(b). See Order Adopting Respondent's Protective Order dated April 6, 1993.

² Abbreviations used in this decision are:

Cplt:	Complaint
Ans:	Answer
Tr.:	Transcript of testimony given in investigational hearings
HX:	Investigational Hearing Exhibit
Aff.:	Respondent's Affidavits
F.:	Finding

and consumers. Trans Union furnishes these consumer reports through the means and facilities of interstate commerce. Thus, Trans Union is a consumer reporting agency, as defined in Section 603(f) of the FCRA (Cplt paragraph 2; Ans paragraph 2; Botruff Aff., paragraph 4).

3. TransMark is a division of Trans Union and is engaged in the business of target marketing, a field which it entered in 1987 (Frank Tr. 11, 15).

4. In connection with its target marketing business, TransMark rents computer tapes for one-time use which contain computerized data on consumers to users who market goods or services through direct mail or telemarketing. The tapes contain coded information on individual consumers which, when translated by a computer, reveal their names and addresses. TransMark's customers are not permitted to use the computer tapes and the information contained thereon for any other purpose (Frank Aff., paragraphs 6 & 7).

5. The average computer tape leased by TransMark contains the names and addresses of 30,000 customers and TransMark will not lease a computer tape unless there are a minimum of 5,000 consumers who meet the criteria selected by its customers (Frank Aff., paragraphs 15, 17).

6. TransMark's target marketing lists do not involve, as does credit reporting, consumer-initiated transactions; rather, these lists are sold to users who do not intend to make a firm offer of credit to all consumers on the lists (Frank Tr. 15; Trans Union's Response to Complaint Counsel's First Request For Admissions ("First Request") No. 8).

B. Trans Union's Credit Reporting Database

7. Trans Union creates and maintains a consumer reporting database named CRONUS for use in its credit reporting business. CRONUS contains numerous individual files on consumers and the information it contains is reported by credit grantors, collection agencies, governmental agencies and utilities, or is obtained from public records (Botruff Aff., paragraph 6).

8. Credit grantors generally provide credit information on individual consumers to Trans Union in the form of accounts receivable tapes which usually contain the name, address, zip code, social secu-

rity number, account number and account activity for each consumer account (Botruff Aff., paragraph 7).

9. CRONUS compiles identifying information on consumers from multiple files, assigns the information to a new or existing file on the consumer, and adds credit-related information to the file. The account number and credit information appended to this number is called either a "tradeline" or a public record set (Botruff Aff., paragraphs 8, 9, 10).

10. A tradeline is identified in CRONUS by the name of the credit grantor and the account number and has appended to it credit information relating to a particular account; it reveals credit limits, payment patterns, payment history, and the present status of the account, *i.e.*, the balance owing and the amount past due (Botruff Aff., paragraph 11).

11. Trans Union's credit report customers access individual consumer files by providing the name, zip code and address of an individual consumer. Trans Union then transmits the consumer's complete credit report to its customer (Botruff Aff., paragraph 13).

12. A credit report consists of sections containing demographic information (name, address, social security number, etc.), tradeline information, public record information, and inquiries (Botruff Aff., paragraph 14, Ex. A).

13. The tradeline section of the credit report is divided into three parts. The first part includes the following: (a) the credit grantor's name and code; (b) the date the account was opened; (c) the account number; (d) the terms of sale -- number of payments, payment frequency and dollar amount due each payment; (e) ECOA code; and (f) collateral (Botruff Aff., paragraph 16).

14. The second part of the tradeline section of a credit report includes the following information for each tradeline: (a) the high credit amount (highest amount ever owed) and the date it was verified; (b) the maximum amount of credit approved by the creditor; (c) the date the account was closed; (d) the present status of the account, *i.e.*, the balance owing and amount past due; (e) the maximum delinquency -- date, amount and manner of payment; (f) remarks; and (g) type of loan (Botruff Aff., paragraph 17).

15. The third portion of the tradeline section of a credit report includes the following information for each tradeline: (a) the payment pattern, *i.e.*, 1-12 months or 13-24 months; (b) the historical status in number of months, *i.e.*, either 30-59, 60-89 or 90+; and (c) the type

of account and manner of payment, *e.g.*, current, 30 days past due, bankrupt, etc. (Botruff Aff., paragraph 18).

16. The public record section of a credit report includes the following information for each public record: (a) the location of the court where the public record was recorded; (b) the court type; (c) the date the public record was reported; (d) the ECOA code; (e) any assets or liabilities; (f) the type of public record; (g) the date paid, if applicable; (h) the docket number; and (i) the plaintiff and attorney involved in the case (Botruff Aff., paragraph 19).

17. The inquiry section of a credit report includes the following information for each inquiry on a consumer's credit file: (a) the date of the inquiry; (b) the ECOA code; (c) the Trans Union subscriber inquiry code; and (d) the subscriber short name (Botruff Aff., paragraph 20).

C. TransMark's Target Marketing List Databases

18. TransMark creates and maintains a number of separate databases for use in its target marketing business ("list databases"). The information contained in the list databases is derived from CRONUS and outside sources (Frank Aff., paragraph 33) and is moved quarterly from these sources to the target marketing database, although certain "hotline" information is moved monthly (Frank Tr. at 22).

19. The accounts receivable tapes provided by credit grantors to Trans Union for use in its credit reporting business are provided under agreements that do not prevent their use for target marketing (Weckman Aff., paragraph 3).

20. TransMark creates and maintains the following list databases: (a) Base List; (b) Homeowners; (c) Automobile Owners; (d) Students; (e) Puerto Rico; (f) New Issues; (g) New Homeowners; (h) New Movers; and (i) Reverse Append (consumers who have either a bankcard or a travel and entertainment card) (Weckman Aff., paragraphs 5, 54).

21. The Base List database is created by selecting from CRONUS only those consumers who have at least two tradelines. The information extracted from CRONUS is then separated into various segments in the Base List database (Weckman Aff., paragraph 6).

22. Trans Union promotional material entitled "Direct Marketing Lists" discloses to its clients that it uses two-tradeline selections to compile its target marketing base:

Consumers on each quarterly updated list must possess a minimum of two tradelines and have activity in past 90 days on one account

(HX 1; *see also* Second Response No. 61).

23. The demographic information extracted from CRONUS reveals: a) the consumer's name, address, social security number, date of birth and telephone number (the "standard segment"); b) whether the consumer is the head of household, his or her ethnic background and marital status (the "household segment"); and, c) the consumer's occupation (the "employment segment") (Weckman Aff., paragraphs 6, 7, 8, 9).

24. The tradeline information extracted from CRONUS is separated into five segments in the Base List database: (a) bankcard; (b) premium bankcard; (c) retail; (d) upscale retail; and (e) finance loan (Weckman Aff., paragraph 10; First Response Nos. 11-23).

25. The information extracted from CRONUS and included in each of these five segments of the Base List database is: a) a yes or no indication as to whether the consumer has one or more of the type of accounts included in that segment; b) the open date of the oldest tradeline; and c) the open date of the newest tradeline (Weckman Aff., paragraph 11).

26. The Base List database does not include the identity of the credit grantor, the terms, collateral, the high credit amount, the credit limit, the payment status or pattern, delinquency or derogatory information, or any other comparable information included in CRONUS (Weckman Aff., paragraph 13).

27. The Homeowners, Automobile Owners, Students, Puerto Rico, New Issues, New Homeowners, and Reverse Append databases do not include the identity of the credit grantor, the terms, collateral, the payment status or pattern, delinquency or derogatory information, or any other comparable information included in CRONUS (Weckman Aff., paragraphs 24, 31, 39, 44, 48, 53, 69, 74).

28. TransMark describes the features of its base list and segments in brochures directed to its customers; it notes that the "Bankcard" segment of its base list names 104.4 million consumers who have a bank credit card (HX 2).

29. The "Upscale Retail" segment of the base list, which names 36.2 million consumers, is described in a marketing brochure as offering:

direct marketers the opportunity to reach America's retail shopping elite. The Upscale file has been developed from TransMark's list of retailers that cater to consumers with discriminating taste. These individuals have high discretionary income and are used to paying more than the average consumer to purchase quality products

(HX 2).

30. A customer purchasing a segment can further refine the list by choosing "selects," or additional criteria to select certain characteristics of the consumers on the list (First Response Nos. 26, 34, 43, 51, 59, 68, and 76).

31. Examples of the "selects" offered by Trans Union include: bankcard or retailer; "hotline" consumers; age; estimated household income; children; working women; length of residence; zip code; and persons who have responded to mail order solicitations (Kiska Tr. 37, 59-60; HX 2). Much of the information for selects is derived from Trans Union's consumer reporting database (Frank Tr. 40).

32. For each base list segment, there is a brochure which describes its core population, the available "selects," the file size (the number of consumers on the list), a description of the list, and the list's purchase price. The source of all five segments is identified in the brochure as "Trans Union consumer database" (HX 2; First Response Nos. 15, 17, 19, 21, and 23).

33. Trans Union also offers other target marketing lists from more specific databases. These include "new issues," a monthly compilation of consumers who have responded via mail to a credit card solicitation, "Hispanics," "singles," "college students," "homeowners," "new movers," and "automobile owners" (Weckman Tr. 83-84. *See also* Kiska Tr. 37, 59-60; HX 2).

34. One of the selects offered for many of the base lists is labeled "hotline," a compilation of those consumers who have appeared on a credit grantor's tape within the prior 30-90 days (Respondent's Answers to Complaint Counsel's First Set of Interrogatories No. 10).

35. Trans Union has recently introduced additions to its base lists. One is the TransMark Income Estimator ("TIE"), which is described in one of its brochures:

TIE evaluates individual consumer income based upon a mix of credit data from Trans Union's database and census demographic data TIE . . . is based on the notion that consumer spending and payment behavior is closely related to income.

(HX 1).

36. The information created by the TIE model is based in whole or in part on information contained in Trans Union's consumer reporting database. TIE contains information on consumers who have at least two tradelines (First Response Nos. 90, 92).

37. Another enhancement recently introduced by TransMark is "SOLO," described in a brochure, along with a companion program known as SILHOUETTE (offered only for prescreened lists (Kiska Tr. 51; Frank Tr. 32-33)), as follows:

Both products provide a consistent and effective way to develop qualified prospects based upon similar credit behavior (SILHOUETTE) and credit behavior overlaid with demographic data (SOLO) . . . [T]he products evaluate individual behavior and establish tendencies.

(HX 1).

38. SOLO is based upon information contained in Trans Union's consumer reporting database (First Response No. 96).

39. TransMark sends its target marketing lists directly to its clients. TransMark does not require its clients to use third party mailers although it sometimes sends the lists to third party mailers on behalf of its clients (First Response Nos. 110, 112).

40. TransMark advertisements emphasize that its lists are: "Not just ordinary lists but lists of people who are active users of credit." (DM News, May 18, 1992, at p. 12. *See also* Second Response No. 65.) Nevertheless, Mr. Hopfensperger, TransMark's Director of Marketing, Central Region, has filed an affidavit asserting that he is familiar with the type of information on consumers which is contained in TransMark's list databases and that they do not contain any information upon which a credit grantor can make a judgment as to a consumer's eligibility for credit (Hopfensperger Aff., paragraph 7).

41. The computer tapes leased by TransMark are rented for one-time use--to produce mailing labels to mail the customer's material to consumers. TransMark's customers are not allowed to put the computerized information into a database to access the information contained on the tape, or use the tape for any other purpose (Frank Aff., paragraph 6, 7).

42. TransMark does not allow access to its list databases to anyone seeking information on identified individual consumers (Frank Aff., paragraph 8).

43. Prior to sending out a computer tape, TransMark deletes the name and address of each consumer who satisfies the criteria selected

by the customer but whose name and address appears in the Opt Out Database to ensure that each consumer who has chosen not to have his or her name and address used for target marketing purposes does not receive a mail piece (Frank Aff., paragraph 18).

44. The process used to mail the materials of TransMark's customers is automated. The computer tape is sent to either an independent mailing house or one run by TransMark's customer. Approximately 90% of the computer tapes leased by TransMark are sent directly to mail houses that are independent of its customers (Frank Aff., paragraph 20).

45. TransMark's customers use the computer tapes to mail offers to consumers to enter into credit, insurance or business transactions. For example, TransMark has leased computer tapes to:

(a) Colonial Penn Auto Insurance, to mail consumers material about "The Experienced Driver Program";

(b) Citibank, to mail consumers an offer to apply for home equity financing;

(c) Publishers Clearing House, to mail consumers notification of their Finalist status in its Ten Million Dollar Sweepstakes;

(d) Columbia House, to mail consumers an offer to become a member of the Columbia House Video Club;

(e) Ross-Simons, to mail its catalog to consumers;

(f) Fingerhut, to mail its catalog to consumers; and

(g) Phillips Publishing, to mail consumers the Better Retirement Report.

(Frank Aff., paragraph 21, Exhibits D-J).

46. TransMark also leases computer tapes containing names and addresses of consumers to customers who promote their product or services through telemarketing. Approximately 2% of TransMark's revenue is derived from the rental of computer tapes for telemarketing purposes. When a customer orders a computer tape for telemarketing purposes from TransMark, the tape is sent to a company that provides telemarketing services for TransMark's customer. The telemarketing company is not made aware of the criteria chosen by TransMark's customer to select the names and addresses appearing on the tape (Frank Aff., paragraph 24).

47. TransMark has several competitors such as Donnelley Marketing, Metromail and R.L. Polk, who have generated much more

revenue from the rental of consumer lists than has TransMark (\$4,700,000 in 1992).

<u>Name</u>	<u>Revenue</u>
Donnelley Marketing	\$60-100 million
Metromail	\$40-60 million
R.L. Polk	\$50 million

(Frank Aff., paragraph 26, Exhibit K).

III. CONCLUSIONS OF LAW

A. *Summary Decision Is Appropriate In This Case*

The Rules of Practice, Section 3.24(2), authorize summary decision when “there is no genuine issue as to material fact and . . . the moving party is entitled to such decision as a matter of law.”

The existence of unimportant or peripheral disputed issues of fact does not rule out summary disposition as long as material facts are not seriously challenged. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-49 (1986).

Trans Union’s response to the motion for summary decision does not challenge the accuracy of those facts which complaint counsel offer in support of their motion for summary decision, nor does it point to substantial unresolved factual disputes; rather, Trans Union cites other facts--unchallenged by complaint counsel--which it claims support its argument that its target marketing operation does not violate the FCRA.

Thus, there is no genuine issue of material fact presented in the motion and response thereto; only legal disputes remain and summary decision is therefore appropriate.

B. *The Purpose Of The FCRA*

In enacting the FCRA, Congress found that “there is a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer’s right to privacy” Sec. 602(a)(4), and, in Section 602(b) of the Act, it required:

consumer reporting agencies [to] adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information. . . .

C. The Complaint Allegations

There is no dispute that Trans Union is a consumer reporting agency as defined in Section 603(f) of the FCRA (F. 2). The remaining issues raised by the complaint in this proceeding are whether its target marketing lists are “consumer reports” under the FCRA³ and, if so, whether those reports are sold to its customers for a permissible purpose under Section 604.⁴

D. Trans Union's Target Marketing Lists Are Consumer Reports Under Section 603 Of The FCRA

Section 603(d) of the FCRA defines a consumer report as the communication of any information by a consumer reporting agency such as Trans Union bearing on “a consumer’s credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living.”

³ Section 603(d) of the FCRA defines a consumer report as:

any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer’s credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer’s eligibility for (1) credit or insurance to be used primarily for personal, family, or household purposes, or (2) employment purposes or (3) other purposes authorized under section 604.

⁴ Section 604. Permissible purposes of reports:

A consumer reporting agency may furnish a consumer report under the following circumstances and no other:

(1) In response to the order of a court having jurisdiction to issue such an order.

(2) In accordance with the written instructions of the consumer to whom it relates.

(3) To a person which it has reason to believe--

(A) Intends to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to, or review or collection of an account of, the consumer; or

(B) Intends to use the information for employment purposes; or

(C) Intends to use the information in connection with the underwriting of insurance involving the consumer; or

(D) Intends to use the information in connection with a determination of the consumer’s eligibility for a license or other benefit granted by a governmental instrumentality required by law to consider an applicant’s financial responsibility or status; or

(E) Otherwise has a legitimate business need for the information in connection with a business transaction involving the consumer.

In January 1993, the Commission approved a consent order with TRW Inc. which allowed it to use only the following identifying information from its consumer reporting database to compile target marketing lists of consumers for sale to its customers: name, telephone number, mother's maiden name, address, zip code, year of birth, age, any generational designation, social security number, or substantially similar identifiers, or any combination thereof.

Since TRW can use only the listed identifying information to create its target marketing lists, the Commission, by accepting the TRW consent agreement, has established a standard for determining what types of information are not credit-related for the purposes of defining a consumer report under the FCRA.

Trans Union's target marketing lists reveal much more information about the consumer in its database than is allowed under the TRW standard.

When Trans Union generates its target marketing database and lists, it lists only those consumers from its credit reporting database who have two or more tradelines (F. 21). Since tradelines are reports of accounts by credit grantors (F. 8, 9, 10), they reveal to Trans Union's customers that at least two credit grantors found consumers on the list to be credit worthy (F. 22), and this information therefore bears on the consumer's "credit worthiness, credit standing, [or] credit capacity" (Sec. 603(d), FCRA). Even the fact that a consumer possesses a credit card (F. 24, 28) reveals, to some extent, a consumer's credit worthiness, credit standing, or credit capacity because it "conveys the information that each consumer named meets certain criteria for credit worthiness." FTC Commentary on the FCRA, 55 Fed. Reg. 18804 at 18815 (1990) ("FCRA" Commentary) (*re* pre-screened lists).

Other Trans Union lists such as "Upscale Retail" (F. 29) or its "selects" (F. 30) bear on a customer's credit worthiness, credit standing or capacity. Indeed, the implication of Trans Union's description of "Upscale Retail" is that consumers on this list are credit worthy (F. 29).

I reject Trans Union's claim that if the information in its target marketing lists is not, as the complaint alleges, used for permissible purposes, it is therefore not credit-related. *See St. Paul Guardian Insurance Co. v. Johnson*, 884 F.2d 881, 884-85 (5th Cir. 1989):

F. Trans Union's Clients Have No Permissible Purpose To Receive Consumer Reports In The Form Of Target Marketing Lists

The Commission has taken the position that all of the permissible purposes for obtaining a consumer report listed in Section 604 of the FCRA relate to transactions initiated by the consumer by applying for credit, employment, insurance, government benefits, a lease, or check cashing privileges.

For example, the Commission has interpreted Section 604(3)(A) of the FCRA as allowing creditors to obtain prescreened lists of consumers; however, it has done so only with the understanding that consumers on the list would be given credit as a result.

Prescreening is permissible under the FCRA if the client agrees in advance that each consumer whose name is on the list after prescreening will receive an offer of credit. In these circumstances, a permissible purpose for the prescreening service exists under this section, because of the client's present intent to grant credit to all consumers on the final list, with the result that the information is used "in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to . . . the consumer."

FCRA Commentary at 18815.

On the other hand, the Commission has recently rejected the claim that target marketing is legal under the FCRA:

List sellers and those who sell consumer goods and services are always eager to obtain personal information about consumers' finances and lifestyles for marketing purposes. When they obtain such information from sources other than consumer reporting agencies, the FCRA is inapplicable. When credit bureaus supply such information on consumers from their consumer reporting databases, however, the privacy protections of Section 604 come into play because the Commission views such lists as a series of consumer reports.

Prepared Statement of the FTC before the Senate Banking Committee (May 27, 1993) at 16.

Another Commission statement to Congress took the same position:

There is no apparent legal rationale for this [the industry] position under the existing law. The desire to market goods or services to consumers does not constitute a permissible purpose for obtaining a consumer report under any of the provisions of Section 604, and the Commission has never interpreted the Act to permit reports to be obtained for such purposes, whether in their entirety or in the form of prescreened lists.

See Prepared Statement of the Federal Trade Commission before the Subcommittee on Consumer Affairs and Coinage of the House Banking, Finance and Urban Affairs Committee (Oct. 24, 1991) at 14-15. This statement also denied that Section 604(3)(E) of the FCRA might be interpreted as permitting target marketing:

The Commission has interpreted Section 604(3)(E) to apply only to a limited category of consumer-initiated transactions, such as applications for residential leases or for check cashing privileges. A narrow construction of Section 604(3)(E) is critical to the privacy protections of the Act.

1991 Prepared Statement, footnote 12 at 12.

The legislative history of the FCRA supports complaint counsel's claim that target marketing is not a permissible purpose under Section 604.

In introducing his version of the statute, Senator Proxmire, the author of the FCRA, stated:

Credit reporting agencies would furnish information on individuals only to persons with a legitimate business need for the information. . . . This would preclude the furnishing of information . . . to market research firms or to other business firms who are simply on fishing expeditions.

115 Cong. Rec. 2415 (Jan. 31, 1969).

And, in a letter to the Commission dated October 8, 1971, he wrote:

While Section 604(3)(E) permits the furnishing of credit information to persons who have "a legitimate business need for the information in connection with a business transaction involving the consumer," I do not believe the sale of credit information for compiling a mailing list would qualify as a transaction involving the consumer. The legislative history is not definitive on this point, but I believe it is reasonable to interpret a transaction "involving the consumer" as one in which the consumer himself is aware of the proposed transaction. Indeed, this was the position taken by your staff in their interpretation dated May 25, 1971. Under this interpretation, credit information could not be furnished by a consumer reporting agency for the purpose of compiling a mailing list if the individuals on the list have not specifically applied for credit or are otherwise unaware of the proposed transaction.

Thus, while the language of Section 604(3)(E) could be construed as supporting Trans Union's position, congressional history suggests otherwise as does the Commission's opinion that target marketing is not a permissible purpose. This opinion, which is not unreasonable in view of the reasons for passage of the FCRA, is persuasive. *See*

Cochran v. Metropolitan Life Ins. Co., 472 F. Supp. 827, 831 (N.D. Ga. 1979):

the FTC has declared that [claim reports] are not regulated by the Act. The court has no cause to deviate from the agency.

Id. at 832.

Since Trans Union's target marketing lists are consumer reports which are not consumer-initiated (F. 4, 6), they are not furnished to its clients for a permissible purpose under the FCRA.

G. There Are No Constitutional Impediments To This Proceeding

Trans Union claims that prohibiting the use of its target marketing lists would violate First Amendment and Equal Protection rights guaranteed to it by the U.S. Constitution.

Trans Union argues that since its target marketing lists do no more than propose a commercial transaction, they are protected by the First Amendment guarantee of freedom of speech. *See Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976). Trans Union also claims that its equal protection rights would be denied if it were barred from using target marketing lists while its competitors who are not covered by the FCRA would be allowed to do so. *See Sullivan v. Strop*, 496 U.S. 478, 485 (1990).

In *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557, 566 (1980), the Court applied a four part test to determine whether restrictions on commercial speech are constitutional:

1. Is the speech lawful and neither deceptive or misleading?;
2. If the speech is lawful, is the government's interest in regulating it substantial?;
3. If the answer to the first two questions is yes, does regulation directly advance some governmental interest?;
4. Is the regulation no more extensive than is necessary to serve the governmental interest?

Assuming that Trans Union is correct in its assertion that its target marketing lists do not transmit deceptive or misleading information, there is nevertheless a substantial government interest in protecting a consumer's right to privacy, and the FCRA directly advances this interest in a manner which is not unduly restrictive.

I also reject Trans Union's equal protection argument because the FCRA applies equally to all consumer reporting agencies. Furthermore, Congress' conclusion that consumer reporting agencies presented unique problems with respect to consumer privacy which required some regulation of their activities was not unreasonable and its decision to regulate these agencies furthers a legitimate public interest. See *FCC v. Beach Communications, Inc.* 113 S. Ct. 2096 (1993); *Railroad Retirement Board v. Fritz*, 449 U.S. 166, 179 (1980); *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78-79 (1911).

H. Conclusion

I conclude that Trans Union's target marketing lists are consumer reports under Section 603(d) of the FCRA, and that its sale of such lists to persons whom it does not have reason to believe have a permissible purpose to obtain such lists violates Sections 604 and 607 of the FCRA. Therefore, the following cease and desist order is appropriate:

ORDER

It is hereby ordered, That respondent, Trans Union Corporation:

- a) Cease and desist from compiling and/or selling consumer reports in the form of target marketing lists to any person unless respondent has reason to believe that such person either intends to make a firm offer of credit to all consumers on the lists or to use such lists for purposes authorized under Section 604 of the FCRA.
- b) Maintain for at least five (5) years from the date of service of this order and upon request, make available to the Federal Trade Commission for inspection and copying, all records and documents necessary to demonstrate fully its compliance with this order.
- c) Deliver a copy of this order to all present and future management officials having administrative, sales, advertising, or policy responsibilities with respect to the subject matter of this order.
- d) For the five (5) year period following the entry of this order, notify the Commission at least thirty (30) days prior to any proposed change in respondent such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or

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

e) Within one hundred and eighty (180) days of service of this order, deliver to the Commission a report, in writing, setting forth the manner and form in which it has complied with this order as of that date.

OPINION OF THE COMMISSION

BY YAO, *Commissioner*:

I. INTRODUCTION

On December 15, 1992, the Commission issued an administrative complaint charging respondent Trans Union Corporation ("Trans Union") with violating the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. 1681 *et seq.* (1990). The complaint alleged, *inter alia*, that Trans Union violated the FCRA by using credit information to compile lists of consumers for purposes of target marketing and selling such lists to companies who did not have a permissible purpose for obtaining the lists.¹ On September 20, 1993, Administrative Law Judge Lewis F. Parker ("ALJ") issued an Initial Decision granting complaint counsel's motion for summary decision.²

Trans Union appeals, arguing that the ALJ erred in granting summary decision. First, Trans Union urges that the ALJ erred in holding that its target marketing lists violated the FCRA or, in the alternative,

¹ The complaint also alleged that Trans Union provided prescreened lists to credit grantors without requiring that those credit grantors make a firm offer of credit to each person on the list. This part of the litigation was certified to the Secretary and withdrawn from adjudication on June 1, 1993, so that the Commission could consider a proposed consent agreement dealing solely with the issue of prescreening for credit offers. Following the 60 day public comment period, the agreement was given final approval by the Commission on November 18, 1993. Consequently, the prescreening portion of this case is not at issue here.

Moreover, although respondent's brief makes a brief reference to the practice of insurance prescreening, this issue is also not part of this litigation and thus is not discussed in this decision.

² The following abbreviations are used in this opinion:

ID	Initial Decision
IDF	Initial Decision Finding number
OA Tr.	Transcript of Commission Oral Argument (May 4, 1993)
TUAB	Trans Union's Appeal Brief
CCAB	Brief of Appellee Complaint Counsel
TURB	Trans Union's Reply Brief
Aff.	Affidavit

erred in finding no genuine dispute of material fact concerning this question. More specifically, Trans Union argues that its target-marketing lists do not fall within the definition of “consumer report” as set forth in the FCRA; that there is no “communication” as required by the statute; and that Trans Union’s customers have a permissible purpose for obtaining the lists. Second, Trans Union argues that the order is an unconstitutional restriction on its freedom of expression. Third, Trans Union argues that the order creates an arbitrary classification that denies its constitutional right to equal protection. Fourth, and finally, Trans Union urges that the ALJ erred by relying on improper evidence and denying discovery of relevant materials which served as the basis of his decision.

As set forth more fully below, we hold, relying on the FCRA’s statutory language and federal court jurisprudence concerning the FCRA, as well as the FCRA’s legislative history where relevant, that Trans Union’s sale of target marketing lists violates the FCRA and that there is no genuine dispute of material fact concerning this question. We also find that the order does not violate Trans Union’s First Amendment or equal protection rights. Because our review is *de novo* and we have not relied upon the materials which Trans Union alleges were improperly relied upon by the ALJ or improperly denied to Trans Union in discovery, we find that the evidentiary and discovery issues raised by Trans Union are either moot or the error, if any, is harmless. Accordingly, we affirm the ALJ’s conclusion that Trans Union is liable, and adopt the ALJ’s order, except as modified.

II. THE STANDARD FOR SUMMARY DECISION

Commission Rule 3.24 provides that summary decision is appropriate when “there is no genuine issue as to any material fact and . . . the moving party is entitled to such decision as a matter of law.” 16 CFR 3.24(a)(2) (1994) (emphasis added). The mere existence of a factual dispute will not in and of itself defeat an otherwise properly supported motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). A material fact is a fact which might affect the outcome of a suit because of its legal import. *Id.*; *Quarles v. General Motors Corp.*, 758 F.2d 839, 840 (2d Cir. 1985) (*per curiam*). In deciding a motion for summary decision, the burden falls on the moving party to establish that no relevant facts are in dispute. *Clements v. County of*

Nassau, 835 F.2d 1000, 1004 (2d Cir. 1987). In determining whether a genuine issue has been raised, an adjudicative body must resolve all ambiguities and draw all reasonable inferences against the moving party. *United States v. Diebold*, 369 U.S. 654, 655 (1962) (*per curiam*).

With these principles in mind, we turn to the undisputed facts concerning Trans Union's practices.

III. TRANS UNION'S BUSINESS

Based on the record in this matter, the ALJ made findings of undisputed fact.³ The crucial facts, culled from affidavits, transcripts and documents filed by both sides in the summary decision motion, are set forth below.⁴

Respondent's Consumer Reporting Database

Respondent is a consumer reporting agency, as that term is defined under Section 603(f) of the FCRA and is regularly engaged in the business of credit reporting. IDF 2. Respondent creates and maintains a consumer reporting database named CRONUS, containing credit-related information, for use in its credit reporting database. IDF 7. Credit information on individual consumers is provided to Trans Union, generally, in the form of a credit grantor's accounts receivable tape. Botruff Aff. paragraph 7; IDF 8. These accounts receivable tapes are provided to Trans Union by various credit grantors under agreements that do not prevent their use for target marketing. Weckman Aff. paragraph 3. The CRONUS computer is programmed to read these accounts receivable tapes and to consolidate the information on a particular individual consumer contained in those tapes with the existing information in that

³ The Initial Decision makes reference to "findings of fact," and Section 5(b) of the Federal Trade Commission Act, 5 U.S.C. 45(b) (1990), requires "findings of fact." Of course, in a case resolved through summary decision, findings of fact are appropriate only to the extent that the facts are not subject to genuine dispute. We thus use the phrase "findings of fact" to mean findings concerning undisputed facts only. We understand the ALJ to have used the term in this fashion as well.

The following recitation of undisputed facts highlights only the most pertinent facts. The Commission adopts all of the ALJ's undisputed facts.

⁴ The ALJ did not grant any evidence submitted *in camera* treatment, noting that the parties did not request it. ID 1, n.l. Neither party has sought to appeal that decision and, therefore, we hold that none of the materials is subject to *in camera* treatment.

consumer's CRONUS file. Botruff Aff. paragraph 8. Once the CRONUS program finds a match, the credit-related information contained on the credit grantor's tape is appended to an individual consumer's CRONUS file by adding it to an existing account number or by creating a new account. *Id.* paragraph 10. The credit-related information consists of positive and negative credit information, such as credit limits, payment history, current outstanding balances, past due payments. *Id.* paragraph 11. The account number and the credit-related information appended to this number are called a "tradeline." *Id.* paragraphs 8, 9, 10; IDF 9, 10. A tradeline is identified in CRONUS by the name of the credit grantor and the account number. Botruff Aff. paragraph 10.

Respondent's Target Marketing Division

Respondent, through its TransMark division, creates and maintains a number of separate databases for generating lists used in target marketing. IDF 33; Weckman Aff. paragraph 5. The most important database is what TransMark calls its "Base List," but it also creates and maintains the following separate databases: (a) Homeowners; (b) Automobile Owners; (c) Students; (d) Puerto Rico; (e) New Charge Card Issues; and (f) New Homeowners. IDF 20.⁵ We will first discuss the Base List and later describe these other databases.

The Base List Database

The Base List is created by selecting from CRONUS only those consumers who have at least two tradelines. IDF 21. The Base List contains tradeline information extracted from CRONUS. IDF 24. The information in the Base List is separated into five segments: (1) Bankcard; (2) Premium Bankcard; (3) Retail; (4) Upscale Retail; and (5) Finance Loan. IDF 24.

The information extracted from CRONUS and included in each of these five segments of the Base List is a positive or negative indication as to whether the consumer has one or more of the type of accounts included in that segment, the open date of the oldest trade-

⁵ See *infra* pp. 6-7.

line, and the open date of the newest tradeline. IDF 24.⁶ The Base List does not include the identity of the credit grantor, the credit terms, the amount of collateral pledged, the high credit amount, the credit limit, the payment status or pattern, delinquency or derogatory information, or any other comparable information included in CRONUS. IDF 26. The source of all five segments is identified in one of TransMark's brochures as "Trans Union consumer database." IDF 3 (quoting HX 2).

For each Base List segment, there is a brochure describing the particular segment's core population, the file size (the number of consumers on the list), a description of the list, the list's purchase price, and the various "selects" options available for that segment. "Selects" are options enabling a customer to request a list of consumers having certain specific characteristics. IDF 30. Examples of the "selects" offered by Trans Union include: bankcard or retailer; age; estimated household income; children; working women; length of residence; zip code; persons who have responded to mail order solicitations; and "hotline" consumers. IDF 31. The "hotline" select is a compilation of those consumers who have appeared on a credit grantor's list within the prior 30 to 90 days. IDF 34. Most of the information for selects is derived from Trans Union's consumer reporting database. Kiska Tr. at 60.

Trans Union also performs modeling with information contained in CRONUS and includes the result as a data element in the Base List. Weckman Aff. paragraph 61. One model is the TransMark Income Estimator ("TIE"), which is described as follows in one of its brochures:

TIE evaluates individual consumer income based upon a mix of credit data from Trans Union's database and census demographic data. . . .
TIE . . . is based on the notion that consumer spending and payment behavior is closely related to income.

IDF 35 (quoting HX 1). TIE is a mathematical model that estimates an individual's income based on a mix of individual credit information and demographic information. Weckman Aff., Exhibit C. This model is used to select mailing lists by income. *Id.* Once again, the

⁶ The list also contains demographic information extracted from CRONUS which reveals: (1) the consumer's name, address, social security number, date of birth and telephone number; (2) whether the consumer is the head of the household, his or her ethnic background and marital status; and (3) the consumer's occupation. IDF 23.

information created by the TIE model is based in whole or in part on information contained in Trans Union's consumer reporting database. IDF 36.

Another model recently introduced by TransMark is "SOLO," described in a brochure, along with a companion program known as SILHOUETTE (offered only for prescreened lists), as follows:

Both products provide a consistent and effective way to develop qualified prospects based upon similar credit behavior (SILHOUETTE) and credit behavior overlaid with demographic data (SOLO) [T]he products evaluate individual behavior and establish tendencies.

IDF 37 (quoting HX 1). Once again, SOLO is based upon information contained in Trans Union's consumer reporting database. IDF 38.

Other Databases

The other databases created and maintained by TransMark, like the Base List database, contain tradeline information derived from CRONUS. *See generally* Weckman Aff.

The Homeowners List is created by selecting from CRONUS consumers who have at least two tradelines, one of which is a mortgage loan or a secured loan with an opening amount in excess of \$50,000. Weckman Aff. paragraph 19. One of the pieces of information extracted from CRONUS and included in the Homeowners List is the type of loan, the date the account was opened, and the date the account was closed. The mortgage section categorizes the type of loan as either FHA, Veterans, real estate or secured. Weckman Aff. paragraph 22.

The Automobile Owners List is created by selecting from CRONUS consumers who have at least two tradelines, one of which is a loan from a credit grantor such as General Motors Acceptance Corporation. Weckman Aff. paragraph 27. One of the pieces of information extracted from CRONUS and included in the Automobile Owners List is the date that the loan was opened and the expiration date. Weckman Aff. paragraph 30.

The Students List is created by selecting from CRONUS installment loans that have an indicator of "ST" which were opened within the last four years; the "ST" indicator in CRONUS indicates that the individual has a student loan. Weckman Aff. paragraph 34.

One of the pieces of information extracted from CRONUS and included in the Students List identifies the date on which the loan was opened. Weckman Aff. paragraph 35-37.

The Puerto Rico List is a list of consumers residing in Puerto Rico. Weckman Aff. paragraph 42. The list is segmented in basically the same fashion as the Base List, using information obtained from CRONUS. Weckman Aff. paragraph 42-43.

The New Charge Card Issues List is created by selecting from CRONUS consumers who have at least two tradelines, one of which has an opening date within the last 90 days. Weckman Aff. paragraph 46. This list is segmented in the same fashion as the Base List, using information from CRONUS. Weckman Aff. paragraph 47.

Finally, the New Homeowners List is created by selecting from CRONUS consumers who have at least two tradelines, one of which is a mortgage loan or a secured loan with an opening loan amount in excess of \$50,000 and an opening date within the last 90 days. Weckman Aff. paragraph 51. This list includes the same type of information extracted from CRONUS that is included in the Homeowners List. Weckman Aff. paragraph 52.

The Homeowners, New Homeowners, Automobile Owners, Students, Puerto Rico and New Charge Card Issues Lists do not include the identity of the credit grantor, the terms, collateral, the payment status or pattern, delinquency or derogatory information, or any other comparable information included in CRONUS. Weckman Aff. paragraphs 24, 31, 39, 44, 53, 69, 74.

Customers' Knowledge of Criteria for Selecting Consumers

Customers for respondent's target marketing lists are aware of the criteria by which consumers are picked. For example, promotional material used by TransMark entitled "Direct Marketing Lists" states:

Consumers on each quarterly updated list must possess a minimum of two tradelines and have activity in past 90 days on one account.

IDF 22 (quoting HX 1). Similarly, promotional material for TransMark's New Charge Card List states that the list "is created monthly from the Trans Union Consumer Database and consists of individuals who have responded via mail to a credit card solicitation These consumers are ready to purchase with their new cards."

Memorandum in Support of Complaint Counsel's Motion for Summary Decision, Attachment J. TransMark advertisements emphasize that its lists are: "Not just ordinary lists but lists of people who are active users of credit." IDF 40 (quoting TransMark advertisement in DM News, May 18, 1992 at 12).

Similarly, customers are aware of the criteria by which consumers are placed in "segments" and "selects" derived from the Base List. For example, the "Upscale Retail" segment of the Base List, which names 36.2 million consumers, is described in a marketing brochure as offering:

direct marketers the opportunity to reach America's retail shopping elite. The Upscale file has been developed from TransMark's list of retailers that cater to consumers with discriminating taste. These individuals have high discretionary income and are used to paying more than the average consumer to purchase quality products.

IDF 29 (quoting HX 2).

Dissemination of Target Marketing Lists to Customers

TransMark sends its target marketing lists directly to its customers as well as to third-party mailers. IDF 39. Approximately 90% of the computer tapes leased by TransMark are sent directly to mail houses that are independent of its customers. IDF 39, 44.

The computer tapes leased by TransMark are rented for one-time use -- to produce mailing labels to mail the customer's material to consumers. TransMark's customers are not allowed to place the computerized information into a database to access the information contained on the tape, or use the tape for any other purpose. IDF 41.

Both TransMark's customers and third-party mailers have access to the names on the target marketing lists. TransMark's customers who conduct mailings themselves must have access to the names on the list to send out mailings. When TransMark's customers use third-party mailers, these mailers have access to the names on the list. For example, an official of a third-party mailing company, Acxiom Mailing Services ("AMS"), notes that:

AMS's customer will occasionally request AMS to access the tape for an individual name to confirm that a particular person was sent a mail piece and/or to delete a particular person's name.

Ortiz Aff. paragraph 15.

TransMark's customers use the computer tapes to mail offers to consumers to enter into credit, insurance or business transactions. IDF 45. The customer or the customer's third-party mailer places a source code on each mail piece. Ortiz Aff. paragraph 13; Frank Aff. paragraph 22. "The source code enables AMS' customer to track the number of consumers who respond to a particular mailing from a particular target list." Ortiz Aff. paragraph 13; *see also* Frank Aff. paragraph 22.

TransMark does not require that its customers only use the lists to make a firm offer of credit to all consumers on the lists. IDF 8; Frank Tr. at 15. TransMark also leases its tapes to some customers who promote their product or service through telemarketing. IDF 46.

IV. THE FAIR CREDIT REPORTING ACT

In holding that respondent's activities fell within the scope of the FCRA, the ALJ relied to some extent on the FTC Commentary on the FCRA, 55 Fed. Reg. 18,804 (1990) (hereafter "FCRA Commentary"), the Commission's consent agreement with TRW entered on January 14, 1993, and Commission testimony before various committees of Congress. *See* IDF 11-16. While federal courts have sought guidance from the Commission's FCRA Commentary in recognition of the Commission's special expertise with regard to the FCRA, *see, e.g., Estiverne v. Sak's Fifth Ave.*, 9 F. 3d 1171, 1173-74 (5th Cir. 1993) (concerning the FCRA Commentary discussion of bad check lists), *Yonter v. Aetna Fin. Co.*, 777 F. Supp. 490, 491-92 (E.D. La. 1991) (concerning the FCRA Commentary section on prescreening for firm offers of credit), the Commission has expressly stated that "the Commentary does not have the force of regulations or statutory provisions, and its contents may be revised and updated as the Commission considers necessary or appropriate." 16 CFR 600, App. at 358 (1994). Of course, neither the Commission's consent agreement with TRW nor its testimony to Congressional committees govern the result in this case. As demonstrated below, our conclusion that respondent is liable is based on the statutory language of the FCRA and federal court case law interpreting it, as well as relevant legislative history.

In determining whether respondent's activities fall within the scope of the FCRA, it is necessary to answer two questions: (1) Are TransMark's target marketing lists "consumer reports" under Section

603(d); and (2) if so, are those reports sold to its customers for a permissible purpose under Section 604(3)?⁷ As detailed below, we believe that a proper reading of the statutory language and case law construing that language supports the conclusion that TransMark's target marketing lists are "consumer reports" under Section 603(d) and that its customers have no permissible purpose under Section 604 to receive these reports.

In this endeavor, we are guided by some elemental principles of statutory construction. In order to ascertain the meaning of a statute, a reviewing tribunal should first look at the plain language of the statute. *Pennsylvania Pub. Welfare Dep't v. Davenport*, 495 U.S. 552, 557-58 (1990). Because courts assume that the legislative will is expressed by the ordinary meaning of the words used in the statute, *Moorhead v. United States*, 774 F.2d 936, 941 (9th Cir. 1985), the plain language is usually regarded as conclusive. *Central Montana Elec. v. Administrator of Bonneville Power*, 840 F.2d 1472, 1477 (9th Cir. 1988). Further inquiry is only necessary when (1) the statutory language is ambiguous, *Freytag v. C.I.R.*, 111 S. Ct. 2631, 2636 (1991), or (2) the plain meaning of the words is at variance with the statute as a whole, *United States Nat'l Bank of Oregon v. Independent Ins. Agents of Am., Inc.*, 113 S. Ct. 2173, 2182 (1993). See *Richards v. United States*, 369 U.S. 1, 11 (1962) ("We believe it fundamental that a section of a statute should not be read in isolation from the context of the whole Act, and that fulfilling our responsibility in interpreting legislation, 'we must . . . look to the provisions of the whole law, and to its object and policy.'"). Accordingly, appeals to legislative history are usually well taken only to resolve statutory ambiguity. *Ratzlaf v. United States*, 114 S. Ct. 655, 662 (1994) ("There are, we recognize, contrary indications in the statute's legislative history. But we do not resort to legislative history to cloud a statutory text that is clear."); See also *Barnhill v. Johnson*, 112 S. Ct. 1386, 1391 (1992); *Toibb v. Radloff*, 111 S. Ct. 2197, 2200 (1991).

⁷ Both parties agree that Trans Union is a consumer reporting agency as defined in Section 603(f) of FCRA. IDF 2.

A. The FCRA's Definition of "Consumer Report"

The FCRA's consumer report definition is contained in two sections of the FCRA. Section 603(d) defines a consumer report as:

any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for (1) credit or insurance to be used primarily for personal, family, or household purposes, or (2) employment purposes, or (3) other purposes authorized under section 604.

The last clause of Section 603(d) incorporates Section 604, which establishes the limited permissible purposes under which a customer may receive a report. Section 604 provides as follows:

A consumer reporting agency may furnish a consumer report under the following circumstances and no other:

- (1) In response to the order of a court having jurisdiction to issue such an order.
- (2) In accordance with the written instructions of the consumer to whom it relates.
- (3) To a person which it has reason to believe --

(A) Intends to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to, or review or collection of an account of, the consumer; or

(B) Intends to use the information for employment purposes; or

(C) Intends to use the information in connection with the underwriting of insurance involving the consumer; or

(D) Intends to use the information in connection with a determination of the consumer's eligibility for a license or other benefit granted by a governmental instrumentality required by law to consider an applicant's financial responsibility or status; or

(E) Otherwise has a legitimate business need for the information in connection with a business transaction involving the consumer.

Both parties agree on two aspects of this definition:

- (1) The information on a consumer must bear on one of the seven enumerated characteristics described in Section 603(d) (consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics or mode of living); and (2) this

information on a consumer must then be communicated to a third party. We will return to these two aspects of the definition later. A major point of disagreement that we will consider first concerns the proper interpretation of the portion of Section 603(d)'s definition of a consumer report that reads: "which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for (1) credit or insurance to be used primarily for personal, family, or household purposes, or (2) employment purposes, or (3) other purposes authorized under Section 604."

1. Is the information in the target marketing lists used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for one of the enumerated purposes?

Respondent argues that the statutory definition requires that the information communicated, in addition to its bearing on one of the seven enumerated characteristics, be of the type or kind that is used or expected to be used or collected for the purpose of serving as a factor in determining the consumer's eligibility for one of the identified transactions. TUAB at 16-17. Thus, respondent argues that the ALJ failed to consider whether the information disclosed in the target marketing lists could "be judgmental information of the type used to establish a consumer's eligibility." TUAB at 20 (emphasis added). In support of its argument that there is a factual dispute on this issue, respondent points to an affidavit by TransMark's Director of Marketing for the Central Region, Peter J. Hopfensperger, in which he states that "the list databases do not contain any information upon which a credit grantor can make a judgment as to a consumer's eligibility for credit." Hopfensperger Aff. paragraph 7.

In sharp contrast, complaint counsel views the disputed language -- "which is used or expected to be used or collected for the purpose of serving as a factor in establishing the consumer's eligibility" -- as focusing instead on why the information was collected in the first place by the credit reporting agency or why its customer desires the information. Thus, complaint counsel argues that this statutory language requires only that either (1) the information has been originally collected by a consumer reporting agency for the purpose of serving as a factor in establishing the consumer's eligibility for one of the

enumerated purposes or (2) that it be used or expected to be used for the purpose of serving as a factor in establishing the consumer's eligibility for one of the enumerated purposes. CCAB at 17-21.

We believe that the plain reading of the phrase -- "which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for" -- makes it clear that this language was aimed at limiting coverage by focusing on the purposes for which the information was either collected, used or expected to be used, not the actual content of the information imparted. The structure of the statute supports this reading. The first portion of Section 603(d) sets forth the actual type of information covered by the statute, by including only information that bears on one of the seven enumerated characteristics. By contrast, the second portion of Section 603(d) (and Section 604 which is incorporated by reference) focuses on the consumer reporting agency's reason for collecting the information, its expectation as to how it would be used, or the reason why the requester desires the information. Thus, to determine whether the information imparted falls within the second portion of Section 603(d), the inquiry concentrates on the purposes for which the information was either originally collected, used or expected to be used, not on the actual content of the information imparted.

Federal courts construing this language -- "used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for . . ." -- support our interpretation. In *Heath v. Credit Bureau of Sheridan, Inc.*, 618 F.2d 693 (10th Cir. 1980), the Tenth Circuit held that:

[A] critical phrase in the definition of consumer report is the second requirement: the relevant information must be "used or expected to be used or collected in whole or in part for the purpose of serving as a factor" with regard to enumerated transactions. This phrase clearly requires a judicial inquiry into the motives of the credit reporting agency, for only it "collects" the information. Similarly, the term "expected to be used" would seem to refer to what the reporting agency believed. Thus, if a credit bureau supplies information on a consumer that bears on personal financial status, but does not know the purpose for which the information is to be used, it may be reasonable to assume the agency expected the information to be used for a proper purpose. Similarly, if at the time the information was collected,

the agency expected it to be used for proper purposes, a transmittal of that information would be a consumer report.

Id. at 696 (citations omitted).⁸

Respondent's interpretation would also eviscerate one of the fundamental purposes of the statute. By limiting coverage under the Act to only "judgmental" information of the type or kind used to establish a consumer's eligibility for specified transactions, respondent's interpretation could potentially permit the release of highly confidential personal and credit-related information about consumers. In this way, respondent's interpretation would undermine Congress' concern that consumers' highly confidential credit-related information be kept confidential.⁹ Although respondent has not suggested what determines whether a piece of information is "judgmental," and thus we lack any guideposts as to how respondent would set the legal standard, counsel for respondent suggested at oral argument that "judgmental" information means information that relates to a consumer's credit performance, *i.e.*, paying off debts or making monthly payments.¹⁰ There are, however, potentially numerous situations of highly confidential credit and personal information that might not relate to a consumer's credit performance.

One example might be information providing the number of times a consumer had used a credit card recently. A second situation might be where the information imparted provides no "judgmental" information at all; rather there is an absence of relevant credit history in

⁸ *Accord St. Paul Guardian Ins. Co. v. Johnson*, 884 F.2d 881, 885 n.3 (5th Cir. 1989) ("The focus of the FCRA is primarily upon the credit reporting agency, and the confidentiality and accuracy of the information collected. To focus only on the use of the information after it was collected in determining whether the Act applied would severely undermine the Act's ability to regulate the practice of the collector of the information, the consumer reporting agency"); *Ippolito v. WNS, Inc.*, 864 F.2d 440, 449 n.10 (7th Cir. 1988) ("[T]he plain language of the statute, 'used or expected to be used or collected in whole or in part' requires inquiry into the reasons why the report was requested and why the information contained in the report was collected or expected to be used by the consumer reporting agency."); *Hansen v. Morgan*, 582 F.2d 1214, 1218 (9th Cir. 1978); *Zeller v. Samia*, 758 F. Supp. 775 (D. Mass. 1991).

⁹ As Congress found when it passed the FCRA:
There is a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy.
Section 602(a)(4) (emphasis added).

¹⁰ OA Tr. at 21 ("[Credit grantors] want to know the [consumer's] performance on all three [trade]lines, one, two or any").

the information.¹¹ Under respondent's interpretation, a report indicating an absence of credit-related information might not be covered by the Act because it did not transmit "judgmental" information of the type or kind used to establish a consumer's eligibility for a specified transaction. There are potentially many other situations in which highly confidential credit-related and other personal information might not be covered by the FCRA under respondent's standard.

No court has ever squarely held that this statutory language requires that the information imparted be what respondent calls "judgmental" information. The federal court decisions respondent cites do not alter this conclusion. In *Hovater v. Equifax*, 823 F.2d 413 (11th Cir. 1987), the Eleventh Circuit focused on the fact that the information received from a consumer reporting agency was used by the third party solely to evaluate an insured's claim for benefits. The court did not focus on the actual contents of the information imparted. Noting that the statutory language refers only to a consumer's "eligibility" for insurance and that Section 604(3)(D) also refers only to the "underwriting of insurance," the court stressed that the third party did not in fact use the information for determining eligibility for insurance, but rather to evaluate an insured's claim for benefits under an existing policy. *Id.* at 418-19. Similarly, in *Cochran v. Metropolitan Life Ins. Co.*, 472 F. Supp. 827, 830 (N.D. Ga. 1979), an insurance claim report was found not to be within the ambit of the FCRA. The court emphasized that the recipient did not obtain the report to "determine eligibility for certain transactions." *Id.*

The Third Circuit in *Houghton v. New Jersey Mfrs. Ins. Co.*, 795 F.2d 1144, 1148 (3d Cir. 1986), another case cited by respondent, also focused on the use that the third party was intending to make of the information. In that case, the court considered whether an investigative report prepared for the defense of a personal injury claim was covered by the FCRA. The court found that such a report was not covered by the FCRA. In doing so, the court stressed that:

¹¹ For example, in *Fischl v. General Motors Acceptance Corp.*, 708 F.2d 143 (5th Cir. 1983), the third party recipient of the credit report argued, and the lower court had held, that because credit was refused "for what was not in the report: there was not sufficient evidence . . . of his ability to sustain high monthly payments," the recipient did not need to notify the consumer under Section 615(a). *Id.* at 149. The appellate court rejected this argument, citing to *Carroll v. Exxon Co., U.S.A.*, 434 F. Supp. 557 (E.D. La. 1977), for the proposition that "where denial of credit [is] not premised on adverse information in consumer report, but on credit bureau's inability to furnish definitive information regarding applicant's credit, Section 1681m(a)'s [Section 615(a)'s] disclosure requirement [is] deemed controlling." *Fischl*, 708 F.2d at 149.

[n]othing in the request indicated that [the third party] desired a report on Houghton for a purpose encompassed within the statutory definition of an investigative consumer report. The request concerned only the genuineness of Houghton's personal injury claim and not her "eligibility for . . . credit or insurance . . . or employment"

Id. (emphasis added).¹²

Federal courts have similarly distinguished *Hovater*, *Houghton* and *Cochran* as cases where reports were prepared and transmitted specifically as insurance claims reports, not general credit reports. In *St. Paul Guardian Ins. Co. v. Johnson*, 884 F.2d 881, 885 n.3 (5th Cir. 1989), the court recognized that reports provided to insurers by claims investigation services solely to determine the validity of insurance claims are not consumer reports because Section 604(3)(C) specifically sets forth only "underwriting" as an insurance-related purpose -- rather than "claims" -- and Section 603(d)(1) speaks specifically of "eligibility" for insurance, not the propriety of a claim under a pre-existing insurance policy. *Id.*; accord *Ippolito v. WNS, Inc.*, 864 F.2d 440, 449 n.10 (7th Cir. 1988).

In short, the cases cited by respondent do not support its argument. In fact, courts that have considered *Houghton*, *Cochran* and *Hovater* have refused to read these decisions as enunciating broad principles beyond their facts. For example, litigants in other cases have argued that these decisions stand for the broad proposition that the purpose for which the information was used (as opposed to originally collected) is solely dispositive of whether the information

¹² After finding that the third party did not intend to receive a report covered by the FCRA, the court did proceed to discuss the contents of the report, but only in the context of deciding whether the third-party recipient had a duty to notify the report's subject of its use of the report. The court stressed that "[o]n its face the Equifax report did not contain sufficient detail to alert [the third party] that it may have obtained an investigative consumer report from Equifax that was subject to the FCRA disclosure requirement." *Id.* at 1149 (emphasis added). The court noted that the report stated that Equifax "did check available credit files through a confidential source and ... [was] unable to come up with any financial irregularities" but that this was not sufficient to alert the third party that it had, contrary to its wishes, received a report covered by the FCRA. *Id.* Again, the court stressed the third party's understanding of the report, not what type of information was contained in the report. The court then noted that:

[a]bsolutely nothing in the report indicates that the "available credit files" served as a factor in establishing the consumer's eligibility for (1) credit or insurance to be used for personal, family, or household purposes, (2) employment purposes, or (3) "a legitimate business need for the information in connection with a business transaction involving the consumer."

Id. at 1149. Respondent focuses on this isolated comment to establish the broad principle that only "judgmental" information of the type or kind that would serve as a factor in establishing a consumer's eligibility for one of the permissible purposes constitutes a "consumer report" and is covered by the Act. There is no indication, however, that the court intended to establish such a broad principle or squarely considered all the ramifications of such a holding.

constitutes a “consumer report” under Section 603(d).¹³ Courts, however, have rejected this argument. In *St. Paul*, an insurance company, in the course of investigating an insured’s claim for losses under an existing policy, obtained a credit report that was originally collected for purposes of establishing the consumer’s eligibility for credit and other permissible purposes. The recipient argued that, because it did not “use” the information contained in the plaintiff’s credit report for any of the enumerated purposes in Section 603(d), the credit report was not a consumer report within the meaning of the FCRA. The court rejected the argument that use is solely dispositive, noting that the statutory language expressly includes information “collected” for one of the enumerated purposes. 884 F.2d at 884 & n.1. *Accord Ippolito*, 864 F.2d at 449-50.

We thus find no case law in support of respondent’s position that only “judgmental” information of the type or kind used to establish a consumer’s eligibility for a specified transaction is protected from disclosure by FCRA. Rather, we believe that the statutory language in question is aimed at limiting coverage by focusing on the purposes for which the information was either collected, used or expected to be used.¹⁴

¹³ Complaint counsel characterizes Trans Union’s position as standing for the proposition that target marketing lists are not consumer reports because the information is not used by target marketers to determine eligibility for credit. CCAB at 17. Complaint counsel argues that such an interpretation effectively reads the “collected” language out of the statute. Respondent, however, rejects complaint counsel’s characterization of its argument:

Rather, Trans Union contends that target marketing lists are not consumer reports because the type of information used to prepare them is not the type of information which is “used or collected” for purposes of determining “eligibility” for credit, employment, or insurance. TURB at 7. Although respondent does not advance the argument attributed to it by complaint counsel, we discuss this point in order to complete our interpretation of the statutory language. *See infra* n.14.

¹⁴ We also agree with *St. Paul* and *Ippolito* that *Houghton* cannot be read for the broad proposition that the purpose for which the information was used is solely dispositive of whether the information constitutes a “consumer report” under Section 603(d). As pointed out by the court in *St. Paul*, *Houghton* involved what was largely an insurance report used for the purpose of reviewing the validity of an insurance claim, not information from general credit reports, and thus there was no need for the *Houghton* court to consider whether the information imparted was “collected” for a permissible purpose. *St. Paul*, 884 F.2d at 885 n.3. The report at issue in *Houghton*, however, did briefly reference information from a consumer reporting database and thus may have contained information originally collected in whole or in part with the expectation that the information would be used for the purpose of serving as a factor in establishing the consumer’s eligibility for one of the transactions set forth in the FCRA. *Houghton*, 795 F.2d at 1149. We believe that *St. Paul* and *Ippolito*’s interpretation comports with the actual statutory language which refers to the communication of information which “is used or expected to be used or collected” for one of the enumerated permissible purposes. Section 603(d) (emphasis added).

In accordance with the statutory language, then, the target marketing lists fall within the FCRA's definition of "consumer report" if -- in addition to the requirements that the lists impart information bearing on one of the seven characteristics and that they be communicated to a third party -- any one of the following is true:

(1) The person who requests the information actually uses the information in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for one of the transactions set forth in the FCRA;

(2) The consumer reporting agency which prepares the information "expects" the information to be used in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for one of the transactions set forth in the FCRA; or

(3) The consumer reporting agency which prepared the communicated information originally collected the information in whole or in part for the purpose of it serving as a factor in establishing the consumer's eligibility for one of the transactions set forth in the FCRA.

Ippolito, 864 F.2d at 449. As discussed *infra* at pp. 22-24, we determine that respondent's target marketing lists fall within the third prong.

We believe that both the plain language of the statute and the purposes enumerated in the Act support our interpretation and that, consequently, there is no need to look at the legislative history of the FCRA. *Ratzlaf v. United States*, 114 S. Ct. 655, 662 (1994). However, our review of the somewhat sparse legislative history not only provides no support for respondent's position, but, to the extent that any history exists, lends support to our reading of this portion of Section 603(d). Two points emerge from examining the course of legislative drafting of the FCRA.¹⁵ First, throughout the legislative history, it is clear that this portion of Section 603(d), rather than attempting to limit the content of the divulged information that would be covered under the Act, was aimed at limiting coverage by focusing on the purposes for which the information was either collected, used or expected to be used. There is simply never any hint that the language was intended to restrict coverage in a manner suggested by Trans Union. Second, over the course of the legislative drafting, the

¹⁵ The evolution of the statutory language during the enactment process has been recognized as a useful guide in ascertaining the purpose and intended effect of the bill as passed. 2A Norman J. Singer, *Sutherland Statutory Construction* Section 48.04, at 324-26 (5th ed. 1992) [hereinafter "Sutherland Statutory Construction"].

scope of the definition of “consumer report” was significantly broadened, rather than narrowed.¹⁶

When Senator Proxmire first proposed his credit reporting bill to the Senate in 1968, the scope provision provided:

The term ‘credit report’ means any written or oral report, recommendation, or representation as to the credit worthiness, standing, or capacity of any individual, and includes any information which is sought or given for the purpose of serving as the basis for a judgment as to any of the foregoing factors.

114 Cong. Rec. 24,904 (1968). The references to information being “sought or given” clearly demonstrate that this language was focused on the intent of the credit bureau and/or the recipient in using information, rather than a limitation on the type or kind of information that would be covered by the Act. Respondent focuses upon the fact that the language refers to “information which is sought or given for the purpose of serving as a basis for judgment” as somehow indicating Senator Proxmire’s intent that only “judgmental” information be covered. TUAB at 24. However, the use of the words before that phrase -- “and includes any information which . . .” -- demonstrates that the language was clearly intended to expand the coverage of the statute, rather than to serve as a restriction on the type of information covered. The bill was not addressed before the end of the session.

Senator Proxmire reintroduced the bill in 1969 with a modified definitional provision. The new definition appeared in two parts. The term “credit rating” was defined as “any evaluation or representation as to the credit worthiness, credit standing, credit capacity, character, or general reputation of any individual.” “Credit report” was then defined as a “communication of any credit rating, or of any information which is sought or given for the purpose of serving as a basis for a credit rating.” S. 823, 91st Cong., 1st Sess., 115 Cong. Rec. 2415 (1969). Again, the use of the terms “sought or given” indicates that the focus was on the intent of the credit bureau and/or the recipient to use the information, not on the actual content of the information. Moreover, this two-part definition suggests that this language was intended to expand the scope of coverage beyond what

¹⁶ See generally Mary A. Bernard, *Houghton v. New Jersey Manufacturers Insurance Co.: A Narrow Interpretation of the Scope Provisions of the Fair Credit Reporting Act Threatens Consumer Protection*, 71 Minn. L. Rev. 1319, 1332-33 n.69 (1987) (providing a full explication of the evolution of this statutory language) [hereinafter “Bernard”].

the bill denominated as “credit rating” information, not to restrict coverage to certain types or kinds of information, contrary to respondent’s reading of it. And, finally, the definition of “credit rating” had expanded. It now included information about character or general reputation.

The 1969 bill was then reported to the Senate Committee on Banking and Currency, which substantially changed the bill’s language. “Credit reports” were changed to “consumer reports,” reflecting Congressional intent that the Act regulate more than credit reports. The definition was expanded to cover seven types of information and the language now at issue here was added at the end of Section 603(d). That language had been changed from “sought or given” to “used or expected to be used or collected” for insurance, credit, employment, or licensing purposes, or used in connection with a business transaction involving the consumer. The addition of “collected” was a clear expansion from the language referring to “sought or given.” The emphasis behind the language, however, remained focused on the intent of the recipient and/or the consumer reporting agency in collecting or disseminating the information.

The latter portion of Section 603(d) was obviously an attempt to limit the rather broad definition of “consumer report” by excluding from coverage information in reports that are not used or expected to be used or collected for determining consumer eligibility for insurance, credit, employment, or licensing purposes, or used in connection with a business transaction involving the consumer. For example, the legislative history reveals that this language was relied upon by the drafters in arguing that the statute excluded credit reports in connection with business firms. When the bill was passed by the Senate in substantially identical form to the bill that was reported by the Committee on Banking, as a part of the Bank Records and Foreign Transactions and Credit Card legislation, Senator Proxmire stated, in summarizing the bill:

The act covers all reporting on consumers, whether it be for the purpose of obtaining credit, insurance, or employment. However, credit reports or other reports on business firms are excluded.

116 Cong. Rec. 35,941 (1970). Similarly, when Congresswoman Sullivan, Chairman of the House Subcommittee on Consumer Affairs of the Banking and Currency Committee, reported the conference report to the House, she stated:

The purpose of the fair credit reporting bill is to protect consumers from inaccurate or arbitrary information in a consumer report, which is used as a factor in determining an individual's eligibility for credit, insurance or employment. It does not apply to reports utilized for business, commercial, or professional purposes.

116 Cong. Rec. 36,572 (1970). Respondent asserts that the first sentence of this quotation demonstrates an intention to limit coverage to the type or kind of information used to establish eligibility for credit, insurance or employment. But, as her next sentence reveals, Congresswoman Sullivan referred to reports "used as a factor in determining an individual's eligibility for credit, insurance or employment" solely to distinguish those types of reports from those "utilized for business, commercial, or professional purposes," not to limit coverage under the Act only to "judgmental" information.

Indeed, when Congressman Bow asked for clarification regarding how the statutory language could be read to exclude reports for business purposes, Congresswoman Sullivan pointed to the statutory language at issue here in support of her position that the legislation was designed not to cover reports used for business purposes:

Insofar as reports of a business nature are concerned, this point was raised continually in our hearings on H.R. 16340 in the Subcommittee on Consumer Affairs, and I think we always made clear that we were not interested in extending this law to credit reports for business credit or business insurance. The conference bill spells this out, furthermore, in section 603(d), which defines a "consumer report" as a report, and so on, "which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for (1) credit or insurance to be used primarily for personal, family, or household purposes" and so forth.

Id. at 36, 573. Throughout the legislative history, it appears that this language, rather than attempting to limit the content of the divulged information that would be covered under the Act, was aimed at limiting coverage by focusing on the purposes for which the information was either collected, used or expected to be used.¹⁷

¹⁷ Respondent also asserts that the Commission itself has interpreted this statutory language to restrict coverage to only "judgmental" information. First, respondent cites to prior commentary concerning whether credit guides constitute consumer reports. 16 CFR 600.1 (1981). Credit guides are prepared by credit bureaus which utilize their consumer reporting databases to rate each consumer's bill payment practices. The prior Commentary stated that these guides fit within the definition of "consumer report":

"Credit Guides" as presently compiled and distributed by credit bureaus, are a series of consumer reports, since they contain information which is used for the purpose of serving as a factor in establishing a consumer's eligibility for credit.

We thus proceed to determine whether the information imparted by the target marketing lists was used, expected to be used or originally collected for the purpose of serving as a factor in establishing the consumer's eligibility for one of the transactions set forth in the FCRA. *See Ippolito*, 864 F.2d at 449. We conclude that these lists fall within the definition of "consumer report" because the information imparted by them was originally collected by the consumer reporting agency with the expectation that it would be used by credit grantors as a factor in establishing the consumer's eligibility for one of the transactions set forth in Section 603(d) of the FCRA. The target marketing lists here were compiled by using tradeline information. The tradeline information was originally collected in whole or in part with the expectation that it would be used for the purpose of serving as a factor in establishing the consumer's eligibility for one of the transactions set forth in the FCRA.

There is no genuine dispute of fact here. Respondent admits that it is a consumer reporting agency, as that term is used in the FCRA, and is regularly engaged in the business of credit reporting. IDF 2. Respondent creates and maintains a consumer reporting database named CRONUS. IDF 8. This database contains, *inter alia*, tradeline information collected in whole or in part with the expectation that it will be used by credit grantors for the purpose of serving as a factor in establishing the consumer's eligibility for one of the transactions set forth in the FCRA. The tradeline information is included as one section in credit reports that are routinely sent to credit grantors for the purpose of serving as a factor in establishing the consumer's eligibility for one of the transactions set forth in the FCRA. Botruff Aff. paragraphs 6-14.

Furthermore, there is no factual dispute that respondent, through its TransMark division, creates and maintains databases for generating lists used in target marketing. *See supra* pp. 47. There is also no factual dispute that the lists are created by using tradeline information from CRONUS. *Id.* For example, the Base List is created by select-

16 CFR 600.1(c) (emphasis added). Respondent asserts that the underscored portion indicates that the Commentary found that these guides fit within the definition of "consumer report" only because they contain information of a type or kind that is used for the purpose of serving as a factor in establishing a consumer's eligibility for credit. TUAB at 25-26. We do not agree with respondent's reading. The underscored portion merely reflects the proper statutory interpretation that a report containing information bearing on one of seven enumerated characteristics falls within the definition if it is then used as a factor in establishing a consumer's eligibility for credit. That the quotation does not refer to the "expected to be used or collected" language does not mean that the Commission reads such language out of the statute. Moreover, even if this language supported Trans Union's position, this Commentary has been superseded. 55 Fed. Reg. 18,804.

ing from CRONUS only those consumers who have at least two tradelines as revealed in those consumers' CRONUS individual files. IDF 21. Furthermore, databases other than the Base List contain even more information from the tradelines that came from CRONUS. *See supra* pp. 6-7.

Thus, the tradeline information that is imparted via the target marketing lists was originally collected by respondent, in whole or in part, for the purpose of serving as a factor in establishing the consumer's eligibility for one of the transactions set forth in the FCRA.

Respondent has argued that the tradeline information does not meet this test because credit grantors could not in fact use the information actually imparted here (the number of tradelines as well as some basic information about those tradelines) in establishing the consumer's eligibility for one of the transactions set forth in the FCRA. We have shown that the statutory language cannot be read as restricting coverage in this manner.

Moreover, courts have recognized that, when a consumer reporting agency collects credit-related information in a consumer reporting database, there is a presumption that information was collected with the intention that it will be used by credit grantors as a factor in establishing the consumer's eligibility for one of the transactions set forth in the FCRA. *See Hansen v. Morgan*, 582 F.2d 1214, 1218 (9th Cir. 1978) (“[U]nless the Bureau was generally collecting such information for purposes not permitted by the FCRA, it must have collected the information in the report for use consistent with the purposes stated in the act. There has been no suggestion otherwise.”). Logically, it makes sense that, when a consumer reporting agency admits that it is collecting a natural cluster of credit-related information for statutory purposes, all the credit-related information in that cluster has been collected with the expectation that it will be used by credit grantors as a factor in establishing the consumer's eligibility for one of the transactions set forth in the FCRA. Indeed, given that all the tradeline information was placed in respondent's consumer reporting database, CRONUS, it flies in the face of the facts in this case to suggest that respondent had a different intent with respect to collecting certain aspects of tradeline information than it had in collecting the natural cluster of tradeline information. In any event, even if respondent in fact did have multiple purposes in collecting a natural cluster of tradeline information, respondent would still be liable if one of the purposes for which the cluster was collect-

ed was to serve as a factor in establishing the consumer's eligibility for one of the transactions set forth in the FCRA.

In sum, there is simply no factual dispute that the target marketing lists are created with tradeline information that was originally collected in whole or in part by respondent with the expectation that it would be used by credit grantors for the purpose of serving as a factor in establishing the consumer's eligibility for one of the transactions set forth in the FCRA.

2. Does the information in the target marketing lists bear on one of the seven enumerated characteristics?

The definition of "consumer report" also requires that the information "bear[] on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living." The ALJ held, and we agree, that the information imparted "bears on" the consumer's credit worthiness, credit standing or credit capacity. The plain reading of this statutory language is that the information need only be of some relevance to one of the seven enumerated characteristics. Indeed, the dictionary defines the term "bearing on" as meaning "to relate or have relevance: apply, pertain (facts bearing on the question)." Webster's Third New Int'l Dictionary 191 (1967).

We believe that, taken together, the information respondent releases via its target marketing is of relevance concerning a consumer's credit worthiness, credit standing or credit capacity. The fact that a person has two tradelines alone demonstrates that, at two distinct points in time, credit grantors deemed that person sufficiently credit worthy to be granted credit. Furthermore, the undisputed facts show that TransMark imparted much more credit-related information than the fact that these consumers all had two tradelines. *See supra* pp. 4-7. For example, the information extracted from CRONUS and included in each of the five segments of the Base List is a positive or negative indication as to whether the consumer has one or more of the type of account included in that segment, the open date of the oldest tradeline, and the open date of the newest tradeline. IDF 24.

TransMark advertisements emphasize that its lists are: "Not just ordinary lists but lists of people who are active users of credit." IDF 40 (quoting TransMark advertisement in DM News, May 18, 1992 at

12). For example, the "Upscale Retail" segment of the Base List is described in a marketing brochure as offering:

direct marketers the opportunity to reach America's retail shopping elite. The Upscale file has been developed from TransMark's list of retailers that cater to consumers with discriminating taste. These individuals have high discretionary income and are used to paying more than the average consumer to purchase quality products.

IDF 29 (quoting HX 2). Furthermore, one of the selects, the "hot-line" select, is a compilation of those consumers who have appeared on a credit grantor's tape within the prior 30 to 90 days. IDF 34.

In addition to creating these segments from the Base List, TransMark also maintains other separate databases and offers target marketing lists from those databases. *See supra* pp. 6-7. These databases impart much more than the fact that each consumer on the lists has two tradelines. In the Homeowners List, for example, one of the pieces of information extracted from CRONUS is the type of loan, the date the account was opened, and the date the account was closed. Weckman Aff. paragraph 19. The mortgage segment of the Homeowners List categorizes the type of loan as either FHA, Veterans, real estate or secured. Weckman Aff. paragraph 22. One of the pieces of information extracted from CRONUS and included in the Automobile Owners List is the date that the loan was opened and the expiration date. Weckman Aff. paragraph 30. The New Charge Card Issues List is created by selecting from CRONUS consumers who have at least two tradelines, one of which has an opening date within the last 90 days. Weckman Aff. paragraph 46. The New Homeowners List selects from CRONUS consumers who have at least two tradelines, one of which is a mortgage loan or a secured loan with an opening loan amount in excess of \$50,000 and an opening date within the last 90 days. Weckman Aff. paragraph 51. Finally, one of Trans Union's models, the TransMark Income Estimator, uses a mix of individual credit information and demographic information to estimate an individual's income. *See supra* p. 5.

Taken together, this information is unquestionably of relevance concerning a consumer's credit worthiness, credit standing or credit capacity. Respondent does not deny any of the facts described above about the operation of its target marketing lists. Rather, respondent places most of its reliance on its contention, which we have rejected above, that the information imparted must be "judgmental" informa-

tion of the type or kind used to establish a consumer's eligibility for a specified transaction.

Respondent, however, also argues that it has raised a material factual issue whether the target marketing lists disclose something of relevance about a consumer's credit worthiness. At oral argument, counsel for Trans Union questioned whether a credit grantor would find of relevance at all the fact that a consumer had two tradelines. OA Tr. at 21-22. The only affidavit respondent has filed that potentially addresses this question is an affidavit by its Director of Marketing for the Central Region, Peter J. Hopfensperger, who states only that "the list databases do not contain any information upon which a credit grantor can make a judgment as to a consumer's eligibility for credit." Hopfensperger Aff. paragraph 7. But this affidavit raises the issue only of whether the existence of two tradelines is sufficient information for a credit grantor to "make a judgment" as to eligibility; it does not question whether the fact that a person has two tradelines would be of some relevance to one of the seven enumerated characteristics. Moreover, it does not undermine the undisputed evidence that respondent's target marketing lists impart more than the fact that a consumer has two tradelines. Given the undisputed facts showing that the totality of information imparted in respondent's target marketing lists is unquestionably of relevance to a consumer's credit worthiness, credit standing, or credit capacity, this affidavit is simply not sufficient to defeat a motion for summary decision. See 6 Moore's Federal Practice paragraph 56.15[3] at 56-274-76 ("the opposing party's fact must be material, and of a substantial nature"); see also *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (the party opposing summary judgment is required to raise more than "some metaphysical doubt").

Respondent also asserts that "consumers with both good and bad credit ratings, high and low credit capacity, and negative public information are included in TransMark's database." TUAB at 29. Even granting respondent every possible inference and assuming that respondent could show that consumers with poor credit ratings are included in its lists, this fact would not be material to the critical question here: namely, whether the information imparted via respon-

dent's target marketing lists bears on one of the seven enumerated characteristics.¹⁸

In sum, we hold that the undisputed facts reveal that respondent's target marketing lists impart information bearing on one of the seven enumerated characteristics ("the covered information").¹⁹

3. Is the covered information in the target marketing lists "communicated"?

The FCRA also requires that, in order to constitute a consumer report, the covered information must be "communicated" to a third

¹⁸ This conclusion, respondent argues, conflicts with the Commission's TRW consent agreement. That consent agreement is binding only between the Commission and TRW. In any event, we believe that there is no conflict between the result here and the consent agreement with TRW. The TRW consent agreement permits TRW to communicate certain information from its consumer reporting database: a consumer's name, telephone number, mother's maiden name, address, zip code, year of birth, age, any generational designation, social security number, or substantially similar identifiers, or any combination thereof. *FTC v. TRW, Inc.*, 784 F. Supp. 361 (N.D. Tex. 1991) (Amendment to Consent Decree dated January 14, 1993). Respondent points out that these identifiers arguably fall within one of the enumerated characteristics -- namely, "personal characteristics." Oral Arg. Tr. at 20. Because any information about an individual consumer is arguably "personal," however, the TRW consent sought to provide a common sense distinction between information that merely identifies an individual -- *i.e.*, that John Doe really is John Doe -- and information that bears on one of the seven enumerated characteristics.

Respondent's attorney also asserted at oral argument that release of a consumer's mother's maiden name arguably reveals something of that person's credit worthiness:

How do you think mother's maiden name gets into the database? It's bank card fraud protection. If I printed out a list of everybody with the mother's maiden name, I would have a list of everybody with a bank card.

OA Tr. 70. Respondent, however, has provided no factual support to back this assertion. Moreover, a person's mother's maiden name is commonly used for a variety of security situations to ensure proper identification of an individual, including protecting the confidentiality of common savings and checking accounts. *See, e.g., Wolstein v. C.I.R.*, 52 T.C.M. (CCH) 1069, T.C.M. (P-H) paragraph 860,561 (T.C. Nov. 24, 1986) (savings accounts); *People v. Rosborough*, 2 Cal. Rptr. 669, 674 (Cal. Ct. App. 1960) (checking accounts); *Fanara v. Candella*, 1994 La. App. LEXIS 1059 (La. Ct. App. Apr. 18, 1994) (voting records). *See also Traver v. Meshriy*, 627 F.2d 934, 937 (9th Cir. 1980) (mother's maiden name requested for bank withdrawal over teller's approved limit). Thus, inclusion of identifying information such as an individual's mother's maiden name does not result in the release of information relevant to the seven enumerated characteristics. By contrast, the undisputed facts, as described above, show that Trans Union's target marketing lists impart information bearing on the seven enumerated characteristics.

Finally, respondent claims that the TRW consent agreement might permit recipients to know that consumers have at least one tradeline because inclusion in TRW's consumer reporting database implicitly requires at least one tradeline. TUAB at 27. Respondent's hypothetical, however, is mere speculation. It is not intuitively obvious to us that a reasonable recipient will in fact assume that consumers on a list obtained from TRW's consumer reporting database have at least one tradeline. By contrast, the recipients of Trans Union's target marketing lists clearly receive information about individuals that bears on one of the seven enumerated characteristics.

¹⁹ For ease of expression, "covered information" will be used to refer to information that bears on one of the seven enumerated characteristics (credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living) which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for one of the transactions set forth in the FCRA.

party. Respondent argues that, because in 90% of sales of its target marketing lists TransMark sends a computer-coded tape containing the names and addresses of consumers to a mail facility hired by the customer which is not given the criteria used to select the names, there is no actual "communication" of any covered information. TUAB at 34-35. Respondent further argues that, in the remaining cases, the customer directs the coded tape to its in-house mail facility without providing the criteria used to select the names. *Id.* In sum, respondent argues that, because the individual using the lists to mail out target marketing letters does not know of the criteria by which the names were originally selected, there is no "communication" of covered information as required by the statute.

Webster's Third New International Dictionary defines "communication" as the "act or action of imparting or transmitting." Webster's Third New Int'l Dictionary 460. The broad language in the statute -- "any written, oral or other communication" -- demonstrates that Congress intended that the definition of "consumer report" be read broadly to cover a wide variety of potential avenues of dissemination. Indeed, even at the time of passage of the FCRA, Congress was well aware of the possibilities that computerization might bring.²⁰ The statute's reference to written, oral or other communication demonstrates Congressional resolve that entities not escape coverage under the FCRA by establishing artificial mechanisms that in fact permit them to access covered information.

Given the undisputed facts here, we hold that covered information is "communicated" to TransMark's customers within the meaning of the statute. First, it is undisputed that TransMark's customers know the specific criteria by which names are placed on various TransMark's target marketing lists.²¹ Second, the evidence is also undisputed that both employees of customers, as well as mailers hired by

²⁰ Congresswoman Sullivan, describing the conference bill to her colleagues, captioned one portion of her presentation to the House "The Specter of the Impersonal Computer" and remarked: [W]ith the trend toward computerization of billings and the establishment of all sorts of computerized data banks, the individual is in great danger of having his life reduced to impersonal "blips" and keypunch holes in a stolid and unthinking machine which can literally ruin his reputation without cause, and make him unemployable and uninsurable, as well as deny him the opportunity to obtain a mortgage to buy a home. 116 Cong. Rec. 36,570 (1970).

²¹ See *supra* p. 7.

TransMark's customers as their agents, have actually accessed the names on the lists and, consequently, are aware of those names.²²

In the analogous area of agency law, the law presumes what is common sense: namely, that relevant information within the control of agents, such as the mailers here, concerning matters entrusted to that agent is imputed to the principal. Restatement of the Law (Second) Agency 2d Section 9(3) (1958), ("A person has notice of a fact if his agent has knowledge of the fact, reason to know it or should know it, or has been given a notification of it, under circumstances coming within the rules applying to the liability of a principal because of notice to his agent."); see, e.g., *National Petrochemical Co. of Iran v. The M/T Stolt Sheaf*, 930 F.2d 240, 244 (2d Cir. 1991) ("[i]t is a basic tenet of the law of agency that the knowledge of an agent . . . is imputed to the principal.") (quoting *Mallis v. Bankers Trust Co.*, 717 F.2d 683, 689 n.9 (2d Cir. 1983)).

Courts have found that a corporation cannot pigeonhole various bits of information among different departments and claim that it was not aware of all of the information. As explained by the First Circuit in *United States v. Bank of New England*, 821 F.2d 844 (1st Cir.), cert. denied, 484 U.S. 943 (1987),

Corporations compartmentalize knowledge, subdividing the elements of specific duties and operations into smaller components. The aggregate of those components constitutes the corporation's knowledge of a particular operation. It is irrelevant whether employees administering one component of an operation know the specific activities of employees administering another aspect of the operation.

Id. at 856 (emphasis added). See also *United States v. T.I.M.E.-D.C., Inc.*, 381 F. Supp. 730, 738 (W.D.W.Va. 1974). Similarly, courts

²² Although TransMark's customers are not allowed to place the computerized information into a database to access the information contained on the tape, or use the tape for any other purpose, IDF 41, individuals actually mailing out the solicitations have access to the names on the tape. An affidavit provided by respondent of an official of a third party mailing company, Acxiom Mailing Services ("AMS"), notes that:

AMS's customer will occasionally request AMS to access the tape for an individual name to confirm that a particular person was sent a mail piece and/or to delete a particular person's name.

Ortiz Aff. paragraph 15. In order to take names off of a list or to check to see if the name is on a list, one must necessarily look at the names on the list, and therefore, be aware of the names. Although, at oral argument, respondent's attorney questioned whether this piece of evidence shows that the third party mailers in fact have accessed the lists in the past, OA Tr. at 68, we find his contention to be belied by Mr. Ortiz's own statement of the facts. Moreover, as discussed *infra*, Mr. Ortiz's assertion that he did not have knowledge of the criteria used in picking the names on particular lists does not raise a material factual dispute as to whether Trans Union has communicated the critical two pieces of information to its customers or their agents: the criteria which are used to pick the names and the names themselves.

have found that a principal cannot apportion various pieces of information between itself and its agent and claim that it was not aware of all of the information. *See, e.g., Flying Diamond Corp. v. Pennaluna & Co.*, 586 F.2d 707, 712 (9th Cir. 1978) (rejecting the claim that a principal can “attempt to bootstrap to itself the agent’s ignorance of the facts.”).

These agency law principles have usually been applied to situations involving the principal’s liability for acts of the agent or the imputation of knowledge acquired by the agent. They thus have even greater force when applied to the question at hand. Here the issue is not a matter of apportioning liability or determining whether a principal has notice or knowledge imputed to it.²³ Rather, the question is whether corporate entities can parcel out discrete pieces of information among employees and agents such that the sender of the information may assert that the information the corporate entities requested was actually never “communicated” to the corporate entities.

We do not believe that respondent has raised a material factual dispute as to whether respondent communicates covered information within the meaning of the statute. It does not matter whether there are factual questions as to whether the employees and agents mailing out the target marketing information to consumers know the criteria by which those consumers were picked. The undisputed evidence is that (1) customers know the criteria by which the names are placed on the target marketing lists they request and (2) the customers’ employees and agents mailing out promotional material to consumers on those lists have access to the names on the lists and are thus aware of the names. Consequently, respondent has failed to raise a material factual dispute as to whether Trans Union has communicated the critical two pieces of information: the criteria which were used to pick the names, and the names themselves. *See Fabulous Fur Corp. v. United Parcel Serv.*, 664 F. Supp. 694, 697 (E.D.N.Y. 1987) (granting summary judgment and rejecting conclusory claims unsupported by affidavits asserting that there was a question whether a company was an agent of defendant or plaintiff); *see also National*

²³ We do not read the statute to require a showing of knowledge to prove that “communication” occurred.

Petrochemical Co. of Iran, 930 F.2d at 244 (affirming summary judgment on agency issue).²⁴

Respondent also advances two arguments, each of which questions whether the conclusion here is consistent with the FCRA Commentary. As we have noted above, the FCRA Commentary does not carry the force of law. While we nonetheless consider respondent's arguments, we do not find any of respondent's attempted analogies persuasive. Trans Union first argues that its coding of tapes is similar to the FCRA Commentary position that permits dissemination of coded credit guides, which are listings furnished by credit bureaus to credit grantors that rate how well consumers pay their bills. 16 CFR 600 app. at 360-61 (1994). *See also Howard Enters.*, 93 FTC 909 (1979). The FCRA Commentary permits the dissemination of such credit guides only so long as they are coded, whether by social security number, driver's license number or bank account number. 16 CFR 600 app. at 360-61 (1994). Because of this coding, the credit grantor cannot identify the particular consumer until that consumer affirmatively provides her or his social security number, driver's license number or bank account number. In this way, there is no effective tying of an individual's credit history to her or his name, and thus no imparting of covered information, until the consumer enters into a transaction, at which point the credit grantor has a permissible purpose under Section 604(3). *See infra* Section IV.B. In sharp contrast, Trans Union has no similar restrictions on the dissemination of its lists to ensure anonymity. The customer knows the criteria by which names are placed on lists it purchases and the

²⁴ Furthermore, even if there were no such evidence of the customers' access to names on the target marketing lists, the customers are able to learn the names of individuals responding to target mailings. It is undisputed that, when a promotional mailing goes out, a source code is placed on the mailing by which a customer can discover which list the consumer's name came from. Ortiz Aff. paragraph 13; Frank Aff. paragraph 22. Ortiz states that "[t]he source code enables AMS' customer to track the number of consumers who respond to a particular mailing from a particular target list." Ortiz Aff. paragraph 13; *see also* Frank Aff. paragraph 22. TransMark's customers use the computer tapes to mail offers to consumers to enter into credit, insurance or business transactions. IDF 45. Thus, the source code enables the customer eventually to connect an individual consumer's name to the criteria by which that name was first picked. Trans Union responds, however, that, at that point, the customer then has a "permissible purpose" under the FCRA to know of this information because the consumer has initiated the transaction. *See infra* Section IV.B. However, there is no evidence that consumers are asked this source code only when they are actually ready to purchase a product or service. Indeed, respondent's evidence suggests precisely the opposite: namely that the source code is requested any time a consumer requests more information about an offer, not just when the consumer actually accepts an offer. For example, one of TransMark's customers, Colonial Penn Auto Insurance, mailed consumers material about "The Experienced Driver Program." The source code was printed on the "Rate Request Form" which the consumer could fill out, the customer stressed, for a "no-obligation Rate Quote." Frank Aff. Ex. D (emphasis added).

customer, via its employees or its agents, has access to those names. Moreover, unlike recipients of coded credit guides or bad check lists, Trans Union's customers do not have a permissible purpose to obtain or use target marketing lists, thus making respondent's analogy misplaced. *See infra* Section IV.B.

Respondent's second analogy, this time to the FCRA Commentary section on prescreening, is similarly flawed. Prescreening is the process whereby a consumer reporting agency compiles or edits a list of consumers who meet specific criteria and provides this list to the client or a third party on behalf of the client for the purpose of making a firm offer of credit. The FCRA Commentary has taken the position that a prescreening list constitutes a series of consumer reports, because the list conveys the information that each consumer named meets certain criteria for creditworthiness. However, the FCRA Commentary provides that, if the client agrees in advance that each consumer whose name is on the list will receive a firm offer of credit, there is a permissible purpose for clients to receive this information, since, under Section 604(3)(A), a consumer reporting agency may issue a consumer report "to a person which it has reason to believe . . . intends to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to, or review or collection of an account of, the consumer . . ." 16 CFR 600 app. at 370 (Comment 6). Respondent seizes upon the fact that the FCRA Commentary permits this prescreening process to include:

demographic or other analysis of the consumers on the list (*e.g.*, use of census tract data reflecting real estate values) by the consumer reporting agency or by a third party employed for that purpose (by either the agency or its client) before the list is provided to the consumer reporting agency's client. In such situations, the client's creditworthiness criteria may be provided only to the consumer reporting agency and not to the third party performing the demographic analysis.

Id. Respondent interprets this quotation to suggest that the Commission endorses the view that there is no "communication" so long as the agent does not know the criteria. The Commentary, however, flatly rejects the notion that prescreened lists are not consumer reports if they are furnished solely to third party mailers. FCRA Commentary, 55 Fed. Reg. at 18,807.

In sum, we hold that Trans Union's target marketing lists contain information bearing on one of the seven enumerated characteristics,

that the lists were created with tradeline information that was originally collected in whole or in part by respondent with the expectation that it would be used by credit grantors for the purpose of serving as a factor in establishing the consumer's eligibility for one of the transactions set forth in the FCRA, and that this information is communicated to Trans Union's customers. We thus hold that Trans Union's target marketing lists are "consumer reports" within the statutory definition.

B. The FCRA's Permissible Purpose Requirement

The FCRA permits a consumer reporting agency to provide consumer reports, but only so long as the report is in connection with a permissible purpose. Consequently, TransMark's target marketing lists can be communicated if TransMark's customers have a "permissible purpose" for obtaining these reports at the time of the communication. The ALJ concluded that both legislative history and previous Commission interpretations and statements establish that target marketing is not a permissible purpose under the FCRA. ID at 13-16. The ALJ recognized that Section 604(3)(E) permits release of a consumer report by a consumer reporting agency to a

person which it has reason to believe . . . otherwise has a legitimate business need for the information in connection with a business transaction involving the consumer.

Id. The ALJ held, however, that this provision requires that the consumer initiate the business transaction in question and thus that Trans Union's customers did not have a permissible purpose at the time they obtained the target marketing lists. ID at 16.

We agree with the ALJ's result, but take a different route. We first examine the relevant statutory language in question and then turn to federal court case law interpreting that language in order to determine whether Trans Union's customers have a permissible purpose to receive the target marketing lists. *See supra* pp. 8-10.

Respondent relies on Section 604(3)(E) for the proposition that its customers have a permissible purpose here. Respondent points to the "in connection with" language as evincing Congressional intent that this provision was designed to set a very broad standard for when

a consumer report may be permissibly requested. TUAB at 38. Respondent asserts:

Although target marketing is not specifically identified in Section 604 as a permissible purpose, the transactions offered as a result of target marketing, e.g., consumer credit and insurance and the sale of consumer goods and services, are all specifically identified.

TUAB at 38.

Respondent's reading of the statute, however, would render much of the rest of the statute superfluous. Section 604 carefully lists the "permissible purposes" under which a consumer reporting agency may furnish a consumer report -- stating that reports may be furnished "under the following circumstances and no other" (emphasis added) -- and then provides certain limited circumstances. *See supra* pp. 10-11. Under respondent's reading of the breadth of (E), there would have been no need to delineate subparagraphs (A) through (D) of (3): any time a person wished to make an offer to a consumer about a good or service or wished to transact business of any kind, that person could obtain covered information about that consumer. There would have been no need for Congress to specify credit transactions and the underwriting of insurance. For example, there would have been no need for the careful construction of subparagraph (C)'s language relating to insurance -- in particular, the limitation to the "underwriting" of insurance. So long as the requester sought the report "in connection with" a possible business transaction with that consumer, the requester would have a permissible purpose under respondent's reading.

Respondent's reading of the statute violates the long established principle of statutory construction that a reviewing tribunal should not interpret a statutory provision so as to render superfluous other provisions. *Negonsott v. Samuels*, 113 S. Ct. 1119, 1123 (1993); *Pennsylvania Public Welfare Dept. v. Davenport*, 495 U.S. 552, 562 (1990) (expressing "deep reluctance" to interpret statutory provisions "so as to render superfluous other provisions in the same enactment") (citation omitted); *Bonner Mall Partnership v. U.S. Bancorp Mortgage Co.*, 2 F.3d 899, 908 (9th Cir. 1993); 2A *Sutherland Statutory Construction* Section 46.06 ("It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute.") (quoting *State v. Bartley*, 58 N.W. 172 (Neb. 1894)).

Such a broad interpretation would also violate one of the Congressional findings underlying the perceived need for the FCRA:

There is a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy.

Section 602(a)(4) (emphasis added). Under respondent's interpretation, any person seeking to sell a product or offer a service could obtain consumer reports about individual consumers, resulting in a significant invasion of privacy. We have no hesitation in finding that such an interpretation flies in the face of Congressional intent as expressed in the FCRA legislation in its totality. *United States Nat'l Bank of Oregon v. Independent Ins. Agents of Am., Inc.*, 113 S. Ct. 2713, 2782 (1993) ("Over and over we have stressed that '[i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law and to its object and policy'") (quoting *United States v. Heirs of Boisdore*, 49 U.S. (8 How.) 113, 122 (1849)); *The Coca-Cola Co.*, Dkt. No. 9207, slip op. at 9-10 n.18 (June 13, 1994).

At oral argument, respondent's counsel was asked if respondent had a limiting principle for Section 604(3)(E) to which counsel replied:

I would limit the availability of information . . . [to] the kind of information needed for the business transaction which in this case would be the name and address which we provided. That's what I'd give them. And I would restrict the ability to get any more information than that for a business transaction.

OA Tr. at 26-27. But, as we have found, respondent's target marketing lists divulge much more than merely the names and addresses of consumers. Those lists are compiled so that they impart covered information about individual consumers. Moreover even if only this limited information were given, that does not bring this under Section 604(3)(E) because respondent's principle is not a limitation on the purposes for which the information can be used; it is a limit on the type of information communicated. Such a limiting principle then is truly no limiting principle at all.

Courts have recognized the potential for a broad reading of subparagraph (E) to nullify the rest of the statute. In *Cochran v. Metro-*

politan Life Ins. Co., 472 F. Supp. 827, 830-31 (N.D. Ga. 1979), the court noted:

If such a catch-all reading of [subparagraph (E)] is derived, the specifics of the preceding sections and subsections are rendered meaningless. There is no reason to enumerate covered reports if ultimately all reports are included. An allowance of any other imaginable reports involving consumers would logically conflict with the precision and specifics of Section 1681a [Section 603(d)].

Accord Hovater v. Equifax, Inc., 823 F.2d 413, 419 (11th Cir. 1987) (“In sum, Section 1681b(3)(E) [Section 604(3)(E)] has not been given an expansive interpretation.”).²⁵

Consequently, we reject respondent’s unlimited reading of subparagraph (E) as fundamentally at odds with the language, structure and intent behind the statute. The question remains, however, as to precisely what situations Congress intended subparagraph (E) to cover. A few courts have opined on the proper interpretation. Judge Sloviter’s concurrence in *Houghton v. New Jersey Mfrs. Ins. Co.*, 795 F.2d 1144, 1150-51 (3d Cir. 1986), sought to address concerns about the scope of subparagraph (E). The majority opinion in *Houghton* had interpreted subparagraph (E) to cover only those business transactions “that relate to one of the other specifically enumerated transactions in Sections 1681a(d) [Section 603(d)] and b(3) [Section 604(3)], *i.e.*, credit, insurance eligibility, employment or licensing.” *Id.* at 1151. Judge Sloviter was concerned that this construction of subparagraph (E) could render that provision “superfluous.” *Id.* She suggested that subsection (E) encompasses “the types of business transactions similar to those set forth in subsections (A) through (D), but is not strictly limited to them.” *Id.* at 1152 (emphasis in original).

²⁵ In response, Trans Union notes that, in *Ippolito v. WNS, Inc.*, 864 F.2d 440, 451-52 n.11 (7th Cir. 1988), the Seventh Circuit stated that a court should read Section 604 in a broader fashion when determining whether a permissible purpose exists than when it determines whether a report fits within the statutory definition of “consumer report.” But to say that subparagraph (E) should be read in a broader fashion in the permissible purpose context than when defining a consumer report does not mean that it should be read in a virtually unlimited fashion. Indeed, Ippolito recognized the potential that an unlimited reading of subparagraph (E) could wipe out the rest of the statute. Ippolito involved the question whether a report requested to evaluate prospective business franchisees fell within the definition of “consumer report.” The court noted that, although Section 603(d) limited the definition to reports used for consumer, as opposed to business, purposes, and the legislative history was in accord, a literal reading of subparagraph (E) could support a finding that a report requested to evaluate prospective business franchisees constituted a “consumer report.” Such a literal reading, the Seventh Circuit recognized, was in direct conflict with the rest of the statutory language:

if [subparagraph (E)’s] “business transaction” language is incorporated without qualification into the definition of “consumer report,” most of the other provisions of Section 1681a(d) [Section 603(d)] and 1681b(3) [Section 604(3)] would be rendered a nullity. *Id.* at 451. The court then quoted with approval the above excerpt from Cochran.

She found that this interpretation fits within the *ejusdem generis* doctrine of statutory construction that:

when general words follow an enumeration of specific terms the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.

Id. at 1152 (quoting 795 F.2d at 1150); *see also* 2A Sutherland Statutory Construction Section 47.17, at 166-77 (discussing the use of the *ejusdem generis* doctrine and citing supporting case law). Another court decision, *Boothe v. TRW*, 557 F. Supp. 66, 70 (S.D.N.Y. 1982), held that subparagraph (E):

refers only to those transactions in which there is a 'consumer relationship' between the requesting party and the subject of the report or in which the subject was seeking some benefit mentioned in the Act (credit, insurance, employment, licensing) from the requesting party.

(quoting *Boothe v. TRW*, 80 Civ. 5073, slip op. at 4 (S.D.N.Y. Aug. 26, 1981). In that case, the court held that investigating the plaintiff for suspected counterfeiting activities was an impermissible purpose because there was no consumer relationship between the private investigative agency and plaintiff. Once there is an ongoing relationship between the consumer and the requester or where the consumer initiates a transaction with the requester, and the relationship or transaction is of a type that necessitates use of a consumer report, the requester has a "business need" -- and hence a permissible purpose under subparagraph (E) -- in obtaining covered information. For example, in *Howard Enters., Inc.*, 93 FTC 909, 937-38 (1979), the Commission found that coded credit guides were proper under the FCRA because covered information could only be tied to an individual consumer when that consumer initiated a transaction and provided the unique identifier, such as a social security number, driver's license number or bank account number. Covered information was only imparted at the point when the retailer had a true "business need" -- that is, when the consumer had initiated a transaction and thus sought to establish a relationship with the retailer. *Id.* at 937-38.

We believe that, at least in the context here of companies desiring to sell goods or services or offer credit or insurance to consumers, requiring that the consumer have sought to initiate the transaction, and thus have sought the benefits of a relationship with the requester,

before a permissible purpose can be found, best comports with subparagraph (E)'s language and the case law interpreting it.²⁶ In the context of the facts of this case, the more permissive standard advocated by Trans Union would completely nullify other portions of the statute and undermine the intent behind the statute.

Respondent argues that our interpretation of subparagraph (E) is incorrect because courts do not require that the business transaction be contemporaneous with the communication of information covered by the FCRA. TUAB at 47. But the cases respondent cites all involve ongoing relationships of some type.²⁷

Respondent briefly suggests that, because some of its customers are offering insurance or credit, some of its customers have a permissible purpose under subparagraphs (A) and (C) as well as under subparagraph (E). TUAB at 37. Respondent, however, has not suggested that all its customers have a permissible purpose under another subparagraph, so this issue is not even presented here. Moreover, the prescreening portion of this litigation, which directly con-

²⁶ Respondent cites to *dicta* in one unreported court decision for the proposition that a consumer does not need to have initiated a relationship in order for a requester to have a permissible purpose. In *Anderson v. Nissan, Inc.*, No. 91-1162, 1991 U.S. Dist. LEXIS 14550 (E.D. La. Oct. 8, 1991), the consumer, on two separate occasions, had visited defendant's dealership, test drove a car, and engaged dealership personnel in discussions concerning possible leasing or purchasing of a vehicle. The discussions concerned plaintiff's income, the down payment he could make on a vehicle and the cost of insuring the car. A Nissan employee obtained a copy of his consumer report. The court first concluded that Nissan could not be held liable under the FCRA because Nissan was not a consumer reporting agency. "Alternatively," the court noted that, even if Nissan could be held liable, Nissan had a permissible purpose under subparagraph (A) "if plaintiff's dealings with Nissan are characterized as negotiations." *Id.* at 4. The court then opined that:

Even if no 'negotiations' were being conducted, Nissan had an 'otherwise . . . legitimate business need for the information in connection with a business transaction involving the consumer.' *i.e.* determining whether plaintiff was actually a potential credit customer before having its sales and leasing staff expend further time and effort.

Id. at 4-5. While we need not address the result or reasoning in that case, we note that the level of consumer involvement with the requester in *Anderson* appears to have been qualitatively different from the situation at hand here -- namely, consumers who have not indicated in any way, shape or form any interest in the products or services offered by Trans Union's customers. A mere inquiry or the desire to determine whether someone is a potential customer does not constitute a permissible purpose under subsection (E).

²⁷ For example, in *Zeller v. Samia*, 758 F. Supp. 775, 781 (D. Mass. 1991), the plaintiff signed a note to defendant in 1976 for joint purchase of a condominium. In 1986, the defendant instituted a probate proceeding for a partition and an accounting in connection with the condominium. In 1987, the defendant discovered that the original note signed by plaintiff remained unpaid and subsequently reported a charge-off to Credit Data of New England on plaintiff's credit report. In August and September 1987, defendant made two inquiries to Credit Data regarding plaintiff and received plaintiff's entire credit history. The court held that defendant obtained the credit report for a permissible purpose:

'in connection with' a business arrangement involving the plaintiff. It is undisputed that defendant's inquiry and use of the plaintiff's credit information was limited to the transaction involving the Hull property that was the subject of the probate proceeding.

Id. at 782. Thus, the court recognized that the requester and the subject of the credit report were in an ongoing relationship.

cerns subparagraph (A), has already been settled. *See supra* p. 1 n. 1.²⁸ Although some courts have recognized that subparagraphs (A) through (D) have some flexibility in their interpretation,²⁹ no court has ever held that subparagraphs (A) or (C) could permit a company to obtain covered information in order to send out advertisements for credit or insurance offers.

In sum, we hold that a proper reading of the FCRA demonstrates that Trans Union's customers do not have a permissible purpose in receiving consumer reports in the form of target marketing lists. It is undisputed that TransMark's customers use the computer tapes to mail offers to consumers to enter into credit, insurance or other business transactions. IDF 45. TransMark also leases its tapes to customers who promote their product or service through telemarketing. IDF 46. It is also undisputed that TransMark does not require that its customers only use the lists to make a firm offer of credit to all consumers on the lists. IDF 8; Frank Tr. 15. Thus, there is no material factual dispute that Trans Union's customers lack a permissible purpose for receiving consumer reports in the form of target marketing lists.

Respondent urges, however, that the legislative history suggests that Congress intended to permit use of covered information for target marketing purposes. As we have noted above, however, recourse to legislative history is usually proper only to resolve ambiguities in the plain language of the statute or if the plain meaning conflicts directly with the language of the statute as a whole. Given the express language of the statute concerning limitations on permissible purposes and the language of the statute as a whole in protecting the

²⁸ Respondent claims also that the FCRA Commentary's position on prescreening has interpreted subparagraph (A) in a broad fashion on the question of prescreening and thus that the FCRA Commentary's position on prescreening conflicts with the result here. TUAB 44-45. We do not find that the FCRA Commentary's policy on prescreening conflicts with the result here. We note that credit reporting agencies' customers in the context of prescreening have gone beyond a mere solicitation and have made a firm offer demonstrating a present intention to enter into a credit agreement with each consumer. Thus, following the language of subparagraph (A), a firm offer of credit is sufficient to demonstrate that the consumer reporting agency has "reason to believe" that the customer "intends to use the information in connection with a credit transaction." Section 604(3)(A); FCRA Commentary, 55 Fed. Reg. at 18,815. The credit prescreening situation is thus significantly different from the mere hypothetical possibility of some future purchase of a good or service.

²⁹ *See, e.g., Allen v. Kirkland & Ellis*, 1992 U.S. Dist. LEXIS 12383 (N.D. Ill. Aug. 14, 1992) (holding, *inter alia*, that law firm had permissible purpose under (A) in obtaining credit report of individual who was sole controller of alter ego corporation for litigation over business debt); but *see Mone v. Dranow*, 945 F.2d 306, 308 (9th Cir. 1991) (*per curiam*) (rejecting argument that subparagraph (A) could be interpreted to permit employer to obtain credit report of former employee for purpose of determining whether employee would be able to satisfy judgment in employer's unfair competition litigation against employee).

privacy of consumers' credit and other personal information, we see no need to delve into the legislative history on this question. *Rarzlaf v. United States*, 114 S. Ct. 655, 662 (1994); see also *Barnhill v. Johnson*, 112 S. Ct. 1386 (1992); *Toibb v. Radloff*, 111 S. Ct. 2197, 2200 (1991). Nevertheless, although the legislative history on this particular question is sparse and not entirely clear, we believe that the legislative history supports our interpretation of the statute here.

When Senator Proxmire, the primary sponsor of the legislation that became the FCRA, introduced the 1969 version of the bill, he stated an intent to exclude access to covered information by "market research firms or ... other businesses who are simply on fishing expeditions." 115 Cong. Rec. 2415 (1969). Senator Proxmire's statement signals an intent to exclude access to covered information by target marketers. As the primary sponsor of the legislation that became the FCRA, Senator Proxmire's statement is of relevance in determining the intent behind the legislation.³⁰

Respondent argues that Congress rejected Senator Proxmire's position by rejecting the corresponding House bill that excluded from what it called "legitimate economic need" the use of consumer reports for "market research or marketing purposes." Section 34(c), H.R. 16340, 91st Cong., 2d Sess. (1970). As complaint counsel notes, the House version was never considered by the Congress at all because the Senate version was adopted by the Senate-House Conference Committee before the House had even considered its own FCRA legislation. Thus, Congress did not reject the House's explicit ban on target marketing.

Respondent, however, has unearthed one of a series of Senate Committee on Banking's draft versions of the FCRA that is similar to the House version in this respect. Because that draft's language restricting the scope of "business need" was not included in the final Senate version, respondent argues that the position of Senator Proxmire and the House version on this issue was in fact rejected by the Congress. TUAB at 40-41.

Respondent's argument requires too many leaps of faith. First, there simply is no documented evidence that the Senate Committee even considered this draft, let alone rejected the draft's provision on target marketing. Second, changes to the version of the bill intro-

³⁰ See *Holtzman v. Schlesinger*, 414 U.S. 1304, 1312 n.13 (1973). See generally 2A Sutherland Statutory Construction Section 48.15 (discussing the use of statements by the primary sponsor of legislation in determining legislative intent).

duced by Senator Proxmire show that the provision addressing permissible purposes was clarified and more clearly defined, rather than expanded. Compare Section 164(f)(1), S. 823, 91st Cong., 1st Sess. (1969) with Section 604, S. Rep. No. 517, 91st Cong., 1st Sess. (1969) (S. 823 as reported out of Committee on Nov. 5, 1969).³¹ Nor is there any evidence which suggests that Congress sought to broaden the original scope of the permissible purposes portion of the Senate bill. As noted above, respondent's interpretation of subparagraph (E) would eviscerate the expressed intent to protect the confidentiality of consumer files from "fishing expeditions."

Finally, respondent notes recent Congressional proposals to amend the FCRA to allow use of consumer reports for target marketing purposes. Respondent asserts that such attempts by Congress following enactment of the FCRA demonstrate that Congress did not intend to prohibit use of consumer reports for target marketing purposes. TUAB at 42-44. On the other hand, complaint counsel responds that, if respondent were correct that the original FCRA permitted use of consumer reports for target marketing purposes, then there would be no need to amend the Act to allow something already provided by the Act. Rather than accept either inference, we prefer to look solely to the FCRA as passed by Congress. *See Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) ("Congressional inaction lacks 'persuasive significance' because 'several equally tenable inferences may be drawn from inaction.'").³²

In conclusion, we hold that a proper reading of the FCRA demonstrates that Trans Union's customers do not have a permissible pur-

³¹ Senator Proxmire's 1969 version, S. 823, quite broadly allowed release:

to persons with a legitimate business need for the information and who intend to use the information in connection with a prospective consumer credit or other transaction with the individual on whom the information is furnished . . .

Section 164(f)(1). S. 823, 91st Cong., 1st Sess.; *see also* 115 Cong. Rec. at 2415. The potential breadth of this language was commented upon in hearings on S. 823. Fair Credit Reporting: Hearings on S. 823 Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking and Currency, 91st Cong., 1st Sess. (1969) [hereinafter Hearings on S. 823]. *See, e.g.*, Hearings on S. 823, at 128 (Statement of Dr. Harry C. Jordan, Credit Data Corp.), and 226 (Statement of Sarah Newman, National Consumers League). In response, the committee redrafted the provision and clearly enumerated the purposes covered. *See generally* Bernard at 1364 n.207.

³² Respondent also argues that consumer reporting agencies engaged in the target marketing business at the time of passage of the FCRA and that Congress' silence on the issue demonstrates that it wished them to continue. TUAB at 42. Respondent, however, provides no evidence that such agencies were engaged in the target marketing business. And, even if they were, there is no requirement that Congress must specifically pass on each perceived abuse in passing general legislation on an industry. This position is particularly dubious, given that the legislative history is replete with references by legislators to a wide variety of perceived abuses on the part of the credit reporting industry. *See generally* Hearings on S. 823.

pose in receiving consumer reports in the form of target marketing lists. We also find that the legislative history, although sparse, supports our interpretation of the statute here.

V. DOES THE ORDER ABRIDGE RESPONDENT'S FREEDOM OF SPEECH?

Trans Union contends that the order violates its First Amendment rights by prohibiting it from distributing or selling consumer reports in the form of target marketing lists to its customers. In its argument, respondent has specifically denied that it is challenging the constitutionality of the FCRA on its face. Rather, respondent challenges the FCRA as it is applied in the order. TURB at 16.

A. *Establishing the Proper First Amendment Test*

Under the Supreme Court's First Amendment test for a restriction on commercial speech, the speech at issue must concern lawful activity and not be misleading, while the restriction must directly advance a substantial governmental interest and not be more extensive than necessary to serve that interest. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980). By contrast, a restriction on fully protected speech which is not content neutral is constitutional only if it advances a compelling state interest and is the least restrictive way of advancing the asserted interest. *Boos v. Barry*, 485 U.S. 312, 321 (1988).

Both sides have briefed the First Amendment issue here as if this matter concerned a restraint on commercial speech.³³ But, as respondent noted in a footnote, *see* TUAB at 50, n.30, the Supreme Court has defined commercial speech as communication that "Propose[s] a commercial transaction." *Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 473-74 (1989). Target marketing lists comprise names and addresses of consumers. Although the lists are sold, so are many types of fully protected speech such as books or newspapers. The mere fact that speech is sold for profit, *i.e.*, is the subject of a commercial transaction, does not mean that it necessarily proposes a commercial transaction. *See Ginzburg v. United States*, 383 U.S. 463, 474 (1966).

³³ We reject complaint counsel's suggestion, CCAB at 43-44, that the speech involved here should be accorded no constitutional protection. *Dun & Bradstreet v. Greenmoss Builders, Inc.*, 472 U.S. 749, 760 (1985).

The Supreme Court, however, has commented on the proper constitutional standard of protection for credit reporting information, although the case concerned a defamation lawsuit. In *Dun & Bradstreet v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), the Court stressed that the test for whether speech such as a credit report was subject to less than full constitutional protection depended on whether the report's "content, form, and context" indicate that it concerns a public matter." *Id.* at 762 n.8. The Court found that the report in that case -- which provided false information to five customers of the credit reporting agency that the subject of the report had filed a petition for voluntary bankruptcy -- was speech "solely in the individual interest of the speaker and its specific business audience." *Id.* at 762. Although the Court expressly rejected the notion that such speech should be viewed as commercial speech, *id.* at 762 n.8, the Court seemed to equate the level of protection for credit reports of purely private interest with the level of protection for commercial speech. *See id.* at 793 (Brennan, J., dissenting).

Although *Greenmoss Builders* was decided in a different context, the Court's plurality opinion provides some important guideposts for determining the First Amendment standard most applicable here. While the Court did not call the speech there "commercial speech," the opinion demonstrates some unwillingness to accord credit reporting speech involving purely private interests the full panoply of protections for core speech. The Court seems to be according such speech a level of protection akin to commercial speech. *Accord Millstone v. O'Hanlon Reports, Inc.*, 528 F.2d 829, 832-33 (8th Cir. 1976) (viewing credit reports as commercial speech and upholding the constitutionality of the FCRA); *see also Sunward Corp. v. Dun & Bradstreet, Inc.*, 811 F.2d 511, 533-34 & n.25 (10th Cir. 1987) (collecting cases finding that credit reports are not fully protected speech). Nevertheless, given some uncertainty about the proper standard to use here, we will examine the constitutionality of the order under both (1) the standard for commercial speech and (2) the standard applicable to fully protected speech. Under either standard, as shown below, we believe that the order passes muster under the First Amendment.

B. Analyzing the Speech as Commercial Speech

The Supreme Court, in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980), set out a four-prong test for determining whether restrictions on commercial speech are constitutional under the First Amendment:

At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within the provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than necessary to serve that interest.

See also *Posadas de Puerto Rico Assoc. v. Tourism Co.*, 478 U.S. 328, 340 (1986). In this inquiry, the burden is on the government to show by more than “mere speculation or conjecture” that the “harms it recites are real and that its restriction will in fact alleviate them to a material degree.” *Edenfield v. Fane*, 113 S. Ct. 1792, 1800 (1993); see also *Ibanez v. Florida Dept of Business & Professional Regulation, Bd. of Accountancy*, 114 S. Ct. 2084 (1994). It is undisputed that respondent’s target marketing lists do not concern unlawful activity and are not misleading. The main points of contention are over the last three prongs: (1) whether the asserted government interest is substantial; (2) whether the regulation directly advances the asserted government interest; and (3) whether the regulation is more extensive than necessary to serve that interest. We will turn now to consider each of these prongs.

1. Whether the governmental interest asserted is substantial

The government’s asserted interest here is, as found by Congress in passing the FCRA, “respect for the consumer’s right to privacy.” Section 602(a)(4). In particular, the substantial governmental interest furthered by the order is the privacy interest consumers have in preventing communication of covered information, without a permissible purpose, by consumer reporting agencies. *St. Paul Guardian Ins. Co. v. Johnson*, 884 F.2d 881, 884 (5th Cir. 1989) (“One of the central purposes of the FCRA was to restrict the purposes for which consumer reports may be used, for the simple reason that such reports may contain sensitive information about consumers that can easily be

misused.”); *Zamora v. Valley Fed. Sav. & Loan Ass’n*, 811 F.2d 1368, 1370 (10th Cir. 1987) (FCRA intended to protect right to privacy); *Heath v. Credit Bureau of Sheridan, Inc.*, 618 F.2d 693, 696, (10th Cir. 1980) (FCRA designed to restrict intrusions into consumers’ private affairs). We find this interest to be substantial. See *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977); *Barry v. City of New York*, 712 F.2d 1554, 1559 (2d Cir.), cert. denied, 464 U.S. 1017 (1983) (“[P]ublic disclosure of financial information may be personally embarrassing and highly intrusive.”).³⁴

Congress in passing the FCRA left a legislative history replete with instances of perceived violations of consumers’ privacy by consumer reporting agencies, leaving no question that the harms here are very real.³⁵ Given this record, we believe the government interest asserted here is not just a speculative, conclusory or hypothetical one, but a very real one.

Respondent argues, however, that Congress’ concern for consumers’ right to privacy in passing the FCRA does not assist in understanding “whether Congress considered target marketing to be an invasion of privacy and, if so, why.” TUAB at 54. It is not necessary to establish that Congress considered respondent’s actual practices to violate a substantial governmental interest. Complaint counsel has alleged, and we have found, that respondent’s practices violate the FCRA because they permit the communication of covered information without a permissible purpose. See Section IV. Thus, the proper inquiry here is whether the particular interests underlying the statute that have been raised by respondent’s law violations -- specifically, the privacy interest consumers have in preventing access to consumer reports for an impermissible purpose -- are substantial. The legislative history of the FCRA shows that this interest is indeed weighty.

³⁴ In cases involving the direct solicitation of consumers, courts have generally recognized that protecting consumers’ right to privacy is a substantial government interest. See *Edenfield v. Fane*, 113 S. Ct. at 1799 (“Likewise, the protection of potential clients’ privacy is a substantial state interest.”); *Rowan v. United States Post Office Dep’t*, 397 U.S. 728, 736-37 (1970) (“[I]t seems to us that a mailer’s right to communicate must stop at the mailbox of an unreceptive addressee.”).

³⁵ S. Rep. No. 517, 91st Cong., 1st Sess. 4 (1969) (“A fourth problem is that the information in a person’s credit file is not always kept strictly confidential.”); see generally Bernard at 1324 n.34, 1326 n.41, 1334 n.80 (citing various portions of legislative history concerning breaches of consumers’ privacy). See also 115 Cong. Rec. 33,412 (1969) (statement of Sen. Williams) (“Hearings held earlier this year before the Banking and Currency Committee showed that in some cases highly confidential and personal data had been disseminated as a result of random telephone calls or letters. In these cases not even a cursory check was made on the individual making the request for the data or its ultimate use.”).

Respondent also notes that the order does not prohibit it from purchasing credit information separately from sources other than its consumer reporting database and using that information to compile target marketing lists. Respondent then seeks to argue that this undermines the asserted governmental interest in protecting the privacy of consumers' covered information. TUAB at 54-55, 57. In enacting the FCRA, Congress recognized that the databases of credit bureaus contain a tremendous amount of highly personal credit-related and other personal information, and thus it was necessary to regulate the industry that controls that information.³⁶ That Congress did not regulate entities other than credit bureaus does not indicate that the government's interest in regulating credit bureaus was in any way insubstantial. Again, respondent's quarrel is more properly with the statute itself than with the order.³⁷

Finally, respondent urges that the Supreme Court has rejected the notion that protecting consumers' privacy from target marketing mailings is a substantial governmental interest. TUAB at 55-56. In *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988), the Supreme Court found unconstitutional a ban on lawyers' solicitations to potential clients. The FCRA and the order, however, do not restrict the ability of target marketers to solicit consumers. They apply only to respondent's practice of providing target marketing lists containing covered information to its customers, who then make solicitations.

³⁶ As explained by Senator Proxmire when the Senate first passed the FCRA:

With the growth of consumer credit, a vast credit reporting industry has developed to supply credit information . . . Few individuals realize that these credit files are in existence. However, such a file can have a serious effect on whether a man gets employment or insurance. It can have a disastrous effect, as our hearings show it has had a disastrous effect, on some individuals.

115 Cong. Rec. 33,408-09 (1969). Congresswoman Sullivan, in presenting the Conference Report to the House for its final consideration, similarly stressed the unique nature of consumer reporting agencies' databases:

[This legislation] obligates credit reporting bureaus to protect the confidentiality of such information . . . and otherwise to operate their businesses in a responsible manner commensurate with the intimate nature of the personal data on individual consumers which is the "merchandise" which such agencies sell for a fee.

116 Cong. Rec. 36,570 (1970).

³⁷ In any event, as discussed in the next section concerning whether the restriction directly advances the governmental interest asserted, the Supreme Court has held that under-inclusiveness is not fatal to a restriction on commercial speech. In *Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986), the Supreme Court upheld a ban on the advertisement of casino gambling, even though it did not apply to advertising of other forms of gambling. The Court reasoned that this under-inclusiveness did not indicate that the prohibition did not advance a substantial governmental interest, since the legislature believed that greater risks were involved in casino gambling than other types of nonrestricted gambling. *Id.* at 342-43. Similarly, here, the FCRA recognizes the unique risks to privacy that are posed by the communication of covered information, without a permissible purpose, by consumer reporting agencies.

The privacy interest here, then, is not simply the right not to receive mail solicitations, but the right not to have covered information communicated by consumer reporting agencies to target marketers for the impermissible purpose of assisting them in sending out their solicitations.

2. Whether the regulation directly advances the governmental interest asserted

The third prong of the Central Hudson test is whether the regulation directly advances the substantial governmental interest asserted. While the respondent mounts an "as-applied" challenge, *see supra* p. 44,³⁸ questioning not whether the FCRA directly advances the interest, but whether the order does so, TUAB at 52, we believe that under either inquiry, this prong of the Central Hudson test is satisfied: we find that both the order and the FCRA directly advance the governmental interest asserted here.

The governmental interest here is in protecting consumers' right not to have covered information communicated by consumer reporting agencies to target marketers for impermissible purposes. The order directly advances that interest. The undisputed evidence, as described above, demonstrates that Trans Union's target marketing lists contain information bearing on one of the seven enumerated characteristics, that this information was originally collected for one of the enumerated statutory purposes, that this information is communicated to Trans Union's customers, and that Trans Union's customers do not have a permissible purpose in receiving this information. This order will then effectively prevent Trans Union from using covered information to distribute or sell target marketing lists.³⁹

The FCRA also directly advances this governmental interest. As stated by Congress, one of the main purposes of the FCRA was to

³⁸ An "as-applied" challenge questions the constitutionality of a statute as it is applied to the respondent in question and to the facts of the respondent's situation, as opposed to a broad challenge to the constitutionality of a statute itself which is known as a "facial" challenge.

³⁹ Respondent argues that the order here is ineffective because it does not prevent target marketing. TUAB at 60-62. Respondent notes that TransMark's revenues from the rental of target marketing lists in 1992 were only 2 to 3 percent of the aggregate revenues from target marketing of only three of TransMark's competitors who are not subject to the FCRA. IDF 47. Again, however, respondent misconstrues the substantial governmental interest involved here. As noted above, the interest is not in preventing unwanted solicitation by target marketers in and of itself, it is in protecting consumers' right not to have covered information communicated by consumer reporting agencies to target marketers for the impermissible purpose of assisting them in sending out their solicitations.

prohibit unwarranted intrusions into individuals' consumer reports. *See supra* pp. 46-47 & n.35. Section 604 of the Act directly accomplishes this by enumerating specific reasons for which consumer reporting agencies can provide covered information. Subparagraph (E) protects consumers by only allowing companies to obtain consumer reports where there is an ongoing relationship or the consumer has initiated the transaction. *See* Section IV.B. Section 607 furthers this objective by requiring that users of consumer reports certify to the consumer reporting agency the purposes for which they are seeking the information. These provisions ensure that information is obtained only for statutory purposes. Moreover, as shown above, *see supra* pp. 46-49 & nn.35-36, Congress in passing the FCRA sought to correct specifically stated harms caused by the communication of covered information, without a permissible purpose, by consumer reporting agencies.

Respondent, however, contends that the fact that the FCRA applies only to consumer reporting agencies makes the restrictions ineffective. TUAB at 61. Respondent asserts that other companies will often be able to obtain the same confidential credit-related and other personal information about consumers. The FCRA's distinction between consumer reporting agencies and other companies is not, as respondent contends, based on a "bare" assertion; rather, as shown above, the FCRA limited its reach to consumer reporting agencies in recognition of the unique risks to privacy that are posed by the disclosure, without a permissible purpose, of covered information by those agencies. The distinction enunciated in the FCRA then is a rational legislative decision to restrict the focus of the statute to address the perceived problem. *Posadas de Puerto Rico Assoc.*, 478 U.S. at 342-43 & n.8; *see supra* n.37.

3. Whether the regulation is a reasonable fit
to serve the governmental interest

With regard to this last prong, the Court has explained that the test is not whether the regulation, as applied, represents the absolutely least severe means of achieving the desired end, but rather whether it has been "narrowly tailored" to serve the government's asserted purpose. *Fox*, 492 U.S. at 480-81. The "reasonable fit" inquiry focuses on the order. *Edge Broadcasting*, 113 S. Ct. at 2704 (suggesting that the proper place to judge the validity of a statute's

application to a particular respondent is whether the specific regulation is more extensive than necessary to serve the government's interest as expressed in the statute).

We are convinced that the order as applied to respondent represents a narrow restriction under the First Amendment. The order permits respondent to communicate target marketing lists created by using "identifying" information from its consumer reporting database. Furthermore, respondent may supplement this information with credit data separately obtained for target marketing purposes. Thus, the order only prohibits respondent from distributing or selling target marketing lists created by using covered information. This narrowly-crafted application of the FCRA achieves the governmental purpose in protecting information covered by the FCRA without unduly hampering Trans Union's ability otherwise to sell target marketing lists.

Respondent, however, argues that the credit-related and other personal information that Trans Union can obtain under this order will, in many instances, be the same as the covered information it already possesses, the only distinguishing characteristic being the price of the information. TUAB at 64. Respondent thus contends that the order is not a reasonable fit with the asserted governmental interest.⁴⁰ Again, however, the order properly draws the line established in the statute, in recognition of the uniqueness of covered information in the possession of consumer reporting agencies as expressed in the FCRA.⁴¹

⁴⁰ The Commission's consent settlement with Trans Union on the issue of prescreening also permits Trans Union to sell prescreening lists to customers so long as they promise to make a firm offer of credit to each consumer on the list. Respondent argues, in a similar fashion as above, that the consent order's provisions permitting it to sell prescreened lists so long as a firm offer of credit is made also show that the order is not a reasonable fit with the asserted governmental interest. TUAB at 64-65. As discussed above, *see supra* n.28, there are significant differences between credit prescreening in which consumers receive a firm offer of credit under Section 604(3)(A) and target marketing.

⁴¹ *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505 (1993), cited by respondent, does not suggest otherwise. That case, in what the Court described as a "narrow" holding, *id.* at 1516, found unconstitutional a decision by the City of Cincinnati to remove newspaper racks used by commercial publications from certain street corners. *Id.* at 1507. The City cited visual blight and safety concerns as its justifications for the restriction. *Id.* at 1514-1515. Noting that nothing in the record suggested that news racks containing "commercial handbills" were more unattractive than news racks containing newspapers, *id.* at 1514-1515, the Court questioned whether the City's distinction between commercial and more traditional publications was justified based on a record that showed that the restriction would remove 62 out of some 1500 to 2000 news racks. *Id.* By contrast, in this case the distinction between consumer reporting agencies and other companies reflects a legislative determination, backed by a legislative record of abuses in the credit reporting industry, that there were unique risks to privacy posed by the communication, without a permissible purpose, of covered information by those agencies.

In sum, we believe that the order is constitutional. Under the Central Hudson test, the FCRA directly advances a substantial governmental interest -- namely, the privacy interest consumers have in preventing communication, without a permissible purpose, of covered information by consumer reporting agencies. The order directly advances this interest by barring Trans Union from distributing or selling target marketing lists created by using covered information. Finally, the order is narrowly tailored to the asserted governmental interest.

C. Analyzing the Speech as Fully Protected

The result would be no different if the speech here were judged under the standard governing fully protected speech. Restrictions on "non-commercial" speech are subject to a higher level of scrutiny, the strictness of which is determined based on whether the law is deemed "content-based" or "content-neutral." To justify content-based regulation, the government must "show that the 'regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.'" *Boos v. Barry*, 485 U.S. 312, 321 (1988). "Content-neutral" regulations must further "an important or substantial governmental interest unrelated to the suppression of expression," and their limitation on free speech must be "no greater than is necessary or essential to the protection of the particular governmental interest involved." *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32 (1984).

We believe that the order is a "content-neutral" restriction, as that term has been articulated by the Supreme Court. According to one recent Court opinion:

As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content-based By contrast, laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content-neutral.

Turner Broadcasting Sys., Inc. v. FCC, 114 S. Ct. 2445, 2459 (1994) (citations omitted).

Key to a determination of content-neutrality is the purpose underlying the restriction on speech.

The principal inquiry in determining content neutrality, in speech cases generally ... is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others. Government regulation of expressive activity is content neutral so long as it is 'justified without reference to the content of the regulated speech.'

Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (citations omitted).

As Congress stated in the Act itself, the FCRA was enacted "to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information...." Section 602(b). This purpose was driven in large part by Congress' finding of a need to ensure "a respect for the consumer's right to privacy," Section 602(a)(4), and to protect the continued viability of a banking system that had come to depend on "fair and accurate credit reporting." Section 602(a)(1). Thus, Congress' purpose was not to suppress expression on the basis of its message, but rather to restrict the manner by which certain commercial information could be disseminated to achieve the purposes described above.⁴² Likewise, in the case at hand, the order does not restrict the dissemination of Trans Union's target marketing lists because of their viewpoint or the ideas that they express; it restrains them because their source is Trans Union's consumer reporting database,⁴³ and the purpose for which they are sought is impermissible under the statute.

⁴² The Supreme Court has upheld certain forms of economic regulation which only incidentally burdened speech. In *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990), the Court noted that:

This Court has recognized the strong governmental interest in certain forms of economic regulation, even though such regulation may have an incidental effect on rights of speech and association. The right of business entities to 'associate' to suppress competition may be curtailed. Unfair trade practices may be restricted. Secondary boycotts and picketing by labor unions may be prohibited

Id. at 428 n.12 (quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 912 (1982)) (citations omitted). See also *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978) (noting that these examples and others "illustrate[] that the State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity").

⁴³ See *Rhinehart*, 467 U.S. at 20-37 (court protective order restraining release of information obtained by command of the court through civil discovery process did not offend First Amendment where the same information could be disseminated if obtained from other sources).

To be sure, the FCRA is not wholly without some reference to content. The definition of “consumer report” is itself hinged in part on the subject matter of the information contained therein, *i.e.*, the seven enumerated characteristics. Nevertheless, the fact remains that Congress' justification for limiting the dissemination of consumer reports to certain permissible purposes was unrelated to its agreement or disagreement with a particular message, but rather was because of its substantial concern for the privacy of individuals. *See City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 48 (1986) (zoning ordinance aimed at adult movie theaters was “consistent with our definition of ‘content-neutral’ speech regulations as those that ‘are justified without reference to the content of the regulated speech.’”) (quoting, with emphasis, *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976)).

Having deemed the order to be essentially “content-neutral,” we now consider whether the order furthers a substantial state interest and is no greater than necessary to protect that interest. As discussed earlier in more detail, we conclude that there is a substantial governmental interest in preventing unwarranted invasions of the individual's right to privacy in covered information. We also conclude that the order is no broader than necessary to protect this interest. Specifically, the order does not limit Trans Union's ability to communicate similar information through means other than accessing its consumer reporting database.⁴⁴

In conclusion, we hold that, regardless of the test used to analyze the regulation here, both the FCRA and the order are constitutional under the First Amendment as narrowly tailored regulations designed directly and materially to protect against the harm of communication, without a permissible purpose, of covered information by consumer reporting agencies.

VI. DOES THE ORDER ABRIDGE RESPONDENT'S EQUAL PROTECTION RIGHTS?

In line with respondent's earlier First Amendment argument that the FCRA and the order treat it unfairly because other companies that do not fall within the definition of “consumer reporting agencies” may sell target marketing lists containing covered information, respondent contends that this distinction is arbitrary and thus violates

⁴⁴ See *supra* n. 43.

its equal protection rights. In areas of social and economic policy, regulations that create classifications will be upheld against equal protection challenge "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *FCC v. Beach Communications, Inc.*, 113 S. Ct. 2096, 2101 (1993). As discussed above, Congress had a rational basis for distinguishing between consumer reporting agencies and other companies. Consumer reporting agencies present unique problems for the protection of consumer privacy and special regulation of their activities was determined to be necessary. Moreover, the FCRA and the order are narrowly tailored to address perceived problems of privacy without unduly burdening respondent's ability to do business. Indeed, as we have noted above, the order permits respondent to use "identifying" information from its consumer reporting database in its target marketing business. Furthermore, it may supplement this information with credit data separately obtained for target marketing purposes.

Respondent cites to the fact that the Supreme Court in *Beach Communications*, 113 S. Ct. at 2101 n.6, left open the question of the precise Equal Protection test when a restriction infringes on a fundamental constitutional right. But as we found in Section V, the FCRA and the order do not violate respondent's First Amendment rights and thus do not encroach on a fundamental constitutional right. Given this determination, we do not believe that respondent's equal protection challenge fares any better.

VII. DISCOVERY ISSUES

Respondent argues that the ALJ committed reversible error by relying on the Commission's TRW consent order, the Commission's FCRA Commentary on prescreening and recent testimony by the Commission before Congress, and by refusing to permit Trans Union to obtain relevant underlying information and documents. *See* Trans Union Corp., Dkt. No. 9255, Order Denying Respondent's Motion for Access to Documents (Aug. 9, 1993). This decision relies on the statutory language, federal court case law construing that language, and relevant legislative history. We do not rely upon the TRW consent order, the FCRA Commentary, or recent testimony by the Commission. Consequently, respondent's argument that it was unfairly denied discovery of the underlying documents is now moot. One issue, however, remains. The ALJ referred to a letter sent to the

Commission by Senator Proxmire dated Oct. 8, 1971, which was not made a part of the record in the proceeding. That letter was not released to respondent during the course of the administrative litigation, nor is it available from any other source. Our decision is not based in any part, nor have we relied, on the Proxmire letter. Accordingly, any error is harmless.

VIII. CONCLUSION

We hold that there is no genuine dispute of material fact that Trans Union's target marketing lists contain information bearing on one of the seven enumerated characteristics, that the lists were created with tradeline information that was originally collected in whole or in part by respondent with the expectation that it would be used by credit grantors for the purpose of serving as a factor in establishing the consumer's eligibility for one of the transactions set forth in the FCRA, and that this information is communicated to Trans Union's customers. We thus hold that Trans Union's target marketing lists are "consumer reports" within the statutory definition. Furthermore, we hold that Trans Union's customers do not have a permissible purpose for receiving target marketing lists containing this information. We also hold that there is no genuine dispute of material fact about this question. We also hold that, regardless of the test used to analyze the regulation here, both the FCRA and the order are constitutional under the First Amendment as narrowly tailored regulations designed directly and materially to protect against the very real harm of communication, without a permissible purpose, of covered information by consumer reporting agencies. Finally, we hold that the FCRA and the order do not violate respondent's equal protection rights, and that respondent was not prejudiced by its lack of access in discovery to documents on which the Commission did not rely in this decision.

CONCURRING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

I join in the Commission's order and generally in the majority opinion holding that Trans Union's dissemination through its target marketing lists of information bearing on the credit worthiness, credit standing, or credit capacity of consumers violated the Fair Credit Re-

porting Act ("FCRA").¹ I write separately to note certain different views related to the analysis of whether Trans Union's target marketing lists are consumer reports under the FCRA. *See* Slip op. at 10-34. I do not support the majority opinion to the extent that it may imply that the content of the information imparted should not be examined to determine the purpose for which that information was collected. Nor do I join in the majority's discussion of the consent agreement with TRW.

Under Section 603(d) of the FCRA,² a "consumer report" includes any "communication" of information "bearing on credit worthiness, credit standing, or credit capacity" that was "collected for the purpose of serving as a factor in establishing [a] consumer's eligibility" for credit or insurance or one of the other transactions set forth in the FCRA. I agree with the majority that Trans Union has communicated information relating to credit worthiness, credit standing, or credit capacity to its customers or their third-party mailers by providing them target marketing lists.³

The next question under Section 603(d) is whether Trans Union collected the information to serve as a factor in establishing eligibility for one of the transactions set forth in the FCRA. The majority states that:

the plain meaning of the phrase -- 'which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for . . . ' -- makes it clear that this language was aimed at limiting coverage by focusing on . . . the consumer reporting agency's reason for collecting the information, its expectation as to how it would be used, or the reason why the requester desires the information . . . not on the actual content of the information imparted.

See Slip op. at 12. The last portion of this statement gives me pause.

It is true that the "focus" of the inquiry into why a consumer reporting agency collected information need not be solely, or even primarily, on the "content of the information imparted." The majority opinion, however, may suggest a more narrow reading. To the extent

¹ 15 U.S.C. 1681b and 1681e.

² 15 U.S.C. 1681a(d).

³ I agree with the majority that Section 603(d) does not require a showing that the recipients of information had knowledge of that information to prove that "communication" occurred (*see* Slip op. at 31 n. 23), and I do not join the part of the majority opinion (*id.* at 29 and 31) that addresses the knowledge of Trans Union's customers.

that it may suggest that examination of the content of a communication in such an inquiry would be improper or irrelevant in assessing the purpose of the communication, I cannot agree.⁴

Nothing in the statute or in the case law prohibits consideration of the content of information imparted in determining the purpose for which the information was collected. Nor is there any other apparent reason for doing so.⁵ Prohibiting an examination of content in determining the purpose for which information was collected could preclude the consideration of highly probative evidence.⁶ Although I would not require that content be considered in this context, neither would I exclude content from consideration absent a reason for doing so, and I see none.

I also do not join in the analysis of the majority concerning the consent agreement in *FTC v. TRW Inc.*, 784 F.Supp. 361 (N.D. Tex. 1991) (as modified on Jan. 14, 1993), except that I agree that the TRW order is not controlling in this proceeding. *See* Slip. op. at 27 n.18. Trans Union's argument on this point is based on facts not in the record in this case or in TRW. We have no Commission opinion to enlighten us regarding the TRW order and no adjudicative record to compare to that in this case. I see no necessary inconsistency between the result in this case and the action the Commission took in TRW. Attempts to explain what the Commission intended in TRW and to compare the two cases as Trans Union proposes are simply not useful.

⁴ Two of my colleagues who support the majority opinion have said in a separate statement that “[n]othing in the statute, the case law, or the Commission opinion . . . precludes the Commission from considering the content of the disseminated information as evidence of the purpose for which it was originally collected, used, or expected to be used.” This *post hoc* clarification of the majority opinion, although welcome and consonant with my position, does not persuade me that the opinion could not reasonably be construed another way.

⁵ The majority itself, in deciding the purpose for which Trans Union collected the information it communicated to its clients, seems to rely on the fact that the target marketing lists in question contained tradeline information. *See* Slip op. at 22-23.

⁶ Although the content of information communicated may not be determinative of purpose, it can evidence purpose. For example, communication to a credit card company of a consumer's affiliation with an organization dedicated to lobbying for legislation to limit service charges by credit card companies might suggest that the purpose had little to do with assessing the creditworthiness, insurability or employability of the organization's members and perhaps more to do with purposes impermissible under the FCRA.

SEPARATE STATEMENT OF CHAIRMAN JANET D. STEIGER
AND COMMISSIONER ROSCOE B. STAREK, III

We write to clarify one portion of the Commission opinion discussed in Commissioner Azcuenaga's Concurring Statement. In its argument, Trans Union attempted to deflect inquiry away from the purpose for which it had originally collected the tradeline information used in its target marketing lists. Such an inquiry, however, is plainly required by the FCRA's definition of consumer report. Thus, in responding to Trans Union's argument, the Commission noted that one portion of the FCRA's definition of consumer report "focuses" on the purpose for which the information was originally collected, used, or expected to be used. Slip op. at 12. That is, in this context, the Commission must reach a conclusion as to Trans Union's purpose in collecting the information, not as to the content of the information.

Nothing in the statute, the case law, or the Commission opinion, however, precludes the Commission from considering the content of the disseminated information as evidence of the purpose for which it was originally collected, used, or expected to be used. Indeed, the Commission considered the nature of the information Trans Union communicated through the target marketing lists in concluding that the information had been collected for the purpose of serving as a factor in establishing a consumer's eligibility for credit, insurance, or one of the other transactions set forth in the FCRA. Slip op. at 22-24. Contrary to Commissioner Azcuenaga's Concurring Statement, the Commission never stated or implied that it was prevented from considering the content of the information imparted when determining the purpose for which that information was collected.

FINAL ORDER

This matter has been heard by the Commission upon the appeal of respondent Trans Union Corporation from the Initial Decision, and upon briefs and oral argument in support of and in opposition to, the appeal. For the reasons stated in the accompanying Opinion, the Commission has determined to affirm the Initial Decision to the extent that it is not inconsistent with the accompanying Opinion. Accordingly, the Commission enters the following order.

It is hereby ordered, That respondent, Trans Union Corporation:

a) Cease and desist from distributing or selling consumer reports in the form of target marketing lists to any person unless respondent has reason to believe that such person either intends to make a firm offer of credit to all consumers on the lists or to use such lists for purposes authorized under Section 604 of the FCRA.

b) Maintain for at least five (5) years from the date of service of this order and upon request make available to the Federal Trade Commission for inspection and copying, all records and documents necessary to demonstrate fully its compliance with this order.

c) Deliver a copy of this order to all present and future management officials having administrative, sales, advertising, or policy responsibilities with respect to the subject matter of this order.

d) For the five (5) year period following the entry of this order, notify the Commission at least thirty (30) days prior to any proposed change in respondent such as dissolution of subsidiaries, or any other change in the corporation that might affect compliance obligations arising out of this order.

e) Within one hundred and eighty (180) days of service of this order, deliver to the Commission a report, in writing, setting forth the manner and form in which it has complied with this order as of that date.

By the Commission.¹

¹ Prior to leaving the Commission, former Commissioner Owen and former Commissioner Yao registered their votes in the affirmative for the Opinion of the Commission and the Final Order in this matter.

IN THE MATTER OF

L&S RESEARCH CORPORATION, ET AL.

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

Docket C-3534. Complaint, Oct. 6, 1994--Decision, Oct. 6, 1994

This consent order requires, among other things, the New Jersey corporation and its officer to pay \$1.45 million to the United States Treasury, prohibits the respondents from making misrepresentations regarding the efficacy of their bodybuilding and weight loss products, and requires them to possess competent and reliable scientific evidence to substantiate future bodybuilding and weight loss claims. In addition, the order restricts the use of endorsements, including "before" and "after" pictures, which do not represent the typical experience of users.

Appearances

For the Commission: *Richard L. Cleland, Nancy S. Warder and Carol A. Kando.*

For the respondents: *Paul M. Hyman, Hyman, Phelps & McNamara, Washington, D.C. and Harry J. Levin, Levin & Rosen, River, N.J.*

COMPLAINT

The Federal Trade Commission, having reason to believe that L&S Research Corporation, a corporation, and Scott Chinery, individually and as an officer of said corporation ("respondents"), have violated Sections 5 and 12 of the Federal Trade Commission Act (15 U.S.C. 45 and 52), and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent L&S Research Corporation is a New Jersey corporation with its office and principal place of business located at 450 Oberlin Ave., S., Lakewood, New Jersey.

Respondent Scott Chinery is the founder, chairman of the board, and chief executive officer of the corporate respondent named herein. Individually, or in concert with others, he formulates, directs, and

controls the acts and practices of the corporation, including the acts and practices alleged in this complaint. His office and principal place of business is the same as that of the corporate respondent.

PAR. 2. Respondents are engaged, and have been engaged, in the manufacturing, offering for sale, selling, advertising, promoting, and distributing to the public of nutrient supplements, including products sold under the name Cybergemics. Such products are foods and/or drugs as “food” and “drug” are defined in Section 15 of the Federal Trade Commission Act.

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.

PAR. 4. Respondents have disseminated or have caused to be disseminated advertisements and promotional materials, including but not necessarily limited to the attached Exhibits A-C, all of which prominently feature pictures of the advertised products. These advertisements contain the following statements about the following products:

A. In regard to Cybergemics Total Body Building System:

1. “. . . [N]o other product works like Cybergemics Total Body Building System. This truly amazing breakthrough product is the result of the most sophisticated scientific research available. All of the before and after photos on this page show the results achieved with Cybergemics . . . These photos accurately depict the ultra-powerful, muscle building, that is possible for anyone who uses this product in just 8 short weeks . . . If you use this product as directed, you will experience the most incredible muscular development, fat depletion and total physique enhancement of your entire life.” (Exhibit A)

2. “The Cybergemics Total Body Building System is unlike any other product currently available to athletes anywhere. It is truly an amazing breakthrough in the science of physique enhancement that can enable anyone who uses it to add a significant amount of muscle to their physique in a very short time.” (Exhibit A)

3. It is “. . . the absolute most effective means of building muscle in the world . . .” (Exhibit A)

4. It is “. . . based on a bedrock of reliable scientific research. The mechanism which promotes unprecedented gains in lean body mass is based on an ingenious and extremely sophisticated theory called Anabolic Matrix Alteration (AMA). The premise of this theory is that the mechanism of anabolism can be emphasized as a priority metabolic cycle through the implementation of a broad, but extremely exacting scope of stimulus.” (Exhibit A)

5. “In just weeks after beginning, you will see a dramatic increase in muscle, a noticeable depletion of body fat. . .” (Exhibit A)

6. “Nothing on earth builds muscle like this amazing system.” (Exhibit B)

7. "The amazing before and after photos on this page depict the incredible muscle-building and fat-loss power of the most sophisticated muscle building system in the world. . . ." (Exhibit B)
8. "This product builds muscle every time." (Exhibit B)

B. In regard to Cyberganics for Hard Gainers:

1. "This system singularly addresses the unique metabolism of the hard gainer and finally creates the potential for unprecedented gains . . ." (Exhibit C)
2. "A system of unparalleled power that really supplies you with all the elements and tools, to accomplish . . . ultimate muscle mass." (Exhibit C)
3. It is ". . . the most revolutionary mass-building system ever created." (Exhibit C)
4. "A methodology which if used properly, can literally change your physical appearance and strength in 60 short days." (Exhibit C)
5. It is ". . . a complete package incorporating state-of-the-art supplements to support mass building. Everything you need to begin making significant gains is in this box[.]" (Exhibit C)

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

A. In regard to Cyberganics Total Body Building System:

1. The product component of Cyberganics Total Body Building System causes its users to lose more body fat and to gain more muscle than non-users of the product, all other conditions remaining equal.
2. The product component of Cyberganics Total Body Building System causes its users to lose body fat and to gain muscle more rapidly than non-users of the product, all other conditions remaining equal.
3. Cyberganics Total Body Building System causes its users to gain more muscle than users of other body building products, all other conditions remaining equal.
4. Scientific research demonstrates that the product component of Cyberganics Total Body Building System causes its users to gain more muscle than non-users of the product, all other conditions remaining equal.
5. The product component of Cyberganics Total Body Building System works for all people who use it.

6. Cybergeneics Total Body Building System is new and unique.

B. In regard to Cybergeneics for Hard Gainers:

1. Cybergeneics for Hard Gainers is new and unique.
2. The product component of Cybergeneics for Hard Gainers causes its users to gain more muscle than non-users of the product, all other conditions remaining equal.
3. Cybergeneics for Hard Gainers causes its users to gain more muscle than users of other body building products, all other conditions remaining equal.

PAR. 6. In truth and in fact:

A. In regard to Cybergeneics Total Body Building System:

1. The product component of Cybergeneics Total Body Building System will not cause its users to lose more body fat and to gain more muscle than non-users of the product, all other conditions remaining equal.
2. The product component of Cybergeneics Total Body Building System will not cause its users to lose body fat and to gain muscle more rapidly than non-users of the product, all other conditions remaining equal.
3. Scientific research does not demonstrate that the product component of Cybergeneics Total Body Building System causes its users to gain more muscle than non-users of the product, all other conditions remaining equal.
4. The product component of Cybergeneics Total Body Building System does not work for all people who use it.
5. Cybergeneics Total Body Building System is not new and unique.

B. In regard to Cybergeneics for Hard Gainers:

1. Cybergeneics For Hard Gainers is not new and unique.
2. The product component of Cybergeneics for Hard Gainers does not cause users to gain more muscle than non-users of the product, all other conditions remaining equal.

Therefore, the representations set forth in paragraph five A (1), (2), and (4) through (6); and five B (1) and (2) were, and are, false and misleading.

PAR. 7. Through the use of the statements contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits A-C, respondents have represented, directly or by implication, that at the time they made the representations set forth in paragraph five A (1) through (3) and (5); and five B (2) and (3), they possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 8. In truth and in fact, at the time they made the representations set forth in paragraph five A (1) through (3) and (5); and five B (2) and (3), respondents did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation set forth in paragraph seven was, and is, false and misleading.

PAR. 9. Respondents have disseminated or have caused to be disseminated advertisements and promotional materials, including but not necessarily limited to the attached Exhibits D-G, two of which, Exhibits D and E, prominently feature pictures of the advertised products. These advertisements contain the following statements about the following products:

A. In regard to Cybertrim:

1. "Cybergenics Cybertrim Fat Loss System is the most comprehensive, safest, and most effective approach to fat-loss that is on the market today." (Exhibit D)
2. "Through the implementation of a plethora of landmark technological innovation. . . . CYBERTRIM offers everyone, regardless of genetic predispositions, the potential to experience the single most, incomparable weight-loss and body-shaping ever seen in the history of medically approved appearance enhancement sciences." (Exhibit D)
3. "CYBERTRIM controls the appetite more effectively than any other product by not only suppressing hunger but by also actually blocking the biochemical messages stimulated by the catabolism of fat." (Exhibit D)
4. ". . . CYBERTRIM allows for the maximum depletion of body fat while actually gaining muscle." (Exhibit D)
5. "CYBERTRIM's concentrated formulas incorporate the following powerful, research-driven ingredients: chromium picolinate (clinically proven to build muscle, reduce fat and lower cholesterol)" (Exhibit D)

6. "CYBERTRIM is the most sophisticated fat-loss system in the world. It is designed for the fastest possible weight loss ever. It is research-proven, medically approved, extremely easy to use" (Exhibit D)

7. "... CYBERTRIM is a major breakthrough in safe, medically approved weight loss. The product . . . has been thoroughly tested in both laboratory and clinical trials." (Exhibit E)

8. "The formulas and components of this revolutionary product are proprietary and cannot be duplicated." (Exhibit E)

B. In regard to Mega-Fat Burner Tablet (also called Super Fat-Loss Tablet):

1. "...[H]elps to increase the body's ability to burn fat for energy." (Exhibit E)
2. "It can be used . . . to maintain your weight loss." (Exhibit E)

C. In regard to Cybergenics QuickTrim:

1. "QuickTrim is the absolute fastest way possible to lose weight!" (Exhibits F and G)
2. "There is nothing else that even remotely compares to this truly revolutionary product!" (Exhibits F and G)
3. "This medically-approved, weight-loss miracle uses the research-proven technology that is on the cutting edge of nutrition science." (Exhibits F and G)
4. "Whether you're trying to lose a lot or that last stubborn 15 lbs., this . . . can release you from excess weight -- all in just two short weeks!" (Exhibits F and G)
5. "QuickTrim is extremely easy to use, and does not require any great effort. Rather, it is an ingenious technology whereby the body is gently coaxed into an accelerated lipotropic (fat-burning) state." (Exhibits F and G)
6. "It's also great for maturing women whose metabolism is beginning to slow down." (Exhibits F and G)

PAR. 10. Through the use of the statements contained in the advertisements referred to in paragraph nine, including but not necessarily limited to the advertisements attached as Exhibits D-G, respondents have represented, directly or by implication, that:

A. In regard to Cybertrim:

1. The product component of Cybertrim causes its users to lose body fat and weight more rapidly than non-users of the product, all other conditions remaining equal.

2. The product component of Cybertrim causes its users to lose more body fat and weight than non-users of the product, all other conditions remaining equal.

3. Cybertrim causes its users to lose more body fat and weight than users of all other weight loss products, all other conditions remaining equal.

4. Cybertrim is superior to other appetite suppressants on the market.

5. Cybertrim suppresses hunger and blocks biochemical messages stimulated by the catabolism of fat.

6. The product component of Cybertrim causes its users to gain more muscle than non-users of the product, all other conditions remaining equal.

7. Cybertrim contains an ingredient, chromium picolinate, which has been clinically proven to build muscle, reduce fat, and lower cholesterol.

8. Scientific evidence demonstrates that the product component of Cybertrim causes its users to lose more fat and weight, and gain more muscle, than non-users of the product, all other conditions remaining equal.

9. Cybertrim is new and unique.

B. In regard to Mega-Fat Burner Tablet (also called Super Fat-Loss Tablet):

1. Mega-Fat Burner Tablet causes its users to burn more fat, compared to non-users of the product, all other conditions remaining equal.

2. Mega-Fat Burner Tablet causes its users to maintain weight loss longer, compared to non-users of the product, all other conditions remaining equal.

C. In regard to Cybergenics QuickTrim:

1. The product component of Cybergenics QuickTrim causes its users to lose more weight than non-users of the product, all other conditions remaining equal.

2. The product component of Cybergenics QuickTrim causes its users to lose fat and weight more rapidly than non-users of the product, all other conditions remaining equal.

3. Cybergenics QuickTrim causes its users to lose weight more rapidly than users of all other weight loss products, all other conditions remaining equal.

4. Cybergenics QuickTrim provides a benefit to maturing women which causes maturing women to lose more weight than non-users of the product, all other conditions remaining equal.

5. Scientific evidence demonstrates that the product component of Cybergenics QuickTrim causes its users to lose more weight or fat than non-users of the product, all other conditions remaining equal.

6. Cybergenics QuickTrim is easy to use and does not require any great effort.

PAR. 11. In truth and in fact:

A. In regard to Cybertrim:

1. Scientific evidence does not demonstrate that the product component of Cybertrim causes it users to lose more fat and weight, and gain more muscle, than non-users of the product, all other conditions remaining equal.

2. Cybertrim is not new and unique.

B. In regard to Mega-Fat Burner Tablet (also called Super Fat-Loss Tablet):

1. Mega-Fat Burner Tablet does not cause its users to maintain weight loss longer, compared to non-users of the product, all other conditions remaining equal.

C. In regard to Cybergenics QuickTrim:

1. Cybergenics QuickTrim does not provide a benefit to maturing women which causes maturing women to lose more weight than non-users of the product, all other conditions remaining equal.

2. Scientific evidence does not demonstrate that the product component of Cybergenics QuickTrim causes its users to lose more fat and weight than non-users of the product, all other conditions remaining equal.

3. Cybergenics QuickTrim is not easy to use and does require effort.

Therefore, the representations set forth in paragraph ten A (8) and (9); ten B (2); and ten C (4) through (6) were, and are, false and misleading.

PAR. 12. Through the use of the statements contained in the advertisements referred to in paragraph nine, including but not necessarily limited to the advertisements attached as Exhibits D-G, respondents have represented, directly or by implication, that at the time they made the representations set forth in paragraph ten A (1) through (7), ten B (1) and (2), and ten C (1) through (4), they possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 13. In truth and in fact, at the time they made the representations set forth in paragraph ten A (1) through (7), ten B (1) and (2), and ten C (1) through (4), respondents did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation set forth in paragraph twelve was, and is, false and misleading.

PAR. 14. Through the use of statements in advertisements, including but not necessarily limited to the advertisements attached as Exhibits A-D and F-G, and depictions, including pictures of individuals "before" and "after" a period of use of the advertised product, contained in those advertisements, respondents have represented, directly or by implication, that testimonials from consumers appearing in advertisements for Cybergenics Total Body Building System, Cybergenics for Hard Gainers, Cybertrim, and Cybergenics QuickTrim reflect the typical or ordinary experience of members of the public who have used the products.

PAR. 15. Through the use of the statements contained in advertisements, including but not necessarily limited to the advertisements attached as Exhibits A-D and F-G, and depictions, including pictures of individuals "before" and "after" a period of use of the advertised product, contained in those advertisements, respondents have represented, directly or by implication, that at the time they made the representation set forth in paragraph fourteen that such representation was true and that respondents possessed and relied upon a reasonable basis that substantiated such representation.

PAR. 16. In truth and in fact, testimonials from consumers appearing in advertisements for Cybergenics Total Body Building System, Cybergenics for Hard Gainers, Cybertrim, and Cybergenics QuickTrim do not reflect the typical or ordinary experience of members of the public who have used the products and at the time they

made the representation set forth in paragraph fourteen, respondents did not possess and rely upon a reasonable basis that substantiated such representation. Therefore, the representation set forth in paragraph fifteen was, and is, false and misleading.

PAR. 17. Through the use of pictures of a man "before" and "after" he used Cybergenics Total Body Building System for six (6) months in advertisements, including but not necessarily limited to the advertisement attached as Exhibit A, respondents have represented, directly or by implication, that this man is typical of users of the product and that the results depicted in the "after" picture reflect the typical or ordinary experience of members of the public who have used the product.

PAR. 18. In truth and in fact, prior to the time the "before" picture of this man was taken, he was a champion body builder. Therefore, he is not typical of users of Cybergenics products and his results as depicted in the "after" picture 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 seventeen above was, and is, false and misleading.

PAR. 19. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices and the making of false advertisements in or affecting commerce in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

EXHIBIT A

Experience Mind Blowing Gains

Never received such an accolade of praise from both the scientific and medical communities, as well as from professional bodybuilders, top trainers, and athletes from all sports where strength, muscle-mass and stamina are important.

► Renowned medical expert, Steven Crawford, M.D., from the prestigious All-American Sports Medicine, calls it "a true and unprecedented milestone in the field of sports medicine: a natural product that really works in adding pounds of pure muscle—fast."

H.K. Panjwani, M.D., Ph.D., and member of the exclusive Royal Society of Medicine says, "The Cybergensics Total Body Building System is unlike any other product

called Cybergensics "the most incredible thing I have ever used. It literally changed my physique to this extent without it."

► Charles Durr, NPC Mr. USA and possessor of the world's most massive physique, says, "There is nothing else that works like Cybergensics—nothing even comes close."

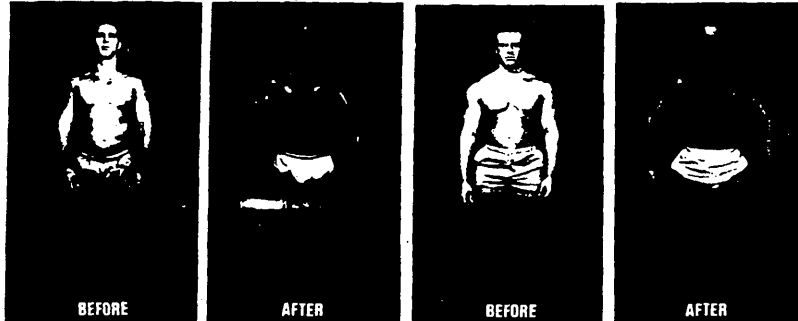
► *Muscle Training Illustrated* reported in the August '89 issue that "Cybergensics Total Body Building System is the first real alternative to anabolic steroids."

► And Bob Kennedy's *Muscle Mag International* said of Cybergensics in the November '91 issue, "The Cybergensics Total Body Building System seems to have a metaphysical mystique about it—like an ancient formula with herculean power that chisels

the most sophisticated theory called Anabolic Matrix Alteration (AMA). The premise of this theory is that the mechanism of anabolism can be emphasized as a priority metabolic cycle through the implementation of a broad, but extremely exacting scope of stimulus. This theory, nearly a decade old, is drawing critical and unprecedented support from members of the scientific medical communities.

► Dr. Doug Price, from the Council of Sports Injuries and Physical Fitness and a six-time All-American shortstopper says, "Cybergensics AMA theory is redefining the way we look at building muscle. The concept is brilliant and indeed very impressive."

The Cybergensics Total Body Building

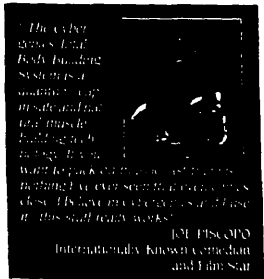


currently available to athletes anywhere. It is truly an amazing breakthrough in the science of physique enhancement that can enable anyone who uses it to add a significant amount of muscle to their physique in a very short time."

► Renowned fitness expert and celebrity trainer Darryl James, whose client list includes names like Eddie Murphy, Arsenio Hall and the Jackson Brothers, to name a few, calls the Cybergensics Total Body Building System "the absolute most effective means of building muscle in the world—a program that works better than anything else anywhere."

► Eric Dorsey, super-star defensive end from the Super Bowl Champion, New York Giants says, "It made me bigger and stronger than I ever thought I could be. This product is amazing beyond anything I could even imagine."

the body into Adonis-like proportions." The Cybergensics Total Body Building System is based on a bedrock of reliable scientific research. The mechanism which



System utilizes seven concentrated isolate formulas that are the cornerstone of this amazing system. They are unlike any other mere nutritional supplement. These isolates are pharmaceutical-grade nutritional substrates which contain proprietary blends and compounds which *cannot* be produced in any other product in the world. They have been formulated to exact specifications in a proprietary delivery system called CyberTab™ which makes these critical components more bio-available than ever before possible. In just days after beginning the Cybergensics Total Body Building System, subjects have reported "actually feeling the puny and potency of these amazing compounds."

The Cybergensics Total Body Building System is a complete system that takes *all* of the guesswork out of building muscle. *Nothing* is left to chance. The program incorporates a highly specialized, revolutionary



CYBER

EXHIBIT A

Complaint

EXHIBIT A

With The World's #1 Mass Builder!

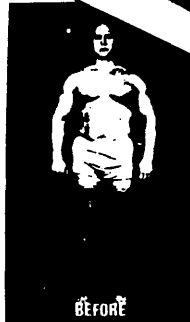
days per week. Workouts can be performed morning, afternoon, or evening. The kit also includes a complete dietary regimen which is the third piece to the Cybergeneics anabolic triad. It is important to note that this system is extremely easy to use and, if used properly, works every time.

If you have never used this remarkable system before, you owe it to yourself to try it. In just weeks after beginning, you will see a dramatic increase in muscle, a noticeable depletion of body fat, and an increase in strength and increased energy levels. There is truly nothing else in the world like the Cybergeneics Total Body Building System!

potent muscle-building characteristics of the Cybergeneics

Total Body Building System.

In less than 6 months, Franco transformed his body into a world-class physique. Franco would later say of his experience, "It's obvious to me now, that the turning point in my life was when I began using Cybergeneics. It has truly enabled me to live my dream!"



GUARANTEED TO BUILD MUSCLE FAST!

The Cybergeneics Total Body Building System is guaranteed to produce the most phenomenal muscle-building and fat-depleting results possible or we will refund your money—unconditionally. In fact, we guarantee that if used properly, this system will dramatically change your entire physique in just 60 short days. No other company can make this offer because no other product works like the Cybergeneics Total Body Building System. This truly amazing breakthrough product is the result of the most sophisticated scientific research available. All of the before and after photos on this page show the results achieved with Cybergeneics. They were all taken two months apart except for Franco Santorillo's which were taken five months apart. These photos accurately depict the ultra-powerful, muscle-building, that is possible for anyone who uses this product in just 8 short weeks. If you use this product as directed, you will experience the most incredible muscular development, fat depletion and total physique enhancement of your entire life. **WE GUARANTEE IT!**

Available at: **CNC**
NATURE FOOD CENTERS
and other fine Health Food Stores

NEW 120 DAY KIT
SAVE \$60.00

CYBERGENICS
TOTAL BODY BUILDING SYSTEM

3/93 MTI CY

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ASK US ABOUT OVERNIGHT DELIVERY

FREE VIDEO CYBERGENICS SEMINAR WITH EACH KIT!
On phone orders please use special account #

Please Rush Me The Following:

<input type="checkbox"/> 60 DAY KIT	\$139.95	<input type="checkbox"/> 120 DAY KIT	\$219.95
<input type="checkbox"/>	CYBER VIDEO	<input type="checkbox"/>	\$19.95

(ALL PRICES INCLUDE POST AND INS.)

L&S RESEARCH CORPORATION
450 Overton Avenue South Lakewood New Jersey 08701 (908) 363-5820

Name _____
Address _____
City _____ State _____ Zip _____
 Check MO Enclosed VISA MC
Card No. _____ Exp. Date _____
Signature _____

GENICS

EXHIBIT A (cont.)



Franco with Harry Thanos after his 60 day Cybergenics transformation.

24 yr old Harry Thanos' photos depict the incredible mass building and fat loss power of Cybergenics in a mere 60 days.

Cut away of Harry Thanos' mid-section before and after Cybergenics.

GUARANTEED RESULTS IN 60 DAYS

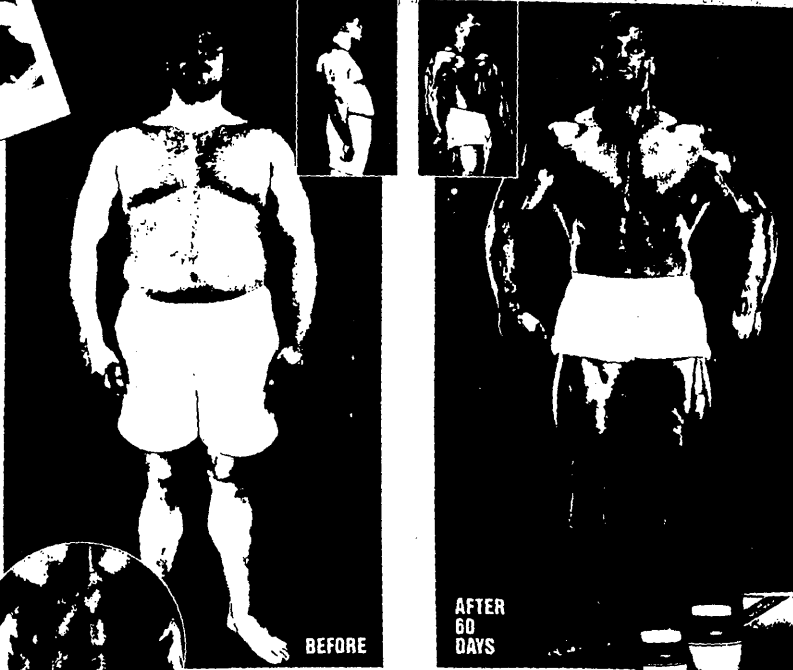
builds muscle like this amazing system.

When 24 year old Harry Thanos began his 60-day Cybergenics cycle, he never even dreamed that his physique and entire life would change so dramatically in just two months. He would later say of his experience, "You know, I saw the ads for years: the before and after pictures and all, but I wasn't sure if it would work for me. But inside, I had a burning desire to be the best that I could be. So I gave it a try. There are no words to describe just how powerful this product is. I mean you have to experience it to believe it. I could see *my body change every day!* It was the most compelling thing I have ever experienced. Cybergenics has made it possible for me to live my dream."

The amazing before and after photos on this page depict the incredible muscle building and fat loss power of the most sophisticated muscle building system in the world, the Cybergenics Total Bodybuilding System. This amazing product is the only product of its kind in the world that is *unconditionally guaranteed* to produce the kind of results Harry Thanos experienced in just 60 short days. If you have never tried it, you owe it to yourself and to your future to try it now. *You cannot miss!* This product builds muscle every time. Just ask Harry.

DON'T DELAY! ORDER NOW!
1-800-635-8970

OVERNIGHT DELIVERY AVAILABLE
MAJOR CREDIT CARDS ACCEPTED



Cybergenics Available Internationally

USA: 1-800-635-8970
1-800-635-8970
1-800-635-8970

U.K. 1-800-635-8970
1-800-635-8970
1-800-635-8970

1-800-635-8970
1-800-635-8970
1-800-635-8970



Available at:

CNE

CYBERGENICS

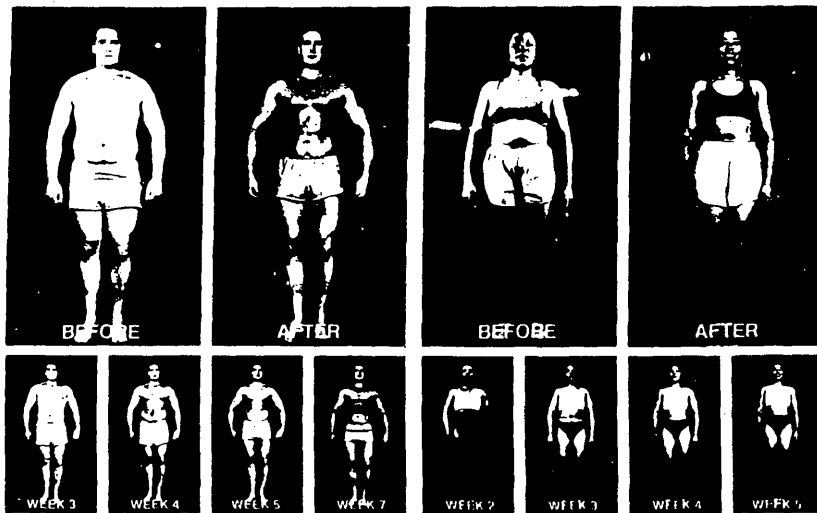
EXHIBIT B

Complaint

EXHIBIT B

introduces

THE WEIGHT-LOSS MIRACLE OF THE DECADE!



Your product is truly amazing. I have tried everything and every way to lose fat but nothing worked. Your program changed my whole life. Not only did I lose fat quicker than I ever thought possible, but I actually gained a lot of muscle at the same time!

—JOHN GORDON

I never thought I could look like this. In 6 weeks I lost 31 lbs. and toned & reshaped my body. I still can't believe it's me when I look in the mirror! Thank you, CYBERGENICS!

—BARBARA BUTTERFIELD

GUARANTEED TO WORK!

Cybergensics CYBERTRIM is guaranteed to produce phenomenal results or we will refund your money—unconditionally! No other company can make this offer, because no other product works like CYBERTRIM. This truly amazing breakthrough program is the product of the most sophisticated scientific research available. All of the before and after photos on these pages are the product of Cybergensics. They were all taken six weeks apart—except for John Gordon's, which

were taken eight weeks apart and Penny Estelle's, which were taken fourteen days apart. These photos accurately represent the ultra-powerful weight-loss that is possible for anyone who uses CYBERTRIM in just 6 short weeks. If you use this product as directed, you will experience the most incredible weight-loss of your entire life. We guarantee it!

EXHIBIT B (cont.)

EXHIBIT C

NEW **INTRODUCING THE MOST POWERFUL**


Attention Hard Gainers

Cybergene has designed a truly revolutionary system for hard gainers. It is the most exciting development I have seen in this field during my entire career in the sports nutrition field. This system singularly addresses the unique metabolism of the hard gainer and finally creates the potential for unprecedented gains for guys who, until now, just could not gain muscle mass.

I have personally supervised and observed hard gainers like Mike Dunphy, pictured here, make such astounding gains that I am confident this system for hard gainers will change the way athletes approach building muscle. It is truly the most advanced system my company has ever produced, and I give my personal guarantee that if used properly, this system will produce significant muscular gains in even the hardest gainer.

Please consider giving this incredible product a chance. You have my promise that it will be the most productive and rewarding experience in your training career.

Yours in good health,



Scott Chinery
Chairman & CEO of Cybergene

"Being a true hard gainer, I know how hard and frustrating it can be putting on real size. But with the Hard Gainers System the gains are unreal. This has to be the most powerful and most advanced system Cybergene has ever produced."
— MIKE DUNPHY


Imagine discovering a method, a sophisticated technology that changes the way you look and feel. A system of unparalleled power that really supplies you with all of the elements and tools to accomplish what you only dreamed about—ultimate muscle mass. This is the premise for the most revolutionary mass-building system ever created—**Cybergene For Hard Gainers**.

Within this system, you will find the keys with which to unlock the metabolism of the true hard gainer. A methodology which if used properly can literally change your physical appearance and strength in 60 short days. It is the turn-key approach that leaves absolutely nothing to chance. By simply following the step by step instructions, you will embark on a journey of physical development that you never thought possible.

Cybergene For Hard Gainers carries a unique money back guarantee—one which you will not see anywhere else. The bottom line is this, that if within the first 30 days you have not experienced the most significant gains of your training career, then simply return the product for a full refund—no questions asked.

If you are someone who has a deep desire to possess a strong and massive physique, then seize the moment! Do not let any more time pass—live your dreams. This system contains everything you need to set in motion, the power for you to truly become what you want to be. Dare to dream—make the commitment now and begin today to change the way you look and feel forever.

BEFORE



Available Only At:
GNC
and
NATURE FOOD CENTRES

GUARANTEED TO PRODUCE AMAZING RESULTS



CYBERGENE
POWERFUL FOR HARD GAINERS

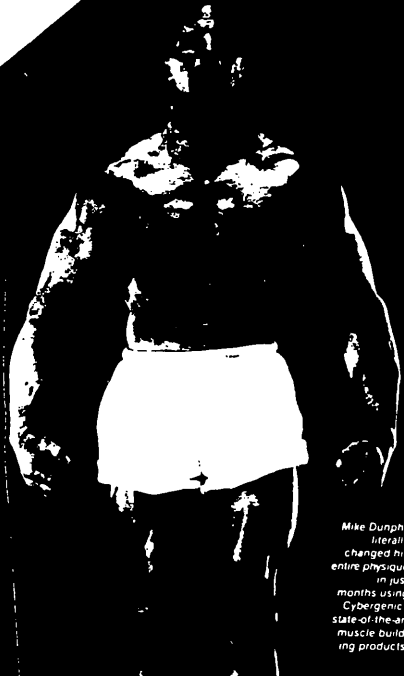
EXHIBIT C

Complaint

EXHIBIT C

PERFECT CYBERGENICS SYSTEM EVER

AFTER



Mike Dunphy
literally
changed his
entire physique
in just
months using
Cybergenics
state-of-the-art
muscle build-
ing products

Cybergenics For Hard Gainers is a blessing for hard gainers. I have never seen a product attack mass building like this one. I recommend this product with all of my heart to anyone who is having trouble gaining size. This is the best product I have ever seen!

FRANCO SANTORIELLO

Your **Cybergenics For Hard Gainers** is a complete package incorporating the following state-of-the-art supplements to support mass building. Everything you need to begin making significant gains is in this box:

- 1. **HG1 SUPER ANTI-FATIGUE SUSPENSION COMPLEX** is a state-of-the-art medication free, non-toxic, fat-burner, muscle builder, and muscle performance enhancer during rigorous training.
- 2. **HG2 GLYCOGEN TRANSPORT & HYPERTROPHY FORMULA** a revolutionary supplement that helps increase carbohydrate synthesis assisting in the production and retention of glycogen within the muscle.
- 3. **HG3** contains the ultimate synergy of intensive reactive enzymes for the rapid digestion and metabolism of protein, carbohydrates, and fats.
- 4. **HG4 BIO-CELLULAR PURIFICATION FORMULA** composed of concentrated biological materials designed to cleanse and scour the intestinal tract for superior absorption of vital nutrients such as vitamins, minerals, and amino acids.

helps maximize the protein efficiency ratios of ingested proteins by effective assimilation of amino acids into the bloodstream.

designed to assist the vital recovery process.

7) The most comprehensive training and dietary manual ever published, incorporating all aspects of the Hard Gainers System process.

8) Analog food scale to accurately measure food values in grams or ounces, enabling precision nutrient intake.

9) Durable folding hand guide of food composition values to be used in daily meal preparation.



(Scale included)
(#9 not shown)



L&S Research Corporation 450 Oberlin Ave. South
Lakewood, NJ 08701

Please Rush Me The Following:
CYBERGENICS FOR HARD GAINERS KIT (Scale included) \$139.95

Name _____
Address _____
City _____ State _____ Zip _____
Phone (____) _____
Check MO Enclosed Visa MC
Card No. _____ Exp. Date _____
Signature _____
On phone orders please use special account #

3/93-u

EXHIBIT C (cont.)

EXHIBIT D

“Cybergeneics CyberTrim Fat Loss System is the most comprehensive, safest, and most effective approach to fat loss that is on the market today. It combines nutritive supplements, exercise and diet in a complete fat-loss program which is on the cutting edge of sports nutrition technology.”

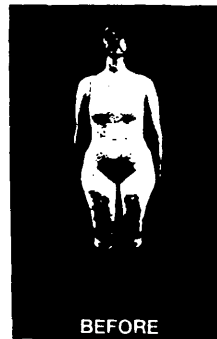


Steven Crawford, M.D.
Sports Physician
All American Sports
Medicine Associates, PA



arely in medical annals has a single development had such an immediate and significant impact as has the newly-developed Cybergeneics CYBERTRIM weight-loss technology. Through the implementation of a plethora of landmark technological innovation, Cybergeneics' revolutionary CYBERTRIM offers everyone, regardless of genetic predispositions, the poten-

tial to experience the single most, incomparable weight-loss and body-shaping ever seen in the history of medically approved appearance-enhancement sciences. Never has a product received such a universal accolade of praise from members of the medical profession, as well as fitness experts and authorities. It has been called "sheer genius—a remarkable product that makes weight-loss easier, faster and more permanent than anything else ever developed," by H.K. Panjwani, M.D., Ph.D., re-



POWER

EXHIBIT D



Barbara Butterfield's magnificent progress speaks for itself!

CYBERTRIM's spectra-nutritional profile will actually enhance your energy levels, making you feel livelier and more energetic.

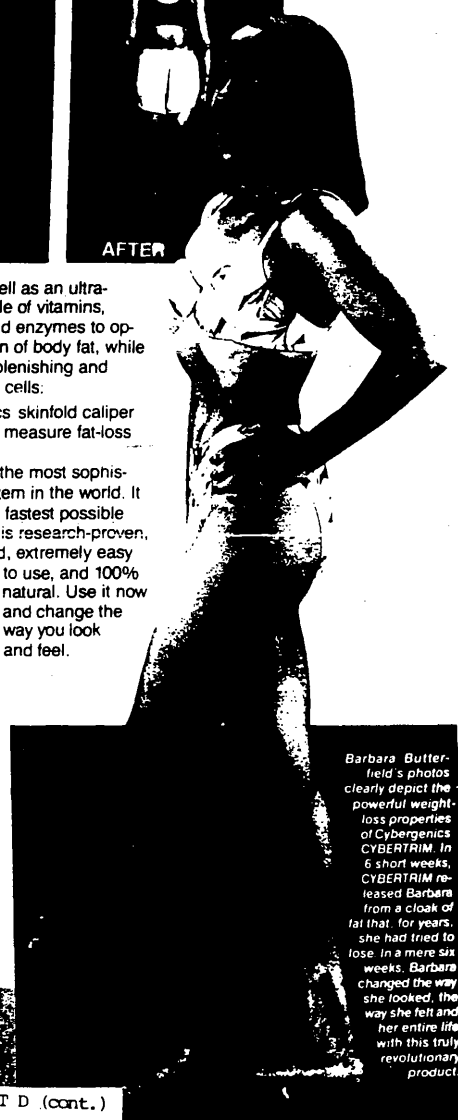
CYBERTRIM is extremely easy to use.

CYBERTRIM's concentrated formulas also incorporate the following powerful, research-proven ingredients: chromium picolinate (clinically proven to build muscle, reduce fat and lower cholesterol), carnitine (for accelerated fat-loss), anti-oxidants (for free radical

scavenging), as well as an ultra-sophisticated profile of vitamins, minerals, fibers and enzymes to optimize the depletion of body fat, while simultaneously replenishing and nourishing muscle cells.

A Cybergenics skinfold caliper is included to measure fat-loss progress.

CYBERTRIM is the most sophisticated fat-loss system in the world. It is designed for the fastest possible weight-loss ever. It is research-proven, medically approved, extremely easy to use, and 100% natural. Use it now and change the way you look and feel.



Barbara Butterfield's photos clearly depict the powerful weight-loss properties of Cybergenics CYBERTRIM. In 6 short weeks, CYBERTRIM released Barbara from a cloak of fat that, for years, she had tried to lose. In a mere six weeks, Barbara changed the way she looked, the way she felt and her entire life with this truly revolutionary product.

NOLOGY

EXHIBIT D (cont.)

Complaint

EXHIBIT E

Cybergene's CYBERTRIM produce the most phenomenal muscle-toning and total body toning. We guarantee you will lose weight or we will refund your money unconditionally! No other company can because no other product works like this truly amazing breakthrough program. It's the most sophisticated scientific research of the before and after photos on the product of Cybergene's. They were taken six weeks apart—except for John Gordon Ray Ford's which were taken eight weeks apart. Lisa Macrina's, which were taken four weeks apart. These photos accurately represent the powerful weight-loss that is possible for anyone who uses CYBERTRIM in just 6 short weeks. If you use the product as directed, you will experience the most credible weight-loss of your entire life. We

GUARANTEED TO WORK!

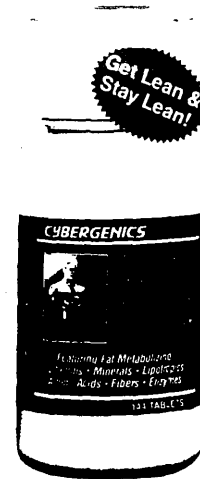
Lisa Macrina made this incredible progress using Cybergene's state-of-the-art weight-loss products. You can too!



Dear Sirs:
Never in my life could I have imagined that something could work like your products! I am so happy with the results that sometimes I still can't believe it all. For so long I have tried so hard to lose the extra 15 lbs. that I just could not lose. Your product has enabled me to lose the weight and finally become what I always wanted to be. I love your products and will recommend them to everyone I know. Again, my heartfelt thanks.
Sincerely,
Lisa Macrina

FAT BURNER

Featuring Fat-Metabolizing:
**Vitamins,
Minerals,
Lipotropics,
Amino Acids,
Fibers, Enzymes**



Designed to provide you with a unique mixture of nutrients, herbs, fibers and enzymes, this sophisticated fat-burner actually helps to increase the body's ability to burn fat for energy. It can be used with CYBERTRIM for maximum results, or after your CYBERTRIM cycle to maintain your weight loss. Cybergene's CYBERTRIM includes:

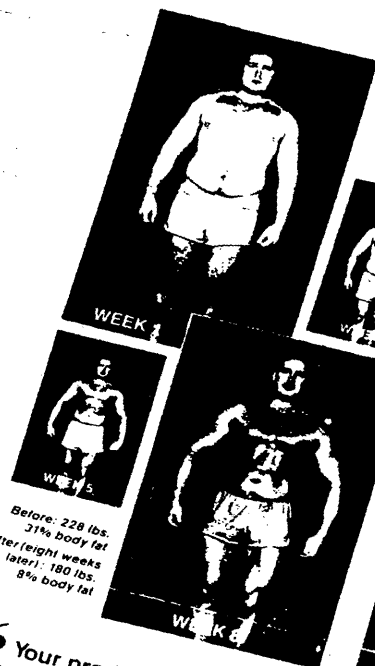
1. Key fat burning vitamins and minerals.
2. Lipotropic Optimizer Complex from: Choline, Inositol, Betaine, Lecithin, Linoleic and Oleic Acids, and Medium Chain Triglycerides.
3. Lipotropic Amino Acid complex from: L-Carnitine, Methionine, DL-Phenylalanine, Taurine and Glycine.
4. Herbal complex from: Buchu, Chickweed, Couch Grass, Cornsilk, Cranberry, Hydrangea, Juniper Berries, Urva Ursi.
5. Fiber complex from: Grapefruit Concentrate, Glucomanan, Galactomannan, Oatbran, Vegetable Cellulose.
6. Enzyme complex from: Lipase, Cellulase, Amylase, Papain and Papaya.
7. Plus 100 mg of Chromium Picolinate a clinically-proven muscle builder and fat reducer.

**SATISFACTION GUARANTEED:
TO ORDER CALL
1-800-635-8970**

EXHIBIT E

8-992 C

EXHIBIT E



Before: 228 lbs.
31% body fat
After (eight weeks later): 180 lbs.
8% body fat

“Your product is truly amazing. I have tried everything and every way to lose fat but nothing worked. Your program changed my whole life. Not only did I lose fat quicker than I ever thought possible, but I actually gained a lot of muscle at the same time! I think that this product is great because there are so many people who just cannot lose their body fat—now they really can.”

—JOHN GORDON

John Gordon's progress epitomizes the rapid fat-loss during CYBERTRIM. John lost an amazing 48 lbs. during 8 weeks (John used CYBERTRIM for 8 weeks instead of six).

SATISFACTION GUARANTEED:
TO ORDER CALL
1-800-635-8970

CYBERGENICS

TRIM is a major breakthrough in rapid weight-loss. This product is proven thoroughly tested in both men and women. We certify that this product is the most effective weight-loss tool of its kind in the world. The formula and components of this product are proprietary and cannot be duplicated. Our product in the world works like no other. Have never used it,—try it without changing the way you look and feel.!

Best Cherry
Chinery
of Product Development

...number one performance nutrition products. Sold in over 40 countries. Introduced the Cybergenics Total Body Building program, the #1 selling performance nutrition product in the world. Sold in over 50,000 retail outlets worldwide including Sports Centers, Herman's World of Sporting Goods, National Chain, National Health & Nutrition, Holland & Barrett and many more. Based on a bedrock of reliable scientific research and the art of the art in safe and natural performance and nutrition. Cybergenics is a company you can depend on in producing products that improve the quality of life.

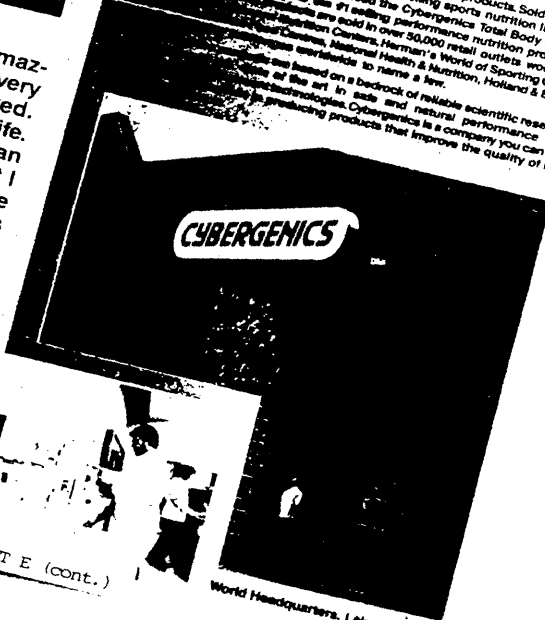


EXHIBIT E (cont.)

World Headquarters, Lakewood, NJ

Complaint

EXHIBIT E

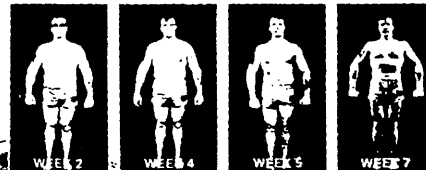
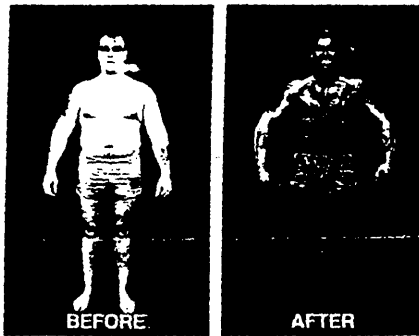
CYBERGENICS

introduces

THE WEIGHT LOSS MIRACLE OF THE DECADE

“CYBERTRIM is the best thing to ever happen to me! This product helped me to change my whole life!”

RAY FORD



“I never thought I could look like this. Thank you, CYBERGENICS!”

BARBARA BUTTERFIELD

AFTER

Turn the page for more photos of Barbara and others who've changed their lives with CYBERTRIM!

EXHIBIT E (cont.)

EXHIBIT F

"I only had 2 weeks..."

"QuickTrim is the only diet I used for 14 days and lost 10 lbs. I am so happy with my weight loss. I will be able to wear my special dress for this special day. Thanks to QuickTrim, I have lost 10 lbs. in 14 days!"

151 MARYVALE

"SHIR GENIUS!"

★ ★ ★ ★

H. K. Panoware, MD, PhD
Renowned Medical Expert,
Member of the Prestigious
Royal Society of Medicine

Loss Making us wedding gown
and low in her
after
I was apart



CYBERGENICS



QUICKTRIM
DIET CRASH

Available at
GNC
NATURE FIBER CENTERS • Good Earth
NUTRITION CENTERS

To order Cybergenics QuickTrim for \$49.95
call 1-800-635-8970 or at
L&S Research Corp., 450 Oberlin Ave. S
30 Day Satisfaction G

EXHIBIT F

QuickTrim is the absolute fastest possible way to lose weight!

Have you ever had a reason to lose weight fast? Maybe you wanted to get into that special dress for a wedding, prom, reunion, or some other special event. Or maybe you were dreading that upcoming vacation when you would have to wear a bathing suit in public? Well, QuickTrim was developed with exactly these kinds of situations in mind. It can help you to lose weight and look your best in just two weeks!

This medically approved weight-loss miracle uses research-proven ingredients that combine the latest in nutrition science. QuickTrim attacks weight loss from every possible angle.

Whether you are trying to lose a lot of weight or that last stubborn 15 lbs., the QuickTrim natural energy powerhouse can rid you from the excess weight—all at just one simple step. QuickTrim is extremely easy to use and does not require any great effort. Rather, it is an amazingly powerful weight loss aid that is gently coaxed into an accelerated lipotropic (fat-burning) state.

You will feel more energetic and healthier on QuickTrim than ever before. It is especially effective for women whose metabolism is beginning to slow down.

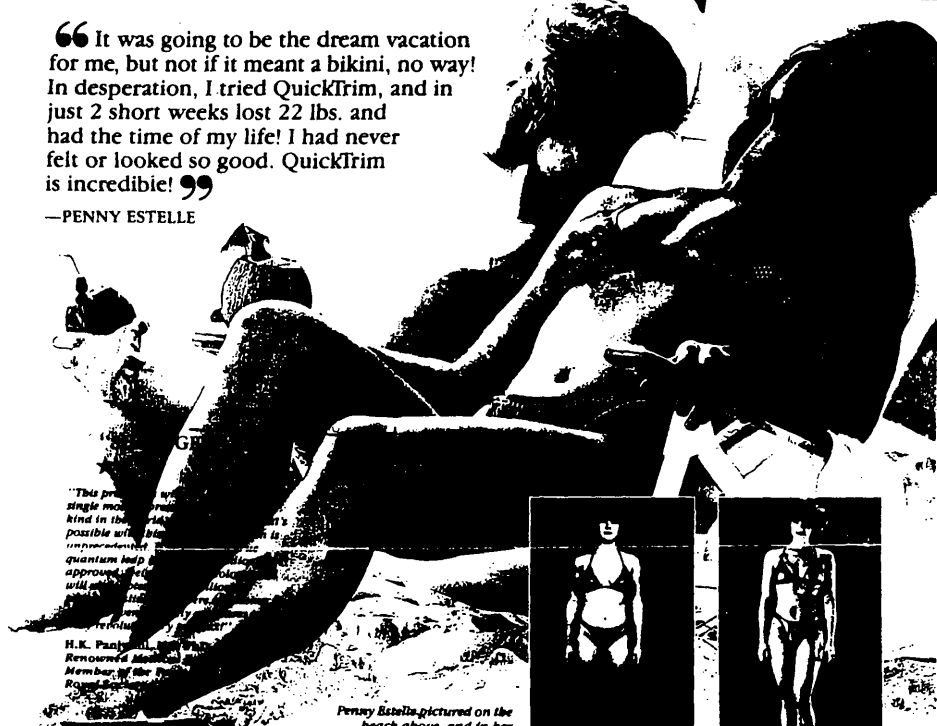
QuickTrim is a comprehensive program that leaves nothing to chance. It includes a manual detailing the complete QuickTrim program.

If you have never tried QuickTrim, you will be amazed at how fast it will help you lose weight. QuickTrim is 100% guaranteed to change the way you look and feel in your months back. When you need to lose weight quickly, you need QuickTrim!

"I only had 2 weeks..."

“It was going to be the dream vacation for me, but not if it meant a bikini, no way! In desperation, I tried QuickTrim, and in just 2 short weeks lost 22 lbs. and had the time of my life! I had never felt or looked so good. QuickTrim is incredible!”

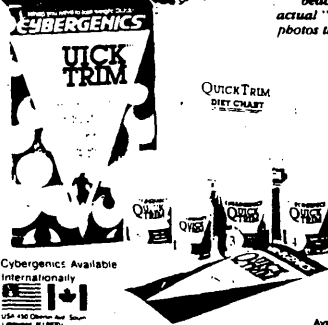
—PENNY ESTELLE



"This product is a single most important kind in the possible with the quantum help approach will..."

H.K. Paul, M.D. Renowned Medical Member of the Royal Society

Penny Estelle pictured on the beach above, and in her actual "before" and "after" photos taken 14 days apart.



Cybergemics Available Internationally
USA 1-800-635-8970
UK 011-44-181-271-387
AUS 011-61-2-937-387
U.S. & Canada Member of the International Health Food Stores Association

Available at
ONE
Member of
ARS

EXHIBIT G
and other fine Health Food Stores

QuickTrim is the absolute fastest possible way to lose weight!

Have you ever had a reason to lose weight fast? Maybe you wanted to get into that special dress for a wedding, prom, reunion, or some other special event. Or maybe you were dreading that upcoming vacation, when you would have to wear a bathing suit in public? Well, QuickTrim was developed with exactly these kinds of situations in mind. It can help you to lose weight and look your best in just two weeks!

This medically-approved, weight-loss miracle uses research-proven technology that is on the cutting edge of nutrition science. QuickTrim attacks weight loss from every possible angle.

Whether you are trying to lose a lot of weight or that last stubborn 15 lbs., this 100% natural weight-loss powerhouse can release you from the excess weight—all in just two short weeks! QuickTrim is extremely easy to use, and does not require any great effort. Rather, it is an ingenious technology whereby the body is gently coaxed into an accelerated lipotropic (fat-burning) state.

You will feel more energetic and healthier on QuickTrim than ever before. It's also great for maturing women whose metabolism is beginning to slow down.

QuickTrim is a comprehensive program that leaves nothing to chance. It includes a manual detailing the complete QuickTrim program.

If you have never tried QuickTrim, you will be amazed at how fast it will help you lose weight. QuickTrim is 100% guaranteed to change the way you look and feel—or your money back.

When you need to lose weight quickly, you need QuickTrim!

To order Cybergemics QuickTrim for \$49.95 call 1-800-635-8970 or mail your order to: L&S Research Corp., 450 Oberlin Ave. South, Lakewood, N.J. 08701

DECISION AND ORDER

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

The respondents, their attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the 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 a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent L&S Research Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its offices and principal place of business located at 450 Oberlin Ave., S., in the City of Lakewood, State of New Jersey.

Respondent Scott Chinery is an officer of said corporation. He formulates, directs, and controls the policies, acts and practices of said corporation, and his principal office and place of business is located at the above stated address.

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 the following definitions apply:

A. "*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 by others in the profession to yield accurate and reliable results.

B. "*Substantially similar product*" shall mean any product that is substantially similar in composition, in terms of the types of ingredients that it contains, or possesses substantially similar properties.

I.

It is ordered, That respondents, L&S Research Corporation, a corporation, its successors and assigns, and Scott Chinery, 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 the product component of Cybergenics Total Body Building System, Cybergenics for Hard Gainers, or any substantially similar 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:

A. Any such product component causes a user of such product to achieve greater or more rapid loss of fat or gain of muscle than a non-user of such product; or

B. Any such product component works for all users.

II.

It is further ordered, That respondents, L&S Research Corporation, a corporation, its successors and assigns, and Scott Chinery, individually and as an officer of said corporation, and respondents' agents, representatives, and employees, directly or through any cor-

poration, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of Cybergenics Mega-Fat Burner Tablet (also known as Super Fat-Loss Tablet) [referred to herein as Cybergenics Mega-Fat Burner Tablet], or the product component of Cybertrim, Cybergenics QuickTrim, or any substantially similar 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:

A. Any such product component or Cybergenics Mega-Fat Burner Tablet causes a user of such product to maintain weight loss longer than a non-user of such product; or

B. Any such product component or Cybergenics Mega-Fat Burner Tablet provides a benefit to a maturing person who uses such product which causes that person to lose more weight than a non-user of such product.

III.

It is further ordered, That respondents, L&S Research Corporation, a corporation, its successors and assigns, and Scott Chinery, 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 Cybergenics Mega-Fat Burner Tablet, or the product component of Cybergenics Total Body Building System, Cybergenics for Hard Gainers, Cybertrim, Cybergenics QuickTrim, or any substantially similar product, do forthwith cease and desist from representing, directly or by implication, contrary to fact, that scientific evidence demonstrates that:

A. Any such product intended for body building causes a user to lose more fat or gain more muscle than a non-user of such product; or

B. Any such product intended for weight or fat loss causes a user to lose more fat or weight than a non-user of such product.

IV.

It is further ordered, That respondents, L&S Research Corporation, a corporation, its successors and assigns, and Scott Chinery, 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:

A. Any such product or program causes, assists, or enables a user to lose or control weight or fat loss, or maintain weight or fat loss, or to suppress hunger or appetite;

B. Any such product or program causes, assists, or enables a user to achieve muscle gain or development;

C. Any such product or program works for all users;

D. Chromium picolinate in any such product, or used in conjunction with any such program, builds muscle, reduces fat, or lowers cholesterol; or

E. Any such product or program intended for body building, weight loss, or fat loss is more effective than other products or programs intended for similar purposes;

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

V.

It is further ordered, That respondents, L&S Research Corporation, a corporation, its successors and assigns, and Scott Chinery, 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 Commis-

sion Act, do forthwith cease and desist from representing, in any manner, directly or by implication, that any endorsement (as "endorsement" is defined in 16 CFR 255.0(b), including "before" and "after" pictures) of a product or program represents the typical or ordinary experience of members of the public who use the product or program, unless at the time of making such representation, the representation is true, and respondents possess and rely upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates such representation, provided, however, respondents may use such endorsements, including accurate "before" and "after" pictures, if the statements or depictions that comprise the endorsements are true and accurate, and if respondents disclose clearly and prominently and in close proximity to the endorsement what the generally expected performance would be in the depicted circumstances or the limited applicability of the endorser's experience to what consumers may generally expect to achieve, that is, that consumers should not expect to experience similar results.

VI.

It is further ordered, That respondents, L&S Research Corporation, a corporation, its successors and assigns, and Scott Chinery, 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, in any manner, directly or by implication, that:

- A. Any such product or program is new or unique; or
- B. The ease of use of, or lack of effort required by, any such product or program intended for weight or fat loss if achieving the advertised results depends on adhering to a special diet or exercising.

VII.

It is further ordered, That respondents, L&S Research Corporation, a corporation, its successors and assigns, and Scott Chinery, 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, in any manner, directly or by implication, the contents, validity, results, conclusions, or interpretations of any test or study.

VIII.

It is further ordered, That within five (5) business days of the date of service of this order, respondent L&S Research Corporation, or its successors and assigns, shall pay the sum of one million four hundred fifty thousand dollars (\$1,450,000.00) to the United States Treasury. Such payment shall be by cashier's check or certified check made payable to the United States Treasury. In the event of default of payment, which default continues for more than ten (10) days beyond the due date of payment, and without any notice required to be given to the respondents:

A. Respondent shall also pay interest as computed under 28 U.S.C. 1961, which shall accrue on the unpaid balance from the date of default until the date the balance is fully paid;

B. Individual respondent Scott Chinery shall become liable for the full unpaid balance and interest; and

C. The Commission may draw the balance of the payment due on the Irrevocable Standby Letter of Credit, which has been provided by respondent as security for the payment provided for herein.

No portion of the payment herein described shall be deemed a payment of any fine, penalty, or punitive assessment against respondents with respect to the acts and practices which are the subject of the complaint and which occurred prior to issuance of the order.

IX.

It is further ordered, That the corporate respondent L&S Research Corporation shall for five (5) years following the service of this order, notify the Commission at least thirty (30) days prior to any change in the corporate respondent such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation that may affect compliance obligations arising out of the order, or of any change in the position and responsibilities of the individual respondent Scott Chinery in regard to L&S Research Corporation or any subsidiary of which he is an officer. The expiration of the notice provisions of this part shall not affect any other obligation arising out of this order. In addition, respondents shall require, as a condition precedent to the closing of the sale or other disposition of L&S Research Corporation or the right to the use of the name Cybergenics or to market any of the products in its product line, that the acquiring party file with the Commission, prior to the closing of such sale or other disposition, a written agreement to be bound by the provisions of this order.

X.

It is further ordered, That the individual respondent Scott Chinery promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. In addition, for a period of five (5) years from the date of service of this order, the individual respondent shall promptly notify the Commission of each affiliation with a new business or employment. Each such notice shall include the individual respondent's new business address and a statement of the business or employment in which the respondent is newly engaged as well as a description of respondent's duties and responsibilities in connection with the business or employment. The expiration of the notice provisions of this part shall not affect any other obligation arising under this order.

XI.

It is further ordered, That for five (5) years after the last date of dissemination of any representation covered by this order, respon-

dents, or their successors or assigns, shall maintain and upon request make available to the Federal Trade Commission for inspection and copying:

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

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

XII.

It is further ordered, That respondent L&S Research Corporation shall:

A. Within thirty (30) days after service of this order, provide a copy of this order to each of respondent's 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;

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 respondent's 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 respondent or any subsidiary, successor, or assign, within three (3) days after the person assumes his or her position; and that respondent secure from each such person a signed statement acknowledging receipt of said order.

XIII.

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

INTERIM AGREEMENT

L&S Research Corporation and Scott Chinery (proposed respondents) acknowledge receipt of a copy of the proposed agreement containing order to cease and desist (consent agreement) between proposed respondents and the Federal Trade Commission (Commission). Proposed respondents acknowledge that under the terms of the consent agreement they are obligated to pay \$1,450,000.00, and that, pursuant to Part IX of the consent agreement, proposed respondents are obligated to require, as a condition precedent to the closing of the sale or other disposition of L&S Research Corporation or the right to the use of the name Cybergemics or to market any of the products in its product line, that the acquiring party file with the Commission, prior to the closing of such sale or other disposition, a written agreement to be bound by the provisions of this consent agreement.

Commission staff requires as a condition of settlement that an Irrevocable Standby Letter of Credit for the full \$1,450,000.00 be delivered within three (3) days of notification that there is an agreement in principle to settle the Commission's Part II investigation of L&S Research Corporation, Nonpublic File No. 912-3004, and that proposed respondents enter into this agreement.

As an inducement for the Commission to accept and make final the consent agreement, the proposed respondents agree:

- A. To deliver the Irrevocable Standby Letter of Credit, in a form approved by the Commission staff, as security for the payment due under the consent agreement to Richard L. Cleland, Federal Trade Commission, at 601 Pennsylvania Avenue, N.W. Washington, D.C.; and
- B. If L&S Research Corporation or the right to use the name Cybergemics or to market any of the products in its product line is sold before the Commission accepts the consent agreement, to require the acquiring party to file with the Commission, prior to the closing of such sale or other disposition, a written agreement to be bound by the provisions of the order included in the consent agreement, if and when it is finally accepted by the Commission.

It is further agreed that in the event that the consent agreement does not become final on or before September 15, 1995, the

Irrevocable Standby Letter of Credit shall be returned to the respondent L&S Research Corporation or Scott Chinery.

This agreement shall terminate on September 15, 1995, provided that, in the event the consent agreement is finally accepted by the Commission, this agreement shall terminate upon service of the order provided for in the consent agreement.

CONCURRING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

The Commission has strong evidence supporting the central allegations in this complaint, and I have voted to accept the consent agreement. In my view, however, the complaint should not allege that the maintenance claim for Mega-Fat Burner and the maturing women weight loss claim for QuickTrim were false. I am inclined to believe that the claims are false but I would prefer to have some corroborating evidence of falsity before finding reason to believe that Section 5 of the FTC Act has been violated. Because the available information shows only that there is no evidence that these claims are true, it seems to me more appropriate to allege that they are unsubstantiated.

In addition, the QuickTrim weight loss allegations seem inconsistent in light of the evidence. The complaint alleges that the weight loss claim for maturing women users of QuickTrim is false but alleges that the same claim for all users of QuickTrim is unsubstantiated. Yet we have no evidence indicating that the weight loss claims are any more likely to be false for maturing women than for users generally.

I therefore do not support the complaint to the extent that the maintenance claim for Mega-Fat Burner and the maturing women weight loss claim for QuickTrim are alleged to be false, not unsubstantiated.

IN THE MATTER OF

BPI ENVIRONMENTAL, INC.

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

Docket C-3535. Complaint, Oct. 17, 1994--Decision, Oct. 17, 1994

This consent order prohibits, among other things, a Massachusetts-based corporation from making unsubstantiated degradability claims for its plastic grocery bags or any of its plastic products in the future. The order also requires the respondent to possess competent and reliable evidence to substantiate claims regarding any environmental benefit of its plastic products.

Appearances

For the Commission: *Gary S. Cooper.*

For the respondent: *Dennis N. Caulfield*, President, North Dighton, MA.

COMPLAINT

The Federal Trade Commission, having reason to believe that BPI Environmental, Inc., successor to Beresford Packaging, Inc., a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent BPI Environmental, Inc. ("BPI") is a Delaware corporation with its office and principal place of business located at 155 Myles Standish Boulevard, Taunton, Massachusetts.

Beresford Packaging, Inc. ("Beresford") was a Massachusetts corporation with its office and principal place of business located at 155 Myles Standish Boulevard, Taunton, Massachusetts.

On or about August 2, 1990, Beresford was merged into BPI, at which time the separate corporate existence of Beresford ceased and BPI became the surviving corporation. BPI, as the successor in merger to Beresford, is the legal successor to Beresford and is responsible for the acts or practices of Beresford alleged herein.

PAR. 2. Respondent has advertised, offered for sale, sold, and distributed throughout the United States plastic grocery bags or sacks containing cornstarch additives under such trade names as "BIO-SAC," and plastic grocery bags or sacks containing ultra-violet radiation enhancing additives under such trade names as "PHOTO-SAC."

PAR. 3. The acts or practices of respondent alleged in this complaint constitute the maintenance of a substantial course of trade in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Respondent, through the sale of its plastic grocery bags or sacks to third party purchasers, has caused plastic grocery bags or sacks containing product labeling, including, but not necessarily limited to the attached Exhibit A, to be distributed to consumers throughout the United States. In the course and conduct of its business, and for the purpose of promoting the sale or distribution of its plastic grocery bags or sacks, respondent has also disseminated or caused to be disseminated to purchasers of its plastic grocery bags or sacks various advertisements and promotional materials, including, but not necessarily limited to the attached Exhibit B.

PAR. 5. The product labeling, referred to in paragraph four above, an example of which is attached hereto as Exhibit A, contains, among others, the following statements or claims concerning respondent's BIO-SAC plastic grocery sack:

- a. "BIO-DEGRADABLE" [In large, bold typeface]
- b. "TOTALLY BIO-DEGRADABLE"
- c. "DECOMPOSES WITHOUT SUNLIGHT"
- d. "ENVIRONMENTALLY SAFE IN LANDFILLS AND INCINERATION"

PAR. 6. The advertisements or promotional materials, referred to in paragraph four above, an example of which is attached hereto as Exhibit B, contain, among others, the following statements or claims concerning respondent's BIO-SAC plastic grocery sack:

- a. "BIO-SAC IS SAFE FOR THE ENVIRONMENT" [In large typeface]
- b. "Cornstarch additives in the sack are attacked by micro-organisms which ultimately results in complete degradation of the plastic."
- c. "BIO-SAC will completely disappear when buried in landfills in 3 to 6 years"
- d. "BIO-SAC decomposes in the environment without sunlight, naturally"

PAR. 7. Through the use of the statements and claims referred to in paragraphs five and six above, and others not specifically set forth herein, respondent has represented, directly or by implication, that compared to untreated plastic grocery sacks, respondent's BIO-SAC plastic grocery sacks offer a significant environmental benefit when consumers dispose of them as trash.

PAR. 8. Through the use of the statements and claims referred to in paragraph six above, and others not specifically set forth herein, respondent has represented, directly or by implication, that respondent's BIO-SAC plastic grocery sacks will completely break down, decompose, and return to nature within 3 to 6 years when buried in landfills.

PAR. 9. The product labeling referred to in paragraph four above, contains, among others, the following statements or claims concerning respondent's PHOTO-SAC plastic grocery sack:

- a. "DEGRADABLE"
- b. "LANDFILL-SAFE"

PAR. 10. Through the use of the statements and claims referred to in paragraph nine above, and others not specifically set forth herein, respondent has represented, directly or by implication, that:

- a. Compared to untreated plastic grocery sacks, respondent's PHOTO-SAC plastic grocery sacks offer a significant environmental benefit when consumers dispose of them as trash.
- b. Respondent's PHOTO-SAC plastic grocery sacks will completely break down, decompose, and return to nature in a reasonably short period of time after consumers dispose of them as trash.

PAR. 11. Through the use of the statements and claims and the representations referred to in paragraphs five, six, seven, eight, nine and ten above, and others not specifically set forth herein, respondent has represented, directly or by implication, that at the time the representations set forth in paragraphs seven, eight and ten above were made respondent possessed and relied upon a reasonable basis for such representations.

PAR. 12. In truth and in fact, at the time the representations set forth in paragraphs seven, eight, and ten above were made, respon-

dent did not possess and rely upon a reasonable basis for such representations. Therefore, the representation set forth in paragraph eleven above was, and is, false and misleading.

PAR. 13. Respondent's dissemination of the false and misleading representations as alleged in this complaint, and the placement in the hands of others of the means and instrumentalities by and through which others may have used said false and misleading representations, constitute unfair or deceptive acts or practices in or affecting commerce and false advertisements in violation of Section 5(a) of the Federal Trade Commission Act.

Complaint

118 F.T.C.

EXHIBIT A

EXHIBIT A

LABELING ON BIO-SAC PLASTIC SACK



beresford packaging inc.

155 myles standish blvd.
taunton, massachusetts 02780

Tel. (508) 824-8636
FAX (508) 822-6872
IN MASS. (800) 641-8900
OUTSIDE MASS. (800) 628-8206

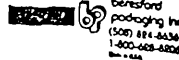
We care about
our environment

• TOTALLY BIO-DEGRADABLE • DECOMPOSES
WITHOUT SUNLIGHT • NON TOXIC • ENVIRONMENTALLY
SAFE IN LANDFILLS AND INCINERATION.

BIO-DEGRADABLE
BIO-DEGRADABLE
BIO-DEGRADABLE
BIO-DEGRADABLE



ADM is a registered trademark of ADM. ADM is a registered trademark of ADM. ADM is a registered trademark of ADM.



Complaint

EXHIBIT B

EXHIBIT B
PROMOTIONAL LITERATURE**BIO-SAC™ IS SAFE
FOR THE ENVIRONMENT.**

Cornstarch additives in the sack are attacked by microorganisms which ultimately results in complete degradation of the plastic. Therefore:

BIO-SAC™ will completely disappear when buried in landfills in 3 to 6 years.

BIO-SAC™ decomposes in the environment without sunlight, naturally.

BIO-SAC™ is printed with only water based inks.

BIO-SAC™ leaves no toxic or harsh chemicals to harm the environment.

BIO-SAC™ is incinerator safe.

BIO-SAC™ is recyclable.

BIO-SAC™ is non-leaching in landfills.

BIO-SAC™ is available only from:

Beresford Packaging Inc.
155 Myles Standish Blvd.
Taunton, Massachusetts 02780
Tel. (508) 824-8636 FAX (508) 822-6872

DECISION AND ORDER

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

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

The Commission, having thereafter considered the matter and determined that it had reason to believe that the respondent has violated the Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, and having duly considered the recommendations of its staff to modify the consent agreement pursuant to the comments received and the supplemental letter agreement executed by the respondent's counsel, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent BPI Environmental, Inc. ("BPI") is a Delaware corporation with its office and principal place of business located at 155 Myles Standish Boulevard, Taunton, Massachusetts. Beresford Packaging, Inc. ("Beresford") was a Massachusetts corporation with its office and principal place of business located at 155 Myles Standish Boulevard, Taunton, Massachusetts. On or about August 2, 1990, Beresford was merged into BPI, at which time the separate corporate existence of Beresford ceased and BPI became the surviving

corporation. BPI, as the successor in merger to Beresford, is the legal successor to Beresford.

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

ORDER

DEFINITION

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

“BPI Environmental plastic product” means any product or product packaging composed of plastic, in whole or in part, including but not limited to plastic grocery bags or sacks, plastic T-shirt bags or sacks, plastic produce bags or sacks, and plastic bakery bags or sacks, that is offered for sale, sold, or distributed by respondent, its successors and assigns, or that is distributed to the public by any other person, corporation or third party who has purchased said plastic product from respondent, its successors and assigns, under the “BIO-SAC” or “PHOTO-SAC” brand names or any other brand name of respondent, its successors and assigns; and also means any plastic product that is sold or distributed to the public by third parties under private labeling agreements with respondent, its successors and assigns.

I.

It is ordered, That respondent BPI Environmental, Inc., a corporation, its successors and assigns, and its officers, representatives, agents, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, labeling, offering for sale, sale, or distribution of any BPI Environmental plastic product, in or affecting commerce, as “commerce” is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, by word or depiction:

(1) That any such plastic product is “degradable,” “biodegradable,” or “photodegradable”; or,

(2) Through the use of such terms as “degradable,” “biodegradable,” “photodegradable,” or any other substantially similar term or expression, that the degradability of any such plastic product offers any environmental benefits when disposed of as trash in a sanitary landfill, or when incinerated,

unless at the time of making such representation, respondent possesses and relies upon a reasonable basis for such representation, consisting of 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 respondent BPI Environmental, Inc., a corporation, its successors and assigns, and its officers, representatives, agents, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, labeling, offering for sale, sale, or distribution of any BPI Environmental plastic product, in or affecting commerce, as “commerce” is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, by word or depiction, that any such product offers any environmental benefit, unless at the time of making such representation, respondent possesses and relies 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, for a period of three (3) years from the date that any representation covered by this order is last disseminated, respondent shall maintain and upon request make available to the Commission for inspection and copying:

A. All materials that were relied upon to substantiate such representation; and

B. All test reports, studies, surveys, demonstrations or other evidence in respondent's possession or control, that contradict, qualify, or call into question such representation or the basis relied upon for such representation.

IV.

It is further ordered, That respondent shall distribute a copy of this order within sixty (60) days after service of this order upon them to each of its operating divisions and to each of its officers, agents, representatives, or employees engaged in the preparation of labeling or the preparation or placement of advertisements or other such sales or promotional materials covered by this order.

V.

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

VI.

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

Commissioner Varney not participating.

Complaint

118 F.T.C.

IN THE MATTER OF

ADOBE SYSTEMS INCORPORATED, ET AL.

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

Docket C-3536. Complaint, Oct. 18, 1994--Decision, Oct. 18, 1994

This consent order permits the consummation of the acquisition of Aldus Corporation by Adobe Systems Incorporated and requires, among other things, the two software firms to divest Aldus Corporation's FreeHand professional-illustration computer software and name to Altsys Corporation within six months. In addition, for ten years, the order requires the respondents to obtain Commission approval before acquiring any stock or other interest in any firm engaged in the development or sale of professional-illustration software for the Macintosh or Power Macintosh.

Appearances

For the Commission: *Mary Lou Steptoe* and *Mark Menna*.

For the respondents: *Wayne D. Collins, Sherman & Sterling*, New York, N.Y. and *Harvey I. Saferstein, Irell & Manella*, Los Angeles, CA.

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 respondent Adobe Systems Incorporated, a corporation, has agreed to acquire the Aldus Corporation, a corporation, in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and that such acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. RESPONDENTS

1. Respondent Adobe Systems Incorporated ("Adobe") is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its principal place of business at 1585 Charleston Road, Mountain View, California. Adobe, which had sales of approximately \$313.5 million in 1993, develops and markets computer software. Adobe develops and markets, among other graphics software, Illustrator, a professional illustration program.

2. Respondent Aldus Corporation ("Aldus") is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Washington, with its principal place of business at 411 First Avenue South, Seattle, Washington. Aldus, which had sales of approximately \$206.5 million in 1993, is also a producer of computer software, with the majority of its revenue derived from graphics products. Aldus markets FreeHand, a professional illustration program, under license from Altsys Corporation, which initially developed the program and continues to develop it in consultation with Aldus.

II. JURISDICTION

3. Adobe and Aldus are, and at all time relevant herein have been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and are corporations whose business is in or affects commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

III. THE ACQUISITION

4. Adobe and Aldus entered into an agreement on or about March 15, 1994, pursuant to which Adobe intends to acquire essentially all of the stock of Aldus in exchange for Adobe stock valued at the time at approximately \$525 million. On or about July 14, 1994, Adobe and Aldus agreed to revise their March 15 agreement, reducing the value of the proposed acquisition to approximately \$455 million.

IV. MARKET STRUCTURE

5. One relevant line of the commerce in which to analyze the effects of the proposed acquisition is the development and sale of professional illustration software for use on Apple Macintosh and Power Macintosh computers. Illustrator and FreeHand are the only two products in that market, with combined 1993 worldwide sales of approximately \$60 million and combined 1993 U.S. sales of \$32 million, of which approximately 70 percent was attributed to sales of Illustrator and approximately 30 percent was attributable to sales of FreeHand.

6. Illustrator and FreeHand compete for sales to graphics arts professionals and are the only illustration programs which offer features and performance characteristics enabling graphics professionals efficiently and reliably to create and print high-quality illustrations.

7. Even if the relevant market is broadened to include the development and sale of all illustration software for use on Apple Macintosh and Power Macintosh computers, or is broadened even further to include the development and sale of illustration software for use on IBM-compatible computers with the Windows operating environment, the relevant market is highly concentrated and Adobe and Aldus have a combined share of more than 35% of sales. The products are differentiated and a significant share of sales in the broader markets is accounted for by customers who regard Illustrator and FreeHand as their first and second choices.

8. The relevant geographic market in which to consider the proposed acquisition is either the United States or worldwide. There are no significant impediments to the sale of imported illustration programs in the United States; however, most illustration software is published in the United States.

9. Entry into the market for professional illustration software for use on Apple Macintosh and Power Macintosh computers would not be timely, likely, or sufficient in its magnitude, character, and scope to deter or counteract anticompetitive effects. Developing a professional illustration program is difficult and time consuming. Marketing a technically comparable or even an improved illustration program would be difficult and time consuming because of network externalities associated with Illustrator's and FreeHand's extensive installed user bases. Repositioning of other programs to compete

with Illustrator and FreeHand would also be difficult, time consuming and unlikely.

10. Adobe and Aldus have competed vigorously against each other with respect to price and development of new versions of Illustrator and FreeHand.

V. EFFECTS OF THE ACQUISITION

11. The proposed acquisition, if consummated, may substantially lessen competition or tend to create a monopoly in the relevant markets in the following ways, among others:

- a. It will increase the already high concentration in the relevant markets;
- b. It will eliminate Aldus as a substantial independent competitive force in the relevant markets;
- c. It will eliminate actual, direct and substantial competition between Adobe and Aldus;
- d. It will eliminate competition between the two closest substitutes, Illustrator and FreeHand, among differentiated products in the relevant markets;
- e. It will allow the merged firm unilaterally to exercise market power;
- f. It will allow the merged firm to raise prices, either directly or through reduced discounting, promotions, or service, on either Illustrator or FreeHand or on both products;
- g. It will allow the merged firm to reduce innovation by delaying or reducing product development; and
- h. It will increase the likelihood of coordinated interaction.

VI. VIOLATIONS CHARGED

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

13. The proposed acquisition of Aldus by Adobe, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

Commissioner Varney not participating.

DECISION AND ORDER

The Federal Trade Commission ("Commission") having initiated an investigation of the proposed acquisition by respondent Adobe Systems Incorporated of the stock of respondent Aldus Corporation, 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 a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18; and

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

The Commission, having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, 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 Adobe Systems Incorporated is a corporation organized, existing, and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 1585 Charleston Road, Mountain View, California.
2. Respondent Aldus Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Washington, with its office and principal place of business located at 411 First Avenue South, Seattle, Washington.

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

ORDER

I.

It is ordered, That, as used in this order, the following definitions shall apply:

A. “*Adobe*” means Adobe Systems Incorporated, its predecessors, divisions, subsidiaries, groups and affiliates that it controls, and their respective directors, officers, employees, agents and representatives, and their respective successors and assigns.

B. “*Aldus*” means Aldus Corporation, its predecessors, divisions, subsidiaries, groups and affiliates that it controls, and their respective directors, officers, employees, agents and representatives, and their respective successors and assigns.

C. “*Respondents*” means Adobe and Aldus.

D. “*Altsys*” means Altsys Corporation, a Texas corporation located at 269 West Renner Parkway, Richardson, Texas.

E. “*Professional Illustration Software*” means a complete path-based illustration program native to Apple Macintosh or Power Macintosh computers, targeted to meet the needs of professional customers whose function is to create graphics for internal and external clients to be used in publications printed on a printing press, and excludes Computer Aided Design (CAD) and 3D programs.

F. “*FreeHand*” means the Professional Illustration Software program marketed and sold by Aldus under the name “Aldus FreeHand” pursuant to a Software License Agreement with Altsys dated as of July 20, 1987, as amended (the “License”); Aldus source code incorporated in FreeHand (for use in FreeHand); the name “FreeHand” (but not the name “Aldus”); the FreeHand customer names and addresses together with FreeHand specific information in the Aldus database (but not the underlying database application software); and all marketing, advertising, training and technical support information and materials for FreeHand.

G. “*Illustrator*” means the Professional Illustration Software program marketed and sold by Adobe under the name “Illustrator.”

H. “*Altsys Agreement*” means the July 11, 1994, agreement between Aldus and Altsys.

I. “*Acquisition*” means the stock acquisition of Aldus by Adobe.

J. “*Commission*” means the Federal Trade Commission.

II.

It is further ordered, That, pending divestiture of FreeHand, respondents shall take such action as is necessary to maintain the viability and marketability of FreeHand and shall not cause or permit the destruction, removal from the market, wasting, deterioration or impairment of FreeHand. Pending divestiture of FreeHand, employees of respondents involved in the development, marketing, or sale of Illustrator or FreeHand shall not be involved in the development, marketing or sale of the other product; and employees of respondents involved in the development, marketing or sale of Illustrator or FreeHand shall not receive or have access to or the use of any “material confidential information” not in the public domain, with respect to the other product except as such information would be available to those employees in the normal course of business if the acquisition had not taken place. (“Material confidential information,” as used herein, means competitively sensitive or proprietary information not independently known from sources other than those employees involved in the development, marketing, or sale of FreeHand or Illustrator.)

III.

It is further ordered, That within six (6) months after the acquisition is consummated respondents shall absolutely and in good faith divest FreeHand to Altsys in accordance with the Altsys agreement. Adobe and Aldus shall comply with all the terms of the Altsys agreement, except that the License shall be terminated no later than six (6) months after the acquisition. The purpose of the divestiture is to ensure the continuation of FreeHand as an ongoing viable Professional Illustration Software program, to maintain FreeHand as an independent competitor in the Professional Illustration Software business, and to remedy the lessening of competition resulting from the acquisition as alleged in the Commission’s complaint.

IV.

It is further ordered, That, within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until respondents have fully complied with the provisions of paragraphs II and III of this order, respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, or have complied with those provisions. Respondents shall include in their compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with paragraphs II and III of this order.

V.

It is further ordered, That for a period of ten (10) years from the date on which this order becomes final, respondents shall not, without the prior approval of the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise:

A. Acquire any stock, share capital, equity or other interest in any concern, corporate or noncorporate, then engaged in the development or sale of Professional Illustration Software, provided, however, that an acquisition of such stock, share capital, equity or other interest will be exempt from the requirements of this paragraph if it is solely for the purpose of investment and respondents will hold no more than one percent of the shares of any class of security traded on a national securities exchange or authorized to be quoted in an interdealer quotation system of a national securities association registered with the United States Securities and Exchange Commission; or

B. Acquire any Professional Illustration Software or acquire or enter into any exclusive license to Professional Illustration Software; provided, however, that such an acquisition will be exempt from the requirements of this paragraph if the purchase price is less than \$2,000,000 (two million dollars).

VI.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, unless respondents are required to seek

prior approval from the Commission pursuant to paragraph V, respondents shall not, without providing advance written notification to the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise, acquire any Professional Illustration Software or any exclusive license to Professional Illustration Software;

Said notification shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (hereinafter referred to as "the Notification"). Respondents shall provide to the Commission at least ten days prior to acquiring any such interest (hereinafter referred to as the "first waiting period"), both the Notification and supplemental information either in respondents' possession or reasonably available to respondents. Such supplemental information shall include a copy of the proposed acquisition agreement; the names of the principal representatives of each respondent and of the firm respondents desire to acquire who negotiated the acquisition agreement; and any management or strategic plans discussing the proposed acquisition. If, within the first waiting period, representatives of the Commission make a written request for additional information, respondents shall not consummate the acquisition until twenty days after submitting such additional information. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted in the same manner as is applicable under the requirements and provisions of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. 18a.

VII.

One year from the date this order becomes final, annually for the next nine (9) years, and at other times as the Commission may require, respondents shall file with the Commission verified written reports setting forth in detail the manner and form in which they have complied and are complying with paragraphs V and VI of this order.

VIII.

It is further ordered, That, for the purposes of determining or securing compliance with this order, and subject to any legally recognized privilege, upon written request and on reasonable notice to

respondents, respondents shall permit any duly authorized representatives 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 respondents relating to any matters contained in this order; and

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

IX.

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

Commissioner Varney not participating.

IN THE MATTER OF

BOULDER RIDGE CABLE TV, ET AL.

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

Docket C-3537. Complaint, Oct. 19, 1994--Decision, Oct. 19, 1994

This consent order prohibits, among other things, two California-based cable companies and their officers from enforcing any rights they may have under certain paragraphs of an agreement not to compete, entered into as part of Boulder Ridge's acquisition of Three Palms, Ltd., and prohibits the respondents from entering into similar agreements not to compete with the seller or buyer of a cable television system or cable television service in any geographic area in the future.

Appearances

For the Commission: *Ronald B. Rowe, Jill M. Frumin and Mary Lou Steptoe.*

For the respondents: *Burt Braverman, Cole, Raywid & Braverman, Washington, D.C. and Ray Jacobsen, Howrey & Simon, Washington, D.C.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the respondents Boulder Ridge Cable TV, a corporation, and Dean Hazen, individually and as an officer of said corporation, Weststar Communications, Inc., a corporation, and Rodney A. Hansen, individually, hereinafter sometimes referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

I. RESPONDENTS

PARAGRAPH 1. Respondent Boulder Ridge Cable TV (hereinafter "Boulder Ridge") is a corporation organized, existing and doing

business under and by virtue of the laws of the State of California, with its principal office and place of business at 590 Kelly Ave., Half Moon Bay, California. During 1986, 1987, 1988, and 1989, respondent Boulder Ridge, doing business as Desert Cable TV, owned and operated a cable television system in Indian Wells Valley in the State of California.

PAR. 2. Respondent Dean Hazen is the president and majority shareholder of Boulder Ridge, and was the sole shareholder of Boulder Ridge at the time of the acts and practices referred to in paragraphs eight through twelve. His business address is 590 Kelly Ave., Half Moon Bay, California. Respondent Dean Hazen formulates, directs, and controls the acts and practices of respondent Boulder Ridge.

PAR. 3. Respondents Boulder Ridge and Dean Hazen are collectively and individually referred to herein as "Boulder Ridge Entities."

PAR. 4. Respondent Weststar Communications, Inc. (hereinafter "Weststar"), is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its principal office and place of business at 2200 Sunrise Blvd., Suite 250, Rancho Cordova, California. Respondent Weststar indirectly owned a substantial interest in Three Palms, Ltd., (hereinafter "Three Palms").

PAR. 5. Respondent Rodney A. Hansen is a shareholder of Weststar and was a partner in Three Palms, Ltd., a dissolved California partnership. His business address is 8217 Hegseth Court, Fair Oaks, California. During 1986, 1987, and 1988, Three Palms or its predecessors owned and operated a cable television system in Indian Wells Valley in the State of California. Respondent Rodney A. Hansen, through his ownership interests in various corporations and partnerships, formulated, directed and controlled the acts and practices of Three Palms.

PAR. 6. Respondents Weststar and Rodney A. Hansen are collectively and individually referred to herein as "Three Palms Entities."

PAR. 7. At all times relevant herein, each of the respondents or their predecessors maintains or has 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 Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

II. THE NON-COMPETITION AGREEMENT

PAR. 8. On November 16, 1988, respondents entered into an asset purchase agreement in which Boulder Ridge agreed to acquire the assets of Three Palms.

PAR. 9. As Schedule Z to the asset purchase agreement referred to in paragraph eight, respondents entered into a NON-COMPETITION AND NON-DISCLOSURE AGREEMENT, dated November 22, 1988. In paragraphs 3 and 4 of the latter agreement, respondents agreed that: (a) respondents Boulder Ridge Entities would not "own, manage, operate, control, or engage or participate in the ownership, management, operation, or control of, or be connected as a stockholder, officer, director, agent, employee, consultant, partner, joint venturer, or otherwise with any business or organization, any part of which engages in the business of operating a cable television system, subscription television system, multipoint distribution system, direct broadcast system, private operational fixed microwave service, or any similar system or service (or obtaining or holding any authorizations or franchises for any of the foregoing)," located within fifteen (15) miles of the legal boundaries of a community in which respondents Three Palms Entities currently, or at any time in the future, own or operate a cable television system; and (b) respondents Three Palms Entities would not "own, manage, operate, control, or engage or participate in the ownership, management, operation, or control of, or be connected as a stockholder, officer, director, agent, employee, consultant, partner, joint venturer, or otherwise with any business or organization, any part of which engages in the business of operating a cable television system, subscription television system, multipoint distribution system, direct broadcast system, private operational fixed microwave service, or any similar system or service (or obtaining or holding any authorizations or franchises for any of the foregoing)," located within fifteen (15) miles of the legal boundaries of a community in which respondents Boulder Ridge Entities currently, or at any time in the future, own or operate a cable television system.

PAR. 10. On November 22, 1988, Boulder Ridge Entities owned and operated cable television systems on the Island of Oahu in the State of Hawaii and in eight counties in the State of California. On that date, Three Palm Entities owned and operated cable television systems in twenty-two (22) locations in the State of California.

PAR. 11. The purpose, capacity, tendency, or effect of the agreement described in paragraph nine has been, and continues to be, to restrain competition unreasonably and to injure competition and consumers in the following ways, among others:

- A. Preventing the respondents from competing for cable television subscribers;
- B. Restricting the supply and quality of cable television service and of alternate sources of home-video entertainment; and
- C. Maintaining monopoly pricing for cable television service.

III. VIOLATIONS CHARGED

PAR. 12. The acts or practices of respondents constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. These acts or practices 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 complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the respondents with violation of the Federal Trade Commission Act; and

The respondents, their officers, 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 a complaint should issue stating

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

1. Respondent Boulder Ridge Cable TV (hereafter "Boulder Ridge") is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its principal office and place of business at 590 Kelly Ave., Half Moon Bay, California.

2. Respondent Dean Hazen is the president and majority shareholder of Boulder Ridge, and was the sole shareholder of Boulder Ridge at the time of the acts and practices being investigated. His business address is 590 Kelly Ave., Half Moon Bay, California.

3. Respondent Weststar Communications, Inc. (hereafter "Weststar") is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its principal office and place of business at 2200 Sunrise Blvd., Suite 250, Rancho Cordova, California.

4. Respondent Rodney A. Hansen is a shareholder of Weststar and was a partner in Three Palms, Ltd., a dissolved California partnership. His business address is 8217 Hegseth Court, Fair Oaks, California.

5. 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.

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

(A) "*Boulder Ridge*" means (1) Boulder Ridge Cable TV, and its predecessors, successors and assigns, subsidiaries, and divisions, and their respective directors, officers, employees, agents, and representatives; and (2) partnerships, joint ventures, groups and affiliates that

Boulder Ridge Cable TV, controls, directly or indirectly, and their respective directors, officers, employees, agents, and representatives.

(B) "*Dean Hazen*" means Dean Hazen, individually, and all partnerships, joint ventures, and corporations that Dean Hazen controls, directly or indirectly, and their respective directors, officers, employees, agents, and representatives.

(C) "*Three Palms, Ltd.*," means (1) Three Palms, Ltd, and its predecessors, successors and assigns, subsidiaries, and divisions, and their respective directors, officers, employees, agents, and representatives; and (2) partnerships, joint ventures, groups and affiliates that Three Palms, Ltd., controlled, directly or indirectly, and their respective directors, officers, employees, agents, and representatives.

(D) "*Weststar Communications, Inc.*" means (1) Weststar Communications, Inc., and its predecessors, successors and assigns, subsidiaries, divisions, and their respective directors, officers, employees, agents, and representatives; and (2), partnerships, joint ventures, groups and affiliates that Weststar Communications, Inc., controls, directly or indirectly, and their respective directors, officers, employees, agents, and representatives.

(E) "*Rodney A. Hansen*" means Rodney A. Hansen, individually, and all partnerships, joint ventures, and corporations that Rodney A. Hansen controls, directly or indirectly, and their respective directors, officers, employees, agents, and representatives.

(F) "*Respondents*" means Boulder Ridge Cable TV, Dean Hazen, Weststar Communications, Inc., and Rodney A. Hansen.

(G) "*Cable Television Service*" means the delivery to the home of various entertainment and informational programming via a cable television system.

(H) "*Cable Television System*" means a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable television service, which includes video programming and which is provided to multiple subscribers within a community. The term does not include: (a) a facility that serves only to retransmit the television signals of one or more television broadcast stations; or (b) a facility that serves only subscribers in one or more multiple dwelling units under common ownership, control, or management, unless such facility or facilities uses a public right-of-way.

(I) "*NON-COMPETITION AGREEMENT*" means the "*NON-COMPETITION AND NON-DISCLOSURE AGREEMENT*" signed by respondents and Three Palms, Ltd., on November 22, 1988.

(J) "*Agreeing not to compete*" means agreeing directly or indirectly not to own, manage, operate, control (or engage or participate in the ownership, management, operation, or control of) a cable television system, subscription television system, multipoint distribution system, direct broadcast system, private operational fixed microwave service, or any similar multi-channel video distribution system or service (or obtaining or holding any authorizations or franchises for any of the foregoing) in competition with another person.

II.

It is ordered, That respondents, in connection with the purchase, sale, or operation of any cable television system or cable television service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from enforcing any rights they may have under paragraphs three and four of the *NON-COMPETITION AGREEMENT*.

III.

It is further ordered, That respondents, in the acquisition or sale of any cable television system or cable television service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from agreeing not to compete with the seller or buyer of such cable television system or cable television service in any geographic area. Provided, however, that this paragraph shall not apply to any agreement made in connection with the lawful acquisition or sale of a cable television system or cable television service in which the seller agrees not to compete with the buyer or buyers, or the buyer agrees not to compete with the seller or sellers, in a geographic area that is reasonably related to:

(A) The cable television system or cable television service that is being acquired or sold;

(B) A proximately located system or service of the buyer with which the cable television system or cable television service that is being acquired will be jointly operated; or

(C) A proximately located system or service of the seller with which the cable television system or cable television service that is being sold previously was jointly operated.

IV.

It is further ordered, That, within sixty (60) days after the date this order becomes final, and annually thereafter for a period of three (3) years on the anniversary date this order becomes final, and at such other times as the Commission or its staff may request, each respondent shall file with the Secretary of the Federal Trade Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying and has complied with this order.

V.

It is further ordered, That, for the purposes of determining or securing compliance with this order, and subject to any legally recognized privilege, upon written request and on five days notice to any respondent, made to its principal office, such respondent shall permit any duly authorized representatives of the Federal Trade Commission:

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

(B) Without restraint or interference from respondent, an opportunity to interview officers or employees of respondent, who may have counsel present, regarding any matters contained in this order.

VI.

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

Commissioner Varney not participating.

IN THE MATTER OF

HEALTHTRUST, INC. - THE HOSPITAL COMPANY

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

Docket C-3538. Complaint, Oct. 20, 1994--Decision, Oct. 20, 1994

This consent order requires, among other things, a Tennessee-based corporation, that provides acute care hospital services, to divest Holy Cross Hospital of Salt Lake City to a Commission approved acquirer; to complete the divestiture within six months of the date of the order; and to consent to the appointment of a trustee, if the divestiture is not completed within six months. In addition, the consent order requires the respondent, for ten years, to obtain prior Commission approval before purchasing any acute care hospital or any hospital, medical or surgical diagnostic or treatment service or facility in the Utah counties of Weber, Davis, and Salt Lake.

Appearances

For the Commission: *Mark J. Horoschak, Philip M. Eisenstat and Rendell Davis.*

For the respondent: *Phil Proger, Jones, Day, Reavis & Pogue, Washington, D.C. and G. Scott Rayson, Waller, Lansden, Dortch & Davis, Nashville, TN.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that respondent Healthtrust, Inc. - The Hospital Company ("Healthtrust"), a corporation subject to the jurisdiction of the Commission, has entered into an agreement whereby Healthtrust will acquire certain assets from Holy Cross Health System Corporation; that the acquisition agreement violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; that the proposed acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its

complaint, pursuant to Section 11(b) of the Clayton Act, 15 U.S.C. 21(b), and Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), stating its charges as follows:

DEFINITIONS

PARAGRAPH 1. For purposes of this complaint, the following definitions shall apply:

a. "*Acute care hospital*" means a health facility, other than a federally owned facility, having a duly organized governing body with overall administrative and professional responsibility, and an organized medical staff, that provides 24-hour inpatient care, as well as outpatient services, and having as a primary function the provision of inpatient services for medical diagnosis, treatment, and care of physically injured or sick persons with short-term or episodic health problems or infirmities.

b. "*Acute care inpatient hospital services*" means 24-hour inpatient health care, and related medical or surgical diagnostic and treatment services, for physically injured or sick persons with short-term or episodic health problems or infirmities.

THE PARTIES TO THE PROPOSED ACQUISITION

PAR. 2. Healthtrust, Inc. - The Hospital Company ("Healthtrust") is a corporation organized, existing, and doing business under and by virtue of the laws of Delaware, with its principal place of business at 4525 Harding Road, Nashville, Tennessee. Healthtrust and/or its subsidiaries own and operate six acute care hospitals in Utah, including Lakeview Hospital in Bountiful, Pioneer Valley Hospital in West Valley City, and Mountain View Hospital in Payson.

PAR. 3. Holy Cross Health System Corporation ("Holy Cross") is a corporation organized, existing, and doing business under and by virtue of the laws of Indiana, with its principal place of business at 3606 East Jefferson Blvd., South Bend, Indiana. Holy Cross Health Services of Utah, a wholly-owned subsidiary of Holy Cross, owns three acute care hospitals in Utah: St. Benedict's Hospital in Ogden, Holy Cross Hospital in Salt Lake City, and Holy Cross-Jordan Valley Hospital in West Jordan.

JURISDICTION

PAR. 4. Healthtrust and Holy Cross are, and at all times relevant herein have been, engaged in commerce, as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12. The businesses of Healthtrust and Holy Cross are, and at all times relevant herein, have been, in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

THE PROPOSED ACQUISITION

PAR. 5. On or about December 3, 1993, Healthtrust and Holy Cross entered into an agreement whereby Healthtrust will acquire from Holy Cross substantially all the assets of Holy Cross hospitals in Utah and related Holy Cross assets in Utah. The total value of the Holy Cross assets to be acquired by Healthtrust is approximately \$125 million.

NATURE OF TRADE AND COMMERCE

PAR. 6. For the purposes of this complaint, the relevant line of commerce in which to analyze the proposed acquisition is the production and sale of acute care inpatient hospital services and/or any narrower group of services contained therein.

PAR. 7. For the purposes of this complaint, the relevant sections of the country are the Salt Lake City area, encompassing Salt Lake County and southern Davis County; and the Salt Lake City - Ogden Metropolitan Statistical Area, an area encompassing three contiguous counties in northern Utah: Weber County, Davis County, and Salt Lake County.

MARKET STRUCTURE

PAR. 8. The relevant markets -- *i.e.* the relevant line of commerce in the relevant sections of the country -- are highly concentrated, whether measured by Herfindahl-Hirschmann Indices ("HHI") or by four-firm concentration ratios.

ENTRY CONDITIONS

PAR. 9. Entry into the relevant markets is difficult. In particular, substantial lead times are required to establish a new acute care hospital in the relevant sections of the country.

COMPETITION

PAR. 10. In the relevant markets, Healthtrust and Holy Cross acute care hospitals are actual and potential competitors.

EFFECT

PAR. 11. The effect of the aforesaid acquisition may be substantially to lessen competition in the relevant markets in the following ways, among others:

- (a) It would eliminate actual and potential competition between Healthtrust's and Holy Cross' hospitals in the relevant markets;
- (b) It would significantly increase the already high level of concentration in the relevant markets;
- (c) It would eliminate Holy Cross' hospitals from the relevant markets as a substantial independent competitive force;
- (d) It may increase the possibility of collusion or interdependent coordination by the remaining firms in the relevant markets; and
- (e) It may deny patients, physicians, third-party payers, and other consumers of hospital services in the relevant markets the benefits of free and open competition based on price, quality, and service.

VIOLATIONS CHARGED

PAR. 12. The acquisition agreement described in paragraph five above violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

PAR. 13. The acquisition described in paragraph five, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation into the proposed acquisition by Healthtrust, Inc. - The Hospital Company of assets of Holy Cross Health System Corporation, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with a violation of Section 7 of the Clayton Act, as amended, 15 U. S. C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Acts, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days (and having duly considered the comments received), 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 Healthtrust, Inc. - The Hospital Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business at 4525 Harding Road, in the City of Nashville in the State of Tennessee.

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

ORDER

I.

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

A. "*Respondent*" or "*Healthtrust*" means Healthtrust, Inc. - The Hospital Company, its partnerships, joint ventures, companies, subsidiaries, divisions, groups and affiliates controlled by respondent, and their respective directors, officers, employees, agents, and representatives, and their respective successors and assigns.

B. The "*acquisition*" means the acquisition by Healthtrust of certain assets of Holy Cross Health System Corporation including Holy Cross Hospital of Salt Lake City, Holy Cross-Jordan Valley Hospital, and St. Benedict's Hospital.

C. "*Acute care hospital*" means a health facility, other than a federally owned facility, having a duly organized governing body with overall administrative and professional responsibility, and an organized medical staff, that provides 24-hour inpatient care, as well as outpatient services, and having as a primary function the provision of inpatient services for medical diagnosis, treatment, and care of physically injured or sick persons with short-term or episodic health problems or infirmities.

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

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

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

G. "*Three-County Area*" means the area consisting of the following three Utah counties: Salt Lake County, Davis County, and Weber County.

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

I. "*Schedule A Assets*" means assets acquired by the respondent and listed on the attached Schedule A.

J. "*Viability and competitiveness*" means that the Schedule A Assets are capable of functioning independently and competitively.

K. "*Assets and Businesses*" include, but are not limited to, all assets, properties, businesses, rights, privileges, contractual interests, licenses, and goodwill of whatever nature, tangible and intangible, including, without limitation, the following:

1. All real property interests (including fee simple interests and real property leasehold interests, whether as lessor or lessee), together with all buildings, improvements and fixtures located thereon, all construction in progress thereat, all appurtenances thereto, and all licenses and permits related thereto (collectively, the "Real Property");

2. All contracts and agreements with physicians, other health care providers, unions, third-party payors, HMOs, customers, suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, cosigners and consignees (collectively, the "contracts");

3. All machinery, equipment, fixtures, vehicles, furniture, inventories and supplies (other than such inventories and supplies as are used in the ordinary course of business during the time that Healthtrust owns the assets) (collectively, the "Personal Property");

4. All research materials, technical information, management information systems, software, software licenses, inventions, trade secrets, technology, know-how, specifications, designs, drawings, processes, and quality control data (collectively, the "Intangible Personal Property");

5. All books, records and files, excluding, however, the corporate minute books and tax records of Healthtrust and its Affiliates; and

6. All prepaid expenses.

II.

It is ordered, That:

A. Respondent shall divest, absolutely and in good faith, within six (6) months of the date this order becomes final, the Schedule A Assets, and shall also divest such additional assets and businesses ancillary to Holy Cross Hospital of Salt Lake City, Utah (excluding Pioneer Valley Hospital, Lakeview Hospital, Jordan Valley Hospital, St. Benedict's Hospital, Salt Lake Industrial Clinic, and West Jordan

Clinic), and effect such arrangements as are necessary to assure the marketability and the viability and competitiveness of the Schedule A Assets.

B. Respondent shall divest the Schedule A Assets only to an acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission. The purpose of the divestiture of the Schedule A Assets is to ensure the continuation of the Schedule A Assets as an ongoing, viable acute care hospital and to remedy the lessening of competition resulting from the acquisition as alleged in the Commission's complaint.

C. Respondent shall comply with all terms of the Agreement to Hold Separate, attached hereto and made a part hereof as Appendix I. Said agreement shall continue in effect until such time as respondent has fulfilled the divestiture requirements of this order or until such other time as the Agreement to Hold Separate provides.

D. Pending divestiture of the Schedule A Assets, respondent shall take such actions as are necessary to maintain the viability and competitiveness and the marketability of the Schedule A Assets and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the Scheduled Assets except for ordinary wear and tear.

E. A condition of approval by the Commission of the divestiture shall be a written agreement by the acquirer of the Schedule A Assets that it will not sell for a period of ten (10) years from the date of divestiture, directly or indirectly, through subsidiaries, partnerships or otherwise, without the prior approval of the Commission, the Schedule A Assets to any person who operates, or will operate immediately following the sale, any other acute care hospital in the Three-County Area. Provided, however, that the acquirer is not required to seek prior approval of the Commission for the sale of any of the assets identified in Part II of Schedule A.

III.

It is further ordered, That:

A. If the respondent has not divested, absolutely and in good faith and with the Commission's prior approval, the Schedule A Assets, in accordance with this order, within six (6) months of the date this order becomes final, the Commission may appoint a trustee

to divest the Schedule A Assets. In the event that the Commission or the Attorney General brings an action for any failure to comply with this order or in any way relating to the acquisition, pursuant to Section 5(l) of the Federal Trade Commission Act, 15 U.S.C. 45(l), or any other statute enforced by the Commission, the respondent shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it for any failure by the respondent to comply with this order.

B. If a trustee is appointed by the Commission or a court pursuant to paragraph III.A. of this order, the respondent shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:

1. The Commission shall select the trustee, subject to the consent of the respondent, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures. If respondent has not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after notice by the staff of the Commission to respondent of the identity of any proposed trustee, respondent shall be deemed to have consented to the selection of the proposed trustee.

2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest the Schedule A Assets.

3. Within ten (10) days after appointment of the trustee, respondent shall execute a trust agreement that, subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestiture required by this order.

4. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in paragraph III.B.3. to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve-month period, the trustee has submitted a plan of divestiture or believes that divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or in the

case of a court-appointed trustee, by the court; provided however, the Commission may extend this period only two (2) times.

5. The trustee shall have full and complete access to the personnel, books, records, and facilities related to the Schedule A Assets or to any other relevant information as the trustee may request. Respondent shall develop such financial or other information as such trustee may reasonably request and shall cooperate with the trustee. Respondent shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays in divestiture caused by respondent shall extend the time for divestiture under this paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed trustee, by the court.

6. The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to the respondent's absolute and unconditional obligation to divest at no minimum price. The divestiture shall be made in the manner and to the acquirer as set out in paragraph II of this order; provided, however, if the trustee receives *bona fide* offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest to the acquiring entity selected by respondent from among those approved by the Commission.

7. The trustee shall serve, without bond or other security, at the cost and expense of the respondent, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have the authority to employ, at the cost and expense of respondent, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the sale and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of the respondent and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's divesting the Schedule A Assets.

8. Respondent shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses

arising out of, or in connection with, the performance of the trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of any claim, whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.

9. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in paragraph III.A. of this order.

10. The Commission or, in the case of a court-appointed trustee, the court, may on its own initiative, or at the request of the trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this order.

11. The trustee shall have no obligation or authority to operate or maintain the Schedule A Assets.

12. The trustee shall report in writing to the respondent and the Commission every sixty (60) days concerning the trustee's efforts to accomplish divestiture.

IV.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, respondent shall not, without the prior approval of the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise:

A. Acquire any stock, share capital, equity, or other interest in any person presently engaged in, or within the two years preceding such acquisition engaged in, operating an acute care hospital in the Three-County Area;

B. Acquire any assets used, or previously used, in the Three-County Area (and still suitable for use) for operating an acute care hospital from any person presently engaged in, or within the two years preceding such acquisition engaged in, operating an acute care hospital in the Three-County Area;

C. Enter into any agreement or other arrangement to obtain direct or indirect ownership, management, or control of any acute care hospital, or any part thereof, in the Three-County Area,

including but not limited to, a lease of or management contract for any such acute care hospital;

D. Acquire or otherwise obtain the right to designate directly or indirectly directors or trustees of any acute care hospital in the Three-County Area;

E. Permit any acute care hospital it operates in the Three-County Area to be acquired by any person that operates, or will operate immediately following such acquisition, any other acute care hospital in the Three-County Area.

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

1. The establishment of a new hospital service or facility (other than as a replacement for a hospital service or facility, not operated by respondent, in the Three-County Area, pursuant to an agreement or understanding between respondent and the person operating the replaced service or facility);

2. Any transaction otherwise subject to this paragraph IV of this order if the fair market value of (or, in case of an asset acquisition, the consideration to be paid for) the acute care hospital or part thereof to be acquired does not exceed one million dollars (\$1,000,000); or

3. The acquisition of products or services in the ordinary course of business.

V.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, respondent shall not, directly or indirectly, through subsidiaries, partnerships or otherwise, without providing advance written notification to the Commission, consummate any joint venture or other arrangement with any other acute care hospital in the Three-County Area for the joint establishment or operation of any new acute care hospital, hospital medical or surgical diagnostic or treatment service or facility, or part thereof, in the Three-County Area. Such advance notification shall be filed immediately upon respondent's issuance of a letter of intent for, or execution of an agreement to enter into, such a transaction, whichever is earlier.

Said notification required by this paragraph V of this order shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations

(as amended), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification, notification need not be made to the United States Department of Justice, and notification is required only of respondent and not of any other party to the transaction. Respondent is not required to observe any waiting period for said notification required by this paragraph V.

Respondent shall comply with reasonable requests by the Commission staff for additional information concerning any transaction subject to this paragraph V of this order, within fifteen (15) days of service of such requests.

Provided, however, that no transaction shall be subject to this paragraph V of this order if:

1. The fair market value of the assets to be contributed to the joint venture or other arrangement by acute care hospitals not operated by respondent does not exceed one million dollars (\$1,000,000);
2. The service, facility or part thereof to be established or operated in a transaction subject to this order is to engage in no activities other than the provision of the following services: laundry; data processing; purchasing; materials management; billing and collection; dietary; industrial engineering; maintenance; printing; security; records management; laboratory testing; personnel education, testing, or training; or health care financing (such as through a health maintenance organization or preferred provider organization); or
3. Notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. 18a, or prior approval by the Commission is required, and has been requested, pursuant to paragraph IV of this order.

VI.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, respondent shall not permit all or any substantial part of any acute care hospital it operates in the Three-County Area to be acquired by any other person (except pursuant to the divestiture required by paragraph II of this order) unless the acquiring person files with the Commission, prior to the closing of such acquisition, a written agreement to be bound by the provisions

of this order, which agreement respondent shall require as a condition precedent to the acquisition.

VII.

It is further ordered, That:

A. Within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until the respondent has fully complied with paragraph II of this order, the respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with paragraph II of this order. Respondent shall include in its compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with paragraph II of the order, including a description of all substantive contacts or negotiations for the divestiture and the identity of all parties contacted. Respondent shall include in its compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning divestiture.

B. One (1) year from the date this order becomes final, annually for the next nine (9) years on the anniversary of the date this order becomes final, and at other times as the Commission may require, respondent shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and it is complying with paragraphs IV, V, and VI of this order.

VIII.

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

IX.

It is further ordered, That, for the purpose of determining or securing compliance with this order, the respondent shall permit any duly authorized representative of the Commission:

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

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

SCHEDULE A

The assets to be divested ("Schedule A Assets") shall consist of, without limitation, all Assets and Businesses relating to Holy Cross Hospital of Salt Lake City (the "Hospital"), which were acquired by Healthtrust pursuant to the acquisition (including all improvements, additions and enhancements made to such assets prior to divestiture), and shall include, without limitation, the Assets and Businesses of the following:

PART I

1. Holy Cross Hospital of Salt Lake City, 1050 East South Temple, Salt Lake City;

PART II

2. Moreau Medical Building, 1002 East South Temple, Salt Lake City;

3. Salt Lake Professional Building, 24 South 1100 East, Salt Lake City;

4. Foothill Family Clinic, 2295 Foothill Drive, Salt Lake City;

5. Eastridge Clinic medical office suites, 160 South 10th East, Salt Lake City;

6. Southeast Health Center, 1275 East Fort Union Boulevard, Midvale, Utah (Southeast Center for Family Medicine; Holy Cross Medical Park);

7. Southwest Health Center, 1990 West 7800 South, West Jordan Valley, Utah (Southwest Center for Family Medicine; Southwest Emergency Clinic);

8. The Magna Health Clinic, 8370 West 3500 South, Magna, Utah; and

9. The Hospital's Park City, Utah Ambulance Service.

10. The Real Property located at:

A. 45 South 1100 East, Salt Lake City - approximately .227 acres with house thereon;

B. 57 South 1100 East, Salt Lake City - approximately .21 acres with house thereon;

C. 59 South 1100 East, Salt Lake City - approximately .086 acres with house/office thereon;

D. 42 South 1000 East, Salt Lake City - approximately .1875 acres of unimproved land;

11. Option to purchase four contiguous residential properties consisting of approximately .54 acres in the aggregate located at approximately 1014 through 1026 East 100 South, Salt Lake City.

* * *

It is further provided, That to the extent that any of the contracts, warranties with respect to Personal Property, licenses or other interests in the Intangible Personal Property, or other Schedule A Assets:

(A) Also applies to facilities or operations other than those included in the Schedule A Assets, then during the period (the "Contract Period") beginning on the closing date of the acquisition and ending on the earlier of (1) the expiration of the term of the given contract or other right and (2) the second anniversary of Healthtrust's divestiture of the Schedule A Assets, Healthtrust, at the request of the owner or acquirer of the Schedule A Assets, shall use its reasonable best efforts to cause the services, property or other benefits provided or made available under such a contract or other Schedule A Asset to continue to be available to the owner or acquirer of the Schedule A Assets on terms and conditions substantially similar to those presently in effect; or

(B) Requires the consent of a third party in order to transfer or assign such contract or other Schedule A Asset, then Healthtrust, at the request of the owner or acquirer of the Schedule A Assets, shall use its reasonable best efforts to obtain such consent and, if such consent cannot be obtained, to cooperate in any reasonable arrangement with the owner or acquirer of the Schedule A Assets designed to provide to such owner or acquirer the benefits of the given contract or other Schedule A Asset during the Contract Period on terms and conditions substantially similar to those presently in effect.

Commissioner Varney not participating.

APPENDIX I

AGREEMENT TO HOLD SEPARATE

This Agreement to Hold Separate ("Agreement") is by and between Healthtrust, Inc. - The Hospital Company ("respondent" or "Healthtrust"), a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business at 4525 Harding Road, Nashville, Tennessee; and the Federal Trade Commission ("Commission"), an independent agency of the United States Government, established under the Federal Trade Commission Act of 1914, 15 U.S.C. 41, *et seq.*

Whereas, on or about December 3, 1993, respondent entered into an agreement with Holy Cross Health System Corporation ("Holy Cross"), an Indiana corporation, whereby respondent will acquire from Holy Cross certain Holy Cross assets in Utah (hereinafter the "Acquisition"); and

Whereas, the Commission is now investigating the Acquisition to determine if it would violate any of the statutes enforced by the Commission; and

Whereas, if the Commission accepts the Agreement Containing Consent Order ("Consent Order"), which would require the divestiture of certain assets listed in Schedule A of the Consent Order ("Schedule A Assets"), including Holy Cross Hospital ("HCH") in Salt Lake City, Utah, the Commission must place the Consent Order on the public record for a period of at least sixty (60) days and may subsequently withdraw such acceptance pursuant to the provisions of Section 2.34 of the Commission's Rules; and

Whereas, the Commission is concerned that if an understanding is not reached, preserving the *status quo ante* of the Schedule A Assets during the period prior to the final acceptance and issuance of the Consent Order by the Commission (after the 60-day public comment period), divestiture resulting from any proceeding challenging the legality of the Acquisition might not be possible, or might be less than an effective remedy; and

Whereas, the Commission is concerned that if the Acquisition is consummated, it will be necessary to preserve the Commission's ability to require the divestiture of the Schedule A Assets as described in paragraph II of the Consent Order and the Commission's right to have HCH continue as a viable independent acute care hospital; and

Whereas, the purpose of this Agreement and the Consent Order is to:

- (i) Preserve HCH as a viable independent acute care hospital pending its divestiture, and
- (ii) Remedy any anticompetitive effects of the Acquisition;

Whereas, respondent's entering into this Agreement shall in no way be construed as an admission by respondent that the Acquisition is illegal; and

Whereas, respondent understands that no act or transaction contemplated by this Agreement shall be deemed immune or exempt from the provisions of the antitrust laws or the Federal Trade Commission Act by reason of anything contained in this Agreement.

Now, therefore, the parties agree, upon understanding that the Commission has not yet determined whether the Acquisition will be challenged, and in consideration of the Commission's agreement that, unless the Commission determines to reject the Consent Order, it will not seek further relief from respondent with respect to the Acquisition, except that the Commission may exercise any and all rights to enforce this Agreement and the Consent Order to which it is annexed and made a part thereof, and in the event the required divestiture is not accomplished, to appoint a trustee to seek divestiture of the Schedule A Assets pursuant to the Consent Order, as follows:

1. Respondent agrees to execute the Agreement Containing Consent Order and be bound by the Consent Order.

2. Respondent agrees that from the date this Agreement is accepted until the earliest of the dates listed in subparagraphs 2.a - 2.b, it will comply with the provisions of paragraph 3 of this Agreement:

a. Three (3) business days after the Commission withdraws its acceptance of the Consent Order pursuant to the provisions of Section 2.34 of the Commission's Rules; or

b. The day after the divestiture required by the Consent Order has been completed.

3. Respondent will hold the Schedule A Assets as they are presently constituted separate and apart on the following terms and conditions:

a. The Schedule A Assets, as they are presently constituted, shall be held separate and apart and shall be operated independently of respondent (meaning here and hereinafter, Healthtrust excluding the Schedule A Assets) except to the extent that respondent must exercise direction and control over the Schedule A Assets to assure compliance with this Agreement or the Consent Order, and except as otherwise provided in this Agreement.

b. Prior to or simultaneously with its acquisition of the Holy Cross assets in Utah, respondent shall organize a distinct and separate legal entity, either a corporation, limited liability company, general or limited partnership ("New Company") and adopt constituent documents for the New Company that are not inconsistent with other provisions of this Agreement or the Consent Order. Respondent shall transfer all ownership and control of all Schedule A Assets to the New Company.

c. The board of directors of the New Company, or, in the event respondent organizes an entity other than a corporation, the governing body of the entity ("New Company Board") shall have five members. Respondent may elect the members of the New Company Board; provided, however, that the New Company Board shall include no more than two members who are a director, officer, employee, or agent of respondent ("the respondent's New Company Board member(s)"). The New Company Board shall include a chairman who is independent of respondent and is competent to assure the continued viability and competitiveness of the Schedule A Assets. Meetings of the New Company Board during the term of this

Agreement shall be stenographically transcribed and the transcripts retained for two (2) years after the termination of this Agreement.

d. Respondent shall not exercise direction or control over, or influence directly or indirectly, the Schedule A Assets, the independent Chairman of the Board of the New Company, the New Board, or the New Company or any of its operations or businesses; provided, however, that respondent may exercise only such direction and control over the New Company as is necessary to assure compliance with this Agreement or the Consent Order.

e. Respondent shall maintain the viability and competitiveness and the marketability of the Schedule A Assets and shall not sell, transfer, encumber (other than in the normal course of business), or otherwise impair their viability and competitiveness or their marketability.

f. Except for the respondent's New Company Board members, respondent shall not permit any director, officer, employee, or agent of respondent to also be a director, officer, or employee of the New Company.

g. The New Company shall be staffed with sufficient employees to maintain the viability and competitiveness of the Schedule A Assets, which employees shall be selected from Holy Cross' existing employee base and may also be hired from sources other than Holy Cross.

h. With the exception of the respondent's New Company Board Members, respondent shall not change the composition of the New Company Board unless the independent chairman consents. The independent chairman shall have power to remove members of the New Company Board for cause. Respondent shall not change the composition of the management of the New Company except that the New Company Board shall have the power to remove management employees for cause.

i. If the independent chairman ceases to act or fails to act diligently, a substitute chairman shall be appointed in the same manner as provided in paragraph 3.c. of this Agreement.

j. Except as required by law, and except to the extent that necessary information is exchanged in the course of evaluating the Acquisition, defending investigations or defending or prosecuting litigation, or negotiating agreements to divest assets, or complying with this Agreement or the Consent Order, respondent shall not receive or have access to, or use or continue to use, any material confidential

information not in the public domain about the New Company or the activities of the New Company Board. Nor shall the New Company or the New Company Board receive or have access to, or use or continue to use, any material confidential information not in the public domain about respondent and relating to respondent's acute care hospitals in Utah. Respondent may receive on a regular basis aggregate financial information relating to the New Company necessary and essential to allow respondent to prepare United States consolidated financial reports, tax returns and personnel reports. Any such information that is obtained pursuant to this subparagraph shall be used only for the purposes set forth in this subparagraph. ("Material confidential information," as used herein, means competitively sensitive or proprietary information not independently known to respondent from sources other than the New Company, and includes but is not limited to customer lists, price lists, marketing methods, patents, technologies, processes, or other trade secrets.)

k. Except as permitted by this Agreement, the respondent's New Company Board members shall not in their capacity as New Company Board members, receive material confidential information and shall not disclose any such information received under this Agreement to respondent or use it to obtain any advantage for respondent. The respondent's New Company Board members shall enter a confidentiality agreement prohibiting disclosure of material confidential information. The respondent's New Company Board members shall participate in matters that come before the New Company Board only for the limited purposes of considering a capital investment or other transaction exceeding \$250,000, approving any proposed budget and operating plans, and carrying out respondent's responsibilities under this Agreement and the Consent Order. Except as permitted by this Agreement, the respondent's New Company Board members shall not participate in any matter, or attempt to influence the votes, of the other members of the New Company Board with respect to matters, that would involve a conflict of interest if respondent and the New Company were separate and independent entities.

1. If necessary to assure compliance with the terms of this Agreement, the Consent Agreement, or the Consent Order, respondent may, but is not required to, assign an individual to the New Company for the purpose of overseeing such compliance ("on-site person"). The on-site person shall have access to all officers and

employees of the New Company and such records of the New Company as he deems necessary and reasonable to assure compliance. Such individual shall enter into a confidentiality agreement prohibiting disclosure of material confidential information.

m. Any material transaction of the New Company that is out of the ordinary course of business must be approved by a majority vote of the New Company Board; provided that the New Company shall engage in no transaction, material or otherwise, that is precluded by this Agreement.

n. All earnings and profits of the New Company shall be retained separately in the New Company. If necessary, respondent shall provide the New Company with sufficient working capital to operate at its current rate of operation, and to carry out any capital improvement plans for the New Company which have already been approved.

o. During the period commencing on the date this Agreement is effective and terminating on the earlier of (i) six months after the date the Consent Order becomes final, or (ii) the date contemplated by subparagraph 2.b (the "Initial Divestiture Period"), respondent shall make available for use by the New Company funds sufficient to perform all necessary routine maintenance to, and replacements of, the Schedule A Assets ("normal repair and replacements"). After termination of the Initial Divestiture Period and until the earlier of the date contemplated by either subparagraph 2.a or 2.b, respondent shall make available for use by the New Company each year an amount not less than that required for normal repair and replacement, plus \$1,000,000 for capital improvements to the Schedule A Assets, unless a smaller amount is requested or required by the New Company, in its sole discretion, for capital expenditures. Provided, however, that in any event, respondent shall provide the New Company with such funds as are necessary to maintain the viability and competitiveness and marketability of the Schedule A Assets.

4. Should the Federal Trade Commission seek in any proceeding to compel respondent to divest any of the Schedule A Assets, as provided in the Consent Order, or to seek any other injunctive or equitable relief for any failure to comply with the Consent Order or this Agreement, or in any way relating to the Acquisition, as defined in the draft complaint, respondent shall not raise any objection based upon the expiration of the applicable Hart-Scott-Rodino Antitrust

Improvements Act waiting period or the fact that the Commission has permitted the Acquisition. Respondent also waives all rights to contest the validity of this Agreement.

5. To the extent that this Agreement requires respondent to take, or prohibits respondent from taking, certain actions that otherwise may be required or prohibited by contract, respondent shall abide by the terms of this Agreement or the Consent Order and shall not assert as a defense such contract requirements in a civil penalty action brought by the Commission to enforce the terms of this Agreement or Consent Order.

6. For the purpose of determining or securing compliance with this Agreement, subject to any legally recognized privilege, and upon written request with reasonable notice to respondent made to its principal office, respondent shall permit any duly authorized representative or representatives of the Commission:

a. Access during the office hours of respondent and in the presence of counsel to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of respondent relating to compliance with this Agreement;

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

7. This Agreement shall not be binding until approved by the Commission.

IN THE MATTER OF

AMERICAN BODY ARMOR AND EQUIPMENT, INC.

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

Docket C-3539. Complaint, Oct. 21, 1994--Decision, Oct. 21, 1994

This consent order prohibits, among other things, a Florida-based company from misrepresenting that its bullet-resistant garments are certified, approved, endorsed, or sanctioned by any government body or private organization. In addition, the respondent is required to contact certain past purchasers and offer to provide replacement vests at a reduced cost.

Appearances

For the Commission: *Lisa B. Kopchik, Joel C. Winston and Maureen Enright.*

For the respondent: *Eugene Gulland, Covington & Burling, Washington, D.C.*

COMPLAINT

The Federal Trade Commission, having reason to believe that American Body Armor and Equipment, Inc., a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent American Body Armor and Equipment, Inc. is a Florida corporation, with its office and principal place of business located at 85 Nassau Place, Yulee, Florida.

PAR. 2. Respondent has manufactured, advertised, marketed, offered for sale, sold and distributed personal body armor, also known as bullet-resistant vests, to the public, including police departments and other law enforcement agencies. Body armor consists of a ballistic panel made up of a number of layers of ballistic resistant fabric, enclosed in a cover. Body armor is intended to protect the wearer from gunfire.

PAR. 3. The acts and practices of respondents alleged in this complaint have been in or affecting commerce.

PAR. 4. In the course of advertising, promoting, soliciting the sale of and selling its body armor, respondent has represented, directly or by implication, to purchasers and potential purchasers of its armor, that its body armor has been certified by the National Institute of Justice ("NIJ") as complying with NIJ's current voluntary performance standard, Ballistic Resistance of Police Body Armor, (Standard 0101.03) (April 1987) (".03 Standard").

PAR. 5. In truth and in fact, in numerous instances, the body armor respondent has sold has not been certified by NIJ as complying with the .03 Standard, because said body armor differs significantly from that certified by NIJ in certain respects, including but not limited to one or more of the following:

- a. Waterproofing on the ballistic panel;
- b. Configuration of stitching on the ballistic panel, including label-stitching through the ballistic panel;
- c. The type of material used on the vest covers;
- d. The presence or absence of foam padding on the vest cover;
- e. The removability of the cover from the ballistic panel; and
- f. The method of closure of the vest (*e.g.*, front closure or side closure).

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

PAR. 6. Respondent has disseminated or has caused to be disseminated advertisements and promotional materials for body armor treated with "Black Magic" treatment. Typical of respondent's advertisements and promotional materials, but not necessarily all-inclusive thereof, are the attached Exhibits A through D. The aforesaid advertisements and promotional materials contain the following statements:

1. "Black Magic ... strengthens Kevlar, the material used in soft body armor, better than any other treatment. Wear the best." (Exhibit A)

2. "Less Layers, More Protection ... The more layers of Kevlar ... the better protection - until Black Magic. Black Magic ... toughener strengthens our vest to eliminate heavy, uncomfortable and unnecessary layers with no loss of performance." (Exhibit B) (emphasis in original)

3. "The ballistic technicians at American Body Armor, manufacturer of light-weight police armor, invented Black Magic This technological breakthrough is unparalleled in the industry. When Kevlar is treated with Black Magic, a chemical fusion takes place. The fusion of Kevlar and Black Magic produces a tougher, stronger and longer lasting product. A Level II garment with Black Magic treated Kevlar contains only 17 plies. The extra weight and discomfort of 5-7 unnecessary plies of Kevlar has been eliminated, with no loss of ballistic performance. In fact, American Body Armor effectively exceeds current U.S. Government backface deformation criteria." (Exhibit C)

4. "Black Magic increases comfort and performance in the following ways ... Black Magic effectively controls blunt trauma." (Exhibit D)

PAR. 7. Through the use of the statements set forth in paragraph six, and others not specifically set forth herein, respondent has represented, directly or by implication, that Black Magic treatment effectively improves the ballistic performance of respondent's body armor.

PAR. 8. Through the use of the statements set forth in paragraph six, and others not specifically set forth herein, respondent has represented, directly or by implication, that at the time it made the representation set forth in paragraph seven, respondent possessed and relied upon a reasonable basis for such representation.

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

PAR. 10. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce, in violation of Section 5(a) of the Federal Trade Commission Act.

EXHIBIT A

IT WON'T WORK... IF YOU DON'T USE IT!

Exhibit A

You're in the
business of saving
lives.

We're in the
business of saving
yours.

American Body Armor's
Armitron IIIA soft body
armor vest leads the
industry in maximum pro-
tection, comfort and con-
cealability. Black Magic
(Patent No. 4,522,871)
strengthens Kevlar[®], the
material used in soft body
armor, better than any other
treatment. Wear the best.
Armitron IIIA is the vest for
protection. If you need any more
reasons to wear an Armitron IIIA
vest, just ask your family.

AMERICAN
BODY ARMOR AND EQUIPMENT, INC.

ONE KAPLAN COURT, P.O. DRAWER 1769 FERNANDINA BEACH, FL 32034, U.S.A.
(904) 261-4035 • TLX 1691170ABAVEST FAX NUMBER 904/261-4037

EXHIBIT B

THE BEST FIT. THE BEST PROTECTION.



PROTECT YOURSELF WITH THE BEST

The Armtron™ actually wears Black Magic™ Techno-Kevlar™ armor for superior protection. Its unique construction, superior flexibility and protection. Armtron's sculptured perimeter and special engineering eliminates pressure points, chafe points and buckling. Armtron actually molds to and follows every curve and contour of your body. And, it features a 5 x 8 Shok Plate™ as standard equipment.

Elastic and velcro closure system helps achieve the perfect fit while Armtron's hand washable design (clean your vest with mild soap and water) ensures years of dependable wear.

Less Layers.

More Protection.

There used to be no secret to the construction of lightweight, concealable armor. The more layers of Kevlar®...the better protection — until Black Magic™. Black Magic™ Patent No. 4,522,871 toughener strengthens our vest to eliminate heavy, uncomfortable and unnecessary layers with no loss of performance. No wonder Armtron™ IIIA is the lightest, toughest and most comfortable vest available.

*Pocket will also accommodate the optional 6 x 8 Super Shok Plate

Available in Navy, Light Blue, Green, Grey, Tan, White, Black and Camouflage.

AMERICAN
BODY ARMOR & EQUIPMENT, INC.

American Body Armor & Equipment, Inc.

P.O. Box 1769, Fernandina Beach, Florida 32034 U.S.A.
(904) 261-4035 • TLX #6971170 ABAVEST

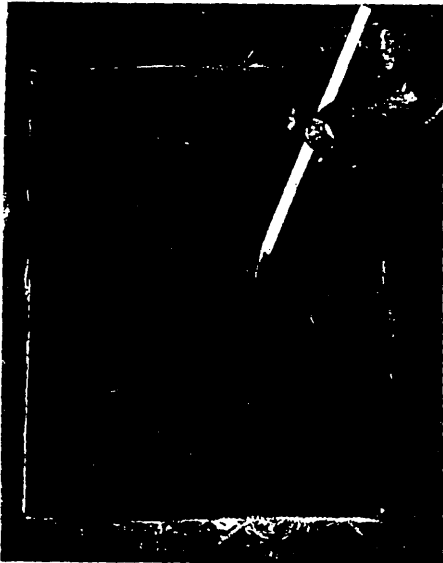
Circle No. 5 on Reader Information Card

EXHIBIT C



Conventional Untreated Kevlar

This .357 Magnum 158 gr. bullet at 1274 f.p.s. tore through many layers of conventional untreated Kevlar.



With Black Magic

The .357 Magnum 158 gr. bullet at 1277 f.p.s. was stopped on the surface of the Kevlar test target treated with Black Magic Patent No.

BLACK MAGIC TECHNOLOGY

PATENT NO. 4,522,871

Black Magic Performance

Patent No. 4,522,871

Until now there was no secret to the construction of lightweight concealable armor. It was previously thought the more plies of Kevlar® added, the greater the ballistic capability.

For example: Some industry experts quote the following concerning 1000 denier 31 X 31 ballistic grade Kevlar® : "Body armor intended for use as a level II garment should contain 22-24 individual plies of Kevlar®."

The ballistic technicians at American Body Armor, manufacturer of lightweight police armor, invented Black Magic Patent No. 4,522,871. This technological breakthrough is unparalleled in the industry. When Kevlar® is treated with Black Magic, a chemical fusion takes place. The fusion of Kevlar® and Black Magic produces a tougher, stronger and longer lasting product. A Level II garment with Black Magic treated Kevlar® contains only 17 plies. The extra weight and discomfort of 5-7 unnecessary plies of Kevlar® has been eliminated, with no loss of ballistic performance. In fact, American Body Armor effectively exceeds current U.S. Government backface deformation criteria.

The Research and Development Team at American Body Armor is constantly seeking ways to utilize the advanced technology of Black Magic, enhancing the full range of products manufactured by American Body Armor.

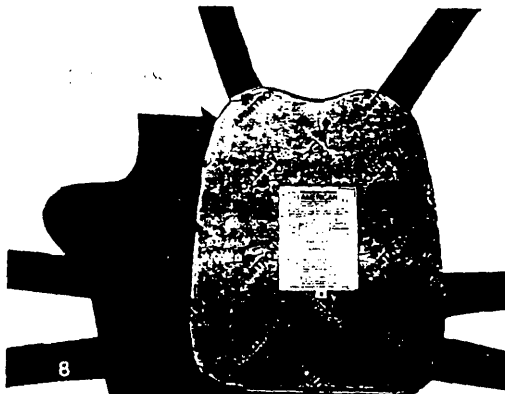
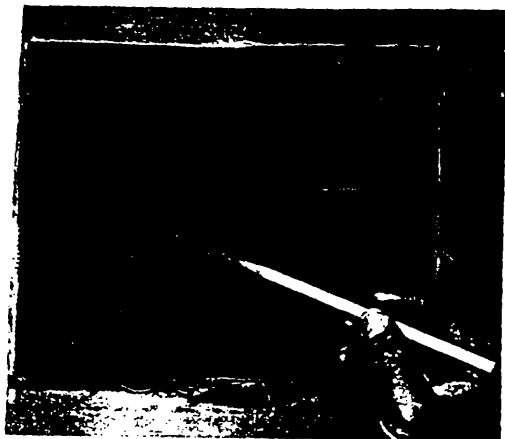
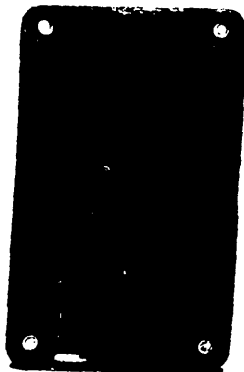


Exhibit C

Complaint

118 F.T.C.

EXHIBIT D

**STANDARD FEATURE**

With All Concealable Vests SHOK PLATE

The Shok Plate is a comfortable, lightweight non-ricochet metal insert that protects the heart and sternum. The Shok Plate can be easily shaped by the wearer for a perfect comfortable fit. It is lightweight, undetectable and can be removed if desired.

The Shok Plate helps to protect against the following in conjunction with vest:

1. Knives, icepicks and sharp instruments.
2. Impact and blunt trauma received from car wrecks, magnums, shotguns and blunt instruments.

BLACK MAGIC

Patent No. 4,522,871

Black Magic increases comfort and performance in the following ways:

1. Overall weight of ballistic garment is considerably reduced.
2. Black Magic gives our vests "shape memory". The vest stays smooth at all times never developing any uncomfortable bumps or lumps.

WE GUARANTEE IT!

3. Black Magic effectively controls blunt trauma. All American Body Armor vests exceed current U.S. government backface deformation criteria.

**Tapered Edges,
High Quality Materials,
Elastic Straps, Velcro Closure**

All vests are fully tapered and easily concealed under a uniform shirt. Top quality materials are used for a dependable long lasting product. Elastic straps are used to allow the vest to conform and move with your body. All vests have velcro closures for an adjustable comfortable fit.

STANDARD SELECTION

WITH ALL CONCEALABLE VESTS
TWO TYPES OF VEST COVERINGS

**PERMANENT
HAND WASHABLE** American Body Armor 420 denier nylon. Pac- is urethane backed to keep moisture and perspiration away from your lifesaving ballistic panels cover is our most popular. It is extremely light durable and easy to maintain for long life performance.

**REMOVABLE
MACHINE WASHABLE
OUTER CARRIER** A 50/50% cotton/polyester outer carrier available. This style allows the outer carrier to be laundered once ballistic panels are removed ballistic panels are protected from moisture, perspiration and ultraviolet light by use of a lightweight carrier urethane coated nylon.

DECISION AND ORDER

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

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments received, 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. American Body Armor and Equipment, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida, with its office and its principal place of business at 85 Nassau Place, Yulee, Florida;
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

1. For purposes of this order, "body armor" or "vest" shall mean any garment intended to protect the wearer's torso against gunfire.

2. For purposes of this order, “.03 Standard” shall mean the U.S. Department of Justice, National Institute of Justice (“NIJ”), Ballistic Resistance of Police Body Armor (Standard 0101.03) (April 1987).

3. For purposes of this order, “NIJ-certified” shall mean certified by the National Institute of Justice under the current .03 Standard, under any subsequent modification, amendment or revision of that Standard, or under any new Standard for body armor promulgated by NIJ.

4. For purposes of this order, “eligible purchaser” shall mean any individual or organization that purchased in the United States body armor manufactured by respondent that is labeled or otherwise represented in any manner as complying with or certified under the .03 Standard, where the manufacture of said body armor took place (a) prior to January 1, 1990; or (b) between January 1, 1990, and the date of service of this order if the body armor differs from the corresponding NIJ-certified model in any of the following respects, excluding minor deviations unavoidable due to the manufacturing process:

- i. Waterproofing on the ballistic panels;
- ii. Configuration of stitching on the ballistic panels, including label-stitching through the ballistic panels, or stitching of the ballistic panels that penetrates the cover;
- iii. The method of closure of the vest (*e.g.*, front closure or side closure);
- iv. The number of ballistic panels that comprise the vest;
- v. The carrier, unless the sole difference from the corresponding NIJ-certified model is that the carrier is (a) a different color or a different fabric, or (b) backed with foam for flotation purposes, where the corresponding NIJ-certified model was not backed with foam, or (c) designed to be permanently attached to the ballistic panel where the carrier on the corresponding NIJ-certified model was designed to be removable; or
- vi. Any other change: (a) to the ballistic elements; or (b) that otherwise may diminish the level of ballistic protection provided by the vest.

5. For purposes of this order, “concealable body armor” shall mean body armor intended to be worn underneath the wearer’s clothing, except for the “concealable tactical” vest.

6. For purposes of this order, "tactical body armor" shall mean body armor intended to be worn over the wearer's clothing and shall include the "concealable tactical" vest.

7. For purposes of this order, "purchased in the United States" shall mean (a) purchased in the United States or its possessions or territories; or (b) sold to any individual who is a citizen of the United States or its possessions or territories, any organization incorporated in the United States or its possessions or territories, or any United States government entity.

I.

It is ordered, That respondent American Body Armor and Equipment, Inc. ("ABA"), a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, labeling, packaging, offering for sale, sale or distribution of any body armor 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, in any manner:

A. That any such body armor is or has been certified under or in compliance with the .03 Standard, is NIJ-certified, or is approved, endorsed, or sanctioned by the National Institute of Justice;

B. That any such body armor is equivalent to, comparable to, the same as, or similar to any other body armor that is NIJ-certified; and

C. That any such body armor is certified under or in compliance with any performance standard, or is approved, endorsed, or sanctioned by any governmental body or private organization.

II.

It is further ordered, That respondent, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, labeling, packaging, offering for sale, sale or distribution of any body armor purchased in the United States in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from

representing, directly or by implication, in any manner, that any such body armor provides any specified threat level or degree of ballistic protection or is tested, approved, endorsed, certified or sanctioned, unless such body armor:

A. Is NIJ-certified at the represented threat level, or

B. Has been certified to meet the specified threat level under a different ballistic standard or test, provided that respondent discloses, clearly and prominently in close proximity to the representation

(1) The standard or test under which the body armor is certified or tested, including the person or organization that promulgated that standard or conducted the test, and

(2) That the standard used or test conducted is different from the National Institute of Justice Standard, if any National Institute of Justice body armor standard is then in effect.

III.

It is further ordered, That respondent, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, labeling, packaging, offering for sale, sale or distribution of any body armor in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, in any manner, the ballistic efficacy or performance of Black Magic or any other treatment applied to the ballistic panel of any body armor unless, at the time of making such representation, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

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

IV.

It is further ordered, That respondent, its successors and assigns, and its officers, employees, agents and representatives, shall offer replacement body armor to purchasers of respondent's body armor, in accordance with the provisions of this Part.

A. Notification of Eligible Purchasers

1. Within 30 days from the date of service of this order, respondent shall compile a current mailing list containing the names and last known addresses of eligible purchasers following the procedures set out below.

a. Respondent shall search its own files for the names and addresses of such purchasers; and

b. Respondent shall use its best efforts to identify other such purchasers, including but not limited to sending the letter set forth in Appendix A to all of its wholesalers, distributors, retailers or others to whom it sold or provided body armor for resale to the public. In the event that any such entity fails to provide any names or addresses of eligible purchasers in its possession, respondent shall provide the names and addresses of all such entities to the Federal Trade Commission within sixty (60) days of service of this order.

2. Within 30 days from the date of service of this order, respondent shall mail the following items by first class mail, certified, return receipt requested, to the last known address of no fewer than one-third of eligible purchasers named on the mailing list compiled in accordance with Part IV.A.1:

a. A dated and signed armor notification letter in the form set forth in Appendix B to this order ("armor notification");

b. A replacement program description in the form set forth in Appendix C to this order;

c. An armor application in the form set forth in Appendix D to this order ("armor application");

d. A price list in the form set forth in Appendix E to this order;

e. A copy of the most recent edition of respondent's catalog containing all models of respondent's body armor listed on Appendix E; and

f. A request for extension of time in the form set forth in Appendix F to this order ("extension form").

The front of the envelope transmitting the above items shall be in the form set forth in Appendix G to this order. The phrase "ATTENTION: BODY ARMOR REPLACEMENT PROGRAM" shall appear on the front of the envelope in typeface equal or larger in size to that set forth in Appendix G. The envelope shall be addressed to the head of the organization to which it is sent (if an organization), and the words "Forward & Address Correction Requested" shall appear in the upper, left-hand corner one-quarter of an inch beneath the return address. Except as otherwise provided by this order, no information other than that required by this Part shall be included in or added to the above items, nor shall any other material be transmitted therewith.

3. Within 75 days from the date of service of this order, respondent shall mail those items set forth in Part IV.A.2(a-f) by first class mail, certified, return receipt requested, to the last known address of no fewer than two-thirds of eligible purchasers named on the mailing list compiled in accordance with Part IV.A.1.

4. Within 120 days from the date of service of this order, respondent shall mail those items set forth in Part IV.A.2(a-f) by first class mail, certified, return receipt requested, to the last known address of each eligible purchaser named on the mailing list compiled in accordance with Part IV.A.1.

5. Respondent shall also mail the items listed in Part IV.A.2(a-f) to any person or organization not on the mailing list prescribed in Part IV.A.1 about whom respondent later receives information indicating that the person or organization is likely to be an eligible purchaser, and to any purchaser whose armor notification is returned by the U.S. Postal Service as undeliverable and for whom respondent thereafter obtains a corrected address. The mailing required by this subpart shall be made within ten (10) days of respondent's receipt of a corrected address or information identifying each such purchaser.

6. Respondent shall also mail the items listed in Part IV.A.2(a-f) to any person or organization who otherwise meets the definition of "eligible purchaser" contained in this order but has failed to make all

payments due for the body armor to be replaced. Said mailing shall include an additional letter stating that the purchaser is not eligible for participation in the replacement program until the purchaser has made payment in full for the body armor to be replaced, and stating the amount due.

B. Respondent's Obligation to Provide Replacement Body Armor

Respondent shall provide replacement body armor to each eligible purchaser who submits a completed armor application to respondent within one-hundred and twenty (120) days after the purchaser's receipt of the armor notification and other items required by Part IV.A.2(a-f) of this order.

1. Respondent shall not charge any such purchaser who complies with the requirements of this Part an amount greater than that listed in Appendix E to this order for the selected model, provided that respondent shall not impose any additional charge, on the basis of a late payment or a late return of the body armor to be replaced, on any purchaser who meets said requirements within ten (10) business days of the deadlines provided for by subparts IV.B.7 and IV.B.9.

2. Respondent shall extend the time for submitting a completed application for each eligible purchaser who, within 120 days of his or her receipt of the armor notification, returns a completed and signed extension form to respondent or otherwise notifies respondent in writing that he or she is unable to apply for replacement body armor within 120 days due to specified procurement or purchasing regulations, procedures, policies or other official requirements, and requests an extension of time to apply. Respondent shall extend the time for application in the amount of time requested by the purchaser up to a maximum of eighteen (18) months from the date of receipt of the armor notification.

3. In any case where respondent is unable to provide replacement body armor to a purchaser due to an incomplete or deficient armor application, respondent shall within fifteen (15) business days of receipt of the application mail to the purchaser a written notice of the deficiency. The purchaser shall have the amount of time remaining in the 120 day period, but in any case no less than fifteen (15) days from the date of receipt of the notice, in which to submit a completed armor application.

4. The replacement body armor shall be in the sizes and models specified by the purchaser. The purchaser shall have the option of selecting any model offered by respondent of the threat level of the replaced body armor and listed in Appendix E; or, if no vests are offered at that threat level, any model offered by respondent of the next highest threat level available; provided that respondent shall not be required to provide a tactical body armor model as a replacement for concealable body armor.

5. The replacement body armor shall be new and shall not differ from the corresponding NIJ-certified model, other than differences in size, color and minor deviations unavoidable due to the manufacturing process, unless the purchaser requests in writing modification(s) to the body armor, respondent agrees to such modification(s), and respondent informs the purchaser in writing that such differences may affect the NIJ-certification status of the body armor. Provided that if any binding law, rule, or regulation is promulgated that prohibits the sale or distribution of body armor which is not NIJ-certified, this order shall not be construed to authorize respondent to make any modifications to a purchaser's replacement body armor that would cause the body armor to violate such law, rule or regulation.

6. Respondent shall ship, at its cost, all replacement body armor selected by the purchaser within sixty (60) days of its receipt of the completed armor application and any payment required by this order.

7. Respondent shall not require the tendering of any payment for the replacement body armor except as follows:

(a) For law enforcement units, governmental entities, military units, businesses, firms, educational institutions or other institutional purchasers, full payment as set forth in Part IV.B.1 within 30 days of the purchaser's receipt of the replacement body armor.

(b) For individual purchasers, full payment as set forth in Part IV.B.1 at the time of the delivery of the replacement body armor (C.O.D.).

8. Respondent shall notify the Commission or its designated staff of its intent to refuse a request for an extension of time in which to submit an armor application. The final determination of eligibility for an extension of time shall rest with the Commission or its designated staff and shall be made within a reasonable time. If the Commission or its designated staff determines that the purchaser is

not eligible for an extension of time, respondent shall, within fifteen (15) business days of receiving the determination of ineligibility, send to the purchaser by first class mail, certified, return receipt requested, a written notice of his or her ineligibility. The purchaser shall have the amount of time remaining in the 120 day period, but in any case no less than fifteen (15) days from the date of receipt of the notice of ineligibility, to submit a completed armor application.

9. Respondent shall not require the return to it by the purchaser of the body armor to be replaced until sixty (60) days after the purchaser's receipt of the replacement body armor.

C. Respondent's Record-Keeping Requirements

Respondent, its successors and assigns, shall, for three (3) years after the date of service of this order, maintain and upon request make available to the Federal Trade Commission or its staff for inspection and copying:

1. Sufficient records to identify:

- a. The name and address of each eligible purchaser;
- b. The name and last known address of each person sent an armor notification pursuant to Part IV.A.2 of this order and the date the armor notification was mailed;
- c. The name and last known address of each person sent an armor notification pursuant to Part IV.A.3 of this order and the date the armor notification was mailed;
- d. The name and last known address of each person sent an armor notification pursuant to Part IV.A.4 of this order and the date the armor notification was mailed;
- e. The name and last known address of each person sent an armor notification pursuant to Part IV.A.5 of this order and the date the armor notification was mailed;
- f. The name and last known address of each person sent an armor notification pursuant to Part IV.A.6 of this order and the date the armor notification was mailed;
- g. The name and address of each purchaser who returns an extension form or otherwise notifies respondent in writing that he or she is unable to file an armor application within 120 days due to procurement or purchasing regulations, procedures, policies or other

official requirements and requests an extension of time, and the disposition of each such request.

h. The name and address of each purchaser who is notified by respondent that his or her armor application is deficient;

i. The name and address of each wholesaler, distributor, retailer, or other sent a letter pursuant to Part IV.A.I(b) of this order and the date the letter was mailed;

j. For each purchaser who applied for replacement body armor pursuant to Part IV.B:

- (1) The name and last known address;
- (2) The date the armor application was received;
- (3) The date the replacement body armor was shipped;
- (4) The model number and threat level of the replacement body armor;
- (5) The total number of body armor units replaced;
- (6) The total price paid for the replacement body armor.

2. The name and last known address of each person who requested replacement body armor and was refused, the reason for each refusal and the dates of the request and refusal.

3. Sample copies of all letters, descriptions, applications and forms sent to purchasers or others pursuant to this order.

4. Each and every armor application received from respondent's purchasers.

5. Each and every extension form received from respondent's purchasers.

6. All correspondence relating to any purchaser's request for an extension of time in which to file an application for replacement body armor.

7. All correspondence and written memorializations of oral communications, not otherwise covered by this Part, relating to the replacement of respondent's body armor pursuant to this order between respondent and any person.

V.

It is further ordered, That respondent, its successors and assigns, shall, for three (3) years after the date of the last dissemination of the representation to which they pertain, maintain and upon request make

available to the Federal Trade Commission for inspection and copying:

A. All materials that were relied upon by respondent in disseminating any representation covered by this order; and

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

VI.

It is further ordered, That respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the respondent such as a dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation that may affect compliance obligations under this order. The respondent shall require, as a condition precedent to the closing of any sale or other disposition of all or a substantial part of its assets, that the acquiring party file with the Commission, prior to the closing of such sale or other disposition, a written agreement to be bound by the provisions of this order.

VII.

It is further ordered, That within 45 days from the date of service of this order, respondent shall mail a letter in the form set forth in Appendix H to this order to all operating divisions, subsidiaries, officers, managerial employees, all of its employees engaged in the preparation and placement of advertisements, labels, or promotional materials covered by this order, and to all of its wholesalers, distributors and retailers of body armor.

VIII.

It is further ordered, That respondent shall, within sixty (60) days after service upon it of this order and at such other times as the Commission may require, file with the Commission a report, in

writing, setting forth in detail the manner and form in which it has complied with this order.

Commissioner Varney not participating.

APPENDIX A

ABA letterhead

Date

Dear [name of wholesaler, distributor or retailer]:

This letter is to request your assistance in a very important program involving American Body Armor & Equipment, Inc.'s customers.

We have settled a dispute with the Federal Trade Commission ("FTC") regarding the certification of ABA body armor by the National Institute of Justice ("NIJ"). The FTC has charged that ABA misrepresented that certain of its vests were certified under the National Institute of Justice ("NIJ") 0101.03 Standard. As you are probably aware, manufacturers may voluntarily submit vests to NIJ for ballistic testing. Models that pass the test are then certified by NIJ as complying with the standard.

Certain ABA vests that were sold in 1989 and 1990 as certified by the NIJ were re-tested according to the NIJ standard and failed those tests due to bullet penetrations. In some cases, there were multiple penetrations. The FTC is concerned that some ABA vests could fail in actual use to provide the claimed level of protection.

The FTC has observed differences between certain ABA vests sold as NIJ-certified and the sample vests that were tested as part of the certification procedure. The differences that FTC has observed include: 1) the lack of NIJ-required labels stitched through the ballistic panels; 2) the lack of waterproofing on the ballistic panels; and 3) the use of different kinds of vest covers. The FTC has charged that, in some cases, there were other, additional differences in the vests. The FTC believes that these differences may make the vests less effective than claimed, and that vests with these changes should have been retested and therefore are not certified.

We deny these charges and believe our vests are effective. To our knowledge, in actual use, no ABA vest has ever failed to provide the level of protection that the vest was designed to provide under the NIJ standard. Nevertheless, as part of our settlement with the FTC, we have agreed to provide replacement vests at a reduced price to purchasers of ABA body armor represented to be certified under NIJ's 0101.03 standard. (A summary of the FTC's order is enclosed.) This program covers ABA vests sold in 1989 and 1990. ABA has also agreed to replace vests sold after that time that differ from the NIJ-certified vests, if any.

As part of our agreement with the FTC, we are required to compile a mailing list containing the names and addresses of ABA customers. In order to do this, we must request from you and our other trade customers a list containing the names of all persons or organizations who purchased ABA body armor from you prior to

January 1, 1990, that was labeled or otherwise represented as complying with the 0101.03 standard. We are also requesting that you provide us with a separate list of names of customers who purchased ABA .03 body armor from you after January 1, 1990. In both cases we will need the following information for each customer:

1. Name of individual or organization and contact person
2. Address and phone number
3. Number of vests purchased
4. Date of purchase
5. Model number(s) and threat level(s)
6. Serial numbers
7. Any amount of money that is due and unpaid from each customer.

Please provide us with these lists as soon as possible, but no later than 20 days after receiving this letter.

You should be aware that the FTC's order requires us to provide the FTC with the names of any wholesaler, distributor or retailer who does not provide us with this information.

Because we realize this may cause you some inconvenience, we are willing to assist you in compiling these lists. Please contact us at (904) 261-4035 to discuss any questions you have. We appreciate your cooperation.

Very truly yours,

Name
Title

Enc.: Summary of Consent Agreement

APPENDIX B

Dear American Body Armor Customer:

We are writing to inform you of the Federal Trade Commission's ("FTC") concerns that certain body armor sold by American Body Armor & Equipment, Inc. ("ABA") could fail in actual use to provide the level of ballistic protection claimed.

This armor was represented as complying with the 0101.03 standard of the National Institute of Justice ("NIJ"), but, the FTC has charged, may not in fact comply with that standard. Certain ABA vests that were sold in 1989 and 1990 as certified by the NIJ were re-tested according to the NIJ standard and failed those tests due to bullet penetrations. In some cases, there were multiple penetrations. The FTC is concerned that some ABA vests could fail in actual use to provide the claimed level of protection.

Although ABA denies the FTC's allegations, there should be no question when it comes to the safety of our customers. Therefore, we have agreed to send this letter and offer a replacement program to settle the FTC charges without costly

litigation. This program covers ABA vests sold in 1989 and 1990. ABA has also agreed to replace vests sold after that time that differ from the NIJ-certified vests, if any.

ABA is offering to replace vests purchased by you and other eligible customers at a reduced cost to the purchaser. The replacement program is described more fully in materials enclosed with this letter. You must notify us within 120 days if you wish to participate in this program, so your prompt attention is necessary.

The FTC has charged that ABA misrepresented that certain of its vests were certified under the NIJ 0101.03 standard (".03 standard"). As you are probably aware, manufacturers may voluntarily submit vests to NIJ for ballistic testing. Models that pass the test are then certified by NIJ as complying with the standard.

The FTC has observed differences between certain ABA vests sold as NIJ-certified and the sample vests that were tested as part of the certification procedure. The differences that FTC has observed include: 1) the lack of NIJ-required labels stitched through the ballistic panels; 2) the lack of waterproofing on the ballistic panels; and 3) the use of different kinds of vest covers. The FTC has charged that, in some cases, there were other, additional differences in the vests. The FTC believes that these differences may make the vests less effective than claimed and that vests with these changes should have been retested and therefore are not certified.

ABA believes that none of these differences affects the ballistic performance of its vests, that it complied with NIJ standards and procedures, and that its vests are effective. To our knowledge, in actual use, no ABA vest has ever failed to provide the level of protection that the vest was designed to provide under the NIJ standard.

If you choose to participate in the replacement program, you must agree to relinquish any and all claims you may have against ABA with respect to the vests being replaced.

The FTC recommends that you discuss the replacement program with the appropriate persons in your organization so that you can determine the best course of action for you.

If you have any questions, you can contact us at (904) 261-4035, or you can call Lisa Kopchik at the Federal Trade Commission at (202) 326-3139.

Very truly yours,

Name, Position

American Body Armor and Equipment, Inc.

Enclosures: "The Body Armor Replacement Program" information sheet
Body Armor application

APPENDIX C

THE BODY ARMOR REPLACEMENT PROGRAM

American Body Armor ("ABA") has agreed to replace certain body armor at a reduced cost to the purchaser. Your body armor, manufactured by ABA and represented as certified under the National Institute of Justice's 0101.03 standard, is eligible for replacement under this program if it has not been rendered unusable by ballistic testing or other destructive damage.

The replacement vests will be as identical as possible in construction to the corresponding models that were submitted for certification testing. However, the FTC will not be inspecting all replacement vests.

In this replacement program, you can choose any vest of the level of protection ("threat level") that you originally ordered, or if no vests are available at that level, you can choose a vest at the next highest threat level available. However, you may not select a tactical vest (including the "tactical concealable" vest) to replace a concealable vest. Our records indicate that the vest(s) you purchased was (were) represented to be threat level _____. You can therefore choose as a replacement any ABA vest certified at that threat level, if available. If no vests are available at that threat level, you can choose a vest at the next highest threat level. The vest you receive will be covered by ABA's standard warranty. Enclosed is an ABA catalogue. Models _____ are certified vests at threat level _____.

To help defray the costs of the program, you must pay a reduced price for the replacement vest(s). The enclosed price list shows the current list prices for our vests. It also shows your price for each model under this program. The replacement prices are 40% of the current list prices.

If you choose to participate in this program you must turn in your old vest(s) to ABA, but not until after you receive replacements. If you want to replace your body armor under this program, you must fill out and mail to us the enclosed application within 120 days of your receipt of this letter, specifying the model number(s) and size(s) of the vest(s) you are ordering. We will ship your replacement vests within sixty (60) days after we receive your application.

The payment terms for your new vests are as follows:

- If you are an individual purchaser, full payment is due C.O.D. when the vests are delivered.
- If you are an institutional purchaser (police department, government agency, business firm, military, etc.), full payment is due within 30 days of your receipt of the new body armor.

If you are unable to order replacement vests within 120 days due to procurement or purchasing regulations, procedures, policies, or other official requirements, an exception can be made for you. You must complete the enclosed Extension Form, sign it and return it to ABA within 120 days. Please explain the specific circumstances why you need the extension and you will receive the amount of time shown to be necessary (up to 18 months).

To qualify for the special terms of this replacement program, you must make all payments when required and return the old vest(s) to ABA no later than 60 days after receiving the replacement vests.

Information about the vests you want as replacements

8. Please send
 _____ of Model _____ in color _____, size _____.
 (Number)
 _____ of Model _____ in color _____, size _____.
 _____ of Model _____ in color _____, size _____.
 _____ of Model _____ in color _____, size _____.
 _____ of Model _____ in color _____, size _____.
 _____ of Model _____ in color _____, size _____.
 _____ of Model _____ in color _____, size _____.
 _____ of Model _____ in color _____, size _____.

(Reminder: the model you select must be one of the models listed in the third paragraph of your information sheet on "THE REPLACEMENT PROGRAM.")

9. Cost to you for each replacement vest _____.
 (From the enclosed price list.)

10. Total cost _____.
 (Cost of each replacement vest multiplied by number of vests to be replaced.)

Reminder:

If you are an institutional purchaser, the total cost (#10) will be due within thirty (30) days of receiving your replacement vest(s).

If you are an individual purchaser, the total cost (#10) is due at the time the vests are delivered (C.O.D.).

By requesting and accepting replacement vest(s), I understand that I waive any and all claims I may have against American Body Armor and Equipment, Inc. with respect to the vest(s) being replaced. I also understand that I must pay all balances when required and return each old vest for which I have received a replacement within sixty (60) days after receiving the replacement in order to qualify for the special terms of this replacement program. I will send those old vests to:

American Body Armor and Equipment, Inc.
85 Nassau Place
Yulee, Florida 32097

Signed: _____

Name: _____

(Print or type name of person who signed)

Position: _____

Date: _____

Send this completed and signed form to:

American Body Armor and Equipment, Inc.
85 Nassau Place
Yulee, Florida 32097

Decision and Order

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APPENDIX E

PRICE LIST

BODY ARMOR VEST MALE CONTOUR

CATALOG PAGE 2

MODEL	THREAT LEVEL	REPLACEMENT PRICE	LIST
504 A IIA CONTOUR REMOVABLE (IIA-C-R)	IIA	\$181.60	\$454.00
504 A IIA CONTOUR NYLON (IIA-C-M)	IIA	\$181.60	\$454.00
504 A IIA CONTOUR TRICOT (IIA-C-T)	IIA	\$181.60	\$454.00
600 II CONTOUR REMOVABLE (II-C-R)	II	\$205.60	\$514.00
600 II CONTOUR NYLON (II-C-N)	II	\$205.60	\$514.00
600 II CONTOUR TRICOT (II-C-T)	II	\$205.60	\$514.00
610 IIIA CONTOUR REMOVABLE (IIIA-C-R)	IIIA	\$276.80	\$692.00
610 IIIA CONTOUR NYLON (IIIA-C-N)	IIIA	\$276.80	\$692.00
610 IIIA CONTOUR TRICOT (IIIA-C-T)	IIIA	\$276.80	\$692.00

BODY ARMOR VEST FEMALE CONTOUR

CATALOG PAGE 2

MODEL	THREAT LEVEL	REPLACEMENT PRICE	LIST
504 A-F FEMALE IIA CONTOUR REMOVABLE (F-IIA-C-R)	IIA	\$181.60	\$454.00
504 A-F FEMALE IIA CONTOUR NYLON (F-IIA-C-M)	IIA	\$181.60	\$454.00
504 A-F FEMALE IIA CONTOUR TRICOT (F-IIA-C-T)	IIA	\$181.60	\$454.00
600-F FEMALE II CONTOUR REMOVABLE (F-II-C-R)	II	\$205.60	\$514.00
600-F FEMALE II CONTOUR NYLON (F-II-C-N)	II	\$205.60	\$514.00
600-F FEMALE II CONTOUR TRICOT (F-II-C-T)	II	\$205.60	\$514.00
610-F FEMALE IIIA CONTOUR REMOVABLE (F-IIIA-C-R)	IIIA	\$276.80	\$692.00

AMERICAN BODY ARMOR AND EQUIPMENT, INC. 1007

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610-F	FEMALE IIIA CONTOUR NYLON (F-III-A-C-N)	IIIA	\$276.80	\$692.00
610-F	FEMALE IIIA CONTOUR TRICOT (F-III-A-C-T)	IIIA	\$276.80	\$692.00

Added charge of 10% for size 50-52, 20% for size 54-56 and 30% for size 58-60.

BODY ARMOR VEST MALE FULLSIDE COVERAGE CATALOG PAGE 2

MODEL		THREAT LEVEL	REPLACEMENT PRICE	LIST
504 A	IIA FULLSIDE REMOVABLE (IIA-FS-R)	IIA	\$205.60	\$514.00
504 A	IIA FULLSIDE NYLON (IIA-FS-N)	IIA	\$205.60	\$514.00
504 A	IIA FULLSIDE TRICOT (IIA-FS-T)	IIA	\$205.60	\$514.00
600 II	FULLSIDE REMOVABLE (II-FS-R)	II	\$234.40	\$586.00
600 II	FULLSIDE NYLON (II-FS-N)	II	\$234.40	\$586.00
600 II	FULLSIDE TRICOT (II-FS-T)	II	\$234.40	\$586.00
610 IIIA	FULLSIDE REMOVABLE (IIIA-FS-R)	IIIA	\$311.20	\$778.00
610 IIIA	FULLSIDE NYLON (IIIA-FS-N)	IIIA	\$311.20	\$778.00
610 IIIA	FULLSIDE TRICOT (IIIA-FS-T)	IIIA	\$311.20	\$778.00

BODY ARMOR VEST FEMALE
FULLSIDE COVERAGE

CATALOG PAGE 2

MODEL		THREAT LEVEL	REPLACEMENT PRICE	LIST
504 A-F	FEMALE IIA FULLSIDE REMOVABLE (F-IIA-FS-R)	IIA	\$205.60	\$514.00
504 A-F	FEMALE IIA FULLSIDE NYLON (F-IIA-FS-N)	IIA	\$205.60	\$514.00
504 A-F	FEMALE IIA FULLSIDE TRICOT (F-IIA-FS-T)	IIA	\$205.60	\$514.00
600-F	FEMALE II FULLSIDE REMOVABLE (F-II-FS-R)	II	\$234.40	\$586.00
600-F	FEMALE II FULLSIDE NYLON (F-II-FS-M)	II	\$234.40	\$586.00
600-F	FEMALE II FULLSIDE TRICOT (F-II-FS-T)	II	\$234.40	\$586.00

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610-F	FEMALE IIIA FULLSIDE REMOVABLE (F-IIIA-FS-R)	IIIA	\$311.20	\$778.00
610-F	FEMALE IIIA FULLSIDE NYLON (F-IIIA-FS-N)	IIIA	\$311.20	\$778.00
610-F	FEMALE IIIA FULLSIDE TRICOT (F-IIIA-FS-T)	IIIA	\$311.20	\$778.00

Added charge of 10% for size 50-52, 20% for size 54-56 and 30% for size 58-60.

BODY ARMOR VEST MALE WEAVER

CATALOG PAGE 2

MODEL		THREAT LEVEL	REPLACEMENT PRICE	LIST
504 A	IIA WEAVER REMOVABLE (IIA-W-R)	IIA	\$236.00	\$590.00
504 A	IIA WEAVER NYLON (IIA-W-N)	IIA	\$236.00	\$590.00
504 A	IIA WEAVER TRICOT (IIA-W-T)	IIA	\$236.00	\$590.00
600	WEAVER REMOVABLE (II-W-R)	II	\$270.40	\$676.00
600 II	WEAVER NYLON (II-W-N)	II	\$270.40	\$676.00
600 II	WEAVER TRICOT (II-W-T)	II	\$270.40	\$676.00
610 IIIA	WEAVER REMOVABLE (IIIA-W-R)	IIIA	\$343.20	\$858.00
610 IIIA	WEAVER NYLON (IIIA-W-N)	IIIA	\$343.20	\$858.00
610 IIIA	WEAVER TRICOT (IIIA-W-T)	IIIA	\$343.20	\$858.00

BODY ARMOR VEST FEMALE WEAVER

CATALOG PAGE 2

MODEL		THREAT LEVEL	REPLACEMENT PRICE	LIST
504 A-F	FEMALE IIA WEAVER REMOVABLE (F-IIA-W-R)	IIA	\$236.00	\$590.00
504 A-F	FEMALE IIA WEAVER NYLON (F-IIA-W-N)	IIA	\$236.00	\$590.00
504 A-F	FEMALE IIA WEAVER TRICOT (F-IIA-W-T)	IIA	\$236.00	\$590.00

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600-F	FEMALE II WEAVER REMOVABLE (F-II-W-R)	II	\$270.40	\$676.00
600-F	FEMALE II WEAVER NYLON (F-II-W-N)	II	\$270.40	\$676.00
600-F	FEMALE II WEAVER TRICOT (F-II-W-T)	II	\$270.40	\$676.00
610-F	FEMALE IIIA WEAVER REMOVABLE (F-III-A-W-R)	IIIA	\$343.20	\$858.00
610-F	FEMALE IIIA WEAVER NYLON (F-III-A-W-N)	IIIA	\$343.20	\$858.00
610-F	FEMALE IIIA WEAVER TRICOT (F-III-A-W-T)	IIIA	\$343.20	\$858.00

Added charge of 10% for size 50-52, 20% for size 54-56 and 30% for size 58-60.

EXECUTIVE VEST

CATALOG PAGE 26

MODEL	THREAT LEVEL	REPLACEMENT PRICE	LIST
504 A IIA-EV (IIA-EV)	IIA	\$320.80	\$802.00
600 II-EV (II-EV)	II	\$368.00	\$920.00
610 IIIA-EV (IIIA-EV)	IIIA	\$492.00	\$1,230.00

CONCEALABLE TACTICAL BODY ARMOR

CATALOG PAGE 9

MODEL	THREAT LEVEL	REPLACEMENT PRICE	LIST
600 II TAC FS NYLON (II-TAC-FS-M)	II	\$268.00	\$670.00
600 II TAC FS FIRE RETARDANT (II-TAC-FS-FR)	II	\$308.00	\$770.00
610 IIIA TAC FS NYLON (IIIA-TAC-FS-N)	IIIA	\$324.00	\$810.00
610 IIIA TAC FS FIRE RETARDANT (IIIA-TAC-FS-FR)	IIIA	\$364.00	\$910.00

POLICE JACKET

CATALOG PAGE 6

MODEL		THREAT LEVEL	REPLACEMENT PRICE	LIST
504A-FO (front opening)	IIA PJ (IIA-PJ)	IIA	\$451.20	\$1,128.00
600-FO (front opening)	II PJ (II-PJ)	II	\$509.60	\$1,274.00
610-FC (front closure)	IIIA PJ (IIIA-PJ)	IIIA	\$649.60	\$1,624.00

NARCOTIC VEST

CATALOG PAGE 5

MODEL		THREAT LEVEL	REPLACEMENT PRICE	LIST
504A-FO (front opening)	IIA WVIIA (IIA-WV)	IIA	\$370.40	\$926.00
600-FO (front opening)	II NV (II-MV)	II	\$411.20	\$1,028.00
610-FC (front closure)	IIIA NV (IIIA-NV)	IIIA	\$512.00	\$1,280.00

Add 20% for extended shoulder coverage.

Added charge of 10% for size 50-52, 20% for size 54-56 and 30% for size 58-60.

M65 JACKET

NOT LISTED IN CATALOG

MODEL		THREAT LEVEL	REPLACEMENT PRICE	LIST
504A-FO (front opening)	IIA M65 (IIA-M65)	IIA	\$396.00	\$990.00
600-FO (front opening)	II M65 (II-M65)	II	\$438.40	\$1,096.00
610-FC (front closure)	IIIA M65 (IIIA-M65)	IIIA	\$553.60	\$1,384.00

MEDIC PROTECTIVE VEST

CATALOG PAGE 7

MODEL		THREAT LEVEL	REPLACEMENT PRICE	LIST
504A-FO (front opening)	IIA MPV CORDURA (IIA-KPV-C)	IIA	\$500.80	\$1,252.00
504A-FO (front opening)	IIA MPV FIRE RETARDANT (IIA-NPV-FR)	IIA	\$616.80	\$1,542.00

AMERICAN BODY ARMOR AND EQUIPMENT, INC. 1011

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600-FO II MPV CORDURA (front opening) (II-MPV-C)	II	\$551.20	\$1,378.00
600-FO II MPV FIRE RETARDANT (front opening) (II-MPV-FR)	II	\$667.20	\$1,668.00
610-FC IIIA MPV CORDURA (front closure) (IIIA-MPV-C)	IIIA	\$680.00	\$1,700.00
610-FC IIIA MPV FIRE RETARDANT (front closure) (IIIA-MPV-FR)	IIIA	\$796.00	\$1,990.00

AK-47 LIGHT WEIGHT MILITARY BODY ARMOR CATALOG PAGE 8

MODEL	THREAT LEVEL	REPLACEMENT PRICE	LIST
600 II AK-47 NYLON (II-AK-47-N)	II	\$446.40	\$1,116.00
600 II AK-47 FIRE RETARDANT (II-AK-47-FR)	II	\$486.40	\$1,216.00
610 IIIA AK-47 NYLON (IIIA-AK-47-M)	IIIA	\$559.20	\$1,398.00
610 IIIA AK-47 FIRE RETARDANT (IIIA-AK-47-FR)	IIIA	\$599.20	\$1,498.00

Added charge of 10% for size 50-52, 20% for size 54-56 and 30% for size 58-60.

TACTICAL JACKET CATALOG PAGE 7

MODEL	THREAT LEVEL	REPLACEMENT PRICE	LIST
600-FO II TACTICAL JACKET (front opening) NYLON (II-TJ-N)	II	\$576.00	\$1,440.00
600-FO II TACTICAL JACKET FIRE (front opening) RET. (II-TJ-FR)	II	\$616.00	\$1,540.00
610-FC IIIA TACTICAL JACKET (front closure) NYLON (IIIA-TJ-N)	IIIA	\$752.00	\$1,880.00
610-FC IIIA TACTICAL JACKET FIRE (front closure) RET. (IIIA-TJ-FR)	IIIA	\$792.00	\$1,980.00

DELTA LIGHTWEIGHT TACTICAL ARMOR CATALOG PAGE 9

MODEL	THREAT LEVEL	REPLACEMENT PRICE	LIST
600 II DELTA NYLON (II-DELT-N)	II	\$466.40	\$1,166.00
600 II DELTA FIRE RETARDANT (II-DELT-FR)	II	\$506.40	\$1,266.00

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610 IIIA DELTA NYLON (IIIA-DELT-M)	IIIA	\$600.00	\$1,500.00
610 IIIA DELTA FIRE RETARDANT (IIIA-DELT-FR)	IIIA	\$640.00	\$1,600.00

HIGH COVERAGE TACTICAL ARMOR

CATALOG PAGE 9

MODEL	THREAT LEVEL	REPLACEMENT PRICE	LIST
610 IIIA ESU NYLON (IIIA-WEPT-N)	IIIA	\$924.00	\$2,310.00
610 IIIA ESU FIRE RETARDANT (IIIA-NYPD-FR)	IIIA	\$964.00	\$2,410.00

ARMORED LOAD BEARING VEST

CATALOG PAGE 6

MODEL	THREAT LEVEL	REPLACEMENT PRICE	LIST
610-FC IIIA ALB NYLON (front closure) (IIA-ALB-N)	IIIA	\$649.60	\$1,624.00
610-FC IIIA ALB FIRE RETARDANT (front closure) (IIIA-ALB-FR)	IIIA	\$689.60	\$1,724.00

Added charge of 10% for size 50-52, 20% for size 54-56 and 30% for size 58-60.

FLAK JACKET USA

CATALOG PAGE 5

MODEL	THREAT LEVEL	REPLACEMENT PRICE	LIST
600-FO II FLAK USA NYLON (front opening) (II-FLAK-N)	II	\$480.80	\$1,202.00
600-FO II FLAK USA FIRE (front opening) RETARDANT (II-FLAK-FR)	II	\$520.80	\$1,302.00
610-FC IIIA FLAK USA NYLON (front closure) (IIIA-FLAK-M)	IIIA	\$596.00	\$1,490.00
610-FC IIIA FLAK USA FIRE (front closure) RETARDANT (IIIA-FLAK-FR)	IIIA	\$636.00	\$1,590.00

TACTICAL ASSAULT VEST-WITH OVER
THE SHOULDER PROTECTION

CATALOG PAGE 8

MODEL	THREAT LEVEL	REPLACEMENT PRICE	LIST
600 II TAC ALT NYLON (II-TAC-A-N)	II	\$364.80	\$912.00
600 II TAC ALT FIRE RETARDANT (II-TAC-A-FR)	II	\$404.80	\$1,012.00
610 IIIA TAC ALT NYLON (IIIA-TAC-A-N)	IIIA	\$479.20	\$1,198.00
610 IIIA TAC ALT FIRE RETARDANT (IIIA-TAC-A-FR)	IIIA	\$519.20	\$1,298.00

AV-1 AVIATORS CREW SUPPORT VEST

CATALOG PAGE 12

MODEL	THREAT LEVEL	REPLACEMENT PRICE	LIST
610-FC IIIA AV-1 NYLON (front closure) (IIIA-AV-1-N)	IIIA	\$540.00	\$1,350.00
610-FC IIIA AV-1 FIRE RETARDANT (front closure) (IIIA-AV-1-FR)	IIIA	\$580.00	\$1,450.00

AV-2 AVIATORS VEST

CATALOG PAGE 12

MODEL	THREAT LEVEL	REPLACEMENT PRICE	LIST
610 IIIA AV-2 NYLON (IIIA-AV-2-N)	IIIA	\$391.20	\$978.00
610 IIIA AV-2 FIRE RETARDANT (IIIA-AV-2-FR)	IIIA	\$431.20	\$1,078.00

Added charge of 10% for size 50-52, 20% for size 54-56 and 30% for size 58-60.

AVIATION FLOATATION VEST

CATALOG PAGE 12

MODEL	THREAT LEVEL	REPLACEMENT PRICE	LIST
610 IIIA AFV NYLON (IIIA-AFV-N)	IIIA	\$580.00	\$1,450.00
610 IIIA AFV FIRE RETARDANT (IIIA-AFV-FR)	IIIA	\$620.00	\$1,550.00

PASSIVE/ACTIVE FLOTATION VEST

CATALOG PAGE 12

MODEL	THREAT LEVEL	REPLACEMENT PRICE	LIST
610 IIIA P/A-FV NYLON (IIIA-P/A-FV-N)	IIIA	\$668.00	\$1,670.00
610 IIIA P/A-FV FIRE RETARDANT (IIIA-P/A-FV-FR)	IIIA	\$708.00	\$1,770.00

Added charge of 10% for size 50-52, 20% for size 54-56 and 30% for size 58-60.

APPENDIX F

REQUEST FOR EXTENSION OF TIME

You must complete this form if you need an extension of time beyond 120 days to order your replacement body armor. The extension must be based on procurement or purchasing regulations, procedures, policies or other official requirements.

Please provide the requested information, sign the form, and return it to:

American Body Armor and Equipment, Inc.
85 Nassau Place
Yulee, Florida 32097

This form must be returned within 120 days.

Additional time is needed in which to order replacement body armor. The amount of time needed is: _____

(up to 18 months)

The additional time requested is necessary to comply with the following procurement or purchasing regulations, procedures, policies or other official requirements (please be specific):

We understand that this request for extension of time does not obligate this organization to order and pay for replacement body armor, but it is our present intention to do so, subject to compliance with the requirements specified above.

Name

Title or position

Decision and Order

APPENDIX G

American Body Armor & Equipment, Inc.
85 Nassau Park
Yulee, FL 32097

FORWARD & ADDRESS CORRECTION REQUESTED

ATTENTION: BODY ARMOR REPLACEMENT PROGRAM

Chief of Police
Anywhere Police Department
Anywhere, USA 10000

APPENDIX H

SUMMARY OF FTC CONSENT AGREEMENT WITH
AMERICAN BODY ARMOR

The Federal Trade Commission has entered into a consent order with American Body Armor & Equipment, Inc. ("ABA") settling its charges against ABA. The FTC alleged that ABA misrepresented that certain of the body armor it sold was certified by the National Institute of Justice, when, according to FTC's charges, this armor was not certified because it differed in certain significant ways from the models that had been certified. The FTC has also alleged that ABA did not have substantiation for its claims that its "Black Magic" treatment effectively improves the ballistic performance of its body armor. ABA denies all charges that it has violated the law, but has agreed to enter into the consent order. The following is a summary of the requirements of the Order.

First, the Order prohibits ABA from misrepresenting that its body armor is certified under the NIJ standard unless it has been tested and certified strictly in accordance with the NIJ procedures; it also prohibits ABA from falsely claiming (that is, misrepresenting) that its body armor carries the approval, endorsement, or sanction of NIJ or any other organization, or that its body armor is the same as or similar to NIJ-approved body armor.

Second, the Order prohibits ABA from representing that its body armor provides any specified degree of ballistic protection, or is tested, approved, endorsed or certified, unless the armor is either:

- a. NIJ-certified at the represented threat level, or
- b. Certified under a different standard or test, so long as ABA discloses the identity of the standard or test and that it is different from the NIJ standard.

Third, the Order requires ABA to have competent and reliable scientific evidence to substantiate any claims of ballistic efficacy or performance it makes for Black Magic or any other ballistic treatment.

Fourth, the Order requires ABA to offer replacement body armor to purchasers of ABA vests represented as certified by NIJ under its 0101.03 standard. All U.S. purchasers of ABA .03 vests are eligible for replacement vests, if the vest was purchased before January 1, 1990. U.S. purchasers of ABA .03 vests are also eligible for replacement vests if the vest was purchased after January 1, 1990, and it differs from the certified model with respect to waterproofing or configuration of stitching on the ballistic panels, method of closure of the vest, the number of panels or the removability of the panels from the vest, the cover (except for certain differences only in the color, use of foam for flotation purposes, or removability of the ballistic panel from the cover), or any other change to the ballistic elements or that may diminish the ballistic protection provided by the vest. "U.S. purchasers" includes purchasers who either: (a) bought vests in the United States; or (b) are United States citizens, corporations or government entities.

The Order requires that ABA compile a list of all purchasers eligible for replacement vests from its own files and by contacting wholesalers, distributors and retailers of ABA vests. After the Order is entered, ABA must mail to the

purchasers a letter and replacement program description, an ABA catalog and price list, and application forms. The letter explains the FTC's charges against ABA and its concern that the vests ABA sold could fail in actual use to provide the level of ballistic protection claimed, and contains ABA's denial of these allegations and its belief that the vests are effective. Purchasers who have not yet fully paid for their vests, but are otherwise eligible, will be sent an additional letter by ABA explaining their need to complete payments to be eligible for the program.

The Order further requires ABA to provide replacement body armor to eligible purchasers who apply for it within 120 days of their receipt of the letter. In those cases where the purchasers cannot meet the 120-day deadline due to procurement or purchasing regulations, procedures, policies or other official requirements, they may submit an application form specifying the official requirements in order to receive an extension of time to apply of up to 18 months.

Under the Order, the purchaser may request any model of armor of the same threat level as the vests to be replaced, or the next higher level, if none is available at the level of the vest to be replaced. However, tactical vests cannot be ordered as replacements for concealable vests. The vests will be provided in the color and size specified by the purchaser. The replacement armor will be new and cannot differ from the corresponding certified model except for minor deviations unavoidable due to the manufacturing process. However, if the purchaser requests a modification from the certified model, ABA may elect to supply the modified vest if it informs the purchaser that the modification may affect its certification by NIJ.

The Order provides for partial payment by the purchaser for the replacement vests in order to defray some of ABA's costs. The cost to the purchaser varies by model. The replacement cost is 40% of ABA's current list price for the vest. The Order further specifies the payment terms. ABA will ship the replacement vests, at its cost, within 60 days of the application. Institutional purchasers must make payment in full within 30 days after receiving the replacement vests, and for individual purchasers, the total cost is due at the time the vests are delivered. Purchasers then have 60 days to return the old vests to ABA, which cannot have been destroyed by ballistic testing or other destructive damage.

Under the Order, ABA must keep records and file reports of its compliance with the provisions of the Order, notify the FTC of changes in its corporate structure, and provide a copy of this Summary to its affiliates, officers, managers, advertising employees, and trade customers. This Summary is not intended to constitute an official interpretation of the Order or to modify in any way its terms.

Complaint

118 F.T.C.

IN THE MATTER OF

REVCO D.S., INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION
OF SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT*Docket C-3540. Complaint, Oct. 31, 1994--Decision, Oct. 31, 1994*

This consent order requires, among other things, an Ohio-based drugstore chain to divest, within twelve months, to a Commission approved acquirer, either the pharmacy business that it owns or the pharmacy business acquired from Hook-SupeRx, Inc. (HSI) in each of three geographic areas in Virginia. If the divestitures are not completed within twelve months, the order requires the respondent to consent to the appointment of a trustee to divest the assets. In addition, the consent order requires the respondent to obtain prior Commission approval, for ten years, before acquiring any similar business interest in any of the three specified geographic areas.

Appearances

For the Commission: *Laura Wilkinson, Ann Malester, Jacqueline Mendel and Mary Lou Steptoe.*

For the respondent: *Louis Sernoff and Alan Ward, Baker & Hostetler, Washington, D.C.*

COMPLAINT

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

I. DEFINITIONS

For the purposes of this complaint the following definitions apply:

1. "*Revco*" means Revco D.S. Inc., a corporation organized, existing, and doing business under and by virtue of the laws of Delaware, its directors, officers, employees, agents and representatives, its domestic and foreign parents, predecessors, successors, assigns, divisions, subsidiaries, affiliates, partnerships and joint ventures, and the directors, officers, employees, agents and representatives of its domestic and foreign predecessors, successors, assigns, divisions, subsidiaries, affiliates, partnerships and joint ventures. The words "subsidiary," "affiliate" and "joint venture" refer to any firm in which there is partial (10 percent or more) or total ownership or control between corporations or partnerships.

2. "*HSI*" means Hook-SupeRx, Inc., a corporation organized, existing, and doing business under and by virtue of the laws of Delaware, its directors, officers, employees, agents and representatives, its domestic and foreign parents, predecessors, successors, assigns, divisions, subsidiaries, affiliates, partnerships and joint ventures, and the directors, officers, employees, agents and representatives of its domestic and foreign predecessors, successors, assigns, divisions, subsidiaries, affiliates, partnerships and joint ventures. The words "subsidiary," "affiliate" and "joint venture" refer to any firm in which there is partial (10 percent or more) or total ownership or control between corporations or partnerships.

II. THE RESPONDENT

3. Respondent Revco is a corporation organized and existing under the laws of Delaware, with its principal place of business at 1925 Enterprise Parkway, Twinsburg, Ohio.

4. For purposes of this proceeding, respondent is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

III. THE ACQUIRED COMPANY

5. HSI is a corporation organized and existing under the laws of the State of Delaware, with its headquarters at 175 Tri County Parkway, Cincinnati, Ohio.

6. HSI is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

IV. THE ACQUISITION

7. On or about March 31, 1994, Revco and HSI entered an agreement providing for the sale of HSI to Revco, for consideration totaling approximately \$600 million ("acquisition").

V. THE RELEVANT MARKETS

8. For purposes of this complaint, the relevant line of commerce in which to analyze the effects of the acquisition is the sale of prescription drugs in retail stores.

9. For purposes of this complaint, the relevant sections of the country in which to analyze the effects of the acquisition are: Covington, Virginia; Marion, Virginia; and Radford, Virginia.

10. The relevant markets set forth in paragraphs eight and nine are highly concentrated, whether measured by Herfindahl-Hirschmann Indices ("HHI") or two-firm and four-firm concentration ratios.

11. Entry into the relevant markets is difficult or unlikely.

12. Revco and HSI are actual competitors in the relevant markets.

VI. EFFECTS OF THE ACQUISITION

13. The effect of the acquisition may be substantially to lessen competition and to tend to create a monopoly in the relevant markets in violation of Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, in the following ways, among others:

- a. By eliminating direct actual competition between Revco and HSI;
- b. By increasing the likelihood that Revco will unilaterally exercise market power; or
- c. By increasing the likelihood of collusion in the relevant markets.

14. All of the above increase the likelihood that firms in the relevant markets will increase prices and restrict output both in the near future and in the long term.

VII. VIOLATIONS CHARGED

15. The acquisition agreement described in paragraph seven constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

16. The acquisition described in paragraph seven, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of respondent's proposed acquisition of certain voting securities and assets of Hook-SupeRx, Inc., and respondent having been furnished thereafter with a copy of a draft of complaint that the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and

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

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

1. Respondent Revco D.S., Inc. ("Revco") is a corporation organized and existing under the laws of Delaware with its office and principal place of business at 1925 Enterprise Parkway, Twinsburg, Ohio.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I.

It is ordered, That, as used in this order, the following definitions shall apply:

- A. "*Revco*" means Revco D.S., Inc., its predecessors, subsidiaries, divisions, groups and affiliates controlled by Revco, and their respective directors, officers, employees, agents, representatives, and their respective successors and assigns.
- B. "*Commission*" means the Federal Trade Commission.
- C. "*Acquisition*" means the acquisition of all the voting stock of Hook-SupeRx, Inc. ("HSI") by respondent Revco.
- D. "*Acquirer*" means the party or parties to whom respondent Revco divests the assets herein ordered to be divested.
- E. "*Prescription drugs*" means ethical drugs available at retail only by prescription.
- F. "*HSI Pharmacy Business*" means HSI's business of selling prescription drugs at any of the retail stores listed in paragraph I.(J). of this order, but does not include HSI's business of selling other products in those retail stores.

G. “*HSI Pharmacy Assets*” means all assets constituting the HSI Pharmacy Business, excluding those assets pertaining to the Hook, SupeRx, and Brooks trade names, trade dress, trade marks and service marks, and to Revco’s proprietary point of sale equipment or its PAL[®] system, and including but not limited to:

1. Leases, at the Acquirer’s option;
2. Zoning approvals and registrations, at the Acquirer’s option;
3. Books, records, manuals, and operations reports relating to the HSI Pharmacy Business, but only if the divestiture is to an Acquirer that does not already operate a pharmacy in any location;
4. Inventory instruction, or, at the Acquirer’s option, lists of stock keeping units (“SKUs”), *i.e.*, all forms, package sizes and other units in which prescription drugs are sold and which are used in records of sales and inventories;
5. Lists of all prescription drug customers, including but not limited to third party insurers, including all files of names, addresses, and telephone numbers of the individual customer contacts, the unit and dollar amounts of sales, by product, to each customer, and store profit and loss statement(s);
6. All names and addresses of prescription drug manufacturers and distributors that supply or have supplied HSI within the six months preceding the date this order becomes final; and
7. Goodwill, tangible and intangible, utilized in the sale of prescription drugs.

H. “*Revco Pharmacy Business*” means Revco’s business of selling prescription drugs at any of the retail stores listed in paragraph I.(J). of this order, but does not include Revco’s business of selling other products in those retail stores.

I. “*Revco Pharmacy Assets*” means all assets constituting the Revco Pharmacy Business, excluding those assets pertaining to the Revco trade names, trade dress, trade marks and service marks, and to Revco’s proprietary point of sale equipment or its PAL[®] system, and including but not limited to:

1. Leases, at the Acquirer’s option;
2. Zoning approvals and registrations, at the Acquirer’s option;
3. Books, records, manuals, and operations reports, relating to the Revco Pharmacy Business, but only if the divestiture is to an Acquirer that does not already operate a pharmacy in any location;

4. Inventory instruction, or, at the Acquirer's option, lists of SKUs, *i.e.*, all forms, package sizes and other units in which prescription drugs are sold and which are used in records of sales and inventories;

5. Lists of all prescription drug customers, including but not limited to third party insurers, including all files of names, addresses, and telephone numbers of the individual customer contacts, the unit and dollar amounts of sales, by product, to each customer, and store profit and loss statement(s);

6. All names and addresses of prescription drug manufacturers and distributors that supply or have supplied Revco within the six months preceding the date this order becomes final; and

7. Goodwill, tangible and intangible, utilized in the sale of prescription drugs.

J. "*Assets To Be Divested*" means either the HSI Pharmacy Assets or the Revco Pharmacy Assets constituting the HSI Pharmacy Business or the Revco Pharmacy Business in the following cities or towns:

1. Covington, Virginia;
2. Marion, Virginia; and
3. Radford, Virginia.

K. "*Competitiveness, viability and marketability*" of the Assets To Be Divested mean that respondent shall continue the operation of the Assets To Be Divested in the ordinary course of business without material change or alteration that would adversely affect the value or goodwill of the Assets To Be Divested.

II.

It is further ordered, That:

A. Respondent shall divest, absolutely and in good faith, within twelve (12) months of the date this order becomes final, the Assets To Be Divested.

B. Respondent shall divest the Assets To Be Divested only to an acquirer or acquirers that receive the prior approval of the Commission and only in a manner that receives the prior approval of

the Commission. The purpose of the divestiture of the Assets To Be Divested is to ensure the continued use of the Assets To Be Divested as ongoing viable pharmacies engaged in the same businesses in which the Assets To Be Divested are presently employed and to remedy the lessening of competition resulting from the acquisition as alleged in the Commission's complaint.

C. Pending divestiture of the Assets To Be Divested, respondent shall take such actions as are necessary to maintain the competitiveness, viability and marketability of the Assets To Be Divested and to prevent the destruction, removal, wasting, deterioration, or impairment of any Assets To Be Divested except for ordinary wear and tear.

D. If a divestiture includes a lease of physical space, and if pursuant to that lease respondent through default of the lease or otherwise regains possession of the space, respondent must notify the Commission of such repossession within thirty (30) days and must redinvest such assets or interest pursuant to paragraph II of this order within six (6) months of such repossession. If respondent has not redinvested such assets or interest pursuant to paragraph II of this order within six (6) months of such repossession, the provisions of paragraph III shall apply to these assets.

III.

It is further ordered, That:

A. If respondent has not divested, absolutely and in good faith and with the Commission's prior approval, the Assets To Be Divested within twelve (12) months of the date this order becomes final, the Commission may appoint a trustee to divest the Assets To Be Divested. In the event the Commission or the Attorney General brings an action pursuant to Section 5(l) of the Federal Trade Commission Act, 15 U.S.C. 45(l), or any other statute enforced by the Commission, respondent shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to Section 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by respondent to comply with this order.

B. If a trustee is appointed by the Commission or a court pursuant to paragraph III.A. of this order, respondent shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:

1. The Commission shall select the trustee, subject to the consent of respondent, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures. If respondent has not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after notice by the staff of the Commission to respondent of the identity of any proposed trustee, respondent shall be deemed to have consented to the selection of the proposed trustee.

2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest the Assets To Be Divested.

3. Within ten (10) days after appointment of the trustee, respondent shall execute a trust agreement that, subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestiture required by this order.

4. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in paragraph III.B.3. to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve-month period the trustee has submitted a plan of divestiture or believes that divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or in the case of a court-appointed trustee by the court.

5. The trustee shall have full and complete access to the personnel, books, records, and facilities related to the Assets To Be Divested, or to any other relevant information, as the trustee may reasonably request. Respondent shall develop such financial or other information as such trustee may reasonably request and shall cooperate with the trustee. Respondent shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays in divestiture caused by respondent shall extend the time for divestiture under this paragraph in an amount equal to the

delay, as determined by the Commission or, for a court-appointed trustee, by the court.

6. The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission subject to respondent's absolute and unconditional obligation to divest at no minimum price. The divestiture shall be made in the manner and to the acquirer or acquirers as set out in paragraph II of this order. Provided, however, if the trustee receives *bona fide* offers from more than one acquirer, and if the Commission determines to approve more than one such acquirer, the trustee shall divest to the acquirer or acquirers selected by respondent from among those approved by the Commission.

7. The trustee shall serve, without bond or other security, at the cost and expense of respondent, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have authority to employ, at the cost and expense of respondent, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are reasonably necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of respondent and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's divesting the Assets To Be Divested.

8. Respondent shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the trustee's duties, and respondent shall either defend against such claims or pay the trustee's expenses, including all reasonable fees of counsel and other expenses incurred in connection with the preparations for, or defense of any such claim, whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.

9. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in paragraph III.A. of this order.

10. The Commission or, in the case of a court appointed trustee, the court, may on its own initiative or at the request of the trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this order.

11. The trustee shall have no obligation or authority to operate or maintain the Assets To Be Divested.

12. The trustee shall report in writing to respondent and to the Commission every sixty (60) days concerning the trustee's efforts to accomplish divestiture.

IV.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, respondent shall not, without the prior approval of the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise: (A) Acquire any stock, share capital, equity, leasehold or other interest in any concern, corporate or non-corporate, presently engaged in, or within the six months preceding such acquisition engaged in, the business of selling prescription drugs at retail stores located in any of the cities or towns listed in paragraph I.(J). of this order; or (B) Acquire any assets used for, or previously used for (and still suitable for use for), the business of selling prescription drugs at retail stores located in any of the cities or towns listed in paragraph I.(J). of this order from any concern, corporate or non-corporate, presently engaged in or within the six months preceding such acquisition engaged in, the business of selling prescription drugs at retail stores located in any of the cities or towns listed in paragraph I.(J). of this order. Provided, however, that these prohibitions shall not relate to the construction of new facilities.

V.

It is further ordered, That:

A. Within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until respondent has fully complied with the provisions of paragraphs II and III of this order, respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with those provisions. Respon-

dent shall include in its compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with paragraphs II and III of the order, including a description of all substantive contacts or negotiations for the divestiture and the identity of all parties contacted. Respondent also shall include in its compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning divestiture.

B. One (1) year from the date this order becomes final, annually thereafter for the next nine (9) years on the anniversary of the date this order became final, and at such other times as the Commission may require, respondent shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and is complying with paragraph IV of this order.

VI.

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

VII.

It is further ordered, That, for the purpose of determining or securing compliance with this order, respondent shall permit any duly authorized representative of the Commission:

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

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

Commissioner Varney not participating.

IN THE MATTER OF

SCHERING CORPORATION

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

Docket 9232. Complaint, Sept. 22, 1989--Decision, Oct. 31, 1994

This consent order prohibits, among other things, a New Jersey manufacturer of the diet product, Fibre Trim, from claiming that any food, food supplement, or drug product provides any appetite suppressant, weight loss, weight control, or weight maintenance benefit without possessing and relying upon competent and reliable scientific evidence to substantiate the claim.

Appearances

For the Commission: *Theodore H. Hoppock* and *Susan Cohn*.

For the respondent: *Joni Lupovitz, Amy E. Hancock, Albert W. Shay, James H. Sneed* and *Paul J. Pantano, McDermott, Will & Emery*, Washington, D.C.

COMPLAINT

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

PARAGRAPH 1. Respondent Schering Corporation is a New Jersey corporation, with its office and principal place of business located at 2000 Galloping Hill Road, Kenilworth, New Jersey.

PAR. 2. Respondent has advertised, offered for sale, sold and distributed Fibre Trim to the public as a high fiber supplement, and a weight loss and weight control aid.

PAR. 3. For the purposes of Section 12 of the Federal Trade Commission Act, 15 U.S.C. 52, Fibre Trim is a drug or food as defined in Section 15 of the Act, 15 U.S.C. 55.

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

PAR. 5. Typical of respondent's advertisements and promotional materials, but not necessarily all-inclusive thereof, are the attached Exhibits A through H. The aforesaid advertisements and promotional materials contain the following statements:

1. "One of the best sources of dietary fiber is Fibre Trim - the safe, all natural aid to weight control developed in Scandinavia." [Exhibit A]
2. "High Fiber Supplement" [Exhibit B]
3. "[Serving size] 5 Fibre Trim Diet Tabs with 8 oz. water, Calories: 5, Dietary fiber (grams): 2.35. [Exhibit G]
4. "Because Fibre Trim extracts its fiber from two food sources, citrus and grain, it too, is an excellent source of both soluble and insoluble fibers." [Exhibit G]
5. "And Fibre Trim even offers you all of fiber's wonderful health benefits as well." [Exhibit E]
6. "Healthy Reasons to take FIBRE TRIM." [Exhibit H]
7. "If your diet has been low in fiber, you may take a few days to adjust to the healthier level of dietary fiber. As a result, a temporary and slight abdominal discomfort may develop, though this soon disappears. This is a positive sign that your digestive system is becoming healthier." [Exhibit F] [emphasis in original]
8. "Take Fibre Trim to ensure a well-balanced, fiber-rich diet, and feel good knowing you're doing something good for yourself." [Exhibit F]
9. "Slims you the natural way - while providing fiber's healthful benefits." [Exhibit B]
10. "Fibre Trim was developed by scientists in Scandinavia and has been tested and enthusiastically received by consumers." [Exhibit A]
11. "It's proven: Fibre Trim has successfully helped European women lose weight and keep it off." [Exhibit D]
12. "A PROVEN, NATURAL WAY TO LOSE WEIGHT" [Exhibit C]
13. "It's sensible: it makes you feel satisfied with less food." [Exhibit D]
14. "Because fiber creates a pleasant feeling of fullness, you'll be satisfied with smaller portions, which means you'll be reducing your calorie intake." [Exhibit A]
15. "Fibre Trim also helps stave off hunger pangs between meals, and keeps those midnight binges at bay." [Exhibit E]
16. "You can even use it for maintenance, to keep those extra pounds from creeping back on again. [Exhibit E]

PAR. 6. Through the use of the statements referred to in paragraph five and others in advertisements and promotional materials not specifically set forth herein, respondent has represented, directly or by implication, that:

1. Fibre Trim is a high fiber supplement.
2. The recommended daily dosage of Fibre Trim provides most of a person's daily requirements of dietary fiber.

3. The recommended dosage of Fibre Trim provides about 2.35 grams of dietary fiber per serving or about seven grams of dietary fiber per day.

PAR. 7. In truth and in fact:

1. Fibre Trim is not a high fiber supplement.
2. The recommended daily dosage of Fibre Trim does not provide most of a person's daily requirements of dietary fiber.
3. The recommended dosage of Fibre Trim does not provide about 2.35 grams of dietary fiber per serving or about seven grams of dietary fiber per day.

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

PAR. 8. Through the use of the statements and representations referred to in paragraphs five and six, and others not specifically set forth herein, respondent has represented, directly or by implication, that at the time it made said representations, respondent possessed and relied upon a reasonable basis for such representations.

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

PAR. 10. Through the use of the statements referred to in paragraph five, and others in advertisements or promotional materials not specifically set forth herein, respondent has represented, directly or by implication, that:

1. Fibre Trim is an effective appetite suppressant, weight loss, weight control or weight maintenance product; and
2. Fibre Trim provides the health benefits associated with a fiber-rich diet or a high intake of dietary fiber from food.

PAR. 11. Through the use of the statements and representations referred to in paragraphs five and ten, and others not specifically set forth herein, respondent has represented, directly or by implication, that at the time it made said representations, respondent possessed and relied upon a reasonable basis for such representations.

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

PAR. 13. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

Chairman Steiger recused.

EXHIBIT A

Good sources of fiber

All plant foods contain dietary fiber, although a much smaller amount of the fiber is eliminated when foods are processed. Whole-grain and bran, are good fiber sources. Here are some other fiber-rich foods:

Cereals	Fruits	Vegetables
bran	apples	asparagus
oatmeal	bananas	beans (black)
prunes (dried)	berries (including	broccoli
rye	blueberries)	cauliflower
whole wheat	blackberries)	celery
	cranberries)	corn
	currants	cucumbers
	grapes	eggplant
	grapes (seedless)	garlic
	kiwifruit	green beans
	lemons	green peas
	limes	green onions
	oranges	green tomatoes
	peaches	green zucchini
	pears	horseradish
	plums	jalapeños
	prunes	kale
	raisins	kohlrabi
	strawberries	lettuce
	watermelon	mushrooms
		onions
		potatoes
		spinach

One of the best sources of dietary fiber is Fibre Trim™, the safe, all-natural and low-calorie weight control developed in Scandinavia. Fibre Trim's unique process combines concentrated grain an

EXHIBIT A
Page 1

Suddenly, everybody's talking about fiber. What you may not know is that you have used to call "roughage" has reeled a lot of new interest among doctors, nutritionists and scientific researchers. The evidence is growing that fiber is essential for good nutrition and good health. And, best of all, fiber can help you lose weight.

What is fiber?

Fiber is the part of fruits, vegetables and whole grains that cannot be digested by the body. The term "dietary fiber" describes several different kinds of fibers found in plant foods. When you eat fiber, it forms bulk in the digestive system by absorbing water.

How can fiber help you lose weight and keep it off?

Because of its bulk-forming properties, foods that are high in fiber are generally more filling and satisfying than low fiber foods. Eating a fiber-rich diet keeps you feeling satisfied so you are less likely to overeat. And fiber-rich diets will make you feel satisfied longer, helping you reduce between-meal snacking.



about fiber and your diet

Safe, sensible weight loss with Fibre Trim

Some diet aids contain drugs that can have harmful side effects. Fibre Trim is all natural. There are no artificial colors, flavors or additives. Fibre Trim contains no salt, caffeine, added sugars or starches. And no drugs.

Fibre Trim was developed by scientists in Scandinavia and has been tested and enthusiastically received by consumers. It's the leading diet product in Europe and Canada where millions of people use Fibre Trim daily to help lose weight and keep it off. Now Fibre Trim is available in the U.S. from Schering Corporation,



one of America's most respected pharmaceutical companies, makers of such fine products as Aldim, Chlor-Trieton, Contac, Demul, and Tisocin.

Schering

The Schering Corporation, Kenilworth, NJ 07033
© 1978, Schering Corporation. All rights reserved. Fibre Trim and Fibre Trim is a registered trademark of Schering Corporation.
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Fiber every day— good health

Once you've reached your weight, you should be important to maintain your good eating habits. That means you should continue to have plenty of fiber in your diet. You can continue to use it to help keep your weight off and maintain your overall good health. Remember, fiber from all natural plant and grain fibers, so you can continue to take it every day.

Other benefits of fiber

Fiber should be an important part of your diet. It helps you feel full, so you're not eating too much. It also helps you feel better, so you're not feeling depressed. It's the only natural and safe fiber that's been shown to help you lose weight. It's also the only fiber that's been shown to help you feel better. It's the only fiber that's been shown to help you feel better. It's the only fiber that's been shown to help you feel better.

Calories burned for 30 minutes of activity*

Activity	110	120	130	140	150	160	170	180	190	200
Walking	120	141	162	183	204	225	246	267	288	309
Swimming (all strokes)	208	215	222	229	236	243	250	257	264	271
Swimming (backstroke)	192	208	224	240	256	272	288	304	320	336
Swimming (breaststroke)	176	192	208	224	240	256	272	288	304	320
Cycling (on flat terrain)	121	142	163	184	205	226	247	268	289	310
Rowing	126	147	168	189	210	231	252	273	294	315
Swimming (water polo)	189	210	231	252	273	294	315	336	357	378

*Adapted from: Physical Activity and Health, 1996

Diet and exercise

In order to lose weight, you should not only reduce the number of calories you consume, but also increase the number of calories you burn. For most people, diet is an important part of their diet plan. It's essential for overall good health. This chart shows you how many calories you should expend for each activity for 30 minutes of activity.

Making fiber a part of your weight-loss plan

Many dieting plans are based on low-calorie, low-fat foods. But fiber is a natural part of a healthy diet. It helps you feel full, so you're not eating too much. It also helps you feel better, so you're not feeling depressed. It's the only natural and safe fiber that's been shown to help you lose weight. It's also the only fiber that's been shown to help you feel better. It's the only fiber that's been shown to help you feel better.

Weight progress chart

Fill in your weight goal and record your progress on this handy chart.

My Weight Now	Goal
My Weight Goal	
My Progress	
1 week	
2 weeks	
3 weeks	
4 weeks	
5 weeks	
6 weeks	

Fiber every day— good health

Once you've reached your weight, you should be important to maintain your good eating habits. That means you should continue to have plenty of fiber in your diet. You can continue to use it to help keep your weight off and maintain your overall good health. Remember, fiber from all natural plant and grain fibers, so you can continue to take it every day.

EXHIBIT B

The Fine Art of Slimming
is Brought to You from
Europe. Naturally.

All-Natural
**FIBRE
TRIM.**

- The original from Europe.
- A safe, sensible aid to long-lasting weight loss.
- Slims you the natural way —while providing fiber's healthful benefits.

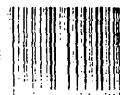


Now, Save 50¢ on
Fibre Trim.

The European Way to Slim.
For Good.

50¢ Off

All-Natural
**FIBRE
TRIM**
106 730



Save 50¢ on Fibre Trim
now with this coupon.

TO THE DEALER: This coupon will be redeemed only as follows: For amount specified plus 5¢ for handling, minimum quantity of required items specified on conditions or terms hereon. Please do not cash for full-face stock or merchandise in other quantities unless noted on coupon or request. (Failure to comply may void all discounts authorized for redemption.) Redeemable not for cash through drawers or other means specified. Coupons are non-transferable and void if torn, mutilated, blank, scratched, or otherwise impaired. Customer must pay at least the cash equivalent value of 1.00 for redemption. Offer is subject to change without notice. © 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025. All rights reserved.



50¢ Off

50¢ Off

EXHIBIT C



HOW FIBRE TRIM® GAVE NEW STRENGTH TO THE FRENCH RESISTANCE.

It's never easy to say "no" to food. Especially in a country totally obsessed with it.

Small wonder the French flocked to Fibre Trim: It's a thoroughly natural way to help you fight hunger, and lose weight. A way that works.

When you're not feeling hungry all the time, you can find the strength to say "no" to crêpes, and croissants, and even chocolate-laden éclairs.

In France, they embraced it. In fact, Fibre Trim is so successful, it's Europe's number one diet aid. Now, it is here.

A PROVEN, NATURAL WAY TO LOSE WEIGHT

Fibre Trim is natural food fiber. But all fiber is not alike.

Fibre Trim is created from different types of grain and citrus fiber, in a unique blend designed to help you lose weight.

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THE EUROPEAN WAY TO SLIM. FOR GOOD.

Taken before meals, Fibre Trim helps you eat less without constantly feeling hungry. It can even help you cope with snacking.

WIN THE DAILY BATTLES, AND THE WAR

Fibre Trim isn't magic. But it's help in a sane, gradual approach to weight loss. Follow the Fibre Trim plan, move around more, and be patient. You may not lose 10 pounds by Thursday, but you'll likely see lasting results.

Since Fibre Trim is simply natural fiber, it can become a sensible way of life—even after you reach your goal. It's the healthy way to stay trim for good.

Take a cue from the food-loving French, and boost your willpower with a little help from Fibre Trim. Vive la resistance!

LADIES FIRST Sunday 7/86

EXHIBIT D

NEW! ALL NATURAL FIBRE TRIM!

TO THE DEALER: This coupon will be honored for the amount specified plus 6% for handling. The amount specified plus 6% for handling, provided coupon is received from customer on purchase of retail merchandise. Please do not purchase at subsequent stock or merchandise to come later. Coupon must be shown on receipt. If failure to comply, they will not be honored. Submit for redemption if merchandise not received through brokers or other outside agencies. Coupons are non-transferable and void if not in proper use. Limit, 10 coupons per customer. Customer must pay all sales tax. Cash redemption value: 1/20¢. For redemption mail to: Science Center, Inc., P.O. Box 4074, Clinton, Ohio 43714. Offer good only in U.S.A. Good only on FIBRE TRIM. Any other use constitutes misuse. Limit: One coupon per sale to be purchased. Expires September 15, 1986.

Save \$1.00 now with this coupon.
Save an additional \$1.00. See package for details.

\$1.00 Off

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Try new Fibre Trim™ and save!

Europe's #1 diet product is finally here.

It's proven: Fibre Trim has successfully helped European women lose weight and keep it off.

It's sensible: it makes you feel satisfied with less food.

It's all-natural: made from concentrated grain and citrus fiber. No drug side-effects.

It's unique: made from an exclusive European formula.

It's Fibre Trim: The safe, sensible all-natural aid to weight loss.



EXHIBIT E

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Page 17

HOW FIBRE TRIM™ CHANGED THE SHAPE OF EUROPE.



It didn't happen overnight.

But gradually
Europe has taken on
sleeker new proportions.

Throughout Europe, thousands have been losing weight—and keeping it off—with the help of an intriguing product called Fibre Trim.

It's a thoroughly natural weight loss product. A product so successful for over 5 years, it's the number one diet aid in Europe.

Now, Fibre Trim is here in America.

A UNIQUE BLEND OF FIBERS PROVEN IN EUROPE

Fibre Trim contains no drugs of any kind. It's simply a unique combination of natural source fibers specifically balanced to help you eat less, and lose weight.

All fiber is not alike. Fibre Trim contains a blend of four different fibers from grain and

citrus. A blend proven successful all over Europe. A blend that works.

And Fibre Trim even offers you all of fiber's wonderful health benefits as well.

TRIUMPH OVER HUNGER PANGS

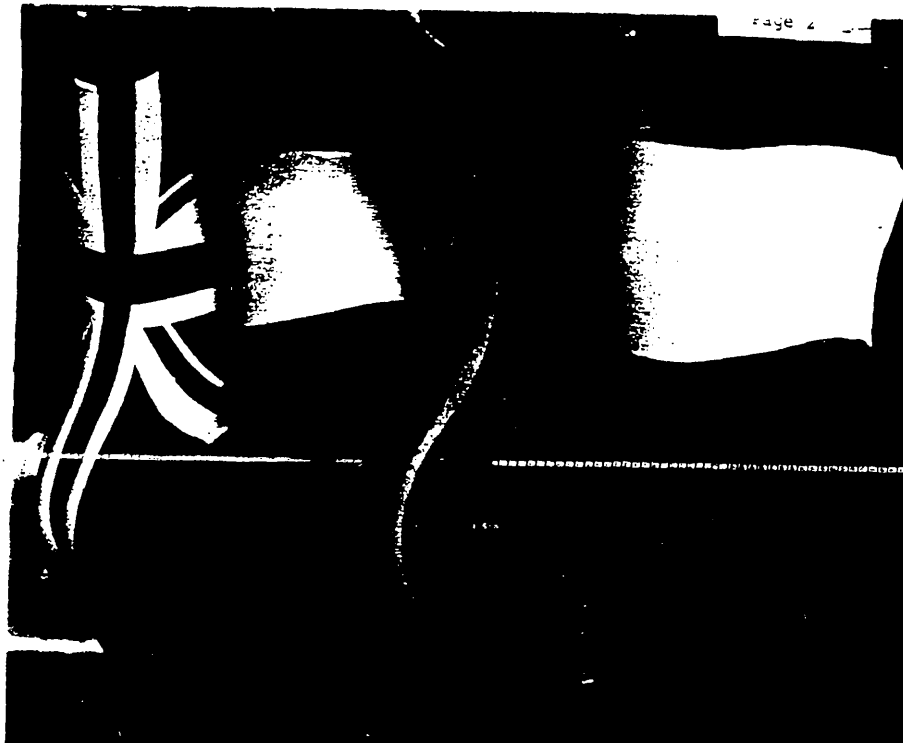
Taken with water before meals, Fibre Trim gives you a pleasant feeling of fullness. So you can still eat normally, but eat less without feeling starved. Fibre Trim also helps stave off hunger pangs between meals, and keeps those midnight binges at bay.

With Fibre Trim, you're fighting hunger without interfering with your body. Because there are no drugs, there are no drug side effects either.

GRADUALLY IS THE WAY TO LOSE WEIGHT PERMANENTLY

Fibre Trim is for those who are serious

EXHIBIT E



about their bodies. People who are smart enough to realize that the results of fad diets almost inevitably evaporate. People with sense enough to know there's just no magical way to lose weight.

You're far more sure of losing weight and keeping it off when you go about it sensibly, and take your time.

That's the Fibre Trim way. A very rational plan designed specifically for gradual weight loss.

SENSIBLE, SO SENSIBLE

Since Fibre Trim offers a safe, natural way to lose weight, it's a program you can live with until you banish

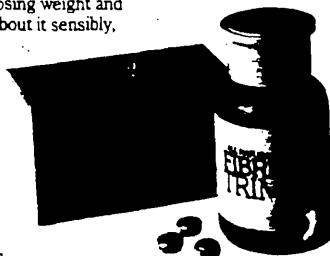
every extra pound. You can even use it for maintenance, to keep those extra pounds from creeping back on again.

But face it. You can't eat cheesecake for breakfast, lunch and dinner and lose weight.

Every dieter knows the basics. Eat right, eat less, and move around more. It's not easy, but Fibre Trim will surely help make it easier.

Because for once, there's a perfectly natural way to lose weight. And keep it off.

Get ready, America. With Fibre Trim, your shape will be changing, too.



THE EUROPEAN WAY TO SLIM. FOR GOOD.

EXHIBIT F

EXHIBIT F
Page 1

FIBRE TRIM.

YOUR ALL-NATURAL AND SAFE AID TO WEIGHT LOSS

Choosing Fibre Trim to help you lose weight is a sensible decision. After all, it's the #1 diet product in Europe and Canada. Losing excess weight can help you look better, feel better and may contribute to your overall health as well. Fibre Trim is designed to help you lose weight and keep it off—safely, sensibly and without drugs.

What is Fibre Trim?

- Fibre Trim is an all-natural product, specially developed for weight loss. Through a unique process, concentrated dietary fiber from grain and some fruits is compressed into easy-to-take FibreTabs.[™]
- Fibre Trim contains no added sugars or starches, no artificial color or flavor, and no chemical preservatives. It's sodium-free and caffeine-free. And there's only one calorie per FibreTab.
- Fibre Trim contains no drugs of any kind, so you don't have to worry about drug-related side effects commonly associated with many other weight loss products.



How Fibre Trim Helps You Lose Weight and Keep It Off

- Fibre Trim helps you improve your eating patterns. Its concentrated fiber lets you enjoy the good foods you like, while feeling satisfied with smaller portions. And because Fibre Trim makes you feel satisfied longer, it takes the edge off hunger, helping you reduce between-meal snacking.
- Fibre Trim is your partner—a helper—that makes it easier to stay with your weight loss program because it keeps you satisfied.
- Fibre Trim works naturally, so it works gradually. People who lose weight gradually tend to keep it off. And for assistance in maintaining your ideal weight, Fibre Trim can help. Because it's safe and natural, you can take it as long as you like.

Fibre Trim—A Healthy Addition to Your Daily Routine

More and more Americans are recognizing the importance of eating right, exercising and keeping fit. We know that when we feel better we look better, and we enjoy life more.

- Results of medical studies indicate that the average person can benefit from increasing the amount of fiber in his or her diet. Fiber-rich diets

have been linked to promoting healthier digestive systems.

- Typical American diets consist largely of processed foods—foods low in fiber. Even though we need more fiber in our diets, it's difficult to consume enough fiber without a lot of extra calories. Fibre Trim is a superior source of dietary fiber. No other food contains as much fiber with so few calories.
- So use Fibre Trim as a daily dietary fiber supplement. Make it as regular a part of your daily routine as brushing your teeth.

Being fit is a new way of life. Avoiding overweight, getting more exercise and including more fiber in your diet are just a few of the steps you can take to better health. Fibre Trim is a natural answer.

How To Use Fibre Trim

Take five FibreTabs with a large (8 oz.) glass of water three times daily, 15 to 30 minutes before each meal. You'll feel satisfied while eating less.

Once you've reached your weight goal, take two or three FibreTabs before mealtime to help maintain your desired weight and to benefit from the healthier fiber level that Fibre Trim provides.

Should you feel hungry between meals, take two to three additional FibreTabs with a large (8 oz.) glass of water. Since Fibre Trim is a safe, natural food fiber product, you can continue to take it as long as you like.

Note: It is important to use Fibre Trim as recommended with plenty of water over a period of several weeks to achieve the desired long-term effects. Remember, gradual weight loss tends to be long-lasting weight loss.

If your diet has been low in fiber, you may take a few days to adjust to the healthier level of dietary fiber. As a result, a temporary and slight abdominal discomfort may develop, though this soon disappears. This is a positive sign that your digestive system is becoming healthier. Should you experience discomfort, take 3 FibreTabs before each meal for the first few days while your system adjusts to the new fiber level of your diet. Then increase to the usual 5.

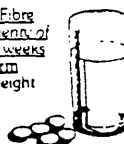


EXHIBIT F

FIBRE TRIM'S FOUR STEPS TO SLIMNESS

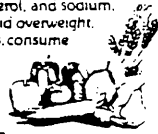
 EXHIBIT F
Page 2

Follow these four steps to a slimmer figure and healthy weight control.

1. Think Thin—Eat Smart!

Think before you eat. The U.S. Dietary Guidelines recommend that Americans eat less sugar, fat, cholesterol, and sodium, and **MORE FIBER** to avoid overweight.

So, eat smaller portions, consume fewer high calorie drinks, and increase your fiber intake.



2. Be More Active—Get More Exercise!

This doesn't mean you have to train for a marathon. Any activity—whether walking, running, swimming or cycling—is good for you, makes you feel good and promotes weight control. Be more active and watch the results!



3. Be Good to Yourself—Use Fibre Trim Every Day!

Make Fibre Trim a part of your healthier lifestyle. Take Fibre Trim to ensure a well-balanced, fiber-rich diet, and feel good knowing you're doing something good for yourself.



4. Keep Your Chin Up and Watch Your Weight Go Down!

Don't give up, don't stop! Keep at it and remember gradual weight loss is healthy weight loss.

Your Fibre Trim Weight-Loss Progress Chart

Fill in your weight goal and record your progress on this handy chart. And remember, it's important to use Fibre Trim as recommended on a daily basis to achieve the desired long-term effects.

	Date	Pounds
My Weight Now		
My Weight Goal		
My Progress	Date	Weight
2 weeks		
3 weeks		
4 weeks		
5 weeks		
6 weeks		
7 weeks		
8 weeks		

Don't Forget: Fibre Trim as suggested three times a day—every day!

Ingredients: Natural fiber from grain and citrus fruit, whey protein concentrate (non-nutritive dietary fiber: 44%). Manufactured in Denmark for Schering Corporation.

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Nutritional Information: Serving size: 5 tablets. Calories per serving: 5 (1 per FibreTab). Protein: less than 1 gram. Carbohydrate: less than 1 gram. Fat: less than 1 gram. Sodium-free. Contains less than 2% of the U.S. RDA of protein, vitamin A, vitamin C, thiamin, riboflavin, niacin, calcium and iron.

As with any diet plan, consult a health professional before starting your diet.

Complaint

EXHIBIT G



INTRODUCTION
 By Audrey Lane, Ph.D.
 author of *Maximum for the Working Woman*

Many weight gain by dieting and doctors' usual advice. Fiber Trim offers a natural, safe alternative to dieting.

The 1988 Calorie Fiber Trim Diet Plan, designed by registered dietitian Kathryn Schick, a staff of *Madame's* Diet Clinic. The plan is available in paperback for \$4.95 or in hardcover for \$9.95.

YOUR WAY TO SAFE SENSIBLE WEIGHT LOSS

Are you aware that one of every four adults over age 20 is overweight? Most dieting programs are designed to help you lose weight, but they don't help you keep it off. And so you're back and forth and back and forth. And so you're back and forth and back and forth.

The Fiber Trim Diet is an eating program for adults who want to lose weight in a healthy way. It's a diet that's designed to help you lose weight in a healthy way. It's a diet that's designed to help you lose weight in a healthy way.

THE FIBER CONNECTION

Most people are eating their exercise and healthful diet. They're eating their exercise and healthful diet. They're eating their exercise and healthful diet.

WHAT IS OLEIC ACID?

Although fiber is not a nutrient, it is a very important part of everyone's diet. It's an important part of everyone's diet. It's an important part of everyone's diet.

enough fiber in their diets. Heavy fiber is a part of people's diets. Heavy fiber is a part of people's diets. Heavy fiber is a part of people's diets.

ANA YOURS DIFFERENT TYPES OF FIBER

There are two types of fiber: soluble and insoluble. Soluble fiber is found in fruits, vegetables, and grains. Insoluble fiber is found in wheat bran, rice bran, and other whole grains.

HOW DOES FIBER HELP YOU?

Fiber helps you in many ways. It helps you in many ways. It helps you in many ways.

HOW CAN YOU ADD MORE FIBER?

You can add more fiber to your diet in many ways. You can add more fiber to your diet in many ways.

HOW CAN YOU ADD MORE FIBER?

You can add more fiber to your diet in many ways. You can add more fiber to your diet in many ways.

FIBRE TRIM - YOUR ALL-NATURAL AND SAFE ADD TO WEIGHT LOSS

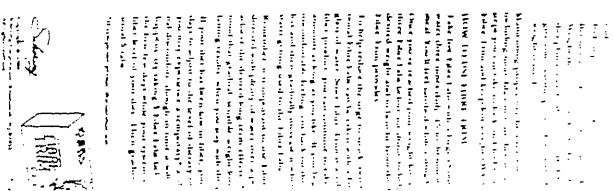
Increasing the amount of fiber in your diet is the best way to help you lose weight safely and naturally. Fiber Trim is a natural, safe, and effective way to increase your fiber intake.

WHAT IS FIBRE TRIM?

Fiber Trim is a natural, safe, and effective way to increase your fiber intake. It's a natural, safe, and effective way to increase your fiber intake.

HOW FIBRE TRIM HELPS YOU WIN AT LOSING

The special blend of fibers in Fiber Trim helps you lose weight safely and naturally. It's a natural, safe, and effective way to increase your fiber intake.



Complaint

118 F.T.C.

EXHIBIT G

GETTING STARTED ON THE FIBRE TRIM DIET PLAN

STEP 1: DETERMINE YOUR DESIRABLE WEIGHT

There are several scientific ways to find your ideal weight... Measure Fat - Be your own judge... Measure Muscle - If a pinch of skin on your thigh...

STEP 2: SET A REALISTIC WEIGHT LOSS GOAL

To lose weight you need a positive state of mind and a commitment to your goal... Losing weight is mathematical... You can lose up to 10 pounds a week...

STEP 3: START A REGULAR ACTIVITY PROGRAM

Adding exercise to your daily routine not only helps you burn calories faster... Aerobics, Brisk walking, Moving the lawn, Canoeing, Jumping rope, Dancing, Bicycling, Swimming, Tennis, Jogging, Climbing stairs, Hiking.

STEP 4: START THE FIBRE TRIM DIET

The Fibre Trim Diet* provides 1,200 calories and about 36 to 40 grams of dietary fibre daily... Choose the level that is most comfortable for you... *This diet is based on the nutritional values of the 1980 USDA Food Guide Pyramid...

Table for Day 1 menu plan showing breakfast, lunch, dinner, and snack items with their respective calorie and fibre content.

Table for Day 2 menu plan showing breakfast, lunch, dinner, and snack items with their respective calorie and fibre content.

Table for Day 3 menu plan showing breakfast, lunch, dinner, and snack items with their respective calorie and fibre content.

FIBRE TRIM DIET 7-DAY MENU PLAN

The Fibre Trim Diet, based on the nutritional values of the average healthy adult, provides 1,200 calories... 1,200 calories means you'll eat an additional serving of fruits, fibre and low-fat dairy.

- TIPS FOR SUCCESS: 1. Increase your food intake by making a start-up of increasing the size of meals... 2. Write down the information under which you experience fat gain... 3. Record your weight before you start and keep your progress up to date with a weight weight record.

Table for Day 4 menu plan showing breakfast, lunch, dinner, and snack items with their respective calorie and fibre content.

Table for Day 5 menu plan showing breakfast, lunch, dinner, and snack items with their respective calorie and fibre content.

Table for Day 6 menu plan showing breakfast, lunch, dinner, and snack items with their respective calorie and fibre content.

EXHIBIT H

Healthy Reasons to Take FIBRE TRIM[®]

Taken with water before meals, Fibre Trim helps you feel pleasantly full. So you can enjoy the foods you like yet be satisfied with eating less. Fibre Trim can also help to curb that between-meal urge to snack.

How is Fibre Trim Different?

All fiber products are not alike. Developed in Scandinavia, Fibre Trim is a unique blend of four different fibers. A blend that works.

Fibre Trim Offers a Choice.

Watching your weight may mean cutting back on foods rich in bone-building calcium.

So we also offer Fibre Trim with Calcium. It's just like regular Fibre Trim, but provides 600 mg of calcium in one day's supply.

Fibre Trim Makes Sense for Everyone.

Medical studies have shown that fiber is important to everyone's health, whether or not you're dieting. And few foods contain as much fiber with so few calories as Fibre Trim.

Watching your weight, getting more exercise and including more fiber in your diet are important to good health. Make Fibre Trim or Fibre Trim with Calcium a part of your healthy lifestyle.



INITIAL DECISION

BY LEWIS F. PARKER, ADMINISTRATIVE LAW JUDGE
SEPTEMBER 16, 1991

I. INTRODUCTION

The Commission issued its complaint in this proceeding on September 22, 1989, charging that respondent Schering Corporation ("Schering") violated Sections 5(a) and 12 of the Federal Trade Commission Act by representing, directly or by implication, that, at the time it made certain claims for its product Fibre Trim, it possessed and relied upon a reasonable basis for such claims, when, in fact, it did not.

The complaint charges in paragraph six, subparagraphs 1, 2, and 3, that Schering, through advertisements and promotional materials, represented, directly or by implication, that:

1. Fibre Trim is a high fiber supplement;
2. The recommended daily dosage of Fibre Trim provides most of a person's daily requirements of dietary fiber;
3. The recommended daily dosage of Fibre Trim provides about 2.35 grams of dietary fiber per serving or about seven grams of dietary fiber per day (Cplt, paragraph 6);¹

The complaint charges, in paragraph ten, subparagraphs 1 and 2, that Schering represented that:

1. Fibre Trim is an effective appetite suppressant, weight loss, weight control or weight maintenance product; and
2. Fibre Trim provides the health benefits associated with a fiber-rich diet or a high intake of dietary fiber from food (Cplt, paragraph 10).

¹ The following abbreviations are used in this opinion:

Cplt:	Complaint
Ans.:	Answer
CX:	Commission Exhibit
RX:	Respondent's Exhibit
Tr.:	Transcript
F.:	Finding of Fact
CPF:	Complaint Counsel's Proposed Findings
RPF:	Respondent's Proposed Findings

The complaint charges that since Schering did not possess and rely upon a reasonable basis for the alleged claims, Schering's claims were false and misleading.

Schering's answer admitted the allegations contained in subparagraphs 1 and 3 of paragraph six of the complaint. It also admitted the allegations contained in subparagraph 1 of paragraph ten of the complaint, but denied that it represented Fibre Trim to be an effective appetite suppressant (Ans., paragraphs 6 and 10).

Schering denied the other allegations of paragraphs six and ten.

After extensive discovery, trial was held from January 22, 1991, to March 28, 1991. The parties called several expert witnesses. Those testifying for the Commission were:

Dr. Terence Shimp, a professor of marketing, University of South Carolina (Tr. 52), is an expert in consumer information processing and in judging the likelihood that advertising will leave consumers with particular impressions (Tr. 71).

Dr. Alan Levy, head of the consumer research staff of the Center for Food Safety and Applied Nutrition, Food and Drug Administration (Tr. 188), is a social psychologist and an expert in environmental research methods and health behavior, including consumer awareness of diet and disease relationships (Tr. 189, 199).

Dr. Jon Story, a professor of nutritional physiology, Department of Food and Nutrition, Purdue University, is an expert in nutrition and physiology, particularly in the areas of diets, effects on cholesterol, bile and metabolism, and the effects of dietary fiber (Tr. 472).

Dr. Harry Kissileff, Associate Professor of Clinical Psychology, Department of Psychiatry and Medicine, Columbia University College of Physicians and Surgeons (Tr. 658), is an expert in human eating behavior and its physiological and psychological controls (Tr. 670).

Dr. Alan Levine, Deputy Associate Chief of Staff for Research, Minneapolis Veterans Administration Medical Center (Tr. 748), is an expert in body weight regulation, including the regulation of food intake and energy expenditure (Tr. 759).

Dr. David Levitsky, professor of nutrition and psychology, Cornell University (Tr. 881), is an expert in the control of food intake and body weight, human obesity, statistics and the design of clinical trials (Tr. 911).

Dr. Elaine Lanza, a nutritionist with the National Cancer Institute, National Institute of Health (Tr. 1180), is an expert in nutrition, cancer, the physiological effects of dietary fiber, and the conduct and review of clinical trials involving nutrition intervention, including dietary fiber (Tr. 1209-10).

The following experts testified for Schering:

Elizabeth Fazio, of VOPAN Marketing Research Corporation (Tr. 1794), is an expert in marketing and advertising research (Tr. 1809).

David M. Kweskin, Senior Vice President, Client Services, Ross-Cooper Associates (Tr. 1860-62), is an expert in the design, execution and analysis of consumer research studies, including what messages an advertisement communicates to consumers, the evaluation of products and marketing concepts, and consumers' needs (Tr. 1866-68).

David A. Leury, Vice President and Senior Methodologist, Total Research Corp. (Tr. 1906-07), is an expert in market research (Tr. 1924).

Dr. David Stewart, a professor of marketing, University of Southern California (Tr. 2031), is an expert in advertising, marketing and consumer responses to advertising (Tr. 2039).

Dr. Evelyn Albu, a former Director of Medical Marketing for Schering (Tr. 2176), is an expert in the analysis of medical and scientific literature and the analysis of clinical studies (Tr. 2187).

Dr. Domenic Iezzoni, Director of Medical Services for Schering (Tr. 2393), is an expert in the analysis of the medical validity of reports of clinical trials (Tr. 2405).

Dr. Frank Hurley, a biostatistician and President of Biometric Research Institute (Tr. 2566-67), is an expert in biostatistics, the design, analysis, coordination and management of clinical trials, and Food and Drug Administration requirements for such trials (Tr. 2586).

Dr. Nelson Schimmel, a self-employed consultant and a former Vice President of Regulatory Affairs for Schering (Tr. 2779, 2784), is an expert in the evaluation of scientific and medical literature and clinical trials (Tr. 2787).

Dr. Stig Larsen, a statistician and the President of MEDSTAT, a company which does statistical analyses in epidemiology studies and clinical trials (Tr. 2900-03), is an expert in mathematics, medical statistics, and the statistical evaluation of clinical trials (Tr. 2918).

Dr. David Ahern, a clinical psychologist employed by the Institute for Behavioral Medicine, Providence, R.I. (Tr. 3207), is an expert in the design, conduct and statistical evaluation of clinical trials (Tr. 3220).

Dr. Martin Eastwood, a gastroenterologist, a member of the Faculty of Medicine, University of Edinburgh, and a National Health Service consultant physician (Tr. 3380), is an expert in gastroenterology, human nutrition, the physiological effects of dietary fiber, and the design, conduct and analysis of clinical trials (Tr. 3390).

Dr. Alvan Feinstein, a professor of medicine and epidemiology at the Yale University School of Medicine (Tr. 3534), is an expert in biostatistics, epidemiology and the design, conduct and statistical evaluation of clinical trials (Tr. 3542).

Dr. James Anderson, a physician on the staff of the University of Kentucky Hospital, and a professor of medicine and clinical nutrition with the Hospital (Tr. 3733), is an expert in human nutrition and the physiological effects of dietary fiber (Tr. 3739).

Dr. Joanne Slavin, associate professor of nutrition, Department of Food Science and Nutrition, University of Minnesota (Tr. 3837), is an expert in human nutrition, the physiological effects of dietary fiber on humans, and the design, conduct and analysis of clinical trials (Tr. 3845).

The parties filed their proposed findings of fact and conclusions of law on June 10, 1991. Answers were filed on July 15, 1991. The Commission granted me an extension of time to October 15, 1991, to file this initial decision.

This decision is based on the transcript of testimony, the exhibits which I received in evidence and the proposed findings of fact and conclusions of law and answers thereto filed by the parties. I have adopted several of the proposed findings verbatim. Others have been adopted in substance. All other findings are rejected either because they are not supported by the record or because they are irrelevant.

II. FINDINGS OF FACT

A. *The Business Of Schering*

1. Schering, a subsidiary of Schering-Plough, is a corporation organized, existing, and doing business under and by virtue of the

laws of New Jersey, with its offices and principal place of business located at 2000 Galloping Hill Road, Kenilworth, New Jersey (Ans., paragraph 1). Its principal business is the development and marketing of prescription and over-the-counter ("OTC") drugs (Tr. 2411, 2809), such as Afrin, Coricidin, Drixoral and Tinactin (CX 144).

B. Schering's Decision To Market Fibre Trim

2. Farma Food A/S ("Farma Food"), a Danish company headquartered in Copenhagen which was started in the early 1970s principally to develop dietary fiber products, is the manufacturer of Fibre Trim (Tr. 305-06; RX 313, p. 1).

3. Before it was marketed in the United States, Fibre Trim, which is composed of natural fiber from citrus fruit and grain compressed into tablets, was the best selling diet aid in Europe, Canada and other parts of the world (Tr. 305, 1458-59, 1564, 2199; RX 263, RX 313, p. 2, RX 358, p. 1).

4. During negotiations with a pharmaceutical company, A.H. Robbins, regarding another product, Schering was informed that Robbins had considered and rejected marketing Fibre Trim in the United States. After a series of meetings with representatives of Farma Food, Schering decided, in late 1984, to enter into an agreement with Farma Food to market Fibre Trim in the United States (Tr. 305-06, 1456-57, 1471).

5. Charles Bonfield, the Vice President, and later President, of Farma Food's U.S. subsidiary, was the liaison between Farma Food and the Schering marketing department regarding Fibre Trim (Tr. 307-08), and sent Schering a series of letters detailing the characteristics and effects of dietary fiber and the demand for diet products in the United States (Tr. 1464-65). He also gave Schering copies of clinical studies of Fibre Trim's efficacy as a weight loss product (Tr. 308).

6. Since Fibre Trim would be the first non-drug product marketed by Schering, it conducted extensive market research into the proper positioning of Fibre Trim in the diet aids market (Tr. 1468-69, 1499, 1564-65).

7. Consumer research confirmed that because of the increase in obesity in the United States (CX 142, p. 1) a market existed for an all-natural aid to weight loss different from other products, particularly those using Phenylpropanolamine ("PPA") as the active ingredient

since PPA can cause side effects such as nervousness, dizziness and sleeplessness (Tr. 672, 1471-72f 156465, 1602; RX 313, p. 4).

8. The amount of market and consumer research conducted for Fibre Trim was significantly greater than that for other Schering products (Tr. 1499). Schering contracted with several independent market research firms to conduct consumer research prior to test marketing Fibre Trim, while Schering's Marketing Research Department also continued to conduct consumer studies on its own (Tr. 1564-65).

9. Early concept testing showed that greatest consumer interest was generated by positioning Fibre Trim as a sensible way to lose weight. The "sensible" concept became the central message of the Fibre Trim creative strategy and was incorporated into virtually every Fibre Trim advertisement (Tr. 1488, 1579-82, 1589-91, 1824, 1825, 1829, 2053, 2060, 2062-63; RX 240, p. 7).

10. The target audience for Fibre Trim was seen to be females who were relatively sophisticated, intelligent, somewhat upscale economically, and knowledgeable about diet advertising (Tr. 78, 108, 1477; RX 229).

11. After test marketing Fibre Trim from May to August 1985 (Tr. 1494, 1509-70), Schering's top management authorized the marketing department to introduce Fibre Trim nationwide (Tr. 1502, 1514-15, 1642-43). According to Schering, Fibre Trim became the top-selling diet product in its category within a few months of its national introduction (CX 347).

12. During the first year following its introduction in the United States, Schering spent \$16.6 million advertising Fibre Trim and realized \$48.5 million in sales, garnering approximately 17 percent of the diet product market, second only to Thompson Medical's Dexatrim (CX 182, pp. 1, 4). Schering continued to expend significant resources advertising Fibre Trim in 1987, spending \$9.6 million in the first half of the year alone (CX 181, p. 2).

13. Fibre Trim is sold in bottles of 100 or 250 tablets (*e.g.*, CX 351). One-hundred-tablet bottles have accounted for approximately two-thirds of total sales, and 250-tablet bottles have accounted for approximately one-third of sales. The suggested retail price for the 100 and 250-tablet bottles was \$5.99 and \$12.69 (CX 310, p. 3; Tr. 1518).

C. Jurisdiction

14. Schering has advertised, offered for sale, sold and distributed Fibre Trim to the public as a high fiber supplement, and as a weight loss and weight maintenance product (Ans., paragraph 2).

15. At all times relevant to the complaint, the acts and practices of respondent alleged in the complaint have been in or have affected commerce (Ans., paragraph 4).

D. Schering's Advertising Of Fibre Trim

1. Introduction

16. The advertisements and promotional materials at issue were disseminated in a long-running advertising campaign, beginning with the test marketing in 1985, and continuing nationwide from January 1986 until the present (Tr. 1594, 1681, 1694, 1726; *see* CX 280). Schering's 1986 advertising expenditures for Fibre Trim of about \$16.6 million were the highest of any diet product (CX 182, pp. 1, 10).

17. Schering's six-year advertising and promotion effort has used television and radio advertisements and promotions, as well as print media, newspaper supplements, free-standing inserts, in-package coupons and direct mail (*see, e.g.*, CX 339, CX 278, CX 291; Tr. 1600-04).

18. Schering also disseminated promotional materials to physicians, pharmacists, retailers and others who sell or recommend the purchase of weight loss products or fiber supplements to consumers (*e.g.*, CX 354, CX 358; Tr. 1734).

19. The test marketing of Fibre Trim, from May - August 1985, used television and print advertisements, free-standing inserts and promotional materials for members of the trade, and reached millions of consumers (Tr. 1502, 1528-29, 1656; CX 321, CX 396).

2. Television Advertisements

20. Among the first advertisements to be disseminated in the national campaign were the 15-second and 30-second versions of the "French Girls" television commercial (CX 339, CX 343, CX 344) which were broadcast on the three major networks or cable networks

during the test marketing in 1985 and at various times through 1989 (CX 368, Interrog. No's. 2, 3, CX 305, CX 316, CX 321, CX 339).

21. The "Take It Off" television commercial (CX 340, CX 343) was broadcast on selected test market television stations in 1985 (CX 368, Interrog. No. 2).

22. The "Italian Men" television commercial (CX 341, CX 343) was broadcast on three networks throughout 1987 (CX 368, Interrog. No. 2).

23. The "English Maids" television commercial (CX 342, CX 343) was broadcast on three networks throughout 1987 (CX 368, Interrog. No. 2, CX 305, p. 2).

24. The 15-second and 30-second versions of the "Enfants" television advertisement (CX 343, CX 344) were broadcast on three networks in 1987 and 1988 (CX 368, Interrog. No. 3, CX 305, CX 316, pp. 1, 2).

3. Radio Advertisements

25. The radio advertisement entitled "Interview/Consumer Hotline with Audrey Cross" (CX 291) was distributed to 1,009 radio stations and aired by 313, with a total reach of almost five million listeners (CX 317, p. 1, CX 322, p. 1, CX 368, Interrog. No. 1).

4. Print Advertisements

26. Two brochures entitled "Fibre Trim Diet Plan" (CX 284, CX 288) were offered by Audrey Cross on television shows and radio programs during 1986 and 1987. They were also disseminated at retailer displays, physicians' offices, pharmacy counters and by mail request directly from Schering Corporation (CX 368, Interrog. No. 1).

27. The newspaper advertisement entitled "Health Hints, Fiber and Weight Loss" (CX 289) was printed in 4,000 different newspapers during the week of February 19, 1986 (CX 368, Interrog. No. 1).

28. The newspaper advertisement entitled "Quick Quiz" (CX 290) was disseminated to 3,800 different newspapers on April 4, 1986 (CX 318, CX 368, Interrog. No. 1).

29. Five different print advertisements were included as free-standing inserts in Sunday newspaper supplements as follows:

CX 271 -- January 18, 1987
CX 272 -- February 15, 1987
CX 278 -- August 10, 1986
CX 287 -- January 10, 1988
CX 293 -- April 27, 1986

Schering intended to distribute 47 million copies of CX 293 nationally (RX 254, p. 22).

30. The newspaper advertisement entitled "Fibre Trim Changed The Shape Of Europe" (CX 279) was printed in the Good Health Magazine of The New York Times, in January 1986 (CX 368, Interrog. No. 1).

31. The newspaper advertisement, with a coupon, entitled "Try New Fibre Trim And Save" (CX 387) appeared as a free-standing insert in the test market and in the national launch of the product (Tr. 1627).

32. The advertisement entitled "Shape Up For Summer" (CX 274) appeared in major national magazines such as Health, Weight Watchers and American Health, in May 1987 (CX 368, Interrog. No. 1).

33. The advertisements entitled "Lately, There's A Lot Less To Pinch In Italy" (CX 285) and "How Fibre Trim Stopped The British Pound From Fluctuating" (CX 286) appeared in major national magazines such as Family Circle, Ladies Home Journal, Redbook, Woman's Day, Cosmopolitan, Glamour, Harpers Bazaar, Health, People, Self, and Working Mother, in 1986 (Tr. 1663; CX 310, CX 325, CX 368, Interrog. No. 1).

34. The advertisement entitled "How Fibre Trim Gave New Strength To The French Resistance" (CX 287) was printed in the major national magazine Health, in February 1987 (CX 368, Interrog. No. 1).

35. The advertisement entitled "Fibre Trim Changed The Shape Of Europe" (CX 292) appeared nationally in magazines during the test market (Tr. 1620; CX 368, Interrog. No. 1).

36. The print advertisement entitled "Lose Weight With The Help Of Phenylpropanolamine Hydrochloride" (CX 294) (also called "Pills") appeared in major national magazines such as New Woman, American Health, Ladies Home Journal, Self, Hippocrates, Health, People, US, Working Woman, Redbook, Vogue, Family Circle,

Better Homes and Gardens, Working Mother and Cooking Light, in 1988 (Tr. 1697; CX 368, Interrog. No. 1).

37. Several similar print advertisements entitled "How Fibre Trim Changed The Shape Of Europe" were disseminated. CX 295 was disseminated in magazines in 1986 (CX 368, Interrog. No. 1). CX 296 was disseminated in magazines during the test market in 1985 (CX 368, Interrog. No. 1; *see* Tr. 1520-22, 1525). CX 297 was disseminated in major national magazines, such as Time on June 24, 1985, Newsweek on July 22, 1985, Family Circle on August 13, 1985, Health in August 1985, Ladies Home Journal in August 1985, Redbook in August 1985, Sunset in August 1985, Woman's Day on August 13, 1985, and on September 2, 1985, and in Parade Magazine on August 10, 1985 (CX 368, Interrog. No. 1; *see* Tr. 1520-22). CX 299 [RX 397] was disseminated in early 1986 (CX 368, Interrog. No. 1; Tr. 1620). CX 300 was disseminated in major national magazines, such as Better Homes and Gardens in August 1985, Health in July 1985, Time on June 17, 1985, Newsweek on June 24, 1985, Sunset in July 1985, Good Housekeeping in August 1985 and 1,001 Home Ideas in August 1985 (Tr. 1620; CX 368, Interrog. No. 1).

38. The print advertisement entitled "Healthy Reasons To Take Fibre Trim" (CX 273) was disseminated to the public by direct mail in 1987 (CX 368, Interrog. No. 1).

39. The brochure entitled "Fiber Facts" (CX 275 [RX 356]) was disseminated to consumers through displays set up at retailers, pharmacies and dieticians' and doctors' offices, as well as through other public relations efforts, during the test marketing and the first half of 1986 (CX 368, Interrog. No. 1; Tr. 1628).

40. The advertisement entitled "Fibre Trim Diet Plan" (CX 276) was disseminated to consumers through distribution to retailers for placement on the shelf beside the product in early 1986 (CX 368, Interrog. No. 1).

5. Advertisements to the Trade

41. The print advertisement entitled "There's A New High Fiber Supplement To Help Your Patients Lose Weight. . . ." (CX 349) was distributed to physicians (CX 369, Respondent's Supplemental Responses to Complaint Counsel's Second Set of Interrogatories [hereinafter "S. Interrog."], No. 1).

42. The brochure entitled "For Your Patients Who Have Trouble With Dieting Programs" (CX 354) was distributed through Schering retail representatives, who called on physicians in 1987 (CX 369, S. Interrog. No. 1).

43. The print advertisement entitled "Losing Weight Safely, Sensibly, Gradually. . . ." (CX 346) was published in magazines such as Drug Topics and Drug Store News, which are aimed at pharmacists and pharmaceutical wholesalers (CX 369, S. Interrog. No. 1).

44. The brochures entitled "Get Ready With Fibre Trim" (CX 352) and "Stock Display And Recommend New Fibre Trim" (CX 357) were distributed to pharmacists in 1985 (CX 369, S. Interrog. No. 1).

45. Letters to pharmacists, beginning with "Your Customers Often Ask Your Advice When Choosing A Diet Product" (CX 356) and "Schering Corporation Is Pleased To Introduce A New Unique Diet Product. . . ." (CX 358) were distributed to pharmacists in 1985 (CX 369, S. Interrog. No. 1).

46. The product information sheet entitled "Fibre Trim With Calcium" (CX 347) was distributed to Schering sales personnel in 1987 (CX 369, S. Interrog. No. 1).

47. The brochure entitled "All Natural Fibre Trim, High Fiber Food Supplement" (CX 350) was distributed to Schering sales personnel in the fall of 1986 (CX 369, S. Interrog. No. 1).

48. Two product information sheets entitled "Fibre Trim" (CX 355, 351) were distributed to Schering sales personnel in 1985 and 1986 (CX 369, S. Interrog. No. 1).

49. The product information document entitled "Introducing All Natural Fibre Trim" (CX 353) was distributed to Schering sales personnel in November 1985 (CX 369, S. Interrog. No. 1).

50. Two sales brochures entitled "Fibre Trim" (CX 348) and "New All-Natural Fibre Trim" (CX 359) were distributed to retailers and wholesalers in 1985 (CX 369, S. Interrog. No. 1).

6. Inserts

51. The package insert entitled "Fibre Trim" (CX 280) was placed in the Fibre Trim package from 1985 to the present (CX 368, Interrog. No. 1).

E. The Claims Made In Schering's Advertisements

1. The Health Benefits Claim

a. The Advertisements

52. References to health in some of the Fibre Trim advertisements were intended to convey the message that it is a healthy, natural way to lose weight and to differentiate it from drug-based diet products (Tr. 1625-26): "And since Fibre Trim is nothing but natural fiber, it can become a healthy way of life. A way to stay slim long after the party's over" (RX 396). "Increasing the amount of fiber in your diet is a healthy way to help you take the pounds off and keep them off naturally" (RX 353; CX 275). "Since Fibre Trim is simply natural fiber, it can become a sensible way of life -- even after you reach your goal. It's the healthy way to stay trim for good" (RX 355; CX 287). "Being fit is a new way of life. Avoiding overweight, getting more exercise and including more fiber in your diet are just a few of the steps you can take to better health" (RX 358; CX 280).

53. However, other Fibre Trim advertisements go beyond the claim that Fibre Trim is a healthy way to lose weight and emphasize the health benefits associated with dietary fiber without regard to Fibre Trim's primary use as a weight loss aid. For example, the headline of CX 273 "Healthy Reasons to Take Fibre Trim" suggests that there are reasons, not a single reason, to use Fibre Trim, and other language states that these reasons involve health, not simply diet: "Medical studies have shown that fiber is important to everyone's health, whether or not you're dieting" (emphasis added).

54. Other advertisements stress the health benefits of fiber without limiting them to those associated with a reduced calorie diet:

CX 275 states that "fiber is essential for good nutrition and good health," that Fibre Trim may be used to "maintain your overall good health," and that it is one of the best sources of dietary fiber.

The Fibre Trim package insert, CX 280, states: "Fibre Trim -- A Healthy Addition to Your Daily Routine," claims that medical studies have shown that "[f]iber-rich diets have been linked to promoting healthier digestive systems," and concludes that "Fibre Trim is a superior source of dietary fiber. No other food contains as much fiber with so few calories" (emphasis in original).

Various versions of the “Shape of Europe” advertisement state that Fibre Trim provides “all of fiber’s wonderful health benefits to boot” (CX 295, CX 296, CX 297, CX 300) or “fiber’s health benefits” (CX 278, CX 293).

Other advertisements state that “Fibre Trim provides needed fiber that many doctors, nutritionists, and scientists have been saying we lack in our diets” (CX 279, p. 2, CX 292, p. 1).

Fibre Trim advertisements disseminated to retailers, pharmacists, or other members of the trade refer to fiber’s health benefits.

Healthy--adds beneficial dietary fiber... superior source of low-calorie fiber... Fiber-rich diets linked to healthier digestive systems (CX 266).

Fibre Trim contributes to the daily intake of dietary fiber, an essential component of good health (CX 349).

[Fibre Trim provides] the healthy benefits of fiber supplementation (CX 352).

You’ve been hearing about the benefits of fiber for years. Now you have convenient Fibre Trim. . . . (CX 356, CX 358).

55. After reviewing Schering’s advertisements, Dr. Shimp concluded that they made product claims related to health by associating one object, Fibre Trim, with another object, fiber, and by explicitly and implicitly asserting that Fibre Trim will provide the same health benefits that fiber or fiber-rich foods provide (CX 266, CX 273, CX 275, CX 278, CX 279, CX 280, CX 292, CX 293, CX 296, CX 295, CX 297; Tr. 123-25, 128-30, 133-34, 136-37, 138-42, 146-50).

56. After reviewing Dr. Shimp’s analysis and the advertisements in question, I find that they make the claim that Fibre Trim provides the health benefits associated with a fiber-rich diet or a high intake of dietary fiber from food. Although the advertisements do not specify the particular benefits that Fibre Trim will provide, they do represent that whatever health benefits the individual consumer associates with fiber will be provided by taking Fibre Trim (*see, e.g.*, Tr. 124-25 re CX 273; Tr. 137 re CX 296). The FDA’s health and diet surveys reveal the health benefits that consumers associate with fiber.

b. The FDA’s Health and Diet Surveys

57. The Health and Diet Survey is a biennial telephone survey conducted by the Food and Drug Administration (“FDA”) which

focuses on consumers' knowledge of diet and health issues (Tr. 190-91, 205). The survey's sample size is composed of approximately 4,000 respondents who are randomly subdivided into four equal sub-samples called "replicates." The questions are different for each replicate, each addressing the same topics from different perspectives. In essence, the Health and Diet Survey is four related, but different, surveys (Tr. 196, 205-07).

58. The 1986 Survey included a number of questions relating to consumer understanding of the health effects of fiber, and Dr. Levy of the FDA testified to conclusions which can be drawn from responses to those questions (CX 103; Tr. 211).

59. Question 41 in the fourth replicate asked respondents if they had "heard about any health problems that might be related to how much or how little fiber people consume?" (Tr. 211; CX 2103, p. 13). Only if they responded "yes" to this screener question were they asked question 42, an open-ended question: "What health problems might be related to not consuming enough fiber?" (CX 103, p. 14; Tr. 212). Question 42 was followed by a probe: "Are there any other problems that might be related to not consuming enough fiber?" (CX 103, p. 14; Tr. 212).

60. In response to question 41, 57% of the replicate said they had heard of health effects associated with fiber; they were then asked question 42 (Tr. 213; CX 103, p. 42). Thirty-nine percent of the replicate sample of 1,000 respondents mentioned cancer as a health problem related to not consuming enough fiber (Tr. 214; CX 382, p. 1). Of those respondents who were more articulate and specified a particular form of cancer, 28% mentioned cancer of the colon, intestines or bowels as a health problem related to insufficient fiber (Tr. 215; CX 282, p. 2).

61. Forty-nine percent of those respondents with more than a high school education believed cancer to be related to insufficient fiber consumption. Women were significantly more likely than men to mention cancer as a health problem related to not consuming enough fiber (Tr. 218-19).

62. Its laxative effect was the next most frequently mentioned effect of fiber (14%) (Tr. 216; CX 382, p. 2).

63. Respondents in the third replicate were asked question 33: "Have you heard about any things people could eat or drink that might help prevent cancer?" (CX 103, p. 11; Tr. 210, 220). Those who responded affirmatively were then asked question 34: "What

things could people eat or drink that might help prevent cancer?" This open-ended question was followed with the probe "are there any other things that people eat or drink that might help prevent cancer?," providing an opportunity for respondents to supply up to four answers (CX 103, p. 11). Thirty-two percent of the 1,000 subjects in this replicate responded that fiber was a cancer preventative (Tr. 221-22; CX 103, p. 54).

64. Respondents in the second replicate were asked "What about cancer of the colon, rectum, or intestines: As you understand it, what things might make people more likely to get these cancers?" (CX 103, p. 8 (question 25); Tr. 224-25). In response to this open-ended question, which, unlike the two previously discussed questions, was not limited to dietary factors, approximately 29% mentioned "too little fiber" as a risk factor for developing these cancers (Tr. 226; CX 103, p. 38).

65. Dr. Levy concluded that in 1986, the most frequently mentioned cancer preventative was fiber consumption and that upscale consumers, Fibre Trim's target market, were even more likely to make this association (Tr. 223-26).

66. The 1988 Survey produced similar results: 25% of the respondents in replicate C mentioned cancer, the most frequently given response, as a health problem associated with not consuming enough fiber (Tr. 232; CX 105, p. 29). The laxative effect of fiber was also a frequently mentioned health benefit (Tr. 233). Twenty-eight percent of respondents in replicate B answered that fiber was a cancer preventative (Tr. 235-36; CX 105, p. 6), and Dr. Levy stated that the 1988 Survey revealed that the public considered fiber to be the primary dietary factor related to cancer prevention (Tr. 238).

67. Twenty-one percent of the respondents in the B replicate named fiber as something one could eat that might prevent heart attacks or lower blood cholesterol (Tr. 239-40; CX 105, pp. 5, 129, 139). Forty-three percent of respondents in the A replicate stated that eating more high-fiber foods might have a large effect in preventing heart disease or heart attack, and 38% responded that it might have a moderate effect (Tr. 243-44; CX 105, p. 38).

68. The results of the 1986 and 1988 surveys represent the knowledge and attitude of the U.S. population as a whole with respect to the relationship between fiber and disease and can be used to determine their interpretation of advertising claims for fiber (Tr. 248-50).

69. The responses to the 1986 and 1988 surveys demonstrate that cancer prevention was the primary benefit that consumers associated with a high fiber diet and that a considerable portion of the population also associates such a diet with reduction in the risk of heart disease. The laxative effect of fiber was also mentioned by a significant number of survey respondents.

c. The Views of Schering Employees

70. Mr. Walsh, the senior director of OTC marketing for Schering, was responsible for approving draft advertising copy for Fibre Trim; he testified that the language in CX 296 “Fibre Trim even offers all of fiber’s wonderful health benefits to boot” suggests that “whatever those healthy things that you can gain from fiber as it relates to the diet you would get from this product” (Tr. 1525-26).

71. Dr. Albu, the head of Schering’s professional services department, testified that the claim in CX 297 that “Fibre Trim even offers you all of fiber’s wonderful health benefits to boot” was supported because “fiber is fiber,” and therefore whatever health benefits are provided by fiber-containing foods are also provided by Fibre Trim, and that the health benefits associated in the literature with increased fiber intake included reduced risk of colon cancer and reduction in serum cholesterol (Tr. 2365-66). Dr. Iezzoni, who was responsible for the medical department’s review of Fibre Trim advertisements, gave similar testimony (Tr. 2536, 2547-49).

72. Sharon McGee, a senior brand manager who was responsible for the Fibre Trim brand from October 1984 through February 1987, testified that Schering undertook a public relations campaign to “[c]reate a positive environment among consumers for the benefits of fiber for . . . general health prior to the start of advertising” (Tr. 1558, 1604-05; CX 308, p. 10).

73. Materials which Schering provided to its sales force contain many references to the health benefits of fiber, including cancer prevention, cholesterol reduction and treatment of diabetes and diverticulosis (CX 142, pp. 42-46, CX 143, pp. 10, 11, 13, 16, 19, 20, 27-28), and Schering knew that consumer “awareness of the benefits of a diet rich in fiber is rising” (CX 143, p. 17):

There is not a week without an article on fiber in a health or women’s magazine. The introduction of FIBRE TRIM is, as you can see, very timely. FIBRE TRIM will benefit from this favorable environment. *Id.*

74. In materials it disseminated at the press conference announcing the national launch of Fibre Trim (CX 310, p. 13; *see* Tr. 1517), Schering claimed that dietary fiber had value in preventing some digestive conditions and that high fiber diets may reduce the risk for certain kinds of colon cancer. Those same materials stated that “[o]ne of the best sources of dietary fiber is FIBRE TRIM. . . .” (CX 310, p. 16).

d. Schering’s Consumer Research

75. Dr. Stewart, Schering’s advertising expert, testified that no advertisements for Fibre Trim made express claims that it provides the health benefits associated with a fiber-rich diet or a high intake of dietary fiber from food (Tr. 2091) and Dr. Shimp agreed that Fibre Trim advertisements which he was questioned about do not specify any particular health benefits provided by Fibre Trim (Tr. 124, 137).

76. Dr. Stewart also testified that the following research conducted by or for Schering reveals that consumers did not take away from Fibre Trim advertisements the message that it will provide the health benefits associated with a diet rich in fiber or a high intake of dietary fiber (Tr. 2057-76).

- (1) Initial Focus Group Consumer Testing: “In Search of A
Concept Statement For Fiber [sic] Trim,”
(Marketing Perceptions, Inc.) (November 1984)

77. In October 1984, at Schering’s request, the market research firm, Marketing Perceptions, Inc. (“Marketing Perceptions”), conducted initial diet market consumer focus groups relating to Fibre Trim (Tr. 1469, 1564; RX 235). Focus groups yield qualitative results about consumer beliefs that are not achieved with consumer surveys (Tr. 2065-66). The purpose of this study was to explore consumers’ feelings and perceptions about dieting in general (Tr. 1564-65). Dr. Stewart testified that the focus group consumers did not take away from Fibre Trim commercials the health benefits claim (Tr. 2066, 2068), and Ms. McGee concluded that the target audience realized that Fibre Trim was not magical but was a sensible diet aid (Tr. 1567-68).

(2) Diet Concept Study (VOPAN Marketing Research)
(January 1985)

78. From December 1984 to early 1985, Schering contracted with another independent market research firm, VOPAN, to conduct a qualitative study of Fibre Trim concepts for consumer advertising (RX 239; Tr. 1573-74, 1809, 2059). VOPAN stands for Voice Pitch Analysis, a sophisticated technique which measures two types of consumer response: (1) voice pitch changes; and (2) consumer recall of advertising messages (Tr. 1573-74, 1798-1800, 2059). The basic premise of this methodology is the belief that consumers' true feelings can be discerned from variations in the intonations in their voices (Tr. 1487, 1573, 1798-99).

79. The specific objective of the VOPAN study was to determine which one of four concepts for Fibre Trim was most persuasive and seemed to communicate the best information about the product (RX 192, p. 3; Tr. 1814).

80. VOPAN's methodology involved a mall intercept test of forcing exposure of one of the four concepts to 150 women who had dieted in the past year, who planned to diet in the future and who were 25-49 years of age (RX 192, p. 4; Tr. 1812).

81. The consumers reviewed one of four "concepts," rather than specific advertisements (Tr. 1814-15), which were developed by the advertising agency (Ogilvy & Mather), Schering and VOPAN (Tr. 1576).

82. According to Dr. Stewart and Ms. Fazio, the results of the VOPAN test do not indicate that consumers took away the message that Fibre Trim would provide specific health benefits associated with a fiber-rich diet or a high intake of dietary fiber from food (Tr. 1831, 2060, 2062). Ms. Fazio concluded that no data in this study indicated that the Fibre Trim positioning communicated to consumers that it is an effective appetite suppressant which works like Dexatrim (Tr. 1832; RX 192) or that Fibre Trim would produce weight loss without needing to cut back on calories (Tr. 1835).

83. Elements of all the concepts which tested favorably were incorporated into commercials and other Fibre Trim advertising (Tr. 1487, 2063-65).

(3) Mapes & Ross Television Commercial Testing
(April and May 1985)

84. Prior to the formal test marketing of Fibre Trim (in April and early May 1985), Schering contracted with an independent market research firm, Mapes & Ross, to conduct consumer testing of three commercials -- "French Girls," "Sensible Girls," and "Take It Off" (a Canadian commercial) for consumer appeal and message communication, among other things (Tr. 1492-93, 1606, 1616; RX 243).

85. Ms. McGee of Schering testified that the Mapes & Ross consumer testing, including the verbatim consumer responses, do not indicate that people who saw the Fibre Trim commercials understood them to communicate that it was an effective appetite suppressant (Tr. 1620) or that taking fiber would provide the health benefits of a diet high in fiber from foods or that the people who saw the commercials understood them to suggest that taking Fibre Trim would provide any specific health benefits, like reducing the risk of colon cancer or coronary heart disease, or any other health benefits (Tr. 1619; RX 243, RX 262).

(4) Diet Product Awareness, Trial and Usage Study, Waves I and II
(July and September 1985)

86. In September 1985, the marketing research firm, Total Research Corporation ("TRC"), conducted an Awareness Trial and Usage ("ATU") study at Schering's request to examine which television commercial, including "French Girls," was most effective in communicating the desired advertising message about Fibre Trim to consumers in the test markets and what spending level was necessary for the commercial to be effective (Tr. 1637-41, 1918; RX 246).

87. An ATU study is a survey intended, among other things, to measure the awareness that consumers have of a particular product or several products in the product category, and to determine how many people have tried the product and how many people continue to use the product (Tr. 1918). The ATU study also contained questions regarding consumers' sources of information about Fibre Trim and what messages they might have taken away from that source (Tr. 1933).

88. In Dr. Stewart's view, the ATU studies do not contain any data indicating that consumers took away from Fibre Trim

advertising the message that it will provide the health benefits associated with a fiber-rich diet or a high intake of dietary fiber from food because the responses to the ATU studies show that consumers did not mention any specific benefits of fiber (RX 224, RX 225; Tr. 2070-72). Furthermore, he concluded that the studies reveal that consumers carried away messages from the advertisements that Fibre Trim was sensible and natural and did not contain drugs or stimulants (Tr. 2069-70; RX 224).

(5) Diet Aid Repeat Purchase Study Tabulations (TRC)
(December 1985)

89. In December 1985, TRC interviewed by telephone a sample of consumers who had purchased Fibre Trim and mailed back Business Reply Cards included in the Fibre Trim package (Tr. 1951, 1953; RX 226, RX 227). The results of the interviews were tabulated by TRC and provided to Schering (Tr. 1953; RX 227).

90. The questionnaire used for the interviews included the question "What, if anything do you particularly like about Fibre Trim? What else do you like?," which was posed to both current and non-current users of Fibre Trim (RX 226, pp. 3-4; Tr. 1951, 1954). Mr. Leury of TRC testified that no consumers responded that they thought they were getting a specific health benefit such as reduced risk of colon cancer or reduced risk of diabetes when asked this question (Tr. 1954-55; RX 227, p. 23).

(6) "Fibre Trim User Study" (TRC) (October 1986)

91. In September 1986, TRC conducted another study, entitled "Fibre Trim User Study," based on the results of telephone interviews with a sample of 200 consumers who had purchased Fibre Trim and returned Business Reply Cards (Tr. 1958, 2072-73; RX 228).

92. Dr. Stewart testified that the Fibre Trim User Study indicates that Fibre Trim advertising did not communicate to consumers the message that Fibre Trim provides the health benefits associated with a fiber-rich diet or a high intake of dietary fiber from food (RX 224, RX 225, RX 228; Tr. 1969-71, 2073), and Mr. Leury stated that the advertising did not communicate to the consumers the message that Fibre Trim is an appetite suppressant like Dexatrim (Tr. 1969-71; RX 224, RX 225, RX 228).

(7) Gallup and Robinson Copytesting of the Print Advertisement "French Resistance" (July 1986)

93. Gallup and Robinson, a marketing research company, copytested the "French Resistance" print advertisement which appeared in the Ladies Home Journal in July 1986, and prepared a "Full Ad Impact Report" on its findings (Tr. 1667; RX 260).

94. Consumer researchers interviewed consumers and examined the messages they recalled from "French Resistance" 24 hours after seeing it in the magazine (RX 260; Tr. 2054). The report showed that the "French Resistance" print advertisement was effective in registering the name of the product to the consumer and communicated the main idea in the advertisement, but Ms. McGee concluded that none of the verbatim responses in the copy test indicate that consumers believed from the "French Resistance" advertisement that taking Fibre Trim would provide them with the health benefits associated with a diet high in fiber from food and that none of the verbatim consumer responses from copytesting showed that consumers took away from "French Resistance" the message that Fibre Trim would provide a particular health benefit, like decreased risk of colon cancer or coronary health disease, diabetes, or any other specific health benefit (Tr. 1670; RX 260, pp. 10-14). None of the verbatim responses indicated that consumers saw a message that Fibre Trim is an effective appetite suppressant like Dexatrim (Tr. 1670; RX 268, pp. 10-14).

(8) Research Systems Corporation Copytesting of the Television Commercial "Enfant Terrible" (1987)

95. In 1987, Research Systems Corporation, an independent marketing research company, copytested the commercial "Enfant Terrible." The testing methodology involved exposing consumers to the commercial in an auditorium format (Tr. 1678-79; RX 350).

96. According to Ms. McGee, the verbatim responses of the study did not indicate that consumers who saw the "Enfant Terrible" commercial understood it to suggest that Fibre Trim was an effective appetite suppressant or that it provides the health benefits from foods high in fiber. None of the verbatim comments from the study indicated that consumers understood from the "Enfant Terrible" commercial that taking Fibre Trim provides any specific health

benefit like decreased risk of colon cancer, coronary heart disease, or any other specific health benefits (Tr. 1680; RX 350, pp. 31-38).

(9) Gallup and Robinson - Magazine Impact Research Service
Full Ad Impact Report on the Print Advertisement
"Test of Time" (March 1987)

97. Gallup and Robinson's Magazine Impact Research Service copytested the print advertisement "Test of Time" as it appeared in Cosmopolitan magazine in March 1987 and prepared a "Full Ad Impact Report" on its findings. The objective of the report was to measure various consumer responses such as proven name registration, idea communication, and favorable buying attitude (persuasion) (Tr. 1683-84; RX 261).

98. Ms. McGee's testimony regarding the message of this advertisement was similar to that given with respect to the "Enfant Terrible" advertisement (Tr. 1686).

(10) Diet Products Market Structure Study (TRC) (March 1987)

99. TRC conducted a study, the final report of which was entitled "Diet Products Market Structure Study Presentation and Final Report," dated March 1987 (RX 229; Tr. 1971, 2074).

100. A market structure study is a comprehensive study of the structure of a market in which a product competes, with the objective of identifying consumers' perceptions about each product relative to other products, the particular attributes that differentiate products within a particular product market and those consumers with different needs and interests (Tr. 1919-20, 2075).

101. The objectives of the Fibre Trim market structure study were, among other things: (1) to understand the market for diet aid products so that Schering could identify groups or subgroups of consumers to whom Schering might best target or promote Fibre Trim; (2) to understand the competitive structure to identify any gaps or niches in the market; and (3) to determine the best positioning for Fibre Trim in the market (Tr. 1973-74; RX 229, p. 4).

102. The market structure study used a national probability sample approach that would be representative of the population of people on a diet in the past year who were between the ages of 18 and 54. A questionnaire was mailed to 811 qualified respondents, and a

high rate of two-thirds of the people responded (Tr. 1975-76). The questionnaire asked a battery of questions about dieting and diet products, such as questions about awareness and usage of diet products, prospective use of diet products, the importance of various attributes of a diet product or method, evaluation of 11 specific diet products, the importance of exercise to lose weight, and descriptions about themselves (Tr. 1979-80; RX 229, pp. 74-92). The market structure study assessed consumers' perceptions of the entire diet category, including Fibre Trim, diet pills such as Dexatrim, weight loss programs, lower calorie products, exercise, and other products in the diet category (Tr. 2053).

103. Dr. Stewart's analysis of this study led him to conclude that there was no data that suggests that consumers took away from Fibre Trim advertising the message that it will provide the health benefits associated with a fiber-rich diet or a high intake of dietary fiber from food (Tr. 2076; RX 229), and Mr. Leury testified that consumers differentiated Fibre Trim from PPA and products like Dexatrim and Accutrim (Tr. 1982, 1988-90; RX 229, p. 19). He also concluded that consumers understand that cutting back on food is necessary when one is on a diet (Tr. 1985).

(11) Additional Focus Group Testing (June 1987)

104. In June 1987, Marketing Perceptions, Inc., conducted additional focus group consumer research regarding Fibre Trim (Tr. 1688-89; RX 251, RX 267). The focus group testing involved conducting eight focus groups of consumers in Stamford, Connecticut fitting Schering's description of the target audience, *i.e.*, women from ages 25 to 45, who had dieted in the past and who were between 5 and 20 pounds over their desired weight (Tr. 1691; RX 251).

105. The focus groups extensively discussed the "French Girls" television commercial and Ms. McGee testified that consumers perceived from this advertisement that Fibre Trim is unique because it is all natural (Tr. 1692-93; RX 251, RX 267, p. 2). The study also showed to Ms. McGee that consumers realized that if Fibre Trim did not work it was because they failed to cut back on calories and did not exercise (Tr. 1692-93).

(12) Ross-Cooper Associates "Pills" Advertisement
Communication Test (February 1988)

106. Schering requested Ross-Cooper Associates ("Ross-Cooper"), an independent marketing research firm, to conduct and design a communications study on the "Pills" advertisement in 1988 (Tr. 1871-73; RX 313). The purpose of the Ross-Cooper copy test was to determine what messages consumers took away from the "Pills" advertisement (Tr. 1867, 1872).

107. Schering informed Ross-Cooper what qualifications respondents needed to satisfy before they should be selected to participate in the test. These specified characteristics fit the description of the intended target audience for Fibre Trim (Tr. 1874).

108. The "Pills" communications study involved face-to-face interviews with respondents chosen in central location facilities, such as a shopping mall (Tr. 1872-75).

109. The "Pills" advertisement questionnaire contained open-ended questions which explored: (1) the main idea communicated by the advertisement; (2) other ideas in addition to the main one communicated by the advertisement; (3) product advantages; (4) product disadvantages; (5) how a respondent would describe the advertised product to a friend; (6) anything respondents found confusing about the advertisement; (7) whether or not respondents agreed with the advertising copy; and, if not, what specifically they disagreed with (Tr. 1878; RX 213, pp. 53-54).

110. Respondents were also asked closed questions asking them: (1) to select as many words which best described the advertisement; (2) interest in purchasing Fibre Trim; (3) whether they found the product to be unique; and (4) whether they agreed or disagreed that the advertisement made certain statements (Tr. 1878-79). The "Pills" advertisement communications test was validated according to industry standards (Tr. 1876).

111. The "Pills" study showed that, after the second exposure to the advertisement, respondents understood the main ideas communicated to be that Fibre Trim is an all-natural product, that it contains fiber, that it is safe and sensible, and that it does not contain drugs (RX 213; Tr. 1879, 1887, 2052-53, 2058).

112. Mr. Kweskin of Ross-Cooper testified that the "Pills" advertisement did not communicate to consumers that Fibre Trim has chemicals and works to suppress appetite or that it provides the health benefits of a high fiber or fiber-rich diet (Tr. 1889-90; RX 213,

RX 216) and Dr. Stewart pointed to the fact that consumers did not mention specific benefits of fiber (Tr. 2058; RX 213).

113. Since the "Pills" advertisement contained elements which have been incorporated into other Fibre Trim advertisements, Dr. Stewart believes it is possible to generalize from the results of this communication test to other Fibre Trim advertisements to the extent they contain common elements, *i.e.*, that Fibre Trim is natural, is made of fiber, contains no drugs, and fills one up (Tr. 2058).

e. The Probative Value of Schering's Research

114. Many of the studies relied upon by Dr. Stewart and other witnesses did not test advertisements which were actually disseminated to the public: For example, the VOPAN study analyzed consumer reactions to four advertising concepts (Tr. 1573, 1814-15; RX 192) which are uncreative descriptions of a product (Tr. 1577-78). The concepts tested by VOPAN made no reference to the health benefits of the fiber in Fibre Trim (Tr. 1844-45, 2142-43) and neither Ms. Fazio of VOPAN nor Dr. Stewart compared the results of this study with any specific Fibre Trim advertisement (Tr. 1843, 2063-64).

115. In fact, neither of these witnesses could conclude from this study that advertisements like "Shape of Europe" ("Fibre Trim even offers you all of fiber's wonderful health benefits") (CX 295, CX 297) did not convey the health benefits claim (Tr. 1844-45, 2143). (*See also* Tr. 1845-46 re CX 279.) Since the Fibre Trim advertisements contain specific language discussing the health benefits of Fibre Trim, the concepts tested by VOPAN, which made no reference to such language, reveal nothing useful about any actual Fibre Trim advertisements. The same defect exists in focus group studies, for their results are not applicable to the language of the advertisements in question (*see* Tr. 1764).

116. The absence of responses mentioning the health benefits of fiber in the TRC studies was relied upon by Mr. Levine of that company and Dr. Stewart as support for their perception that the Fibre Trim advertisements conveyed no health benefit claims (Tr. 1968-69, 2070-73, 2078), but both gentlemen conceded that the results of the July and September 1985 study could not be connected with specific Fibre Trim advertisements that were disseminated during this time period (Tr. 2004, 2131). This is contrary to the

concept that consumer surveys which measure communication should expose respondents to the advertisements being tested (*see* Tr. 2129).

117. TRC also conducted telephone repeat purchase user surveys which asked current and former Fibre Trim users what they liked and disliked about it, but they contained no questions regarding Fibre Trim advertising (Tr. 1951-52, 1960-61; RX 226, RX 227, RX 228); therefore, whatever responses were given are not probative because they do not relate to the issue of the health benefits claim (*see* Tr. 2007, 2012, 2138).

118. The object of TRC's diet products market study was not to discover the messages which Fibre Trim advertisements conveyed to consumers (*see* Tr. 1973-74). Consumers were not shown any Fibre Trim advertisement or asked if they had ever seen one (Tr. 2014-15, 2139); thus, the absence of responses relating to the health benefits claim is not surprising and does not, as Dr. Stewart claimed (Tr. 2076), reveal anything useful about the health benefits issue (*see* Tr. 2018, 2139-40).

119. Complaint counsel stipulated that the "Pills" advertisement which was studied in the Ross-Cooper mall intercept survey (Tr. 1870-73; RX 213, RX 394) makes no representations about the health benefits of fiber or Fibre Trim (Tr. 2055, 2057).

120. Nevertheless, Dr. Stewart relied on this advertisement insofar as it contains elements which appear in other Fibre Trim advertisements (Tr. 2058-59), but I reject the claim that this advertisement has some probative value with respect to advertisements which refer to health benefits. For example, the language "Fibre Trim even offers you all of fiber's wonderful health benefits as well" is contained in CX 295, a version of the "Shape of Europe" advertisement. Dr. Stewart admitted that, because this language was not contained in the "Pills" advertisement, he could not conclude, based upon the results of RX 213, that CX 295 did not communicate the health benefits claim to reasonable consumers (Tr. 2153-54).

121. Schering claims that copy tests of the advertisements "Sensible Girls," "French Girls," "Take It Off," "French Resistance," "Enfant Terrible," and "Test of Time" establish that the health benefits claim was not made. Like the "Pills" advertisement, these are not alleged to make that claim, and copy tests analyzing their message reveal nothing about the messages conveyed by the challenged advertisements.

122. Because the studies relied on by Dr. Stewart and other witnesses have no clear connection with the advertisements conveying the Fibre Trim health benefits claim, I reject his, and Schering's, conclusion that their results are useful in determining the messages conveyed by the advertisements in question.

2. The Weight Loss and Weight Maintenance Claims

123. Schering admits, as the complaint alleges, that the challenged advertisements represented, *inter alia*, that Fibre Trim is an effective weight loss, weight control, or weight maintenance product (Cplt, paragraph 10; Ans., paragraph 10; Tr. 86-87).

3. Modifications of the Weight Loss and Weight Maintenance Claims

a. The Advertisements

124. Many consumers realize that diet and exercise are an essential part of a weight loss program (Tr. 282), and several Schering witnesses testified that the Fibre Trim advertising campaign did not present it as a panacea or magic solution to weight problems and stressed the consumers' responsibility to eat right, cut back on calories and exercise more (Tr. 97, 113, 117, 1622-23, 2056-57). Some Fibre Trim advertising incorporated these concepts:

Fibre Trim isn't magic, but it is a sensible, gradual aid to weight loss. If you take Fibre Trim before meals, eat sensibly and get more exercise, you should begin to notice results (RX 351; CX 279, CX 292, CX 295; *see also* RX 355; CX 287).

It's no panacea -- just natural help that makes eating less a little more bearable (RX 395; CX 285).

Eat right. Eat less. Move around more. With Fibre Trim, a tough job becomes much easier (CX 299; RX 397; Tr. 1622; *see also* CX 297 (containing nearly identical language)).

The Fibre Trim plan means eating less, eating right, moving around more, and gradually losing that extra weight (CX 285; RX 395; Tr. 1661).

By eating healthier food, a little less food, and moving around more. And that's precisely the Fibre Trim way: FIBRE TRIM VS. A STIFF UPPER LIP. Eating less is simple in theory. And with Fibre Trim, equally simple in practice (CX 286; RX 398; Tr. 1663-64).

Take Fibre Trim, stick with a reasonable diet, move around more, and be patient (CX 287; RX 355).

With help from Fibre Trim, you won't have to give up all those wonderful holiday treats. You'll simply eat less of them. The Fibre Trim approach means eating less, moving around more and losing weight gradually (RX 396; Tr. 1664-65).

If you make [Fibre Trim] part of a sensible diet plan, one that includes exercise and eating the right foods, Fibre Trim will help you lose weight . . . (RX 394; CX 294).

Sensible, So Sensible. But let's face it. You can't eat cheesecake for breakfast, lunch and dinner, and lose any weight. Anyone who's ever dieted knows the basics. Eat right. Eat less. And move around more. It's not easy. But Fibre Trim will surely help make it easier (CX 296; RX 397; Tr. 1624-25; *see also* RX 357; CX 295 (containing nearly identical text)).

125. These admonitions amount to little more than general statements about the desirability of maintaining a healthy life style.

126. In fact, the audio portion of these advertisements conveys the impression that using Fibre Trim will result in reduced calorie intake without the need to consciously adhere to a reduced calorie diet:

Now I'm taking it [weight] off and helping to keep it off . . . I take Fibre Trim natural source fiber tablets as directed. They help me to enjoy smaller portions of good food without feeling hungry (CX 340, CX 343).

Your mother is so beautiful, so slim. Does she eat? Silly, just not so much with this--Fibre Trim. . . (CX 339, CX 343).

Eat? She can't possibly eat. Yes, just not so much. With Fibre Trim (CX 341, CX 343).

She can't eat nothing. Her ladyship simply eats a bit less . . . with Fibre Trim (CX 342, CX 343).

Your mother fits into this? How? She eats a little less with Fibre Trim (RX 350, p. 45; CX 343).

127. None of Schering's Fibre Trim television advertisements contain any audio language that states or implies that consumers need consciously adhere to a reduced calorie diet while taking Fibre Trim in order for Fibre Trim to be efficacious as a weight loss or weight maintenance product (Tr. 1523-24, 1705-06, 2864-65; *see* CX 339, CX 340, CX 341, CX 342, CX 343, CX 344).

128. The superscript (words superimposed over the visual image, Tr. 2123) of some television advertisements states "part of [or "with"] a sensible diet plan" (*see* CX 339, CX 341, CX 342, CX 343, CX 344), while in others it states "use as directed" (CX 340). The superscripts are, however, difficult to read, are briefly displayed and are not accompanied by an audio voice over (*see* CX 339, CX 340, CX 342, CX 343, CX 344). Because their language is vague and

their legibility is limited, these superscripts do not convey to reasonable consumers that they must consciously adhere to a reduced calorie diet for Fibre Trim to be effective.

129. Many of the Fibre Trim print advertisements do not mention reducing caloric intake (*e.g.*, CX 271, CX 272, CX 273, CX 274, CX 278, CX 281, CX 283, CX 293, CX 298, CX 347, CX 348, CX 350, CX 351, CX 352, CX 353, CX 355, CX 356, CX 357, CX 358, CX 359, CX 377, CX 387), and Schering employees who were responsible for internally reviewing Fibre Trim copy (Tr. 1519, 1522, 2536) agreed that certain advertisements stated that Fibre Trim made one want to eat less and did not mention the need to follow a reduced calorie diet (Tr. 2548 *re* CX 296; 2548 *re* CX 387. *See* CX 463, p. 1; Tr. 2373).

130. Some print advertisements state that while taking Fibre Trim the consumer can “eat real food, normal food” (CX 296), “enjoy the good foods you like” (CX 280; *see* CX 279, CX 292), or “still eat normally” (CX 295). These statements leave consumers with the net impression that they do not need to consciously change their food consumption habits while taking Fibre Trim.

131. Other language in the Fibre Trim advertisements implies that it will help them to lose weight by causing them to eat less.

Taken with water before meals, Fibre Trim gives you a pleasant feeling of fullness. So you can still eat real food, normal food--but eat less without feeling starved (CX 296).

Its [Fibre Trim’s] concentrated fiber lets you enjoy the good foods you like, while feeling satisfied with smaller portions (CX 280).

132. Admonitions in these advertisements stating that “[y]ou can’t eat cheesecake for breakfast, lunch and dinner, and lose any weight. . . . Eat right. Eat less. And move around more” (CX 296) and “[s]o eat smaller portions, consume fewer high calorie drinks, and increase your fiber intake” (CX 280), do not warn reasonable consumers that they must consciously adhere to a reduced calorie diet if Fibre Trim is to be an effective weight loss product, especially since they are preceded by the language quoted just above which suggests that Fibre Trim itself can reduce caloric intake and that no further caloric reduction is needed to lose weight.

133. Dr. Shimp, who has testified in two federal court proceedings regarding the claims that advertisements were likely to convey to reasonable consumers (Tr. 69-71), concluded after reviewing the

Fibre Trim advertisements that they did not convey to reasonable consumers that conscious adherence to a reduced calorie diet was required if Fibre Trim was to be an effective weight loss and weight maintenance product (Television advertisements: Tr. 94 *re* CX 340; 96, 97-101 *re* CX 339; CX 341, CX 342, CX 343); (Print advertisements: Tr. 102-05, 118, 121-22, 141-42 *re* CX 271, CX 272, CX 273, CX 278, CX 293, CX 377, CX 387).

134. Dr. Shimp conceded that some television and print advertisements contain references to diet or reducing plans (*see* CX 340 "Fibre Trim Reducing Plan" and superscript "use as directed"; CX 341, CX 342, CX 343 superscript "part of a sensible diet plan"; CX 279, CX 285, CX 286, CX 287, CX 292, CX 295, CX 296, CX 297, CX 299: "Eat right. Eat less. Move around more"), but he concluded that the print language, and the television superscripts were vague and ambiguous and did not tell consumers that Fibre Trim is effective only if used in conjunction with a reduced calorie diet (Tr. 94-106).

135. Dr. Shimp's dismissal of the superscripts was echoed by Dr. Stewart, Schering's expert in consumer information processing. He testified that marketing research, including his own research, demonstrates that superscripts that do not reinforce the primary message of a TV commercial tend either to be ignored by or confuse the viewer (Tr. 2123).

136. A few of Schering's advertisements contained somewhat more specific language regarding adherence to a diet while taking Fibre Trim (Tr. 112-15, 126-27, 131-32). However, none of these advertisements -- "Pills" (CX 294), the "Fiber Facts" brochure (CX 275), or the package insert (CX 280) -- according to Dr. Shimp, represent to reasonable consumers that Fibre Trim will only be an effective weight loss and maintenance product if the consumer consciously follows a reduced calorie diet (Tr. 112-13, 115, 126-27, 131-32) since the language in both the full page and half page versions of the advertisement entitled "Pills" (CX 294) does not inform the consumer that a reduced calorie diet is necessary for Fibre Trim to be efficacious, it does not provide a specific plan for dietary behavioral change, and it is ambiguous with regard to any recommended behavioral changes (Tr. 112-13, 115).

137. CX 275, the eight-page point of purchase brochure called "Fiber Facts," states on one of its pages that in order to lose weight one should reduce caloric intake and increase exercise (CX 275; Tr. 126), but Dr. Shimp concluded that this statement is "a trivial part"

of the brochure and accordingly would not be understood by reasonable consumers as a representation that Fibre Trim will not be efficacious unless consumers consciously follow a reduced calorie diet and increase their exercise level (Tr. 127). To the contrary, this brochure contains language, such as "Fibre Trim works to satisfy you naturally and keeps you satisfied so you eat less," that represents that Fibre Trim by itself satiates one in a fashion that makes one eat less, thereby causing the recommended reduction in caloric intake and the resulting weight loss (Tr. 127-28).

138. While the second page of the Fibre Trim package insert, CX 280, contains some general recommendations regarding changing eating habits and increasing exercise to lose weight, Dr. Shimp concluded that these would not be interpreted by reasonable consumers as an assertion that Fibre Trim only works if the consumer undertakes those suggested behavioral modifications. In fact, CX 280 represents to reasonable consumers that using Fibre Trim itself will cause them to feel fuller, reduce their desire to eat and cause weight loss (Tr. 131, 132).

b. Conclusion

139. Schering points to consumer research which it commissioned as establishing that its advertisements informed reasonable consumers that Fibre Trim was effective only if used along with a reduced calorie diet (RPF's 84, 101, 172, 179).

140. Two of these studies reported the results of focus groups (CX 311; RX 235), but none of the participants in the 1984 study were shown advertisements that were disseminated to consumers in the United States (*see* Tr. 1764), and the Schering employee who attended the 1987 focus group could not recall what, if any, advertising copy was shown to participants (Tr. 1708-09).

141. The VOPAN study (RPF 101) tested advertising concepts, not advertisements that were actually disseminated and its probative value with respect to actual advertisements is unclear. The same problem exists with respect to TRC's diet products market structure study (RPF 172).

142. Furthermore, neither the VOPAN nor TRC studies directly asked respondents whether the tested concepts or advertisements conveyed to them the message that Fibre Trim was efficacious only if it were taken in conjunction with a reduced calorie diet.

143. Although Schering's advertisements were directed at up-scale women who might be skeptical about advertising claims, a Schering document estimated that 70% of its 1986 sales of Fibre Trim were to consumers "looking for the magic pill" and who "want a product that will do the work" (CX 465, pp. 2, 6). This confirms complaint counsel's claim that Schering's advertisements were designed to emphasize that using Fibre Trim itself would result in weight loss. The admonitions about dieting, when they were included in advertisements, were not intended to detract from this message.

144. Thus, its advertisements, which Schering admits made the weight loss and weight maintenance claims, did not convey to reasonable consumers the message that they must adhere to a reduced calorie diet if Fibre Trim were to be effective. In fact, the appetite suppressant claims which were contained in many of the advertisements suggested just the opposite: that the feeling of fullness caused by Fibre Trim accomplishes the same result as, and obviates the need for, a diet.

4. The Appetite Suppressant Claim

145. Schering's marketing strategy intended to convey the message that Fibre Trim was not a drug and that it was different from the other "quick-fix" dieting methods such as appetite suppressants like Dexatrim and Acutrim and meal replacement products such as Slimfast (Tr. 1587; RX 240, pp. 5, 7).

146. This marketing strategy was carried out in advertisements which stressed that Fibre Trim is a natural food, not a drug (Tr. 114, 124-25, 128-30, 20, 56-57) and is an all-natural, safe and sensible product (Tr. 94, 111-112, 114, 128, 1624-27, 1658, 1678, 1682-83).

147. However, while the Fibre Trim advertisements differentiated it from appetite-suppressant drugs, they also conveyed to consumers the impression that it, like those drugs, suppressed one's appetite (*see* CX 273, CX 275, CX 279, CX 280, CX 285, CX 286, CX 287, CX 292, CX 294, CX 295t CX 296, CX 297, CX 299, CX 340, CX 347, CX 348, CX 349, CX 351, CX 354, CX 355, CX 357, CX 358, CX 359, CX 387).

148. The following language, taken from Fibre Trim advertisements, illustrates the claims made with respect to its effect on appetite:

1. "Taken with water before meals, Fibre Trim gives you a pleasant feeling of fullness. So you can still eat real food, normal food -- but eat less without feeling starved" (CX 296).
2. Fibre Trim tablets "help me to enjoy smaller portions of good food without feeling hungry" (CX 340).
3. Fibre Trim "makes you feel satisfied with less food" (CX 387).
4. Fibre Trim lets you "eat less without feeling famished (or "hungry")" (CX 286, CX 287).
5. Fibre Trim "promotes satiety" [or "satiates"] (CX 266, CX 357).
6. Fibre Trim provides a "pleasant feeling of fullness" (CX 347), is a "hunger deterrent" (CX 354), "fights off those hunger pangs" (CX 297), "takes the edge off hunger" (CX 280) and "helps you control your appetite" (CX 294).

149. This language allows only one interpretation: That although Schering intended to differentiate Fibre Trim from appetite-suppressant drugs and their undesirable side effects, its advertisements convey to reasonable consumers the net impression that Fibre Trim is an effective appetite suppressant.

150. Dr. Shimp's testimony supports my conclusion that most of Schering's advertisements make the appetite suppressant claim (Tr. 85, 91, 107, 111, 113-14, 117-18, 119, 128, 132, 136, 138, 140 and 147). Furthermore, Ms. McGee, senior brand manager for Fibre Trim, testified that in a survey of Fibre Trim users asking them what they liked about the product, the second most frequently given response was that "it reduces appetite" (Tr. 1674; RX 265, p. 13). Finally, a copy test of the "Pills" advertisement revealed that many of those surveyed understood the advertisement to claim that Fibre Trim curbs appetite (RX 213, pp. 20, 44). If, as Schering claims, these analyses reveal consumer attitudes toward Fibre Trim, it knew or should have known that its advertisements conveyed the appetite suppressant claim.

151. Schering research which purportedly shows that consumers perceived Fibre Trim as different from appetite suppressant drugs like Dexatrim reveals nothing about the appetite suppressant message which specific language in the advertisements conveys, for the intent of the advertisements was to emphasize Fibre Trim's natural ingredients, not to disclaim its appetite suppressant effects.

5. The High Fiber Supplement Claim

152. Schering admits the allegation that its advertisements represented that Fibre Trim is a high fiber supplement (Cplt, paragraph 6, Ans., paragraph 6).

6. The Daily Requirements Claim

153. Subparagraph 2 of paragraph six of the complaint alleges that Schering's advertisements represented that the recommended daily dosage of Fibre Trim provides most of a person's daily requirements of dietary fiber ("daily requirements claim").

154. The Fibre Trim package insert (CX 280) recommends that consumers "use Fibre Trim as a daily dietary fiber supplement" and states that Fibre Trim "is a superior source of dietary fiber" (CX 280, p. 1). The "Fiber Facts" brochure claims that Fibre Trim is a superior source of dietary fiber and warns that consumers need "to have plenty of fiber" (CX 275, p. 2). (*See also* CX 310, p. 11.)

155. Many Fibre Trim advertisements refer to it as a high fiber supplement or state that it may be used as a fiber supplement (CX 271, CX 281, CX 282, CX 283, CX 350, CX 352, CX 353, CX 354, CX 357, CX 358, CX 359).

156. While Fibre Trim advertisements and product inserts refer to it as a fiber supplement, they do not explicitly state that the recommended daily dosage of Fibre Trim provides most of a person's daily requirements of dietary fiber and I cannot infer with any confidence that consumers take away from this language a belief that Fibre Trim's fiber content is so high that it provides all of their daily requirements of fiber, and I reject as speculative Dr. Levy's opinion as to the message this language conveys to consumers (Tr. 265, 276-79).

7. The Fiber Content Claim

157. Subparagraph 3 of paragraph six alleges that Schering advertisements and promotional materials represent that the recommended dosage of Fibre Trim provides about 2.35 grams of dietary fiber per serving or about seven grams of dietary fiber per day (Cplt, paragraph 6). Schering admits this allegation (Ans., paragraph 6).

*F. Substantiation For The Weight Loss, Weight Maintenance,
And Appetite Suppression Claims*

1. Introduction

158. Several Schering advertisements and promotional materials expressly or impliedly assert that the claims discussed above are scientifically supported:

Fibre Trim was developed by scientists in Scandinavia (CX 275).

In a controlled study. . . . In two additional studies, weight loss with Fibre Trim was confirmed (CX 354).

Proven successful (*e.g.*, CX 287, CX 295, CX 346). Fibre Trim works (*e.g.*, CX 280). Developed by a distinguished group of nutrition experts (CX 292).

159. Experts testifying in this case agreed that if Schering claimed scientific substantiation, at least two well-conducted and controlled clinical trials were needed to establish Fibre Trim's efficacy (Tr. 785, 944, 2686, 2832, 3100, 3792). The cost of conducting two such trials should not exceed \$400,000 (Tr. 1096).

2. The Requirements For Well-Designed Clinical Trials

a. Undisputed Requirements

160. The experts testifying for the parties agreed on the essential elements of clinical trials which are designed to evaluate the efficacy of a weight-loss product:

1). A pre-study protocol should be devised which sets forth how the research is to be implemented and analyzed, including how subjects are to be randomized into treatment groups, and what statistical techniques are to be employed (Tr. 3040).

2). The product should be tested against a placebo, which controls for the effect which test subjects often experience simply because they are being treated. A placebo helps control for the subjective reactions of the subject and subjective input from the investigator (Tr. 2684).

Ideally, a placebo should have the same appearance as the active ingredient being tested so that neither the investigator nor the subject knows whether the active ingredient or the placebo is being administered (Tr. 783, 960, 2684, 3314-15). The placebo effect is experienced in both the placebo and active groups because both groups believe that the treatment will be effective (Tr. 2937-38).

3). Subjects should be assigned to the treatment and placebo groups by randomization, a procedure which assures that each has an equal probability of

being assigned to one of the two groups. Randomization eliminates assignment bias, *i.e.*, prejudice that might occur if the investigator were allowed to decide to what group subjects are assigned (Tr. 2602, 3229, 3546).

4). Double blinding minimizes bias by withholding knowledge of placebo or treatment group assignments from the subject and the investigator. Double blinding is especially important when subjective measurements are made, for if the investigator knows to which group the subject is assigned, his perception of the treatment's effects may be altered by that knowledge (Tr. 2605, 2680-81, 3229, 3546).

5). It is generally agreed that a treatment's efficacy should be tested in clinical trials conducted by independent investigators, for one investigator's commitment to the hypothesis being tested may influence his perceptions of a study's results. Confirmation by independent research is, therefore, desirable (Tr. 785, 944, 2451, 2453, 3792).

6). Peer review and publication in a reputable scientific journal validates a study's worth (Tr. 786, 946-47, 3791).

b. Disputed Requirements

161. There is some dispute between the experts as to other requirements for clinical trials:

1). The intention-to-treat principle requires that all subjects that have been randomized into a study must be included in its statistical analysis since anything which occurs post-randomization may be related to the treatment (Tr. 2612-13, 2922, 3227, 3556, 3666; RX 195, pp. 2-3). This principle is designed to eliminate the potential for bias that may result if researchers are allowed to select data which they consider "valuable for efficacy" (Tr. 2613-17, 2716-17). Every clinical trial submitted to the FDA must include an intention-to-treat analysis (Tr. 2613).

2). Most of the Fibre Trim studies distinguished between subjects who discontinued a trial for reasons related to the treatment given (withdrawals) and those who discontinued for reasons not related to the treatment (dropouts) (Tr. 2927-29, 3230-31, 3679).

Withdrawals were assigned the highest observed weight as the final weight measurement; dropouts were assigned the last weight observed as the final weight measurement (Tr. 2981-83, 3230-31, 3679-80). Studies submitted to the FDA routinely treat dropouts and withdrawals differently within the same study for purposes of data analysis (Tr. 2713).

3). When a study shows statistically significant results, it suggests that the observed differences between the placebo and the treatment groups did not occur by chance, but were the result of the treatment (Tr. 2623, 3547).

The conventional test of statistical significance accepts a "p value" of less than .05 -- *i.e.*, a result whose likelihood of occurrence by chance is less than five percent, or five times in one hundred occurrences (Tr. 969-71, 1038-39). P values of more than .05 are generally not accepted as indications of an actual difference between placebo and control groups.

P values can be calculated using “one tailed” or “two tailed” tests. A one tailed test tests the hypothesis that the active treatment is more effective than the placebo. A two tailed test tests the hypothesis that the active treatment may be more or less efficacious than the placebo.

Since the purpose of the clinical trials in question was not to test the latter hypothesis, the appropriate measure of statistical significance is one tailed (Tr. 2625-30, 2931-32, 3223-24, 3565-67). In fact, statistical “power,” *i.e.*, the ability of a test to detect an effect, is increased by the use of a one tailed test (Tr. 3223-24).

4). In each of the placebo-controlled tests discussed below, the placebo tablets contained more calories -- 35 to 60 -- than the Fibre Trim tablets to which they were compared (*e.g.*, Tr. 793, 820, 825), and complaint counsel's experts claimed that this defect compromised the results of the trials because giving additional calories to the placebo subjects handicapped their ability to lose weight and biased the results in favor of the group which took Fibre Trim (Tr. 793-94, 961).

On the other hand, respondent's experts testified that a 50 calorie difference is within the range of normal variance in daily food intake for persons adhering to a 1200 calorie diet and that it is not necessary to adjust the trial results to account for this difference (Tr. 2317-18, 2725, 3083, 3574-76, 3648).

3. The Clinical Trials Relied On By Schering Before Dissemination of the Challenged Weight Loss Advertisements

162. At the time it disseminated the Fibre Trim advertisements, Schering possessed and relied upon the Solum I, Rytig, and Hessel reports provided by Farma Food and described below (Tr. 2204-05, 2427-28, 2793-94; CX 333, pp. 17-19).

a. SOLUM I: “Fibre Tablets, DumoVital, as a Means to Achieve Weight Reduction”

163. This study was conducted in Norway by Toril Solum, a nurse specialist, and was published in The Journal of the Norwegian Medical Association in 1983 (RX 317, p. 1). Its purpose was to test the effect of Fibre Trim and diet on weight loss. It was a randomized, placebo-controlled, double-blinded study involving 53 subjects who came from a slimming club (RX 194, p. 4, RX 197, pp. 10, 17-21, RX 317, pp. 2-4, RX 321, pp. 3-6; Tr. 2644-45, 2972-75, 3256-57).

164. Each of the subjects was told to follow a 1100-1200 calorie diet with an estimated content of approximately 30 grams of dietary fiber. Thirty subjects received 16 Fibre Trim tablets per day; 23 subjects received a corresponding number of placebo tablets (RX 32, pp. 3-6, RX 194, p. 4, RX 197, pp. 10, 17-21, RX 317, p. 2; Tr. 2644-45, 2972-75, 3256-57).

b. *RYTTIG: "Treatment of Slightly to Moderately Overweight Persons"*

165. The Ryttig study was conducted in Copenhagen, Denmark, by Kjeld Ryttig (principal investigator), Laila Haegh, and Stig Larsen, and was published in The Journal of the Norwegian Medical Association in 1984 (RX 324, p. 1). Its purpose was to test whether Fibre Trim tablets, when taken in conjunction with a reduced calorie diet, are an effective aid to weight reduction (RX 324, p. 2, RX 327, p. 4).

166. The Ryttig study was randomized, placebo-controlled and double-blinded, and involved 90 slightly to moderately overweight subjects (RX 324, p. 2, RX 327, p. 4). Each subject was told to follow a 1200 calorie diet for an 11-week period (RX 324, p. 2, RX 327, p. 4). Forty-five subjects were given seven Fibre Trim tablets, four times a day, 30 minutes before meals, and 45 placebo subjects were given a corresponding number of placebo tablets (RX 324, p. 2, RX 327, p. 4).

c. *HESSEL: "Weight Reduction and Long-Term Weight Management of 41 Overweight Patients Using High Fibre Tablets as an Aid to Reduction of Caloric Intake"*

167. This was an open, retrospective study conducted by Lasse Hessel in Scandinavia and presented to The IV International Congress on Obesity in 1983 (RX 343, RX 344). Forty-one subjects were treated for overweight through dietary guidance and the use of Fibre Trim tablets (RX 197, pp. 6-7, RX 343, p. 4, RX 344, p. 2). The subjects were directed to take 6-8 tablets 30 minutes before each meal (18 - 24 tablets per day) (RX 197, pp. 7, 18, RX 343, p. 4, RX 344, p. 2). The average length of treatment was 136 days (RX 197, p. 7, RX 343, p. 4).

168. Twenty-four subjects who participated in the original Hessel study continued to use Fibre Trim for five years as an aid to maintaining or further reducing their weight. Subjects took an average of 12 Fibre Trim tablets per day and either maintained their reduced body weight or experienced a further weight reduction (RX 344, p. 2). Average weight loss at the five-year follow-up was an additional 2.4 kg (in addition to the 11.3 kg lost during the original study) (RX 197, pp. 7, 17-18, RX 344, p. 2).

4. Post-Dissemination Clinical Trials

a. SOLUM II: "The Influence of a High-Fibre Diet on Body Weight, Serum Lipids and Blood Pressure in Slightly Overweight Persons"

169. This study was conducted by Toril Solum (principal investigator), Kjeld Rytting, E. Solum, and Stig Larsen in Scandinavia, and was published in the International Journal of Obesity in 1987. Its purpose was to investigate, among other things, whether Fibre Trim, when taken in conjunction with a calorie-restricted diet, could result in a higher weight loss compared to diet alone (RX 335, pp. 1-2). The study was randomized, placebo-controlled and double-blinded and included 71 subjects, each of whom was told to follow a 1200 calorie diet for a 12-week period (RX 335, p. 2, RX 338, pp. 3, 6-9; Tr. 2986, 3238).

170. Thirty-seven subjects were placed in the Fibre Trim group and received 20 Fibre Trim tablets per day; 34 subjects were placed in the placebo group and received 20 placebo tablets per day. Both groups were instructed to take five tablets with water four times a day 30 minutes before each meal (RX 335, p. 2, RX 338, pp. 3, 6-9; Tr. 2986, 3238-39).

b. ROSSNER: "Weight Reduction with Dietary Fibre Supplements"

171. This study was conducted by a team of researchers consisting of Stephan Rossner (principal investigator), Dan Von Zweigbergk, Agneta Ohlin, and Kjeld Rytting. The study was conducted at the Karolinska Hospital in Stockholm, Sweden, and was published in Acta Medica Scandinavia, the Scandinavian medical journal, in 1987. The aim of the study was to investigate whether a dietary fiber supplement program using Fibre Trim could improve the results of a conventional weight-reduction regimen (RX 329, p. 1, RX 334, p. 4).

172. Rossner was a randomized, placebo-controlled, double-blinded study involving 59 subjects which was conducted over a two-month period (RX 329, pp. 1-3, RX 334, pp. 3, 6). All the subjects were told to follow a 1400 calorie diet (RX 329, p. 2). In addition, 31 subjects were given 18 Fibre Trim tablets per day, while 28 placebo subjects received a corresponding number of placebo tablets. Both groups were instructed to take six tablets with water three times a day

30 minutes before each meal (RX 197, pp. 11, 17-21, RX 329, p. 2, RX 334, pp. 3-4).

c. *EHMANN & RESSIN: "About the Significance of Dietary Fibre in the Dietetic Treatment of Overweight Individuals"*

173. This study was conducted by Dieter Ehmman and Wolfgang Ressin in Germany and published in a German medical journal entitled *Pharmazeutische Zeitung* in 1985. Its purpose was to investigate the effect of Fibre Trim tablets as part of a weight reduction program for overweight individuals. The study was conducted over a four-week period and involved 40 subjects who came from a rehabilitation institution for organic and functional cardiovascular disorders (RX 339, pp. 1-2). This was a single-blinded study; that is, although the investigator knew which tablets (Fibre Trim or placebo) the subjects were receiving, the subjects did not know (RX 197, p. 19).

174. Subjects were divided into two groups of 20 subjects each based on the number of calories in their recommended diet; one group was told to follow an 800 calorie diet; the other group was told to follow a 1200 calorie diet (RX 339, p. 2, RX 342, pp. 3-4; Tr. 2668, 3016-17, 3259-60).

175. Each group was divided again into two subgroups -- one receiving Fibre Trim and one receiving placebo tablets; the Fibre Trim subjects were given up to five Fibre Trim tablets, three times a day before meals; the placebo group took a corresponding number of placebo tablets (RX 339, p. 2).

d. *BIRKETVEDT: "The Effect of a Combination of Fibre Tablets and Reduced Energy Intake in the Treatment of Overweight and on Maintenance of an Achieved Weight Reduction"*

176. This study was conducted by Grethe Birketvedt and Kjeld Rytting in Norway. The results are still in manuscript form (RX 348).

177. Birketvedt was a randomized, double-blinded, placebo-controlled study involving 53 subjects which lasted 26 weeks (RX 197, pp. 11, 17-21, RX 348, pp. 3, 6).

178. All subjects were told to follow a 1200 calorie diet. Twenty-five subjects received placebo tablets, while 28 received Fibre Trim tablets (RX 197, p. 11, RX 348, pp. 6-8). The subjects took 22

tablets per day, six before each meal and four at 3 p.m., until ideal body weight was attained, at which time the dosage was reduced to 15 tablets per day (RX 197, pp. 11, 17-21, RX 348, p. 6).

5. Schering's Analysis of the Clinical Trials and Other Data Provided By Farma Food

179. In the latter half of 1984, Schering assembled the Second Generation Team, composed of company employees from various scientific disciplines, to review scientific data, including the Hessel, Solum I and Rytzig studies provided by Farma Food (Tr. 2406-07, 2458, 2494, 2789-90; CX 333, pp. 169, 174). In late September or early October 1984, a member of that team, Dr. Iezzoni, was asked by his superior to review this package of material over a weekend (Tr. 2406, 2414). Included in this package was a memorandum which set out various potential performance claims for Fibre Trim (Tr. 2409; CX 15, p. 2; RX 211). Dr. Iezzoni reviewed the package of data to determine if the materials therein would support those performance claims (Tr. 2410) and prepared a memorandum that summarized his opinions and comments from that review (Tr. 2408; CX 15, pp. 5-7).

180. Dr. Iezzoni's memorandum was critical of the Rytzig and Solum I studies:

I doubt that the clinical data would be adequate to support an NDA (New Drug Application] for prescription or for OTC marking as a weight loss/control product. The two controlled, blinded clinical studies are flawed, are not of adequate duration, and do not cover a reasonable spectrum of obese patients to evaluate benefit versus risk. There are few or no data to support some of the projected product performance claims (CX 15, p. 5).

Despite these reservations, Dr. Iezzoni's superior did not discuss the memorandum with him (Tr. 2490).

181. Subsequent to the preparation and distribution of Dr. Iezzoni's memorandum, a meeting of the Second Generation Team was scheduled to discuss the adequacy of the materials Dr. Iezzoni had reviewed as substantiation for the proposed Fibre Trim claims (CX 15, p. 1, CX 16). Dr. Iezzoni's memorandum summarizing his opinions and criticisms of the materials he had reviewed was attached to the agenda for that meeting (*see* CX 15), but he did not attend this meeting, and no one briefed him about it (Tr. 2493-94).

182. No member of the Second Generation Team had any expertise in weight loss (Tr. 2496-97; *see* Tr. 2351). Although Dr. Albu prepared a monograph on Fibre Trim to assist Schering employees in analyzing product claims (Tr. 2191-92) and discussed Fibre Trim with Dr. Vahouny, a Fibre Trim consultant and expert on dietary fiber (Tr. 2193-95), Schering never consulted with an independent expert in weight loss or fiber with regard to the adequacy of substantiation data prior to the dissemination of its Fibre Trim advertising (Tr. 2816).

183. All Fibre Trim advertisements and promotional materials were reviewed by Schering's medical, regulatory, legal marketing, and professional services departments (Tr. 1489-90, 2260, 2536). The stated purpose of this review process was to ensure that the claims being made were scientifically accurate and supportable (*see* Tr. 2260, 2536).

184. None of the materials that were believed to substantiate the claims in a proposed advertisement were circulated with that advertisement during the review process (Tr. 1520). The reviewers concluded that the proposed advertisement copy was supportable if, in their judgment, it was consistent with the approach already approved by the Second Generation Team (*see* Tr. 1521, 2538).

185. Farma Food had conducted or sponsored more scientific studies of the efficacy of Fibre Trim than it provided to Schering (CX 110, CX 158, CX 162, p. 2; *see* RX 200, p. 18; CX 208), some of which did not show that Fibre Trim was more efficacious than the placebo as a weight loss product (*e.g.*, CX 110, CX 159, CX 162, p. 2).

186. One weight loss study by Dr. Anderson of Denmark "did not show [a] significant difference between fiber tablets and placebo . . ." which, according to Farma, was due to some unspecified technical difficulties in the design and conduct of the study (CX 162, p. 2).

187. Dr. Albu, Dr. Iezzoni and Mr. Campbell of Schering's marketing department knew of this study (CX 162; *see* Tr. 310, 2325, 2492). Other Schering employees who were reviewing the scientific support for proposed Fibre Trim weight loss claims in late 1984 (*e.g.*, Dr. Giaquinto, Ms. McGee and Mr. Walsh) should have been aware of the existence of this Anderson study based upon the summary of it contained in Dr. Iezzoni's memorandum evaluating substantiation materials (*see* CX 15, p. 7, CX 16). No one from Schering ever asked Farma Food to provide a copy of Dr. Anderson's study (Tr.

381, 2325, 2492, 2874-75; *see* CX 333, p. 200) but Dr. Levine testified that, regardless of the purported "technical difficulties," he would consider such a study highly relevant to a proper scientific evaluation of Fibre Trim's potential efficacy (Tr. 800-01).

188. At the time Dr. Iezzoni reviewed the scientific data provided by Farma Food as support for Fibre Trim's weight loss claims in late 1984, Dr. Kissileff's 1983 food intake study comparing Fibre Trim to a placebo which he undertook for Farma Food (Tr. 681; CX 110) was completed and, according to him, failed to show that Fibre Trim had any effect on food intake (Tr. 689-90).

189. Prior to January 1986, when Schering began to advertise Fibre Trim on a national basis (Tr. 1502; CX 310), an eight week weight loss study by Dr. Brock of the Medical University of South Carolina comparing Fibre Trim to a placebo was completed (Tr. 376). This study, which was sponsored by Farma Foods, failed to show that Fibre Trim was significantly more efficacious than the placebo in achieving weight loss (CPF 269-272).

190. The Kissileff and Brock studies were in the possession of Mr. Bonfield, Farma Food's U.S. representative (Tr. 347, 359-60, 370; CX 208, p. 5), and its liaison with Schering with regard to the marketing of Fibre Trim (Tr. 307-08). No one from Schering ever sought to obtain from Mr. Bonfield any studies that failed to demonstrate Fibre Trim's efficacy as a weight loss product (Tr. 381, 2492; *see* Tr. 2325).

191. In April 1984, Farma Food's U.S. subsidiary cosponsored a fiber symposium in the United States at which scientists reported findings from their research (Tr. 430). One of those scientists, Dr. Rossner, reported the results of his weight loss research comparing Fibre Trim tablets to placebo tablets (*see* Tr. 446-47; CX 63). He reported that the Fibre Trim group experienced a mean weight loss of 7.0 kg and the placebo group experienced a mean weight loss of 6.0 kg (Tr. 447; CX 63, p. 5). This difference of 1.0 kg was reported as not statistically significant (Tr. 446-47; CX 63, p. 5, CX 234, pp. 2-4). Subsequent analysis of the results of this study correcting data entry errors resulted in the conclusion by Dr. Larsen that its results were statistically significant (Tr. 3010-14).

192. No one from Schering ever asked Mr. Bonfield if there was any scientific testing that failed to demonstrate Fibre Trim's efficacy as a weight loss product (Tr. 381, 2492), or ever reviewed any

scientific testing of Fibre Trim that failed to demonstrate its efficacy as a weight loss product (Tr. 2832; CX 333, p. 29).

193. Both Dr. Levine and Dr. Levitsky testified that a reasonable scientist reviewing the Rossner study in addition to Solum I, Rytting and Hessel, would conclude that these materials did not provide a scientific basis for the proposition that Fibre Trim was an effective weight loss product (Tr. 804, 997).

194. Schering also possessed a Farma Food document indicating that 24 studies had been conducted on overweight subjects (RX 200; Tr. 2281-82), but there is no evidence that any employee asked for the results of these studies.

195. On May 1, 1987, Schering's senior brand manager for the Fibre Trim product sent a memorandum to various people having responsibility for Fibre Trim advertising claims and their substantiation. The memorandum enclosed a copy of the Solum II study which had just arrived from Farma Food, and asked for the recipients' evaluation of it as "a proof source for the claims we currently make. . . ." The memorandum also thanked the recipients for their "support of marketing in the face of adversity and ambiguity ('murky' clinicals, questionable ingredients lists, etc. . . .)." The memorandum concluded with the request that the memorandum be destroyed after receipt "so no outsider sees the last line [regarding murky clinicals]" (CX 170, p. 1).

196. Finally, an advisory expert panel to the FDA evaluated the safety and efficacy for weight control of several types of fiber and concluded, in a 1982 Advance Notice of Proposed Rulemaking, that "the value of bulk producers in reducing weight by controlling appetite has not been established" (CX 81, p. 14). As evidenced by the FDA's 1990 Proposed Rule on Weight Control Drug Products for the Over-The-Counter Human Use, this 1982 conclusion has not been superseded (CX 471, pp. 2-4). Fibre Trim is in the same category as these other fiber-based hydrophilic bulk-producing weight control products evaluated by the FDA panel (CX 22; Tr. 2326-28; *see* Tr. 359).

197. Dr. Albu was aware of the existence of this FDA review at the time Schering was developing its Fibre Trim campaign, but did not know whether or not the fiber products evaluated by the panel had been found effective (Tr. 2328). Dr. Giaquinto was also aware of the FDA's review of the efficacy of various fibers as weight loss agents but did not consider it in evaluating claims for Fibre Trim (CX 333, pp. 21, 109).

6. The Relationship Between Schering's Advertising Claims and the Studies Relied On

a. The Weight Loss Claim

198. Schering relies on studies which were conducted before (“pre-dissemination”) and after it began advertising Fibre Trim as support for its claims. However, these studies used Fibre Trim in conjunction with a restricted calorie diet ranging from 800 to 1400 calories per day (CX 66, CX 67, CX 68, CX 166, CX 255, CX 256), and none of the experts testifying for either party said that it would be scientifically sound to infer from their results that consumers using Fibre Trim without deliberately following a reduced calorie diet would lose weight. Proof of this claim would require studies in which Fibre Trim was tested in subjects not on a diet. Schering has not offered such studies (Tr. 826, 1031, 2472-76, 2542-43, 2771, 3101-02, 3295, 3707; CX 333, pp. 17, 27, 69, 87).

199. Dr. Giaquinto, Schering's vice president of Regulatory Affairs at the time the challenged advertisements were first disseminated, testified that the studies would not support a claim that Fibre Trim would be an effective weight loss product without an accompanying reduced calorie diet and an exercise program (CX 333, pp. 27, 69, 87, 101, 193; *see also* Tr. 2541-43).

b. The Weight Maintenance Claim

200. The Rytting, Solum I and Hessel studies do not support the weight maintenance claim, for the first two were of too short a duration (eleven and eight weeks) (Tr. 792, 799, 979, 3699), and the Hessel study, while of adequate duration, was not placebo-controlled, blinded, or randomized (Tr. 949, 2216). In fact, Dr. Iezzoni, Schering's Director of Medical Services, disregarded that study while he was evaluating the support for Fibre Trim's performance claims (Tr. 2460). Therefore, at the time the weight maintenance claim was made, Schering had no competent and reliable scientific basis for that claim, and no valid post-dissemination studies support it.

c. The Appetite Suppressant Claim

201. None of Schering's pre-dissemination studies report on caloric intake, the only meaningful and objective measure of a product's appetite suppressant properties, and they do not therefore support the appetite suppressant claim (CX 153, CX 166, CX 255, *see* CX 333, p. 79; Tr. 679-80, 781, 789, 793, 799, 949-50, 958, 979-81, 997-98).

202. Schering's advertising expressly refers to Fibre Trim's ability to reduce hunger pangs or to make one feel full, but Dr. Albu testified that neither the Solum I nor Rytig studies provide any information about its effect on hunger, fullness or appetite reduction (Tr. 2313, 2319) and that these studies did not support claims of this kind (Tr. 2265).

203. While Dr. Iezzoni testified that the Rytig study supported a hunger reduction claim (Tr. 2481), the report of that study does not refer to this subject (*see* CX 368), and Dr. Iezzoni could not identify at trial the version of the study he relied on (Tr. 2483-84). Therefore, at the time the appetite suppressant claims were made, Schering had no competent and reliable scientific basis for that claim, and no valid post-dissemination studies support it.

7. Analysis of the Weight Loss Studies

a. In General

204. The studies relied upon by Schering do not support its weight loss claims because they involved dieting subjects. In addition, although it is disputed, expert testimony elicited by complaint counsel leads to the conclusion that the studies are flawed, even with respect to support for claims which might be based on them (*i.e.*, that Fibre Trim is effective when taken in conjunction with a reduced calorie diet).

205. Although analysis of the individual merits or faults of the studies is of paramount importance, their results must be viewed in light of the fact that, at the time Schering disseminated its Fibre Trim advertising, other evidence suggested that fiber's ability to cause weight loss was questionable (Tr. 994, 3806).

206. The Brock and Kissileff studies certainly put into question the efficacy of Fibre Trim for weight loss and appetite suppression,

and an October 1985 report on fiber developed by an expert advisory committee for the Canadian Health and Welfare Bureau which reviewed the state of scientific knowledge, concluded that “[t]he evidence to date is in no way sufficient either to establish weight reduction as a physiological effect of fibres, or to determine the role of fibres in weight loss preparations” (CX 78, p. 24). Dr. Anderson, one of Schering’s experts, agreed that as of the date of this report, scientific documentation was lacking for prescribing dietary fiber for weight loss (Tr. 3806), and other experts testified that the role of fiber in weight loss, if any, has still not been established (*see* Tr. 781, 1146-47, 3795; CX 78, p. 24, CX 90, pp. 74-79, CX 480). Very recently - in 1990 - a report on fiber prepared by the British Nutrition Foundation’s Task Force found: “many experiments have been done in which fibre supplements of all kinds have been taken with meals . . . and weight loss is rarely, if ever, reported” (CX 207, p. 81).

207. Furthermore, those studies that have reported a weight loss effect from a quantity of fiber similar to that provided by Fibre Trim have involved soluble fiber such as guar and glucomannon which have different properties than the fiber in Fibre Trim (Tr. 768-69; *see* 482-87) and the results of these studies, according to Drs. Levine and Levitsky, may not be extrapolated to Fibre Trim (Tr. 769, 988-94).

b. The Pre-Dissemination Studies

(1) Hessel

208. Schering did not rely on the Hessel study as substantiation for its claims and since it was not blinded, randomized or placebo-controlled, it could not have served that purpose (Tr. 2460, 2587; RX 197, pp. 6-9).

(2) Rytzig

209. Drs. Levitsky and Levine testified that this study was so flawed that it could not serve as the basis for any claims as to Fibre Trim’s efficacy.

210. Schering’s promotional literature states that the daily dosage of Fibre Trim is 15 tablets (CX 280, p. 2, CX 288, p. 10, CX 310, p. 2), but subjects in the Rytzig study were given nearly twice that amount (CX 255), and it is not scientifically sound to conclude that

because daily consumption of 28 Fibre Trim tablets produces a particular result, 15 will also do so (Tr. 718, 794-95, 975-76; *see* Tr. 3104). Thus, even if the Rytig study were valid in all respects, it could not substantiate a claim for the recommended dosage of Fibre Trim (Tr. 794, 974-80, 2528-29, 3103-04, 3695, 3807).

211. Other flaws in this study were identified: The placebo tablets contained 54 more calories than the fiber tablets (RX 324, p. 2; Tr. 793-94, 960) and if the weight loss difference between the groups is adjusted to take this into account, the results are not statistically significant using a two tailed test (Tr. 1069-75).

212. There were a total of nine withdrawals during the Rytig study, eight placebo and one fiber (CX 255, p. 3 (& Table 3); Tr. 796-98, 962-64). Because there were considerably more withdrawals in the placebo group, and withdrawals were assigned their highest recorded weight (CX 255, p. 2), the actual weight loss of that group was diluted in comparison with the Fibre Trim group, biasing the results in favor of the latter (Tr. 796-98, 963-64, 967; *see* Tr. 3078).

213. Dr. Hurley, who testified for Schering and analyzed the weight loss studies, used subject discontinuance rates as a measure of how well-controlled those studies were (RX 197, pp. 7-8; Tr. 2620). He stated that even if intention-to-treat analysis were used, he would have "grave concerns about the interpretability of the result[s]" of a study in which more than 20 percent of the subjects discontinued (Tr. 2707). In the Rytig study a total of 11 placebo subjects, or 24 percent of the 45 originally enrolled, discontinued (CX 255, p. 3). Finally, Dr. Iezzoni testified that he was unsure whether the sample used in this study could be generalized to the U.S. population (Tr. 2472-74).

(3) Solum I

214. A major criticism of this study is that the description of its design, implementation and results is so brief that one cannot assume its validity and reliability (Tr. 790-91, 955-56; *see* Tr. 320-21, 2726-27, 3696-97). Although he testified in support of Schering's studies, Dr. Feinstein stated: "If the Solum I study were submitted to my journal, we would not accept it because it doesn't have enough detail" (Tr. 3577).

215. Specifically, the report does not reveal the mean beginning or ending weights of the two groups, the amount of weight loss, the

caloric content of the placebo tablets, and it contains no tables presenting any data (Tr. 791, 954, 956). Because of the report's brevity, Dr. Giaquinto testified that:

This study was not meant or at least was not used by me to stand alone and was not looked to have the type of criteria we were looking to get a drug which this is not -- we never classified as such -- approved or qualified for an adequate and well-controlled trial

(CX 333, p. 77). Dr. Levine concluded that the description of the study is so sparse that: "We are supposed to believe that what they were presenting is true, but we're not given the evidence for that" (Tr. 791).

216. Because of the lack of detail in this study, Dr. Iezzoni "assume[d] that [the investigator] did the appropriate things that were necessary for an evaluation of this material" (Tr. 2500) and Dr. Hurley concluded that it did not satisfy randomization criteria (RX 197, p. 20; Tr. 2726). Although Solum I did not reveal whether data from subjects who discontinued was included in its analysis, he assumed that the intention-to-treat principle was followed (Tr. 2727-28).

217. Dr. Larsen's 1983 evaluation of Solum I expressed concern about its lack of data:

the study has certain shortcomings both in the form of lacking data and dropout routine and lack of initial body weight observations. So this result will need to be verified by new studies of a design eliminating the abovementioned shortcomings

(RX 320, pp. 4-5).

c. The Post-Dissemination Studies

(1) Ehmman & Ressin

218. At the end of the four-week period of this study, the fiber group averaged a slightly greater weight loss than the placebo group, but the report of the study does not claim that the difference is statistically significant (CX 67).

219. In addition, Dr. Feinstein concluded that while Ehmman & Ressin is "supportive" because it showed results consistent with the

other studies, it “is not an acceptable study because it wasn't randomized and it wasn't double blind” (Tr. 3587-88).

(2) Solum II

220. According to the published report of this test, at the end of 12 weeks, the fiber group had lost more weight than the placebo group. This difference was statistically significant (CX 66).

221. Despite the statistically significant weight loss in the fiber group, Drs. Levitsky and Levine concluded that Solum II did not support Schering's claims because it is not scientifically appropriate to extrapolate from the effects of this study which used 20 Fibre Trim tablets to the probable effects of using the recommended dosage of 15 tablets. In addition, because these subjects were consuming a baseline diet containing 25 grams of fiber per day, the study's results cannot be generalized to the American population, whose fiber intake is smaller (Tr. 792, 821, 1012-13).

222. Other problems with this study were pointed out: The published study does not reveal the number of subjects or the amount of weight lost (Tr. 818-19). While the abstract refers to 60 participants, the text mentions 70 (CX 66, pp. 2, 4) and the statistical report indicates that 71 were enrolled (RX 337, p. 11, RX 338, p. 3). The abstract and text do not agree as to the weight lost by the placebo group (compare CX 66, p. 2 with CX 66, p. 4).

223. Dr. Levitsky reanalyzed the data in Solum II taking into account the fact that the placebo tablets provided 60 more calories per day than the fiber tablets (Tr. 820, 1011, 1083-86; CX 66, p. 3, CX 332) and found that, using a two tailed analysis, the difference in weight loss between the fiber and placebo groups was not statistically significant (Tr. 1088). Furthermore, Dr. Larsen, a co-author of this study, arrived at statistical significance for this study only after data manipulations which may not have been appropriate (Tr. 3130-34; RX 338, p. 3).

(3) Rossner

224. At the end of this two-month study, the fiber group averaged a one kilogram greater weight loss than the placebo group (CX 256), and the 1987 report of this study concluded that this difference was statistically significant.

225. Dr. Levine testified, however, that several discrepancies raise serious questions about the credibility of this study (Tr. 816-17), particularly an earlier report of what was apparently the same study which states that the weight loss was not statistically significant (*see* Tr. 3014; CX 63, p. 5; RX 333, p. 11).

226. The published report states that the data of discontinuers was to be included in the analysis of results (CX 256, p. 2), but the discussion of the results excludes the six subjects who did not complete the study (Tr. 1004-05). As in other studies, the placebo tablets provided more calories than the Fibre Trim tablets (Tr. 811-12, 1003).

227. As with the Solum I, Rytting, and Solum II studies, Dr. Levitsky performed a reanalysis of the Rossner data, excluding the subjects who did not complete the study (Tr. 107883; CX 331) because inclusion of data for these subjects biased the study in his opinion (RX 329, p. 3; Tr. 1081-82). While the published report does not specify which group these subjects had been assigned to, the backup data reveals that all were from the placebo group (CX 270, pp. 8-12). Including them in the data analysis as if they had participated in the study and lost no weight penalized the placebo group.

228. If Dr. Levitsky's analysis of the Rossner study is accepted, it demonstrates that, although the loss was not statistically significant, the placebo subjects who completed the study actually averaged a slightly greater weight loss than did the fiber subjects (Tr. 1082; CX 331, p. 2). Dr. Larsen, who reanalyzed this and other studies for Schering, agreed that, if it is proper to exclude early discontinuers from the data analysis, the fiber tablets did not cause greater weight loss than did the placebo tablets (Tr. 3121-22). This is true even without adjustment for the caloric differential between the fiber and placebo tablets. If the caloric differential were accounted for, the placebo group's weight loss would be even further enhanced (Tr. 1080).

(4) Birketvedt

229. In this 26-week study, the subjects were given, along with a reduced calorie diet, 22 Fibre Trim or placebo tablets daily until reaching ideal weight, and then a maintenance dose of 15 tablets (CX 68, p. 6). Drs. Levitsky and Levine concluded that since the test dosage was greater than Fibre Trim's recommended dosage,

Birketvedt's results could not substantiate the Fibre Trim claims (Tr. 823-24, 1020-23).

230. Both the Fibre Trim and placebo groups lost statistically significant amounts of weight during the 26 weeks of the study (Tr. 3197; RX 348, p. 8), and the mean weight loss was greater in the Fibre Trim group than in the placebo group from weeks 4 through 24 by a statistically significant amount (Tr. 3553; RX 348, pp. 8-11).

231. However, during the final two weeks of this study, the Fibre Trim group gained weight while taking 15 tablets per day; this gain neutralized the weight lost earlier in the study, so that, at its end, there was no longer a statistically significant difference between the fiber and placebo groups (Tr. 823-24, 1020, 1023, 3169).

232. Dr. Feinstein testified that to demonstrate the efficacy of a product for weight maintenance, a study should be continued for longer than 6 months, and he agreed that the results of the Birketvedt study could not be considered as proof of what its results would have been if it had been continued for more than 26 weeks (Tr. 3698-99).

233. Drs. Levitsky and Levine concluded that the seven studies relied on by Schering do not, either individually or collectively, constitute reliable support for Schering's weight loss, weight maintenance or appetite suppression claims. Even if Schering's post-claim evidence is considered (*infra*), they concluded that each of the studies is critically flawed, contains numerous inconsistencies, and do not in the aggregate support Schering's claims, for it is scientifically improper to conclude that several flawed studies can be considered, if viewed together, as reliable scientific evidence (Tr. 825-27, 980-81, 1030-39).

8. Schering's Defense of the Weight Loss Studies

234. Schering answers the criticisms of complaint counsel's experts by pointing out that the studies it relied upon met some of the recognized standards for clinical trials:

a. Solum I, Rytting, Solum II, Rossner, and Birketvedt were randomized (RX 194, p. 4, RX 195, p. 1, RX 197, p. 19, RX 317, p. 2, RX 321, pp. 3-4, RX 324, p. 2, RX 327, pp. 4, 8, RX 329, p. 1, RX 335, p. 1, RX 338, p. 3, RX 348, p. 6).

b. Solum I, Rytting, Solum II, Rossner, and Birketvedt were double-blinded (RX 194, p. 4, RX 195, p. 1, RX 197, p. 19, RX 317,

p. 2, RX 321, p. 4, RX 324, p. 2, RX 327, p. 4, RX 329, p. 1, RX 335, p. 1, RX 338, p. 3, RX 348, p. 3). Ehmann & Ressin was a single-blind study (RX RX 197, p. 19).

c. Solum I, Rytting, Solum II, Rossner, Ehmann & Ressin, and Birketvedt were placebo-controlled studies (RX 317, p. 2, RX 321, pp. 3-4, RX 324, p. 2, RX 327, p. 3, RX 329, p. 1, RX 334, p. 3, RX 335, p. 1, RX 338, p. 3, RX 339, p. 2, RX 348, pp. 3, 6).

d. Solum I, Rytting, Solum II, Rossner, and Birketvedt were analyzed following the intention-to-treat principle (RX 320, p. 3, RX 321, pp. 3, 6, RX 324, p. 2, RX 327, pp. 3-4, 7, RX 334, p. 5, RX 335, p. 2, RX 348, p. 7; Tr. 2924, 2950).

e. With the exception of Birketvedt and Hessel, the results of each Fibre Trim clinical study demonstrate that the Fibre Trim group lost a statistically significant greater amount of weight than the placebo group (RX 317, p. 2, RX 320, pp. 3-4, RX 321, pp. 3, 8, 12, 15-16, RX 324, pp. 2-3, RX 327, p. 13, RX 329, p. 3, RX 334, p. 7, RX 335, p. 3, RX 338, p. 19, RX 342, p. 15, RX 403; Tr. 3243-45). The results of Solum II, Ehmann & Ressin, and Rytting are also significant when a two-tailed test is used (RX 33, p. 19, RX 327, p. 13, RX 342, pp. 5, 15; Tr. 2953-54, 2995, 3020).

f. Medstat, the research institute that analyzed the Fibre Trim clinical studies, reanalyzed Solum I, Rytting, Rossner, and Solum II, adjusting for the additional calories contained in each placebo tablet (RX 321, p. 10, RX 327, p. 15, RX 334, p. 8, RX 338, p. 8; Tr. 2949, 2956-60, 2980-81, 2994-95, 3012, 3235, 3249, 3255).

g. After adjusting for the additional placebo calories, Medstat concluded that the Fibre Trim group lost a statistically significant greater amount of weight than the placebo group in the Solum I, Rytting, Rossner and Solum II studies (RX 321, p. 15, RX 327, pp. 16-17, RX 334, p. 9, RX 338, p. 19; CX 329, p. 5, CX 330, CX 332, pp. 5-6, CX 393; Tr. 1113-14, 1143-44, 1151, 2949, 2956-62, 2980-81, 2994-95, 3012, 3235, 3249, 3255).

235. Since each of the studies relied on by Schering involved subjects who were consciously following a diet program, it is irrelevant whether those studies were adequate and well-controlled, for Schering's advertisements did not make it clear that Fibre Trim might be an effective weight loss and weight maintenance product only if consumers -- along with taking Fibre Trim -- also consciously followed a reduced calorie diet program.

236. Furthermore, statistical significance alone does not validate a study, for the question remains: was the observed difference clinically significant or “clinically trivial” (CX 492, pp. 546-47). With respect to weight loss studies, some experts believe that a weight loss product should produce a difference of at least one-half pound per week between placebo and treatment groups (Tr. 813). Such a weight loss would not only be statistically significant but clinically significant.

237. The FDA’s proposed monograph for clinical trials of OTC weight control drug products offers some guidance in this regard. While it does not mandate the amount of weight loss that an effective weight loss product must produce, it assumes that subjects receiving the placebo will lose one pound per week, while those receiving an effective weight loss treatment will lose 1.5 pounds per week (CX 81, p. 17).

238. The published results of the Fibre Trim studies reveal that they do not meet this standard (*see* Tr. 813, 824).

239. If the results of a study cannot be applied to the actual conditions under which the tested product will be used they are meaningless. The Rytig study fails this test and its statistical significance does not, therefore, prove the value of the recommended dosage of Fibre Trim.

240. The Hessel study was not randomized or placebo controlled and the results of the Rytig study cannot be extrapolated to actual Fibre Trim dosage; therefore, Schering did not possess two adequate, well-controlled clinical studies supporting the claim that Fibre Trim is an effective weight loss or weight maintenance product when taken in conjunction with a reduced calorie diet.

241. Since Schering had no pre-dissemination basis for the claim which it says it made, it is not essential to decide whether it possessed two adequate, well-controlled post-dissemination clinical trials, but some comment on the adequacy of those trials would not be out of place.

242. The post-dissemination studies are problematic, particularly Rossner, which exemplifies the problem of relying on subjects who discontinued treatment. Respondent’s experts (Drs. Ahern, Hurley and Larsen) testified that inclusion of data for all subjects randomized into a study regardless of whether they complete the study (the “intention-to-treat” principle) is the only acceptable way to treat the results of a study (Tr. 2613, 2622, 3051, 3317-20).

243. If Rossner is analyzed according to this principle, the results are statistically significant; however, if early discontinuers from the study are excluded, the results are not significant (Tr. 3121-22).

244. Dr. Feinstein, who claimed that Rossner provided only marginal support for Schering's claims (Tr. 3677), acknowledged that there are differing views among experts regarding the propriety of applying the intention-to-treat principle and stated that the evaluation of that study as support for the product's efficacy depends on "which church I'm in. In one church the study will get full credit. In the other church it won't" (Tr. 3678; *see* Tr. 798).

245. In fact, some of Schering's own experts do not adhere to the intention-to-treat principle. Dr. Eastwood does not use the intention-to-treat principle in his clinical studies (Tr. 3487), and Dr. Anderson usually requires that subjects consume 75 to 80 percent of the product before including their data in a study analysis, an approach which he prefers over the intention-to-treat principle (Tr. 3785-86) (*see also* CX 515, p. 8; RX 284, p. 4, RX 291, pp. 23-26).

246. Dr. Giaquinto testified in a deposition that he did not believe that the intention-to-treat principle was necessarily the best approach in the context of a weight loss drug study (CX 333, p. 15), and that in research conducted by Schering, the data of discontinuers is included in safety analyses of drugs, but not in efficacy analyses (CX 333, pp. 15, 83, 86).

247. In a study conducted by Dr. Michael Follick of Brown University investigating the efficacy for weight loss of Fibre Trim FruitTabs, he excluded 32 of the 103 subjects originally enrolled in the study "because they either did not complete the project or had a substantial amount of missing data in their measures" (CX 475, p. 6). The results were analyzed based only on the data of those who completed the study (CX 475, pp. 6, 12-13; Tr. 3368-69).

248. There are also problems with Ehmann & Ressin, Solum II and Birketvedt which convince me that, whether one looks at pre- or post-dissemination studies, Schering's weight loss and weight maintenance claims were not substantiated and that Schering should have questioned the results of those studies when they were analyzed, particularly in view of the skepticism in the weight-loss community about the efficacy of fiber for weight loss and scientific studies conducted or sponsored by Farma Food which did not substantiate a weight loss claim (CX 110, CX 159, CX 162, p.2) and whose

existence was known of by Schering employees or of which they should have been aware.

249. Despite the obvious deficiencies of the pre-dissemination studies, and the existence of contrary evidence about Fibre Trim's efficacy, no one at Schering who was responsible for determining whether its weight loss claims were substantiated asked to inspect their protocols, patient data forms or statistical analyses (Tr. 2497, 2509, 2540-41; *see* CX 333, p. 9).

250. Finally, analysis of their validity cannot ignore the apparent lack of peer review for these studies and the participation of the same investigator in several of them. The list of authors of the seven studies relied on by Schering is varied, but one individual, Kjeld Rytting, played a significant role in the design and preparation of several of them: he was the primary author of the Rytting study (CX 255), the co-author as well as the monitor for the Solum II study (CX 66; Tr. 3127), and a co-author of the Rossner and Birketvedt studies (CX 68, CX 256). While not listed as a co-author of Solum I, he was responsible for drafting the article to be submitted for publication (Tr. 3152; CX 366, p. 3). Mr. Rytting was, throughout the relevant time period, Medical Director for Farma Food, the product's manufacturer (Tr. 3056).

251. The Hessel and Birketvedt studies (CX 53, CX 68) are unpublished manuscripts. The record is silent as to whether the European journals in which Rytting, Solum I, Ehmann, and Rossner appeared require peer review; and while Solum II was published in the International Journal of Obesity, a peer review journal of which Dr. Levitsky is a regional editor, the study appeared in a supplement of the journal that consisted entirely of papers presented at a symposium on weight loss. Such supplements are not subjected to the journal's ordinary peer review process (Tr. 1010).

G. Substantiation For The Health Benefits Claim

1. The Benefits of a High Fiber Diet

252. Experts called by both parties agreed that increased intake of dietary fiber may be associated with a variety of health benefits including prevention and treatment of colon cancer, coronary heart disease, obesity, diabetes, irritable bowel syndrome, diverticular

disease, and constipation (Tr. 495, 533, 1282-83, 3457, 3469, 3754, 3845, 3906; CX 90, pp. vii-viii, CX 92a, p. 15; RX 83, p. 1492).

253. Because of this association, several health research organizations, including the National Cancer Institute, the Department of Health and Human Services, the Department of Agriculture, the National Institutes of Health, the National Research Council of the National Academy of Sciences, and the Federation of American Societies for Experimental Biology (“FASEB”), have recommended in recent years that Americans increase their consumption of fiber-containing foods such as fruits, vegetables and whole grains. The recommendation is based on the observation that populations with diets high in those foods tend to have a lower incidence of heart disease, diabetes, cancers, and obesity (Tr. 495, 533, 1223, 1228, 1253-59, 1282-83; CX 90, pp. vii-viii, CX 92a, p. 15, CX 99a, pp. 12-13, CX 154, pp. 120-21). At issue is whether fiber supplements such as Fibre Trim provide the same health benefits as does a fiber-rich diet.

254. Several health organizations have stressed that the recommended increase in fiber consumption should be achieved by eating more high fiber foods, and not by taking fiber supplements (Tr. 533, 535, 1220, 1262-63; CX 78, p. 6, CX 90, p. 161, CX 92a, p. 15, CX 98, p. 6, CX 155, p. 8, CX 156, p. 4, CX 370, p. 6, CX 394, p. 15, CX 395, p. 5).

255. The National Academy of Sciences’ Diet and Health Report specifically states: “there is no conclusive evidence that the dietary fiber itself, rather than other nutritive and nonnutritive components of these foods, exerts a protective effect against these cancers. The committee does not recommend the use of fiber supplements” (CX 92a, p. 15). The National Cancer Institute has stated: “Since the evidence for a protective effect of fiber is generally from an association of dietary patterns in which fiber occurs as a complex mixture with other foods, the extrapolation to the possible beneficial effects from fiber supplements cannot be made at this time” (Tr. 1260; CX 370, p. 7; *see* CX 98a, p. 19). The Institute has further cautioned that “[f]iber supplements, unless they are ordered by your physician, aren’t the answer because all studies to date show that the protective effects are associated with fiber-rich foods” (CX 155, p. 8, CX 156, p. 4; *see* CX 78, p. 32, CX 97, p. 18, CX 395, p. 5).

256. Dr. Anderson testified that with respect to certain diseases such as coronary heart disease, scientific evidence does not support the proposition that fiber supplements provide all of the health

benefits associated with a high fiber diet from foods (Tr. 3758). In addition, because foods contain many different types of fiber, the health community recommends that consumers increase their fiber intake by eating a variety of fiber-containing foods (Tr. 495-96, 1262-63, 3471; CX 97, p. 17-18, CX 98a, p. 18-19, CX 100, p. 889, CX 155, p. 8, CX 395, pp. 2-3, 7, CX 495, p. 5).

2. Fiber and Colon Cancer

257. While populations consuming fiber-rich diets experience a reduced incidence of colon cancer, the specific role of fiber has not been discovered. Other constituents of fiber-containing foods, or the low fat content of high fiber diets, may be responsible for the protective association (*see* CX 92a, p. 15, CX 154, p. 121, CX 370, p. 7). There is, therefore, no basis for a contention that simply because Fibre Trim contains fiber it can provide the colon cancer reduction of a fiber-rich diet (Tr. 543-44, 1261-63).

3. The Laxative Benefits of Fibre Trim

a. Introduction

258. Prior to dissemination of the challenged advertisements, Schering possessed several studies addressing Fibre Trim's laxative properties, although none of its employees testified that they or other Schering employees reviewed these studies (Tr. 2357, 2426, 2488, 2830-31; CX 333, pp. 18, 27-29, 283-84). Thus, the studies relied on by Schering at trial do not constitute pre-dissemination support for the claims made in its Fibre Trim advertisements. These studies are:

b. Schrivjer

259. This study used 55 patients with irritable bowel syndrome (IBS) and other digestive complaints (Tr. 3418). Dr. Slavin, one of Schering's expert witnesses, testified that this study's parallel group design comparing Fibre Trim to wheat bran was appropriate (Tr. 3866) and she concluded that it showed that Fibre Trim is at least as effective as wheat bran (which is a potent fecal bulking fiber) (Tr. 3451; RX 179, p. 10) in increasing fecal weight, decreasing transit time through the gastrointestinal tract (GI) and increasing stool fre-

quency (Tr. 3866-67). Dr. Eastwood concluded that the increase in stool weight shown by the Schrivjer study is especially meaningful since subjects with IBS are less likely to show such an increase (Tr. 3421; *see also* Tr. 3866-67).

c. Lambert's Clinical Trial No. 2

260. This study used 42 patients with simple constipation (RX 187, p. 4299; Tr. 3872) and used a double-blind, parallel group design. Patients were randomly assigned to two groups, one consuming 10 grams of wheat bran and the other taking 12 Fibre Trim tablets per day (RX 187, p. 4299; Tr. 3426-27).

261. Drs. Slavin and Eastwood testified that this study showed that Fibre Trim increased stool frequency as effectively as wheat bran (RX 187, p. 4306; Tr. 3427, 3873), and that there was a significant decrease in GI transit time in the Fibre Trim group (RX 187, p. 4308; Tr. 3428, 3873). Dr. Story concluded that this study "suggests" that Fibre Trim is an effective laxative (Tr. 636-37).

d. Lambert's Clinical Trial No. 3

262. This study was conducted with 15 hospitalized, elderly patients suffering from constipation. The patients served as their own control. There was no parallel group taking a placebo or other product; rather, patient results were compared before and after taking Fibre Trim (CX 126, p. 2; Tr. 3432, 3874-75).

263. Drs. Eastwood and Slavin concluded that this study indicates that in a difficult group, elderly patients with constipation, Fibre Trim is effective in increasing stool weight and transit time (Tr. 3434, 3876). Asked to assume that Fibre Trim increased stool weight over 20 percent as indicated by this study, Dr. Lanza stated that it would be considered an effective laxative (*see* Tr. 1410).

e. The Pulpeiro Study

264. This randomized, double-blinded study was conducted with 40 patients with simple constipation, IBS, or uncomplicated diverticular disease (CX 122, pp. 2-3; Tr. 3435-38, 3877-78). In a crossover trial, subjects consume one product for a certain period; after a "washout" period when they consume no product, they are given a

second product for a period of time. Another group begins with consumption of the second product, then takes the first (Tr. 3437-38).

265. Drs. Eastwood and Slavin testified that Pulpeiro shows that Fibre Trim results in an increase in stool weight and a decrease in transit time compared to placebo (Tr. 3438-40, 3879). Again, assuming a 20 percent increase in stool weight, Dr. Slavin testified that Fibre Trim would be considered an effective laxative (*see* Tr. 1410).

f. The Bjorneklett Study

266. This crossover study, conducted with 20 patients complaining of chronic constipation, assigned them to either a wheat bran or Fibre Trim group for two months (RX 374, pp. 6-7; Tr. 3809). Both products were essentially equal in their laxative effect (RX 374, pp. 11, 13).

g. The Vahouny Study

267. According to Dr. Eastwood, this study using rats given various kinds of fiber (RX 184, p. 2) reveals that wheat bran and barley were effective in increasing stool weight; thus, barley, the principal component of Fibre Trim, and wheat bran are comparable in terms of fecal bulking ability (RX 184, p. 4; Tr. 3447).

h. Analysis of the Laxative Studies

268. There is a consensus in the scientific community that dietary fiber is useful in treating and preventing constipation (Tr. 3858; RX 179, p. 6, RX 188, p. 3 (“Undoubtedly, fibre supplements increase stool output and decrease transit time in healthy people”)).

269. If a fiber or fiber product produces a 20 percent increase in stool weight, it is considered to be an effective laxative (Tr. 1410). Wheat bran, which was used as a comparison for Fibre Trim in some of the studies (CX 123, CX 127, CX 128) is often used as a standard to determine whether other fibers are effective as laxatives (Tr. 565, 1410).

270. Dr. Slavin testified that, on the whole, the laxative studies provide reliable scientific evidence that Fibre Trim works as well as wheat bran and is effective as a laxative (Tr. 3881-82).

271. Drs. Story and Lanza concluded otherwise, pointing out that only the Pulpeiro study was placebo controlled (CX 122); furthermore, the studies did not indicate the type of wheat bran used, and there could therefore be no reliable conclusion about Fibre Trim's effects as compared with wheat bran (Tr. 586-87, 595, 599, 1322, 1344). Complaint counsel's experts identified other problems with the studies which make it impossible to conclude that Fibre Trim's laxative effects have been scientifically established (CPF 555-61).

272. It is probable that fiber supplements provide some of the health benefits that are provided by the fiber in foods (Tr. 630, 3748-50, 3857-58); and this is particularly true with respect to laxative effect (Tr. 3393, 3397, 3403, 3411-12, 3906-07). Dr. Eastwood, an eminent gastroenterologist, testified that Fibre Trim is comparable to other potent fecal bulking fibers, including wheat bran, and is thus an effective laxative (Tr. 3451; RX 179, p. 10).

273. However, even if Dr. Eastwood is correct, Schering did not limit its claims to laxation, but suggested in its advertisements the general importance of fiber, including Fibre Trim, in one's diet, and implied that Fibre Trim would provide the same benefits which the health community discerned in the fiber contained in food. Since Schering stipulated that it would offer no evidence that Fibre Trim had a beneficial effect on cholesterol, coronary heart disease, or diabetes, its health benefit claim was not supported by competent, reliable scientific evidence when it was made.

274. Instead of scientific evidence, Schering relied upon popular press articles praising fiber (Tr. 2232-33, 2425, 2485-86, 2549), and generalized background materials about fiber as support for its health benefits claim (*e.g.*, CX 139 [RX 6]; *see* CX 333, pp. 233-34).

275. Dr. Iezoni, Schering's Director of Medical Services and the person responsible for the medical review for all package labeling and inserts (Tr. 2402), testified that he did not think it unreasonable to expect that, because Fibre Trim contained fiber, it would provide all of fiber's benefits (Tr. 2549). He sought no further substantiation for Schering's health benefits claim.

276. Dr. Albu believed Schering's health benefits claim to be substantiated because much had been written about the health benefits of fiber, all of which would be applicable to Fibre Trim because "once fiber gets in your body, the body doesn't know

whether it came from broccoli or a tablet, so fiber is fiber in that sense. . . ." (Tr. 2365).

277. Dr. Giaquinto, Schering's chief regulatory executive, and the ultimate person responsible for advertising substantiation review for Schering's Regulatory Department at the time Fibre Trim was first marketed (CX 333, pp. 47, 50-51), could not recall any discussion of support for a claim with regard to Fibre Trim's benefit for any health condition or chronic disease other than weight loss during the review of scientific substantiation for Fibre Trim (CX 333, p. 284). He also testified that in his review of Fibre Trim substantiation, he did not see any scientific support for a claim that Fibre Trim would play a role in reducing the risk for colon cancer (CX 333, p. 261). In fact, Dr. Giaquinto admitted that he never reviewed a number of advertisements that made the health benefits claim (CX 333, pp. 277-79).

H. Substantiation For The High Fiber Claim

278. Schering's advertising represented that Fibre Trim is a high fiber supplement. The recommended daily dosage (15 tablets) contains about 4.1 grams of fiber (Stipulation of Fact, at paragraph I (F-G)).

279. Schering's recommended dosage of Fibre Trim as a fiber supplement contains less fiber, about 2.5 grams per day (CX 280, CX 357, pp. 2-3; see Stipulation of Fact at paragraph I (E)).

280. According to a survey of pharmacists conducted by Schering, 37 percent recommended Fibre Trim to their customers as a fiber supplement (CX 314, p. 2).

281. The FASEB report recommends that the U.S. population increase its fiber intake to 20 to 35 grams per day (CX 90, pp. 1X, 163), and Drs. Story and Anderson testified that this recommendation has been widely accepted and strongly supported by the scientific community (Tr. 491, 3761-62). Most diet recommendations made since the FASEB report have adopted its fiber intake suggestions (Tr. 491).

282. According to Drs. Story and Lanza, Fibre Trim cannot be considered a high fiber supplement since its recommended daily dosage (1.65 to 4.1 grams of fiber) is only 8 to 20 percent of the threshold 20 gram recommendation (Tr. 523, 1360).

283. This argument is based on the presumption that supplements -- of whatever kind -- are taken to satisfy a daily requirement (Tr. 520, 1360), but there is no independent record evidence that persons taking Fibre Trim as a supplement do so in the belief that it will provide the recommended 20 to 30 grams of fiber per day.

284. Fibre Trim's recommended weight loss dosage of 4.1 grams, if equated with a serving of food containing dietary fiber, would qualify as a high fiber source. For example, the FDA has taken the position that products making a fiber claim should meet the following standards: a "source" of fiber should provide at least 2 grams per serving; a "good source" at least 5 grams per serving; and an "excellent source" at least 8 grams per serving (CX 79, p. 1; *see* Tr. 294).

285. Other health organizations in the United States have devised similar classifications for the fiber content of foods. The National Cancer Institute, for example, defines "rich sources" of dietary fiber as those containing four grams or more per serving (CX 156, p. 28; Tr. 1359), and Canadian guidelines state that a "moderate source" of fiber should provide between 2.0 and 4.4 grams of fiber per serving; a "high source" between 4.5 and 6.9 grams per serving; and a "very high" source at least 7.0 grams per serving (Tr. 1271; CX 77, p. 7, CX 78, p. 30).

286. Fibre Trim's weight loss dosage of 4.1 grams of fiber compares favorably, in some cases, with the amount of fiber in a single serving of commonly available foods.

287. Cereals such as All-Bran provide approximately 12 grams of fiber per serving (CX 284, CX 288). According to the Fibre Trim Diet plan, one-half cup of green peas contains 5.0 grams of fiber, one-half cup of spinach contains 5.7 grams, a fresh pear provides 3.7 grams, one-quarter cup of baked beans provides 5.1 grams, one-half cup of kidney beans provides 9.6 grams, and one small ear of corn provides 4.3 grams (Tr. 524-27; CX 284, CX 288, pp. 2-3). A large apple provides approximately 4.2 grams (Tr. 526-27). Breakfast cereals provide roughly four to six grams of fiber per serving (Tr. 2359).

288. The complaint's allegation that Fibre Trim is not a high fiber supplement depends upon the assumption that consumers believe that it provides all of their daily fiber needs -- 20 to 30 grams -- and that the Fibre Trim dosage of 4.1 grams is thus comparatively

low in fiber. This assumption is not supported by reliable record evidence of consumer belief.

289. Complaint counsel make a second assumption: that 5 tablets of Fibre Trim is a "serving" and that its fiber content compares unfavorably with a "serving" of many common foods. This assumption is not unreasonable, but it is equally reasonable to assume that the daily weight loss dosage of Fibre Trim -- 15 tablets -- is a "serving" and that its fiber content compares favorably with that in servings of many foods. I conclude that the full daily dosage of Fibre Trim is equivalent to a serving and that the weight loss dosage is high in fiber. The weight maintenance dosage is, however, not high in fiber.

I. Substantiation For The Fiber Content Claim

290. In certain advertisements and promotional materials, Schering represented that the recommended dosage of Fibre Trim provides 2.35 grams of dietary fiber per serving, or about seven grams (7.05 grams) per day; however, throughout the time Fibre Trim tablets have been available for purchase in the United States, each Fibre Trim tablet has contained approximately 275 mg. of dietary fiber (Stipulations of Fact at paragraph I (E)). Therefore, a serving of five tablets contains approximately 1.37 grams of dietary fiber, and the daily dosage of fifteen tablets contains approximately 4.1 grams (*id.* at paragraph (D-G)). Thus, Schering overstated its product's fiber content by approximately 71 percent, and had no reasonable basis for its claim that Fibre Trim provides 2.35 grams of fiber per serving, or 7.05 grams per day.

291. In 1986, Schering learned that there had been a misunderstanding with Farma Food regarding the amount of dietary fiber in the Fibre Trim tablet (Tr. 2250, 2363). All Fibre Trim promotional materials were promptly changed to state the correct amount of dietary fiber in each Fibre Trim tablet (Tr. 2250; *see* RX 352).

III. CONCLUSIONS OF LAW

A. *The Claims Made In Schering's Advertisements*

1. Schering's Admissions

Schering admits that its advertisements made the weight loss and weight control or weight maintenance claims (F. 123), the high fiber supplement claim (F. 152) and the fiber content claim (F. 157).

2. The Disputed Claims

a. *Introduction*

Schering denies that its advertisements made the appetite suppressant, health benefits and daily requirements claims alleged in the complaint and it argues, with respect to the weight loss claims, that its advertisements inform the consumer that Fibre Trim is only effective if it is used in conjunction with a reduced calorie diet.

If the meaning of an advertisement challenged by the Commission is clear, the Commission and its administrative law judges may, without resort to any evidence other than the language of the advertisement, determine the message which it conveys to reasonable consumers. *Kraft Inc.*, D. 9208 (Jan. 30, 1991), slip op. at 7; *Thompson Medical Co.*, 104 FTC 648, 789 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987); *Cliffdale Associates*, 103 FTC 110, 174, 176 (1984) (Policy Statement on Deceptive Act and Practices ("Deception Statement")).

If the Commission cannot confidently determine its message from the advertisement itself, it will turn to extrinsic evidence, the most convincing of which is direct evidence "of what consumers thought upon reading the advertisement in question." *Thompson Medical*, 104 FTC at 789; *Leonard F. Porter, Inc.*, 88 FTC 546, 626 (1976); *Bristol-Myers Co.*, 102 FTC 21, 319 (1983), *aff'd*, 738 F.2d 554 (2nd Cir. 1984). The extrinsic evidence on which the Commission may rely includes consumer testimony, expert opinion, copy tests of advertisements, or surveys. Deception Statement at 176 n.8.

In this case, the advertisements were directed to upscale females who wanted to lose weight (F. 9-10) and the meaning of the

advertisements should be interpreted from their perspective. *See Bates v. Arizona*, 433 U.S. 350, 383 n.37 (1977).

b. *The Need For Conscious Adherence to a Reduced Calorie Diet*

Many of the Fibre Trim print advertisements do not mention the need to reduce calories (F. 129) and the audio portion of the television advertisements contain no such admonition (F. 127). In fact, several advertisements convey the impression that Fibre Trim itself will help to reduce caloric intake (F. 131) or that there is no need to diet while taking it (F. 126).

Dr. Shimp's expert opinion that the advertisement did not convey to reasonable consumers that conscious adherence to a reduced calorie diet was necessary if Fibre Trim is to be effective (F. 133) is amply supported by the record; indeed, the language of some advertisements is so unequivocal (F. 129) that I conclude with confidence, and without resort to his testimony, that the advertisements contain no such admonition. *See Thompson Medical*, 104 FTC at 789; *Kraft, Inc.*, slip op. at 7, 11.

Other television and print advertisements contain references to diet or reducing plans or sensible eating habits (F. 128, 130, 132, 134, 136-38), but I agree with Dr. Shimp that their language is vague and ambiguous and does not convey the message which Schering claims they do (F. 133-38).

Thus, I agree with Dr. Shimp that despite reference to diet and exercise in some of the Fibre Trim advertisements, the net impression they convey is that adherence to a reduced calorie diet is not essential. Compare *Removatron Int'l Corp.*, 111 FTC 206, 294, *aff'd*, 884 F.2d 1489 (1st Cir. 1989) (despite some admonitory language, the "net impression of these claims is that permanency will be achieved. . .").

Schering claims that its advertisements did not contain a specific injunction that Fibre Trim should be used in conjunction with a reduced calorie diet because its target audience knew that fact (Schering's Post Trial Brief, p. 20).

It is true that the Fibre Trim advertisements were aimed at upscale women who are presumably more skeptical about advertising promises; however, their desire to lose weight undoubtedly colors their perception of weight loss advertisements and makes them vulnerable to claims about products which promise them an easy road

to success. Schering intended to reach this group of consumers (F. 143). Although the advertisements in *Porter & Dietsch*, 90 FTC 770, 864-65 (1977), *aff'd*, 605 F.2d 294 (2nd Cir. 1979), *cert. denied*, 445 U.S. 950 (1980), were much more positive in their claims about no need for a diet (“No Starvation Dieting. . .”), the Commission’s conclusion in that case is applicable here:

It is obvious that dieting is the conventional method of losing weight. But it is equally obvious that many people who need or want to lose weight regard dieting as bitter medicine. To these corpulent consumers the promises of weight loss without dieting are the Siren's call, and advertising that heralds unrestrained consumption while meeting the inevitable need for temperance, if not abstinence, simply does not pass muster. Where dieting is required, there is simply no substitute for clear and conspicuous disclosure that dieting is required.

Schering’s own research revealed that most of the purchasers of Fibre Trim were looking for a “magic pill” that might obviate the need to diet (F. 143).

I therefore conclude that many Fibre Trim advertisements made no reference to the need to reduce caloric intake and that those which did did not clearly state to reasonable consumers that Fibre Trim would be effective only if it were used in conjunction with a reduced calorie diet. Indeed, some Fibre Trim advertisements conveyed the message that taking Fibre Trim itself would reduce caloric intake.

Schering’s consumer research does not establish that my conclusion is incorrect because it was not designed to determine what messages the specific advertisements at issue conveyed to consumers (F. 139-42). *See Thompson Medical*, 104 FTC at 809 n.34: “In any event, focus groups are not a research tool whose methodology permits use of their results as the basis for drawing generalizable conclusions”; *American Home Products*, 98 FTC 136, 416 (1981), *aff'd*, 695 F.2d 681 (3d Cir. 1982) (open-ended questions do not reveal all claims that may have been perceived in tested advertising).

c. *The Appetite Suppressant Claim*

Although Schering’s marketing strategy was designed to differentiate it from appetite suppressant drugs, many Fibre Trim advertisements also make the claim that it suppresses appetite (F. 145-50).

Consumer research referenced by Schering which supposedly supports its argument that the advertisements only conveyed to

consumers that Fibre Trim was not a drug like Dexatrim (RPF's 99, 112-13, 122, 132-33, 146, 150) does not do so because it was not designed specifically to determine the messages conveyed to consumers by particular advertisements.

Indeed, the language of the advertisements is so clear -- "takes the edge off hunger"; "helps you control your appetite" (F. 148) -- that one can confidently ignore the testimony of Schering employees and experts who did not perceive an appetite suppressant claim in the advertisements.

d. The Health Benefits Claim

References to health in many of the Fibre Trim advertisements were intended to convey the central message that it was different from drug-based diet products (F. 52) (*ITT Continental Baking Co.*, 83 FTC 865, 964-65 (1973); *aff'd*, 532 F.2d 207 (2d Cir. 1976), but other advertisements stressed the health benefits of fiber in addition to its primary use as a weight loss aid (F. 54) and conveyed the message that Fibre Trim provides the health benefits associated with a fiber-rich diet (F. 56).

Whether the health benefits claim was the central or secondary message in Schering's advertisements is irrelevant, for the Commission has held that, if it is deceptive, a secondary claim in an advertisement is illegal even if the primary claim is accurate. *Deception Statement*, 103 FTC at 178 n.21.

The consumer research which Schering points to as establishing that no health benefits claim was made (RPF 85, 100, 110, 126, 144, 153, 158, 163, 174, 177, 190) is not probative on this issue either because it was not designed to and did not elicit responses to particular Fibre Trim advertisements, *see American Home Products*, 98 FTC at 415; *Thompson Medical*, 104 FTC at 794, or because the copy tests tested advertisements which are not alleged to have made the health benefits claim (RPF 105, 110, 153, 158, 163, 190) (F. 75-122).

Although the advertisements do not specify Fibre Trim's health benefits, it is reasonable to infer that consumers will perceive in them benefits which they assume, from other information available to them, that fiber confers (F. 69-74).

e. The Daily Requirements Claim

The language cited by complaint counsel in Fibre Trim advertisements and product inserts does not explicitly state that Fibre Trim provides all of a person's daily requirements of fiber (F. 156) and I cannot infer that it makes that claim to reasonable consumers. See *ITT Continental*, 83 FTC at 865, 958-59, where the Commission refused to infer a claim that Wonder Bread supplied all the nutrients in recommended quantities that are essential to healthy growth.

Dr. Levy's opinion that the challenged claim was made is not supported by any specific consumer research and I reject it (F. 156).

B. Substantiation For Schering's Claims

1. Introduction

Since consumers would be less likely to rely on product claims if they knew the advertiser did not have a reasonable basis for making them, the Commission requires that advertisers substantiate express and implied claims that make objective assertions about a product. Objective assertions expressly or impliedly represent that the advertiser has a reasonable basis for them. *Thompson Medical*, 104 FTC at 839.

The advertisements in question expressly or impliedly assert that the claims which they make have a scientific basis (F. 158). Compare *Porter & Dietsch*, 90 FTC at 865 ("Laboratory science has perfected. . . ."; "clinic tested ingredients. . . ."); *Removatron, Int'l*, 111 FTC at 298 ("Clinically tested and endorsed"; "research proves Removatron method destroys hair follicle").

Having made these representations, Schering must establish that it possesses a level of proof which would satisfy the appropriate scientific community that its claims are substantiated. *Removatron Int'l*. 111 FTC at 297; *Thompson Medical*, 104 FTC at 821-22 n.59; *Bristol-Myers Co.*, 102 FTC 21, 321, 331 (1983), *aff'd*, 738 F.2d 554 (2d Cir. 1984), *cert. denied*, 469 U.S. 1189 (1985); *Porter & Dietsch*, 90 FTC at 865.

Schering's advertisements do not expressly or impliedly refer to the substantiation which it possesses; therefore, the adequacy of substantiation for its claims is determined by considering the factors listed in *Pfizer, Inc.*, 81 FTC 23, 64 (1972) and subsequent cases,

e.g., *Thompson Medical*, 104 FTC 839, 840. These factors are: (1) the product involved; (2) the type of claim; (3) the benefits of a truthful claim; (4) the ease of developing substantiation for the claim; (5) the consequences of a false claim; and (6) the amount of substantiation experts in the field would agree is reasonable.

The product. Fibre Trim advertisements assert its efficacy as a weight loss, weight control and appetite suppressant product and make generalized claims about its health benefits. In such a case, the Commission requires a “relatively high level of substantiation, typically scientific tests” *Thompson Medical*, 104 FTC at 822, n.60.

Schering cannot avoid this requirement by claiming that Fibre Trim is a food, not a drug, for it does not have the attributes of a food even though it is derived from natural food sources. *See Nutrilab, Inc. v. Schweiker*, 713 F.2d 335, 338-39 (7th Cir. 1983); *Schering, Inc.*, D. 9232, Order Denying Motion for Partial Summary Decision, May 2, 1990 (ALJ Timony).

The type of claim. Because of the placebo effect, it is difficult for consumers to evaluate Schering’s Fibre Trim claims even if they consume it for an extended period of time (F. 160). Credence claims like these which are “the sort that consumers would not be able to verify easily for themselves” therefore require a high standard of proof such as scientifically adequate clinical trials. *Thompson Medical*, 104 FTC at 822, 823.

The benefit of truthful claims and the ease of substantiation. Considering the cost of conducting two well-controlled clinical trials testing Fibre Trim’s efficacy (F. 159) as compared with the revenues that product has garnered for Schering and the advertising costs it willingly incurred (F. 12), it is not conceivable that requiring Schering to do so would significantly reduce the likelihood that consumers would be denied information about an effective product.

The benefit of truthful claims is obvious, for obesity is a major public health problem (F. 7).

The consequences of a false claim. Since Fibre Trim tablets are expensive (F. 13) and long term use is recommended, the consequences to individual consumers of using an ineffective product for an extended period of time are obvious. The economic harm to consumers, in conjunction with the other factors which the Commission traditionally considers, and which are present in this case, justifies the requirement of substantiation by two well-controlled clinical trials. *See Thompson Medical*, 104 FTC at 824.

Experts in the weight control field testifying in this case confirmed that to establish Fibre Trim's efficacy, at least two well-controlled clinical trials should be conducted (F. 159).

2. The Weight Loss, Weight Maintenance And Appetite Suppressant Claims

The three pre-dissemination and four post-dissemination studies on which Schering relies for substantiation of its weight loss and weight maintenance claims did not test the efficacy of Fibre Trim without the simultaneous use of a low calorie diet; in consequence, they do not provide support for the advertised claims -- that Fibre Trim was an effective weight loss and weight maintenance product even if one did not deliberately adhere to a reduced calorie diet.

Since the Fibre Trim studies used subjects who were on diets, the parties' experts, including Dr. Giaquinto of Schering, agreed that they did not establish the truth of the advertised claims (F. 198-99). Therefore, none of the studies substantiate those claims.

Since none of the studies is relevant to any issue in this proceeding, analysis of their scientific validity is unnecessary; however, analysis reveals that the pre-dissemination studies are flawed and do not provide scientific support for Schering's claim, which I reject, that its advertisements told consumers that Fibre Trim was effective only if used in conjunction with a reduced calorie diet.

Hessel was not placebo controlled or blinded, and it can be dismissed from consideration (F. 208). The treatment in Rytting of withdrawals (F. 212-13) gives me pause with respect to its soundness. The most significant defect in this study is, however, its use of almost twice as much Fibre Trim as the recommended dosage. Since its results -- however valid -- cannot support the claim made for the recommended dosage (F. 210), it provides no support for the advertised weight loss claims.

The description of Solum I's protocol was so scanty that Schering's acceptance of its results was not prudent (F. 214-17).

The three studies relied on by Schering are fundamentally flawed and do not meet the standards for a well-controlled clinical test. *See Thompson Medical*, 104 FTC at 828.

At the time of dissemination of the challenged advertisements, Schering personnel who were responsible for analyzing the data supporting its claims were aware of, or should have been aware of,

other evidence, beside the Hessel, Solum I and Rytting studies, which cast doubt on the efficacy of weight loss aids, including Fibre Trim.

In August 1984, Schering knew that there was an additional Fibre Trim study which did not show a significant difference between fiber tablets and placebo (F. 186). Schering never asked Farma Food for this study (F. 187) or other studies which cast doubt on the efficacy of Fibre Trim as an appetite suppressant or aid to weight loss (F. 188-90).

Furthermore, reputable scientific bodies, both before and after dissemination of the advertisements, were skeptical about the efficacy of fiber as a weight loss aid. The FDA's 1982 proposal to establish a weight loss monograph stated that the value of bulk producers like Fibre Trim had not been established (F. 196).

Although the Ehmann & Ressin, Solum II, Rossner and Birketvedt studies were obtained by Schering after dissemination of the challenged advertisements, they are put forward as providing independent scientific support for its claims as well as confirmatory support for the conclusions of the pre-dissemination studies. I reject Schering's argument for two reasons.

First, the studies provide only shaky support for Schering's claims: Dr. Feinstein testified that Ehmann & Ressin is not an acceptable study because it was not randomized or blinded (F. 219); Solum II used 20 Fibre Trim tablets rather than 15, the recommended dosage (F. 221); Dr. Levitsky's reanalysis of Rossner excluding dropouts reveals that placebo subjects actually lost more weight than the fiber subjects and the initial analysis of this study showed no statistically significant difference between placebo and Fibre Trim groups (F. 191, 225, 228); and the Birketvedt study did not show a statistically significant weight loss at its conclusion (F. 231).

The second reason for dismissing these studies is that they cannot, as a matter of law, be considered as substantiation for the claims because they were conducted after the claims were made. *Removatron Int'l*, 111 FTC at 303, 305. The only limitation to this doctrine is discretionary: the Commission may consider them if they "shed light on pre-claim substantiation." *Id.* at 841. These studies do not do so for they are so flawed what they do not provide support, in and of themselves, for the weight loss claim. Nor do they or the pre-dissemination studies provide support for the weight maintenance and appetite suppressant claims (F. 200-01). In conclusion, I agree with Drs. Levitsky and Levine that the pre- and post-dissemination studies

do not support the claims that Fibre Trim is an effective weight loss or weight control product (F. 233).

3. The Health Benefits Claim

While the health benefits statements in Schering's advertisements did not detail the problems on which Fibre Trim might have some beneficial or preventative effect, it is not unreasonable to infer that consumers would associate them with heart disease, colon cancer and digestive ailments (F. 69, 71, 73, 74). The claims were, therefore, objective and Schering should have possessed and relied upon a reasonable basis for them.

Although there is scientific consensus that fiber does provide some health benefits (F. 252-53), Schering's assumption that the fiber in Fibre Trim and the fiber in foods provide the same benefits is not supported by present scientific opinion and Schering, therefore, had no scientific substantiation for a generalized health benefits claim (F. 254-57).

The laxation studies are not without faults, but they appear to show that Fibre Trim may have some laxative effect (F. 268-72); however, these studies were limited to one health problem and provide no substantiation for the other health benefits claims involving cholesterol, coronary heart disease and cancer (F. 273, 277). Schering's reliance on press articles praising fiber (F. 274) does not satisfy the standards established by the Commission for proof of efficacy.

4. High Fiber and Fiber Content Claims

The daily Fibre Trim dosage for weight loss (15 tablets) provides 4.1 grams of fiber. This is a high amount of fiber (F. 278-89). Schering's claim with respect to the fiber content of the weight loss dosage is, therefore, not false or unsubstantiated. The daily weight maintenance dosage of Fibre Trim does not provide a high amount of fiber (F. 289) and representations to that effect were untrue and unsubstantiated, as were representations as to the amount of fiber in a Fibre Trim tablet.

C. Materiality Of The Claims

The lack of substantiation for Schering's health benefits, weight loss and weight maintenance claims was material, for they involved "health, safety, or other areas with which the reasonable consumer would be concerned." *Cliffdale Associates*, 103 FTC at 182. The high fiber and fiber content claims were express; therefore, they are presumptively material. *Ibid.* Schering has offered no convincing evidence rebutting this presumption.

IV. SUMMARY

1. Schering has advertised, offered for sale, sold, and distributed Fibre Trim to the public as a high fiber supplement, and as a weight loss and weight maintenance product.

2. For the purposes of Section 12 of the FTC Act, 15 U.S.C. 52, Fibre Trim is a drug or food as defined in Section 15 of the Act, 15 U.S.C. 55.

3. The acts and practices of Schering challenged in the complaint have been in, or affect, commerce.

4. The Commission has jurisdiction over respondent Schering, and the acts and practices challenged in the complaint.

5. Through statements in advertisements and promotional materials, Schering represented, directly or by implication, that Fibre Trim is an effective appetite suppressant, weight loss, weight control or weight maintenance product, and that Fibre Trim provides the health benefits associated with a fiber-rich diet or a high intake of dietary fiber from food.

6. Schering represented, directly or by implication, that at the time it made the representations in paragraph five, it possessed and relied upon a reasonable basis for such representations.

7. At the time Schering made the representations in paragraph five, it did not possess and rely upon a reasonable basis for them.

8. Schering further represented in advertisements or promotional material that Fibre Trim is a high fiber supplement and that the recommended dosage of Fibre Trim provides about 2.35 grams of dietary fiber per serving.

9. In fact, the Fibre Trim weight maintenance dosage is not high in fiber and the recommended dosage of Fibre Trim does not provide

almost 2.35 grams of dietary fiber per serving, and Schering's representations to the contrary were false and misleading.

10. The above acts and practices of Schering, which induced consumers to purchase substantial quantities of Fibre Trim, constitute unfair or deceptive acts or practices in violation of Sections 5(a) and 12 of the FTC Act.

V. THE ORDER

Over an extended period of time, and in the face of "murky" clinicals (F. 195), and contrary scientific evidence, Schering knowingly advertised and promoted Fibre Trim as an effective weight loss, weight control or weight maintenance product, and consumers were not adequately informed that Fibre Trim might be effective only if taken as part of a reduced calorie diet.

The sales of Fibre Trim have been substantial, indicating extensive consumer reliance on Schering's misrepresentations about its weight loss, weight control and health benefits attributes.

Under these circumstances, complaint counsel's proposed extension of the order beyond that which accompanied the complaint is warranted.

Specifically, Part I of the order would prohibit future misrepresentations (a) about the quantitative or qualitative fiber content or other nutrient or dietary component content of Fibre Trim or any other food, food supplement or drug, or (b) that the product is a high source of fiber, or any other nutrient or dietary constituent. This broadening of the notice order is appropriate in this case. *See Kraft, Inc.*, slip op. at 1, 29-30.

Part II(b) of the order modifies the notice order by stating that, for purposes of any representation that a fiber supplement or other food supplement or drug is an effective appetite suppressant or effectuates weight loss, weight maintenance, or weight control through appetite reduction or any other physiological mechanism, "competent and reliable scientific evidence" shall mean at least two independent, adequate and well-controlled double-blind clinical studies demonstrating the efficacy of the product. This definition is based upon the standard required in the Commission's order in *Thompson Medical*, 104 FTC at 844.

Even if, as Schering argues, Fibre Trim is a food and not a drug, the substantiation standard established in *Thompson Medical* is

appropriate. *See Removatron*, 111 FTC at 310 where the Commission required clinical testing for hair removal products which respondent claimed were cosmetic devices which did not affect public health or safety; *see also North American Phillips Corp.*, 101 FTC 359, 364 (1983) (two clinicals required for claims that electric razors alleviated "razor bumps").

The two trial requirement is consistent with the FDA's Advance Notice of Proposed Rulemaking which includes a proposed protocol for evaluation of weight control products requiring that their efficacy be established by two independent studies (CX 81, pp. 16-19).

The order does not require a specific clinical testing requirement for purposes of the remaining representations covered by Part II. These claims must be substantiated by competent and reliable scientific evidence, defined as "tests, analyses, research, studies, or other evidence conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted by others in the profession or science to yield accurate and reliable results." This definition is consistent with the Commission's recent order in *Kraft, Inc.*, slip op. at 2.

The disclosure requirement of Part III of the order tracks the similar disclosure requirement in *Campbell Soup Co.*, D. 9223 (consent agreement, April 8, 1990).

The multi-product provision of the order is amply justified by Schering's health-related misrepresentations about Fibre Trim, for they were serious, were made repeatedly in an extensive six-year promotional campaign, and are readily transferable to the advertising of other Schering products. *See Kraft, Inc.*, slip op. at 30; *American Home Prods.*, 695 F.2d 681, 707 (3d Cir. 1982); *Litton Industries*, 676 F.2d 364, 372 (9th Cir. 1981); *Thompson Medical*, 104 FTC at 833.

The violations were serious because the weight loss and weight control claims were consciously made despite flaws in the studies relied upon by Schering, and because consumers who were not able to assess the validity of those claims relied on the misrepresentation that Fibre Trim had been proven to be effective. *See Thompson Medical*, 104 FTC at 834. Therefore, the following order is appropriate.

I.

It is ordered, That respondent Schering Corporation, a corporation, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, labeling, packaging, offering for sale, sale or distribution of Fibre Trim or any other food, food supplement or drug 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:

a. The amount of fiber or any other nutrient or dietary constituent contained in the product, whether described in quantitative or qualitative terms; and

b. That the product is a high, rich, excellent or superior source of fiber or any other nutrient or dietary constituent using those words or words of similar meaning.

II.

It is further ordered, That respondent, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, labeling, packaging, offering for sale, sale or distribution of any food, food supplement or drug in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from making any representation, directly or by implication:

a. Regarding the actual or comparative amount of fiber or the type(s) of fiber, or the actual or comparative amount of any other nutrient or dietary component in the product;

b. That the product provides any appetite suppressant, weight loss, weight control, or weight maintenance benefit; or

c. That the product provides any health benefit associated with the intake of fiber, or any other nutrient or dietary component;

unless, at the time that it makes such representation, respondent possesses and relies upon competent and reliable scientific evidence

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

Provided that, for purposes of any representation covered by subpart (b) of this part that a fiber supplement or any other food supplement or drug is an effective appetite suppressant or that it effectuates weight loss, weight control, or weight maintenance through reduction in appetite or any other physiological mechanism, "competent and reliable scientific evidence" shall mean at least two adequate and well-controlled, double-blinded clinical studies that conform to acceptable designs and protocols and are conducted by different persons, independently of each other. Such persons shall be qualified by training and experience to conduct such studies.

Provided further, with respect to any representation covered by the first proviso of this part, if the Food and Drug Administration promulgates any final standard that establishes conditions under which such product is safe and effective under the Food, Drug and Cosmetic Act, then in lieu of the above, respondent may rely upon scientific evidence that fully conforms to such final standard as a reasonable basis for said representation.

III.

It is further ordered, That respondent, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, labeling, packaging, offering for sale, sale or distribution of any food, food supplement or drug in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall, whenever a product's fiber content is described in advertising or labeling, directly or by implication, in quantitative or qualitative terms, disclose clearly and prominently in immediate proximity to such description the number of grams of dietary fiber contained per serving of the product, unless such fiber content descriptor is a term defined by the Food and Drug Administration in labeling regulations under the Food, Drug and

Cosmetic Act, in which case compliance with said regulations will be deemed compliance with Part III of this order.

IV.

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

1. All materials that were relied upon to substantiate any representation covered by this order; and
2. All test reports, studies, surveys, demonstrations or other evidence in respondent's possession or control, or of which it has knowledge, that contradict, qualify, or call into question such representation or the basis upon which respondent relied for such representation.

V.

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

VI.

It is further ordered, That respondent shall forthwith distribute a copy of this order to each of its current operating divisions and to all distributors of products covered by this order.

VII.

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

DECISION AND ORDER

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

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

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

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

1. Respondent Schering Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its office and principal place of business located at 2000 Galloping Hill Road, in the City of Kenilworth, State of New Jersey.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I.

It is ordered, That respondent Schering Corporation, a corporation, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, labeling, packaging, offering for sale, sale or distribution of Fibre Trim or any other food, food supplement or drug in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from making any misrepresentation, directly or by implication:

a. About the amount of fiber or any other nutrient or dietary constituent contained in the product, whether described in quantitative or qualitative terms; or

b. That the product is a high, rich, excellent or superior source of fiber or any other nutrient or dietary constituent using those words or words of similar meaning.

Provided that nothing in this Part shall prohibit any representation as to the amount of fiber or any other nutrient or dietary constituent in any product if such representation is specifically permitted in labeling, for the serving size advertised or promoted for such product, by regulations promulgated by the United States Food and Drug Administration (FDA) pursuant to the Nutrition Labeling and Education Act of 1990.

II.

It is further ordered, That respondent, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, labeling, packaging, offering for sale, sale or distribution of any food, food supplement or drug in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from making any representation, directly or by implication:

- a. Regarding the actual or comparative amount of fiber or the type(s) of fiber, or the actual or comparative amount of any other nutrient or dietary constituent in the product;
- b. That the product provides any appetite suppressant, weight loss, weight control, or weight maintenance benefit; or
- c. That the product provides any health benefit associated with the intake of fiber, or any other nutrient or dietary constituent;

unless, at the time that it makes such representation, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation. For purposes of this order, "competent and reliable scientific evidence" shall mean those tests, analyses, research, studies, or other evidence conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted by others in the profession or science to yield accurate and reliable results.

Provided that, for purposes of any representation covered by subpart (b) of this Part that a fiber supplement or any other food supplement or drug is an effective appetite suppressant or that it effectuates weight loss, weight control, or weight maintenance through reduction in appetite or any other physiological mechanism, "competent and reliable scientific evidence" shall mean at least two adequate and well-controlled, double-blinded clinical studies that conform to acceptable designs and protocols and are conducted by different persons, independently of each other. Such persons shall be qualified by training and experience to conduct such studies.

Provided further, that nothing in this order shall prohibit respondent 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.

Provided further, that nothing in subparts (a) or (c) of this Part shall prohibit respondent from making any representation for any product that is specifically permitted in labeling for such product by regulations promulgated by the FDA pursuant to the Nutrition Labeling and Education Act of 1990.

III.

It is further ordered, That respondent, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, labeling, packaging, offering for sale, sale or distribution of any food, food supplement or drug in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall, whenever a product's fiber content is described in advertising or labeling, directly or by implication, in quantitative or qualitative terms, disclose clearly and prominently in immediate proximity to such description the number of grams of dietary fiber contained per serving of the product.

Provided that if such fiber content descriptor is a term defined by regulations promulgated by the FDA pursuant to the Nutrition Labeling and Education Act of 1990, compliance with said regulations will be deemed compliance with Part III of this order.

IV.

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

1. All materials that were relied upon to substantiate any representation covered by this order; and
2. All test reports, studies, surveys, demonstrations or other evidence in respondent's possession or control, or of which it has knowledge, that contradict, qualify, or call into question such representation or the basis upon which respondent relied for such representation.

V.

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

VI.

It is further ordered, That respondent shall, within thirty (30) days after service of this order, distribute a copy of this order to each of its operating divisions responsible for the preparation or placement of advertisements, promotional materials, product labels, or other such sales materials covered by this order.

VII.

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

Commissioner Varney not participating.

IN THE MATTER OF
TRAUMA ASSOCIATES OF NORTH BROWARD, INC., ET AL.
CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3541. Complaint, Nov. 1, 1994--Decision, Nov. 1, 1994

This consent order requires, among other things, Dr. Johnson, the president of a Florida corporation, to dissolve Trauma Associates within 180 days. Prior to its dissolution, Trauma Associates is required to give copies of the settlement to any entity with whom it has entered into contract negotiations for trauma surgical services since its inception. In addition, the order prohibits the ten surgeons from entering into, organizing, or implementing any agreement to: refuse to provide surgical services in connection with any effort to fix the prices for such services; prevent the offering or delivery of surgical services; deal on collectively determined terms with any provider of health care services; or encourage anyone to engage in an activity prohibited by the settlement.

Appearances

For the Commission: *Mark J. Horoschak, Markus H. Meier and Mary Lou Steptoe.*

For the respondents: *Pro se and Donald Korman, Korman, Schorr & Wagenheim, Fort Lauderdale, FL., for respondent Santiago Triana, M.D.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, Title 15, U.S.C. 41 *et seq.*, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the respondents named in the caption hereof have violated and are violating the provisions of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Trauma Associates of North Broward, Inc. (hereinafter "Trauma Associates") is a corporation organized, existing, and doing business under and by virtue of the

laws of the State of Florida, with its office and principal place of business located at 2170 Southeast 17th Street, Suite 305, Fort Lauderdale, Florida.

The individual respondents named in the caption above (hereinafter "surgeon respondents") are general surgeons, licensed to practice medicine in the State of Florida, and are engaged in the business of providing surgical services to patients for a fee in Broward County, Florida. Their respective business addresses are:

Carl Amko, M.D., 412 Southeast 17th Street, Fort Lauderdale, Florida;
Lucien Armand, M.D., 4330 West Broward Boulevard, Suite 308, Plantation, Florida;
Frantz Chery, M.D., 4101 Northwest 4th Street, Suite 302, Plantation, Florida;
William Cohen, M.D., 8251 West Broward Boulevard, Suite H, Plantation, Florida;
Sergio Gallenero, M.D., 9750 Northwest 33rd Street, Coral Springs, Florida;
Kwang-Jae Joh, M.D., One West Sample Road, Suite 207, Pompano Beach, Florida;
Richard A. Johnson, M.D., 1625 Southeast 3rd Avenue, Suite 721, Fort Lauderdale, Florida;
J.R. Nabut, M.D., 1500 Hillsboro Boulevard, Suite 207, Deerfield Beach, Florida;
Aiden O'Rourke, M.D., 315 Southeast 13th Street, Fort Lauderdale, Florida;
Santiago Triana, M.D., Medical Building, 150 Northwest 70th Avenue, Suite 7, Plantation, Florida.

PAR. 2. The acts and practices of Trauma Associates and the surgeon respondents, including those herein alleged, are in or affect commerce within the meaning of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

PAR. 3. Except to the extent that competition has been restrained as alleged herein, the surgeon respondents have been, and are now, in competition among themselves and with other providers of general surgical services in Broward County, Florida.

PAR. 4. The North Broward Hospital District (hereinafter "the District") is a tax-supported hospital authority, with its principal

offices located at 1625 Southeast Third Avenue, Fort Lauderdale, Florida. Broward General Medical Center (hereinafter "Broward General") and North Broward Medical Center (hereinafter "North Broward") are District hospitals located at 1600 South Andrews Avenue, Fort Lauderdale, Florida, and 201 Sample Road, Pompano Beach, Florida, respectively.

PAR. 5. On or about March 25, 1992, the District's Board of Commissioners officially resolved to seek a license from the State of Florida to operate state-approved trauma centers at Broward General and North Broward. State regulations governing trauma centers include the requirement that a hospital have a minimum of five general surgeons committed to covering the trauma center on a round-the-clock or short-notice basis.

PAR. 6. Each respondent surgeon signed, on an individual basis, the District's applications to operate state-approved trauma centers, thereby committing himself to participate in the District's trauma program.

PAR. 7. During April, 1992, Dr. Richard A. Johnson, the surgeon respondents, leader, entered into contract negotiations with District officials, on behalf of the surgeon respondents. The purpose of these negotiations was to secure a single contract for the surgeon respondents to staff the Broward General and North Broward trauma centers. District officials wished to enter individual contracts with each of the surgeon respondents, but the surgeon respondents said that they would only agree to work at the trauma centers under a single contract that included all of the surgeon respondents.

PAR. 8. During contract negotiations, Dr. Johnson made a number of proposals to the District calling for the payment of various sums of money necessary to cover the costs of the surgeon respondents' services and expenses. The surgeon respondents agreed to these price proposals prior to their submission to the District.

PAR. 9. On May 1, 1992, the surgeon respondents began providing trauma services to the District. On May 5th the District and Dr. Johnson signed a letter of intent ("LOI") outlining the terms under which the surgeon respondents would work, until a more formal contract could be agreed upon. Dr. Johnson signed the LOI on behalf of the surgeon respondents.

PAR. 10. The LOI explicitly omitted any financial terms, as these were still being negotiated. Despite this fact, Dr. Johnson reached an understanding with the District that the District would pay

each surgeon respondent \$100 per hour for in-house service (where the surgeon is present in the trauma center) and \$50 per hour for on-call coverage (where the surgeon is available to respond to a "trauma alert" within twenty minutes). The District also agreed to pay most of the surgeon respondents, and Trauma Associates, costs, which included malpractice liability insurance, office rent, staff, telephones, and other such items.

PAR. 11. Dr. Johnson incorporated Trauma Associates as a for-profit Florida corporation on or about May 7, 1992. Dr. Johnson is Trauma Associates' only director, officer and owner. None of the other surgeon respondents have any ownership interest in, or any other legal relationship with, Trauma Associates. Trauma Associates was intended to function as the "administrative arm" of the surgeon respondents, and it has served as a vehicle for Dr. Johnson and the other surgeon respondents to engage in collective negotiations on fees and other contract terms to be sought from the District and others.

PAR. 12. The surgeon respondents did not integrate their surgical practices in any legally significant way, nor did they create any efficiencies that justify their agreement to act collectively vis-a-vis the District. The surgeon respondents provided the District with little more than a fixed price for their individual services.

PAR. 13. The District made lump-sum payments, totaling around \$600,000, to the surgeon respondents, through Dr. Johnson and Trauma Associates, in May and June, 1992.

PAR. 14. In July, 1992, the District decided not to enter a contract with the surgeon respondents as a group. Instead, the District announced its intention to contract with the surgeon respondents individually. In response, the surgeon respondents refused to deal with the District individually. Additionally, the surgeon respondents sent the District a letter with a list of demands, including price and price-related terms, that had to be included in any final contract, and they threatened to cease providing trauma services at the Broward General and North Broward trauma centers unless all of their demands were met. Respondent Drs. Amko, Armand, Chery, Cohen, Gallenero, Joh, Johnson, O'Rourke, and Triana signed this letter.

PAR. 15. One week after the surgeon respondents threatened to cease providing trauma services, respondent Drs. Amko, Armand, Chery, Cohen, Gallenero, Joh, Johnson, Nabut, O'Rourke, and Triana walked out of the District's trauma centers. As a result of the

walkout, the District was forced to shut down the North Broward trauma center.

PAR. 16. By engaging in the acts or practices herein alleged, the surgeon respondents have acted as a combination or conspiracy to fix or increase the fees received from the District for the provision of trauma surgical services, and to otherwise restrain competition among general surgeons in Broward County, Florida.

PAR. 17. Trauma Associates has conspired with the surgeon respondents, and has acted to implement an agreement among the surgeon respondents to restrain competition among general surgeons, by, among other things, facilitating, entering into, and implementing an agreement, express or implied, that respondent Trauma Associates would negotiate the terms and conditions of agreements between surgeon respondents and the District and others, including the prices to be paid for the surgeon respondents' services.

PAR. 18. The acts and practices of Trauma Associates and the surgeon respondents, as herein alleged, have had the purpose or effect, or the tendency and capacity, to restrain competition unreasonably and to injure consumers in the following ways, among others:

A. By restraining competition among general surgeons in Broward County, Florida;

B. By fixing or increasing the prices that are paid to general surgeons who provide trauma surgical services in Broward County, Florida;

C. By raising the cost, lowering the quality, and reducing access to and the quality-adjusted output of the District's trauma services; and

D. By depriving the District and its patients of the benefits of competition among general surgeons in Broward County, Florida.

PAR. 19. The combination or conspiracy and the acts and practices of Trauma Associates and the surgeon respondents, as herein alleged, constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. The violation or the effects thereof, as herein alleged, are continuing and will continue or recur in the absence of the relief herein requested.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and 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; 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 Trauma Associates of North Broward, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Florida, with its office and principal place of business located at 2170 Southeast 17th Street, Suite 305, Fort Lauderdale, Florida.

Respondent surgeons are Carl Amko, M.D., Lucien Armand, M.D., Frantz Chery, M.D., William Cohen, M.D., Sergio Gallenero, M.D., Kwang-Jae Joh, M.D., Richard A. Johnson, M.D., J. R. Nabut, M.D., Aiden O'Rourke, M.D., and Santiago Triana, M.D., each of whom is a general surgeon licensed to practice medicine in the State of Florida, and is engaged in the business of providing surgical services to patients for a fee in Broward County, Florida.

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

ORDER

I.

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

A. "*Trauma Associates*" means Trauma Associates of North Broward, Inc., a corporation organized, existing, and doing business under and by virtue of the laws of the State of Florida, with its office and principal place of business located at 2170 Southeast 17th Street, Suite 305, Fort Lauderdale, Florida, its Board of Directors, committees, officers, members, representatives, agents, employees, successors, and assigns.

B. "*Surgeon respondents*" means Carl Amko, M.D., Lucien Armand, M.D., Frantz Chery, M.D., William Cohen, M.D., Sergio Gallenero, M.D., Kwang-Jae Joh, M.D., Richard A. Johnson, M.D., J. R. Nabut, M.D., Aiden O'Rourke, M.D., and Santiago Triana, M.D., each of whom is a general surgeon licensed to practice medicine in the State of Florida, and is engaged in the business of providing surgical services to patients for a fee in Broward County, Florida.

C. "*The District*" means the North Broward Hospital District, a tax-supported hospital authority, with its principal offices located at 1625 Southeast Third Avenue, Fort Lauderdale, Florida, its subsidiaries, affiliates, commissioners, officers, administrators, directors, committees, agents, employees, representatives, successors, and assigns.

D. "*Broward General*" means the Broward General Medical Center, one of the hospitals of the North Broward Hospital District, located at 1600 South Andrews Avenue, Fort Lauderdale, Florida, its subsidiaries, affiliates, officers, administrators, directors, committees, agents, employees, representatives, successors, and assigns.

E. "*North Broward*" means the North Broward Medical Center, one of the hospitals of the North Broward Hospital District, located at 201 Sample Road, Pompano Beach, Florida, its subsidiaries, affiliates, officers, administrators, directors, committees, agents, employees, representatives, successors, and assigns.

F. "*Integrated joint venture*" means a joint arrangement to provide health-care services in which physicians who would otherwise be competitors pool their capital to finance the venture, by themselves or together with others, and share a substantial risk of loss from their participation in the venture.

II.

It is further ordered, That each surgeon respondent directly or indirectly, or through any corporate or other device, in connection with the provision of health-care services in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44, forthwith cease and desist from entering into, attempting to enter into, organizing or attempting to organize, implementing or attempting to implement, or continuing or attempting to continue any combination, agreement, or understanding, express or implied, for the purpose or with the effect of:

A. Preventing the offering or delivery of surgical services by the District, Broward General, North Broward, or any other provider of health-care services, including, but not limited to, any agreement to refuse to deal or threaten to refuse to deal with the District, Broward General, North Broward, or any other provider of health-care services;

B. Dealing with the District, Broward General, North Broward, or any other provider of health-care services on collectively determined terms; or

C. Encouraging, advising, pressuring, inducing, or attempting to induce any person to engage in any action prohibited by this order.

Provided that nothing in this order shall be construed to prohibit any individual surgeon respondent from:

1. Entering into an agreement or combination with any other physician with whom the surgeon respondent practices in partnership or in a professional corporation, or who is employed by the same person as the surgeon respondent, to deal with any third party on collectively determined terms; or

2. Forming, facilitating the formation of, or participating in an integrated joint venture and dealing with any third party on

collectively determined terms through the joint venture, as long as the surgeons participating in the joint venture remain free to deal individually with third parties.

III.

It is further ordered, That respondent Richard A. Johnson, M.D., shall:

A. Dissolve Trauma Associates within one hundred and eighty (180) days after the date on which this order becomes final; and

B. File a verified written report demonstrating how he has complied with Section III.A. above, within two hundred and ten (210) days after the date on which this order becomes final.

IV.

It is further ordered, That respondent Trauma Associates shall:

A. Within thirty (30) days after the date on which this order becomes final, and prior to the dissolution provided for in Section III.A. above, distribute by first-class mail a copy of this order and the accompanying complaint to each party with whom Trauma Associates has entered into contract negotiations or finalized a contract concerning the provision of trauma surgical services; and

B. Within sixty (60) days after the date on which this order becomes final, and prior to the dissolution provided for in Section III.A. above, file a verified written report demonstrating how it has complied with Section IV.A. above.

V.

It is further ordered, That each surgeon respondent shall:

A. File a written report with the Commission within ninety (90) days after the date the order becomes final, and annually thereafter for three (3) years on the anniversary of the date the order became final, and at such other times as the Commission may by written notice require, setting forth in detail the manner and form in which

the surgeon respondent has complied and is complying with the order;

B. For a period of five (5) years after the date on which this order becomes final, notify the Commission in writing within thirty (30) days after the surgeon respondent forms or participates in the formation of, or joins or participates in, any integrated joint venture; and

C. For a period of five (5) years after the date on which this order becomes final, maintain and make available to Commission staff, for inspection and copying upon reasonable notice, records sufficient to describe in detail any action taken in connection with the activities covered by this order.

Commissioner Varney not participating.

Complaint

118 F.T.C.

IN THE MATTER OF

ROCHE HOLDING LTD., ET AL.

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

Docket C-3542. Complaint, Nov. 22, 1994--Decision, Nov. 22, 1994

This consent order requires, among other things, Roche to divest Syva's drugs of abuse testing (DAT) business within 12 months to a Commission-approved buyer, to operate the Syva assets separately from its own DAT business pending the divestiture, and to obtain, for ten years, prior Commission approval before acquiring assets or interests of any entity involved in the market for drugs of abuse reagent products.

Appearances

For the Commission: *Claudia Higgins, Ann Malester and Elizabeth Jet.*

For the respondents: *Arthur Golden, Davis, Polk & Wardwell, New York, N.Y. and Neal R. Stoll, Skadden, Arps, Slate, Meagher & Flom, New York, N.Y.*

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that respondent, Roche Holding Ltd ("Roche"), a corporation subject to the jurisdiction of the Commission, has proposed to acquire all of the voting stock of respondent Syntex Corporation ("Syntex"), a corporation subject to the jurisdiction of the Commission, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, ("FTC Act"), 15 U.S.C. 45; and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. RESPONDENTS

1. Respondent Roche Holding Ltd. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York.

Complaint

Switzerland with its principal executive offices located at Grenzachstrasse 124, Basel, Switzerland.

2. Respondent Syntex Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of Panama, with its principal executive offices located at 3401 Hillview Avenue, Palo Alto, California.

II. JURISDICTION

3. Respondents are and, at all times relevant herein have been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and are corporations whose businesses affect commerce as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

III. THE ACQUISITION

4. On or about May 1, 1994, Roche and Syntex signed an agreement and plan of merger whereby Roche would acquire 100 percent of the voting securities of Syntex for approximately \$5.3 billion ("acquisition").

IV. THE RELEVANT MARKET

5. The relevant line of commerce in which to analyze the effects of the acquisition is the manufacture and sale of drugs of abuse reagent products. Drugs of abuse reagents products are diagnostic products used to screen for the presence or absence of illegal drugs in urine.

6. For purposes of this complaint, the United States is the relevant geographic area in which to analyze the effects of the acquisition.

7. The relevant market set forth in paragraphs five and six is highly concentrated, whether measured by Herfindahl-Hirschmann Indices ("HHI") or two-firm and four-firm concentration ratios.

8. Entry into the relevant market is difficult and time consuming.

9. Roche and Syntex are actual competitors in the relevant market.

V. EFFECTS OF THE ACQUISITION

10. The effects of the acquisition may be substantially to lessen competition or tend to create a monopoly in the relevant market in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. 45, by, among other things:

- (a) Eliminating actual, direct and substantial competition between Roche and Syntex in the relevant market;
- (b) Increasing the likelihood that Roche will unilaterally exercise market power in the relevant market;
- (c) Creating a dominant firm in the relevant market; and
- (d) Enhancing the likelihood of collusion or coordinated interaction between or among the firms in the relevant market.

VI. VIOLATIONS CHARGED

11. The acquisition described in paragraph four, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

12. The acquisition agreement described in paragraph four constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition by Roche Capital Corporation, a Panamanian corporation and an indirect, wholly-owned subsidiary of Roche Holding Ltd, a Swiss corporation (collectively referred to as "Roche"), of Syntex Corporation ("Syntex"), and it now appearing that Roche and Syntex, hereinafter sometimes referred to as "respondents," having been furnished thereafter with a copy of a draft of complaint that the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and

Respondents, by their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement 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 said Acts, and the complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, 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 Roche Holding Ltd. is a corporation organized, existing, and doing business, under and by virtue of the laws of Switzerland with its principal executive offices located at Grenzacherstrasse 124, Basel, Switzerland 4002. Hoffmann-La Roche Inc., an indirect wholly-owned subsidiary of Roche Holding Ltd., is located at 340 Kingsland Street, Nutley, New Jersey.

2. Respondent Syntex is a corporation, organized, existing, and doing business under and by virtue of the laws of Panama with its principal executive offices located at 3401 Hillview Avenue, Palo Alto, California. Syva Company, an indirect wholly-owned subsidiary of Syntex, is headquartered at 3403 Yerba Buena Road, San Jose, California.

3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of 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. "*Roche*" means Roche Holding Ltd., its predecessors, subsidiaries, including, without limitation Roche Capital Corporation, divisions, and groups and affiliates controlled by Roche, their directors, officers, employees, agents, and representatives, and their successors and assigns.

B. "*Syntex*" means Syntex Corporation, its predecessors, subsidiaries, divisions, and groups and affiliates controlled by Syntex, their directors, officers, employees, agents, and representatives, and their successors and assigns.

C. "*Syva*" or "*Syva Company*" means Syva Company, a Delaware corporation and an indirect wholly-owned subsidiary of Syntex Corporation, its predecessors, subsidiaries, divisions, and groups and affiliates controlled by Syva, their directors, officers, employees, agents, and representatives, and their successors and assigns.

D. "*Respondents*" means Roche and Syntex.

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

F. "*Acquisition*" means Roche's proposed acquisition of voting securities of Syntex pursuant to the Acquisition Agreement and Plan of Merger dated May 1, 1994.

G. "*Patents*" means some, all or any part of all U.S. or foreign unexpired patents and patents issued in the future based upon patent applications filed in any country as of August 1, 1994, and all substitutions, continuations, continuations-in-part, divisions, renewals, reissues and extensions based on said patents, the applications therefor, or said patent applications.

H. "*Drugs of abuse reagent products*" means diagnostic reagent products used for drugs of abuse testing, including without limitation, reagent, control and calibrator products used to test for cannabinoids or marijuana, cocaine and cocaine metabolites, opiates, amphetamines and methamphetamines, phencyclidine, methadone, methaqualone, propoxyphene, barbiturates, benzodiazepine, lysergic acid diethylamide, ethyl alcohol, or other controlled substances for which drugs of abuse testing is conducted.

I. “*Syva Business*” means all of Syntex’s United States rights, title and interest in and to:

(1) Drugs of abuse reagent products, including but not limited to, EMIT[®], EMIT[®] II, and all patents, production technology and know-how related to the manufacture and sale of drugs of abuse reagent products in the United States; and

(2) All of the Syva Company's assets and businesses as further delineated in Schedule A, attached hereto and made a part hereof.

II.

It is further ordered, That:

A. Roche shall divest, absolutely and in good faith, within twelve (12) months of the date this order becomes final, the Syva Business, and shall also divest such additional ancillary assets and businesses and effect such arrangements as are necessary to assure the marketability, viability, and competitiveness of the Syva Business; provided that Roche is not required to divest any of the Syva assets and businesses identified in Part 2 of Schedule A, if such assets and businesses are not requested by the acquirer.

B. Roche shall divest the Syva Business only to an acquirer that receives the prior approval of the Commission and that has made any necessary notice to or obtained any necessary approval from the FDA to manufacture and sell all of the Syva drugs of abuse reagent products, and only in a manner that has received the prior approval of the Commission. The purpose of the divestiture of the Syva Business is to ensure the continuation of the Syva Business as an ongoing, viable operation, engaged in the same business in which the Syva Business is engaged at the time of the proposed divestiture, and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission’s complaint.

C. Upon reasonable notice from the acquirer to respondents, respondents shall provide such personnel, information, technical assistance, advice and training to the acquirer as is necessary to transfer technology and know-how to assist the acquirer in obtaining any necessary FDA approval for the manufacture and sale of the Syva drugs of abuse reagent products and any other products identified in Schedule A that are acquired pursuant to this order. Such assistance

shall include reasonable consultation with knowledgeable employees of respondents and training at the acquirer's facility for a period of time sufficient to satisfy the acquirer's management that its personnel are appropriately trained in the manufacture of the Syva drugs of abuse reagent products and any other products identified in Schedule A that are acquired pursuant to this order. Respondents shall not charge the acquirer a rate more than their own direct costs for providing such technical assistance.

D. Pending divestiture of the Syva Business, respondents shall take such actions as are necessary to maintain the viability and marketability of the Syva Business and to prevent the destruction, removal, wasting, deterioration or impairment of any of the Syva Business except for ordinary wear and tear.

III.

It is further ordered, That:

A. If Roche has not divested, absolutely and in good faith, and with the prior approval of the Commission, the Syva Business within twelve (12) months of the date this order becomes final, to an acquirer that has made any necessary notice to or obtained any necessary approval from the FDA to manufacture and sell Syva drugs of abuse products, the Commission may appoint a trustee to divest the Syva Business.

B. In the event that the Commission or the Attorney General brings an action pursuant to Section 5 (1) of the Federal Trade Commission Act, 15 U.S.C. 45(1), or any other statute enforced by the Commission, Roche shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to Section 5 (1) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Roche to comply with this order.

C. If a trustee is appointed by the Commission or a court pursuant to paragraph III.A. or B. of this order, Roche shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:

1. The Commission shall select the trustee, subject to the consent of Roche, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures. If Roche has not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after notice by the staff of the Commission to Roche of the identity of any proposed trustee, Roche shall be deemed to have consented to the selection of the proposed trustee.

2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest the Syva Business.

3. Within ten (10) days after appointment of the trustee, Roche shall execute a trust agreement that, subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestiture required by this order.

4. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in paragraph III.C.3. to accomplish the divestiture, which, shall be subject to the prior approval of the Commission. If, however, at the end of the twelve month period, the trustee has submitted a plan of divestiture or believes that divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or, in the case of a court-appointed trustee, by the court; provided, however, the Commission may extend this period only two (2) times.

5. The trustee shall have full and complete access to the personnel, books, records and facilities related to Syva, or to any other relevant information, as the trustee may request. Roche shall develop such financial or other information as such trustee may request and shall cooperate with the trustee. Roche shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays in divestiture caused by Roche shall extend the time for divestiture under this paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed trustee, by the court.

6. The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is admitted to the Commission, subject to Roche's absolute and unconditional obligation to divest at no minimum price. The divestiture shall be made in the manner and to the acquirer as set out in paragraph II of this order, as appropriate; provided, however, if the trustee

receives *bona fide* offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest to the acquiring entity or entities selected by Roche from among those approved by the Commission. If requested by the trustee or acquirer, Roche shall provide the acquirer(s) with the assistance required by paragraph II.C. of this order.

7. The trustee shall serve, without bond or other security, at the cost and expense of Roche, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have the authority to employ, at the cost and expense of Roche, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of Roche, and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's divesting the Syva Business.

8. Roche shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of any claim, whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.

9. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in paragraph III of this order.

10. The Commission or, in the case of a court-appointed trustee, the court, may on its own initiative or at the request of the trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this order.

11. The trustee shall have no obligation or authority to operate or maintain the Syva Business.

12. The trustee shall report in writing to Roche and the Commission every sixty (60) days concerning the trustee's efforts to accomplish divestiture.

IV.

It is further ordered, That respondents shall comply with all terms of the Agreement to Hold Separate, attached to this order and made a part hereof as Appendix I. The Agreement to Hold Separate shall continue in effect until Roche has divested all of the Syva Business as required by this order.

V.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, Roche shall not, without the prior approval of the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise:

(a) Acquire more than 1% of the stock, share capital, equity or other interest in any concern, corporate or non-corporate, engaged in at the time of such acquisition, or within the two years preceding such acquisition engaged in, the manufacture or production of drugs of abuse reagent products in the United States; or

(b) Acquire any assets used or previously used (and still suitable for use) in the manufacture and production of drugs of abuse reagent products in the United States to which sales of \$3 million or more of drugs of abuse reagent products were attributable in the year preceding such acquisition.

Provided, however, that this paragraph V shall not apply to the acquisition of products or services acquired in the ordinary course of business or to any acquisition of a non-exclusive license to any United States patents or other form of intellectual property (excluding assets of the Syva Business).

VI.

It is further ordered, That:

A. Within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until the respondents have fully complied with paragraphs II and III of this order, Roche shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with paragraphs II, III, and IV of this order. Roche shall include in its compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with paragraphs II, III, and IV of this order, including a description of all substantive contacts or negotiations for the divestiture required by this order, including the identity of all parties contacted. Roche shall include in its compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning the divestiture.

B. One (1) year from the date this order becomes final, annually for the next nine (9) years on the anniversary of the date this order becomes final, and at such other times as the Commission may require, Roche shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and is complying with paragraph V of this order.

VII.

It is further ordered, That, for the purpose of determining or securing compliance with this order, respondents shall permit any duly authorized representatives 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 respondents, relating to any matters contained in this order; and

B. Upon five (5) days, notice to respondents, and without restraint or interference from respondents, to interview officers, directors, or employees of respondents. Officers and employees of re-

spondents whose place of employment is outside the United States shall be made available on reasonable notice.

VIII.

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

Commissioner Varney not participating.

SCHEDULE A

Roche shall divest all of the assets and businesses of the Syva Business pursuant to the terms of this order. The associated assets identified in paragraph I. I.(2) of this order shall include all assets, properties, business and goodwill, tangible and intangible, of the Syva Company in and relating to the development, manufacture, sale, distribution and marketing of drugs of abuse reagent products in the United States, including without limitation, the following:

PART I

1. All rare reagent inventory (including antibody reagent pools, hapten conjugates, and detection labels), all inventory (finished and work in process), all sources of the antibodies (whether animals or cell lines), immunogens, commodities, cross-reactants machinery, fixtures, equipment, vehicles, transportation facilities, furniture, tools, and other tangible personal property;

2. All customer lists, vendor lists, catalogs, sales promotion literature, advertising materials, technical information, management information systems, software, inventions, copyrights, trademarks, trade names, trade secrets, intellectual property, formulations, patents, technology, know-how, specifications, designs, drawings, processes, quality assurance and control data, research materials, and information, relating to the manufacture and sale of the drugs of abuse reagent products, including without limitation information relating to FDA approvals and applications for FDA approvals, re-

search and development data, data required under the Good Manufacturing Practices Guidelines, regulatory data packages, process validation, and documentation relating to Drug Enforcement Agency (“DEA”) approvals;

3. All rights, title and interest in and results of all research and development efforts by Syntex relating to improvements, developments, and variants of the Syva EMIT, EMIT II, and other drugs of abuse reagent product lines;

4. All rights, title and interest in and to the contracts entered into in the ordinary course of business with customers (together with associated bid and performance bonds), suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors, and consignees;

5. All rights under warranties and guarantees, express or implied;

6. All books, records and files; and

7. All items of prepaid expense.

PART 2

1. All assets, properties, business and goodwill, tangible and intangible, of the Syva Company in and relating primarily to the development, manufacture, sale, distribution and marketing of any in vitro diagnostic products other than drugs of abuse reagent products, including therapeutic drug monitoring reagent products, infectious disease reagent products, endocrine (thyroid) testing reagent products, and reagents used on the VISTA system (*e.g.*, hormone, cancer, anemia, protein, and hepatitis/HIV testing);

2. Inventory and storage capacity; and

3. All rights, title and interest in and to owned or leased real property, together with appurtenances, licenses and permits.

APPENDIX I

AGREEMENT TO HOLD SEPARATE

This Agreement to Hold Separate (“Hold Separate”) is by and between Roche Holding Ltd (“Roche”), a corporation organized, existing, and doing business under and by virtue of the laws of Switzerland, with its office and principal place of business at Grenzacherstrasse 124, Basel, Switzerland 4002; Syntex Corporation (“Syntex”), a corporation, organized, existing, and doing business under and by virtue of the laws of Panama with its principal place of business located at 3401 Hillview Avenue, Palo Alto, California; and the Federal Trade Commission (“the Commission”), an independent agency of the United States Government, established under the Federal Trade Commission Act of 1914, 15 U.S.C. 41, *et seq.* (collectively, the “Parties”).

PREMISES

Whereas, on May 1, 1994, Roche entered into an Acquisition Agreement and Plan of Merger with Syntex Corporation (“Syntex”) to acquire all the voting stock of Syntex (hereinafter “Acquisition”); and

Whereas, Syntex with its principal office and place of business located at 3401 Hillview Avenue, Palo Alto, California, manufactures and markets through its indirect wholly-owned subsidiary, the Syva Company, among other things, drugs of abuse reagent products; and

Whereas, Hoffmann-La Roche Inc., an indirect wholly-owned subsidiary of Roche, with its principal office and place of business located at 340 Kingsland Street, Nutley, New Jersey, through its subsidiary Roche Diagnostic Systems, Inc., manufacturing and markets, among other things, drugs of abuse reagent products; and

Whereas, the Commission is now investigating the Acquisition to determine whether it would violate any of the statutes enforced by the Commission; and

Whereas, if the Commission accepts the Agreement Containing Consent Order (“Consent Order”), the Commission must place it on the public record for a period of at least sixty (60) days and may subsequently withdraw such acceptance pursuant to the provisions of Section 2.34 of the Commission’s Rules; and

Whereas, the Commission is concerned that if an understanding is not reached, preserving the *status quo ante* of the Syva Business as defined in paragraph I. of the Consent Order during the period prior to the final acceptance of the Consent Order by the Commission (after the 60-day public comment period), divestiture resulting from any proceeding challenging the legality of the Acquisition might not be possible, or might be less than an effective remedy; and

Whereas, the Commission is concerned that if the Acquisition is consummated, it will be necessary to preserve the Commission’s ability to require the divestiture of the Syva Business and the Commission’s right to have the Syva Business continue as a viable competitor; and

Whereas, the purpose of the Hold Separate and the Consent Order is:

1. To preserve the Syva Business as a viable, independent business pending its divestiture as a viable and ongoing enterprise,
2. To remedy any anticompetitive effects of the Acquisition, and
3. To preserve the Syva Business as an ongoing and competitive entity engaged in the same business in which it is presently employed until divestiture is achieved; and

Whereas, Roche and Syntex's entering into this Hold Separate shall in no way be construed as an admission by Roche and Syntex that the Acquisition is illegal; and

Whereas, Roche and Syntex understand that no act or transaction contemplated by this Hold Separate shall be deemed immune or exempt from the provisions of the antitrust laws or the Federal Trade Commission Act by reason of anything contained in this Hold Separate.

Now, therefore, the parties agree, upon the understanding that the Commission has not yet determined whether the acquisition will be challenged, and in consideration of the Commission's agreement that, at the time it accepts the Consent Order for public comment it will grant early termination of the Hart-Scott-Rodino waiting period, and unless the Commission determines to reject the Consent Order, it will not seek further relief from Roche with respect to the Acquisition, except that the Commission may exercise any and all rights to enforce this Hold Separate, the Agreement Containing Consent Order to which it is annexed and made a part thereof and the Order, once it becomes final, and in the event that the required divestiture is not accomplished, to appoint a trustee to seek divestiture of the Syva Business pursuant to the Consent Order, as follows:

1. Roche and Syntex agree to execute and be bound by the Consent Order.
2. Roche and Syntex agree that from the date this Hold Separate is accepted until the earliest of the time listed in subparagraphs 2.a. - 2.b., they will comply with the provisions of paragraph 3. of this Hold Separate:
 - a. Three business days after the Commission withdraws its acceptance of the Consent Order pursuant to the provisions of Section 2.34 of the Commission's rules;
 - b. The time that the divestiture obligations required by the Consent Order are completed.
3. To ensure the complete independence and viability of the Syva Business and to assure that no competitive information is exchanged between the Syva Business and Roche, Roche shall hold the Syva Business as it is presently constituted separate and apart on the following terms and conditions:
 - a. The Syva Business shall be held separate and apart and shall be operated independently of Syntex (meaning here and hereinafter, Syntex excluding the Syva Business and excluding all personnel connected with the Syva Business as of the date this Agreement was signed) and Roche (meaning here and hereinafter, Roche excluding Syntex and excluding all personnel connected with Syntex as of the date this Agreement was signed) except to the extent that Syntex or Roche must exercise

direction and control over the Syva Business to assure compliance with this Agreement or the Consent Order.

b. Syntex personnel connected with Syva or providing support services to Syva as of the date of this Agreement was signed may continue, as employees of Syntex, to provide such services as they are currently providing to Syva. Such Syntex personnel must retain and maintain all material confidential information relating to the Syva Business on a confidential basis and, except as is permitted by this Hold Separate, such persons shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any such information to or with any other person whose employment involves any other Roche business, including the drugs of abuse reagent products business, therapeutic drug monitoring business and the Roche clinical laboratories business.

c. Roche and Syntex shall elect a five-person board of directors for the Syva Company ("New Board"). The New Board shall consist of the Syva Company President and General Manager, Richard Bastiani, the Syva Company Senior Vice-President of Marketing and Sales, David Oxlade, and the Syva Company Vice - President of Finance, Wilbert Lee, as of the date of this Hold Separate (provided they agree, or comparable, knowledgeable persons among the managers of Syva Company independent of Roche); the Chief Financial Officer of Roche whose responsibilities with Roche do not involve direct management of Roche's drugs of abuse, therapeutic drug monitoring or clinical laboratories businesses, Henri B. Meier (provided he agrees, or a comparable, knowledgeable person among the financial managers of Roche); and the Chairman of Syntex, Paul Freiman (provided he agrees, or a comparable, knowledgeable person among the managers of Syntex). The Chairman of the New Board shall be Richard Bastiani (provided he agrees, or a comparable, knowledgeable person among the managers of Syva), who shall remain independent of Roche and competent to assure the continued viability and competitiveness of the Syva Company. Except for the Roche employee serving on the New Board, Roche shall not permit any director, officer, employee, or agent of Roche also to be a director, officer, employee of the Syva Company. Each New Board member shall enter into a confidentiality agreement agreeing to be bound by the terms and conditions set forth in Attachment A, appended to this Hold Separate.

d. Roche shall not exercise direction or control over, or influence directly or indirectly, the Syva Business, the New Board, or any of its operations or businesses; provided, however, that Roche may exercise only such direction and control over the Syva Business as is necessary to assure compliance with this Hold Separate, the order and with all applicable laws.

e. Roche and Syntex shall maintain the marketability, viability, and competitiveness of the Syva Business, and shall not cause or permit the destruction, removal, wasting, deterioration, or impairment of any assets or business they may have to divest except in the ordinary course of business and except for ordinary wear and tear, and they shall not sell, transfer, encumber (other than in the normal course of business), or otherwise impair the marketability, viability or competitiveness of the Syva Business.

f. Except as required by law and except to the extent that necessary information is exchanged in the course of evaluating and consummating the Acquisition, defending investigations or litigation, obtaining legal advice, complying with this Hold Separate or the Consent Order or negotiating agreements to divest assets, Roche and Syntex shall not receive or have access to, or the use of, any material

confidential information of the Syva Business or the activities of the New Board not in the public domain, nor shall the Syva Company, or the New Board, receive or have access to, or the use of, any material confidential information about the Roche drugs of abuse reagent business or the activities of Roche in managing the drugs of abuse reagent business not in the public domain. Roche and Syntex may receive on a regular basis from the Syva Company aggregate financial information necessary and essential to allow Roche and Syntex to file financial reports, tax returns, and personnel reports. Any such information that is obtained pursuant to this subparagraph shall be used only for the purpose set forth in this subparagraph. ("Material confidential information," as used herein, means competitively sensitive or proprietary information not independently known to Roche from sources other than the Syva Company or the New Board and includes but is not limited to customer lists, price lists, marketing methods, patents, technologies, processes, or other trade secrets.)

g. Except as is permitted by this Hold Separate, the director of the Syva Company appointed by Roche who is also a director, officer, agent, or employee of Roche ("Roche New Board member"), shall not receive any Syva Business material confidential information and shall not disclose any such information obtained through his or her involvement with the Syva Business to Roche or use it to obtain any advantage for Roche. The Roche New Board member shall participate in matters that come before the New Board only for the limited purposes of considering any capital investment of over \$150,000, approving any proposed budget and operating plans, authorizing dividends and repayment of loans consistent with the provisions hereof, reviewing material transactions described in subparagraph 3.i, and carrying out Roche's responsibilities under the Hold Separate and the Order. Except as permitted by the Hold Separate, the Roche New Board member shall not participate in any matter, or attempt to influence the votes of other directors on the New Board with respect to matters that would involve a conflict of interest between Roche and the Syva Business. Meetings of the New Board during the term of the Hold Separate shall be audio recorded and the recording retained for two (2) years after the termination of the Hold Separate.

h. The Syva Company shall be staffed with sufficient employees to maintain the viability and competitiveness of the Syva Business, which employees shall be the Syva Company employees and may also be hired from sources other than the Syva Company. Each director, officer, and management employee of the Syva Company shall execute a confidentiality agreement prohibiting the disclosure of any Syva Business confidential information.

i. All material transactions, out of the ordinary course of business and not precluded by paragraph 3 hereof, shall be subject to a majority vote of the New Board.

j. Roche shall not change the composition of the New Board unless the Chairman of the New Board consents. The Chairman of the New Board shall have the power to remove members of the New Board for cause and to require Roche to appoint replacement members to the New Board in the same manner as provided in paragraph 3.c. of this Hold Separate. Roche shall not change the composition of the management of the Syva Company except that the New Board shall have the power to remove management employees for cause.

k. If the Chairman ceases to act or fails to act diligently, a substitute chairman shall be appointed in the same manner as provided in paragraph 3.c.

l. Roche shall circulate to its management employees of Roche drugs of abuse therapeutic drug monitoring and Roche clinical laboratories businesses and appropriately display a notice of this Hold Separate and Consent Order in the form attached hereto as Attachment A.

m. Roche and Syntex shall cause the Syva Business to continue to expend funds for the advertising and trade promotion of the Syva Business at levels not lower than those budgeted for 1994 and 1995, and shall increase such spending as deemed reasonably necessary by the New Board in light of competitive conditions. If necessary, Roche and Syntex shall provide the Syva Business with any funds to accomplish the foregoing. Syntex shall continue to provide to the Syva Business such support services as it provided prior to the Acquisition to the Syva Company.

n. All earnings and profits of the Syva Business shall be retained separately by the Syva Business. If necessary, Roche shall provide the Syva Business with sufficient working capital to operate at the rate of operation in effect during the twelve (12) months preceding the date of the Hold Separate.

o. The New Board shall serve at the cost and expense of Roche. Roche shall indemnify the New Board against any losses or claims of any kind that might arise out of its involvement under this Hold Separate, except to the extent that such losses or claims result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the New Board directors.

p. The New Board shall have access to and be informed about all companies who inquire about, seek or propose to buy the Syva Business.

q. The New Board shall report in writing to the Commission every thirty (30) days concerning the New Board's efforts to accomplish the purposes of this Hold Separate.

4. Should the Federal Trade Commission seek in any proceeding to compel Roche to divest itself of the Syva Business or any additional assets, as provided in the proposed order, or to seek any other equitable relief, Roche shall not raise any objection based on the expiration of the applicable Hart-Scott-Rodino Antitrust Improvements Act waiting period or the fact that the Commission has permitted the Acquisition. Roche shall also waive all rights to contest the validity of this Hold Separate.

5. For the purpose of determining or securing compliance with this Hold Separate, subject to any legally recognized privilege, and upon written request with reasonable notice to Roche made to its General Counsel, Roche and Syntex shall permit any duly authorized representative or representatives of the Commission:

a. Access during the office hours of Roche or Syntex 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 Roche or Syntex relating to compliance with this Hold Separate;

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

6. [Deleted].

7. This Hold Separate shall not be binding until approved by the Commission.

ATTACHMENT A

NOTICE OF DIVESTITURE AND
REQUIREMENT FOR CONFIDENTIALITY

Roche Holding Ltd ("Roche") and Syntex Corporation ("Syntex") have entered into a Consent Agreement and Agreement to Hold Separate with the Federal Trade Commission ("Commission") relating to the divestiture of the Syva Business. Until after the Commission's Order becomes final and the Syva Business is divested, the Syva Business must be managed and maintained as a separate, ongoing business, independent of all other Roche businesses and independent of the Roche drugs of abuse business. All competitive information relating to the Syva Business, including without limitation the drugs of abuse business, must be retained and maintained by the persons involved in the Syva Business on a confidential basis and such persons shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any such information to or with any other person whose employment involves any other Roche business, including the drugs of abuse business, therapeutic drug monitoring business and the Roche Biomedical Laboratories business. Similarly, all such persons involved in the Roche therapeutic drug monitoring business, drugs of abuse business and the Roche Biomedical Laboratories shall be prohibited from providing, discussing, exchanging, circulating or otherwise furnishing competitive information about such business to or with any person whose employment involves the Syva Business.

Any violation of the Consent Agreement or the Agreement to Hold Separate, incorporated by reference as part of the Consent Order, may subject Roche and Syntex to civil penalties and other relief as provided by law.

IN THE MATTER OF

HAYES MICROCOMPUTER PRODUCTS, INC.

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

Docket C-3543. Complaint, Nov. 28, 1994--Decision, Nov. 28, 1994

This consent order prohibits, among other things, a Georgia manufacturer and distributor of computer communications products from making representations for any of its modem related products regarding the risk of data loss or data destruction, or data transmission problems due to any escape method, unless the respondent possesses and relies upon competent and reliable substantiating evidence.

Appearances

For the Commission: *Linda K. Badger and Kerry O'Brien.*

For the respondent: *James Hawkins, Dennis, Goldstein, Frazer & Murphy, Atlanta, GA.*

COMPLAINT

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

PARAGRAPH 1. Respondent Hayes Microcomputer Products, Inc., is a Georgia corporation, with its principal office or place of business at 5835 Peachtree Corners East, Norcross, Georgia.

PAR. 2. Respondent has manufactured, advertised, offered for sale, sold, and distributed products for computer communications, including modems, local area networks, and software. One of respondent's products is a modem with an "escape sequence." An escape sequence is a mechanism by which modems end a data transmission. Respondent patented this product under the title, "Modem with Improved Escape Sequence Mechanism to Prevent Escape in Response to Random Occurrence of Escape Character in Transmitted Data." The escape sequence mechanism defined in this

patent is known as the "Improved Escape Sequence with Guard Time."

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

PAR. 4. Respondent has disseminated or has caused to be disseminated advertisements for the Improved Escape Sequence with Guard Time, including but not necessarily limited to the attached Exhibits A-B. These advertisements contain the following statements and depictions:

A. Tick, Tick, Tick. Boom! You're Dead.

A time bomb may be lurking inside your modem. A fatal flaw that can paralyze the data you're transmitting, causing untold chaos to the flow of accurate data you need.

You see, some modem manufacturers decided to turn their backs on proven modem technology, and on you. They haven't told you about the dangers because the only solution for this crisis is to replace their modems. Fortunately, Hayes can give you the knowledge to locate the bomb and prevent the purchase of another one.

HOW TO UNCOVER THE BOMB. We've developed a FREE test kit that's extremely easy to run on your PC or Mac. The kit spells out the dangers completely and accurately tracks down their fatally flawed component. . . .

THE ONLY WAY TO BE COMPLETELY PROTECTED. You can protect your data, your company, and even your job by purchasing modems that incorporate licensed technology from Hayes. . . .

The bomb is armed. The clock is ticking. Where will you be after the bomb goes off? Contact Hayes today for your FREE test kit and stop data transmission disaster before it strikes. (Exhibit A).

B. It's Time To Find The Bomb.

The Bomb.

By now, you know that a time bomb may be lurking inside your modem. It's there because some modems are using unreliable technology. This fatal flaw can paralyze the data you're transmitting because this unreliable escape sequence can fail you at any time.

The Solution.

This bomb is so dangerous that the best solution for this crisis is to replace these modems. . . .

Improved Escape Sequence with Guard Time.

. . . . To be reliable, it is important that a modem not escape if the characters used in the escape sequence appear at any time in the data being transmitted.

Time Independent Escape Sequence.

If you buy a TIES modem, you might assume that the modem is Hayes compatible because it uses AT commands, only to learn later that the modem might have been designed with a serious reliability problem. . . .

How to test your modem for TIES.

If the file transfer is unexpectedly interrupted or if the modem reverts to Command mode you are using a modem that implements the unreliable TIES procedure. (Exhibit B).

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-B, respondent has represented, directly or by implication, that:

A. Because a modem does not incorporate the Improved Escape Sequence with Guard Time, the use of that modem creates a substantial risk of data destruction.

B. When incorporated in modems, the "Time Independent Escape Sequence" ("TIES") creates a substantial risk of data transmission failure.

C. The Improved Escape Sequence with Guard Time is the only escape method that does not create a substantial risk of data transmission failure.

D. The use of any modem that does not incorporate the Improved Escape Sequence with Guard Time entails a data transmission problem that can be solved only by replacing it with a modem that incorporates the Improved Escape Sequence with Guard Time.

PAR. 6. In truth and in fact:

A. A modem's failure to incorporate the Improved Escape Sequence with Guard Time does not create a substantial risk of data destruction.

B. When incorporated in modems, TIES does not create a substantial risk of data transmission failure.

C. The Improved Escape Sequence with Guard Time is not the only escape method that does not create a substantial risk of data transmission failure.

D. The use of any modem that does not incorporate the Improved Escape Sequence with Guard Time does not entail a data transmission problem that can be solved only by replacing it with a modem that incorporates the Improved Escape Sequence with Guard

Time. In truth and in fact, other methods of escape can be used, or the escape sequence can be disabled or reset.

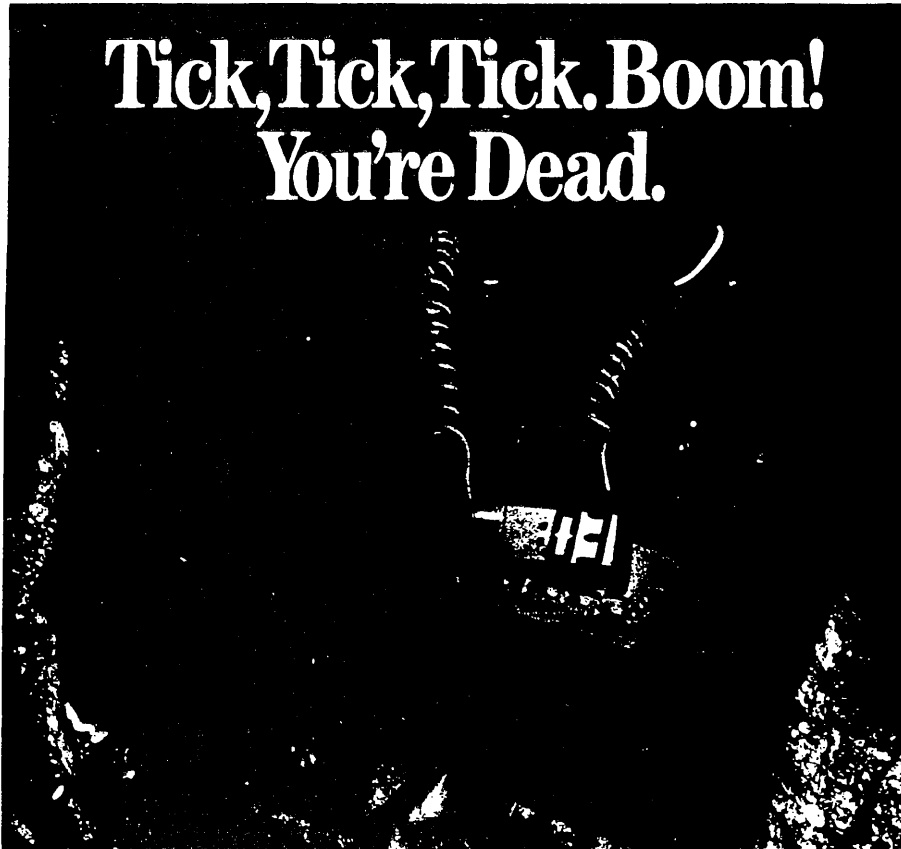
Therefore, the representations set forth in paragraph five were, and are, false and misleading.

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-B, respondent has represented, directly or by implication, that at the time it made the representations set forth in paragraph five, respondent possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 8. In truth and in fact, at the time it made the representations set forth in paragraph five, respondent did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation set forth in paragraph seven was, and is, false and misleading.

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

EXHIBIT A



A time bomb may be lurking inside your modem. A fatal flaw that can paralyze the data you're transmitting, causing untold chaos to the flow of accurate data you need.

You see, some modem manufacturers decided to turn their backs on proven modem technology, and on you. They haven't told you about the dangers because the only solution for this crisis is to replace their modems. Fortunately, Hayes® can give you the knowledge to locate the bomb and prevent the purchase of another one.

HOW TO UNCOVER THE BOMB We've developed a FREE test kit that's extremely easy to run on your PC or Mac. The kit spells out the dangers completely and accurately tracks down their fatally flawed component. To order your FREE kit, just call 800-846-8388, FAX your request to 404-729-6650, or download the test files from the Hayes BBS.

THE ONLY WAY TO BE COMPLETELY PROTECTED. You can protect your data, your company,

and even your job by purchasing modems that incorporate licensed technology from Hayes. Modems using complete solution Rockwell

chip sets are licensed as well as most modems of direct licensees of Hayes U.S. Patent 4,549,302. So look for the symbol. It means your modem uses the industry-standard escape sequence technology that has established its reliability for over a decade. Of course, all modems and ISDN products manufactured by Hayes use this technology as well.

The bomb is armed. The clock is ticking. Where will you be after the bomb goes off? Contact Hayes today for your FREE test kit and stop data transmission disaster before it strikes.



Why settle for anything less? Hayes products have the computer world talking. More than ever.

Go On Line with Hayes BBS: call 800-874-2837 or 404-446-6336
© 1991 Hayes Microcomputer Products, Inc., P.O. Box 9880, Atlanta, GA 30344

EXHIBIT A

EXHIBIT B



EXHIBIT B

EXHIBIT B

It's Time To Find The Bomb.

The Bomb.

By now, you know that a time bomb may be lurking inside your modem. It's there because some modems are using unreliable technology. This fatal flaw can paralyze the data you're transmitting because this unreliable escape sequence can fail you at any time.

The Test.

Fortunately, this free Hayes® test kit will give you the knowledge to locate the fatally flawed component and help you avoid purchasing another one. The test data file is extremely easy to run on your computer, just follow the instructions on the back of this flyer.

The Solution.

This bomb is so dangerous that the best solution for this crisis is to replace these modems. You can protect your data transmission, your company, and even your job by purchasing modems that incorporate licensed technology from Hayes. Modems using complete solution Rockwell® chip sets are licensed, as well as most modems of direct licensees of Hayes U.S. Patent 4,549,302. So look for this symbol. It means your modem uses the industry standard escape sequence technology that has established its reliability for over a decade. Of course, all modems and ISDN products manufactured by Hayes use this technology.



EXHIBIT B

What is a Modem Escape Sequence?

A modem escape sequence allows a modem to change or 'escape' from the receive/transmit mode of operation to the command mode of operation. Prior to 1981, modems used various escape sequences, such as the Eaton escape sequence, but these escape sequences were unreliable in actual use because they could not prevent the modem from unexpectedly escaping into command mode when the data being transmitted contained the escape code.

Improved Escape Sequence with Guard Time.

The Improved Escape Sequence with Guard Time was first used in a Hayes modem in 1981. The particular improvement allows a modem to escape from the receive/transmit mode of operation to the command mode of operation in a very reliable manner that does not depend on the probability of character occurrence in the data. To be reliable, it is important that a modem not escape if the characters used in the escape sequence appear at any time in the data being transmitted.

Dale Heatherington was not satisfied with an escape mechanism which caused some data to be undecodable because the modem would not be truly transparent to some data. He solved the problem by choosing predetermined characters for the escape code (such as `+++`) and surrounding them on either side by a predetermined guard time to alert the modem that the sequence is distinguished from a typical data string transmission.

Dale Heatherington redefined the problem, and his resulting invention led to U.S. Patent # 4,549,302 and corresponding patents in a number of countries. Hayes has licensed many modem manufacturers to allow this technology to be readily available to the market. Currently, manufacturers such as Amstrad, Compaq, GPT, IBM, Megahertz, OKI, Practical Peripherals, US Robotics and others license this technology from Hayes and have provided reliable escape mechanisms in their products.

Time Independent Escape Sequence.

A new escape sequence, the so-called Time Independent Escape Sequence (TIES), has recently appeared on the market. TIES is a non-standard escape sequence which is definitely not the same as the Improved Escape Sequence with Guard Time that was first used in a Hayes modem and is now used as the de facto standard for reliable modem operation by modem manufacturers worldwide.

If you buy a TIES modem, you might assume that the modem is Hayes compatible because it uses AT commands, only to learn later that the modem might have been designed with a serious reliability problem. Under certain system configurations, the modem could be reset or reconfigured by the remote modem, and when a file is being transmitted, the modem may unexpectedly escape into command mode, making it impossible to transmit that particular file. Each time you try to send the file, the same outcome would occur.

By re-introducing the faulty escape problem in the TIES technology, manufacturers would be doing a great disservice to you. Furthermore, because manufacturers of TIES modems do not publicize that the modem uses TIES, you probably would not know that the modem uses the TIES technology until you experience an unexpected interruption of your data transmission.

How do I know if my modem supports TIES?

We've developed the test data file enclosed (TIESTEST.BIN) that can assist you in determining if your modem or the modems which you are evaluating support TIES. If you transfer the TIESTEST.BIN file using XMODEM or YMODEM and your modem supports TIES, the file transfer will unexpectedly abort at a certain point or the modem will revert to Command State where it will not transmit data until an appropriate AT command is typed.

EXHIBIT B

Unlike the Improved Escape Sequence with Guard Time, TIES will cause a file transfer to abort if certain sequences of characters are present. The simplest TIES default escape sequence is "----AT<CR>" where <CR> represents "carriage return." In TIES there are no required guard times. Other "poison sequences" might have a lower case AT ("at") or be of the form "----AT<string><CR>", where <string> is any valid AT command.

The particular "poison sequences" for a TIES modem depend on whether the communications software changes the value of the "escape character" (the ~) and the end-of-command character (the <CR>). The TIESTEST.BIN file includes all possible sequences of the form "----x~y" where the ASCII value for x is varied from 0 to 127 and the ASCII value for y is varied from 0 to 127. This results in 16,384 sequences which are each repeated twice to be sure the protocol does not interrupt the character sequence.

A shorter file, TIESQUIK.BIN, is also available and will detect the existence of TIES if any Hayes Smartcom communications software is used. It will also detect TIES with any other XMODEM or YMODEM file transfer software that does not reprogram the end-of-command character (most widely used communications software fall into this category). This shorter file will upload in 6 to 12 seconds at 2400 bps. (Note: this is a test for TIES escape mechanism only. It does not test for Hayes Improved Escape Sequence with Guard Time in any way).

How to test your modem for TIES.

To test a modem, transfer the TIESTEST.BIN file on this disk to another system or the Hayes BBS using either XMODEM or YMODEM file transfer protocol.

To use the Hayes BBS, call *OnLine with Hayes* in the U.S. at 404/446-8336 or 800/874-2937. Register on the BBS and then select [T] TIES Modem Test Area from the Main Menu. You may then select: 1. What is TIES?, 2. Who needs to perform this test?, 3. Download test file, 4. Upload file/Perform test, and 5. Ask a question about TIES. Set your data communications software to use XMODEM or YMODEM and select 4 from the TIES Modem Test Area menu to perform the test. Tell the BBS which protocol you selected and send the TIESTEST.BIN file.

If the file transfer is unexpectedly interrupted or if the modem reverts to Command mode you are using a modem that implements the unreliable TIES procedure.

Remember, if you are using a Hayes modem you do *not* have to perform this test.

If you need assistance with the test or have any questions or comments, please contact Hayes Customer Service at 800/846-8388.

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Why settle for anything less?
Hayes products have the computer world talking.
More than ever.

DECISION AND ORDER

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

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

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

1. Respondent Hayes Microcomputer Products, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Georgia, with its office and principal place of business located at 5835 Peachtree Corners East, in the City of Norcross, State of Georgia.

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

ORDER

DEFINITIONS

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

A. The term "*Improved Escape Sequence with Guard Time*" means the escape method technology described, among other things, in United States Patent Number 4,549,302, titled as "Modem With Improved Escape Sequence With Guard Time Mechanism."

B. The term "*Time Independent Escape Sequence*," or "*TIES*," means an escape sequence consisting of three escape characters (*e.g.*, "+++"), followed by a valid AT command, which can be followed by additional AT commands, and ended with another character, typically a carriage return.

C. The term "*modem-related product*" means any modem, any component of any modem, or any hardware or software used in the operation of any modem.

I.

It is ordered, That respondent, Hayes Microcomputer Products, Inc., a corporation, its successors and assigns, and its officers, and respondent's agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of products containing the Improved Escape Sequence with Guard Time, 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. Because a modem does not incorporate the Improved Escape Sequence with Guard Time, the use of that modem creates a substantial risk of data destruction;

B. When incorporated in modems, the "Time Independent Escape Sequence" ("TIES") creates a substantial risk of data transmission failure;

C. The Improved Escape Sequence with Guard Time is the only escape method that does not create a substantial risk of data transmission failure; or

D. The use of any modem that does not incorporate the Improved Escape Sequence with Guard Time entails a data transmission problem that can be solved only by replacing it with a modem that incorporates the Improved Escape Sequence with Guard Time;

unless such representation is true, and at the time of making such representation, respondent possesses and relies upon competent and reliable evidence, which when appropriate must be 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 respondent, Hayes Microcomputer Products, Inc., a corporation, its successors and assigns, and its officers, and respondent's agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any modem-related 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, the risk of experiencing data destruction, data loss or data transmission problems due to any escape method, unless, at the time of making such representation, respondent possesses and relies 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 for five (5) years after the last date of dissemination of any representation covered by this order, respon-

dent, or its successors and assigns, shall maintain and upon request make available to the Federal Trade Commission for inspection and copying:

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

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

IV.

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

V.

It is further ordered, That respondent shall, within ten (10) days from the date of service of this order upon it, distribute a copy of this order to each of its officers, agents, representatives, independent contractors, and employees involved in the preparation and placement of advertisements or promotional materials, to all company executives, and to all marketing and sales managers; and for a period of three (3) years, from the date of issuance of this order, distribute a copy of this order to all of respondent's future such officers, agents, representatives, independent contractors, and employees.

VI.

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

Commissioner Varney not participating.

Modifying Order

118 F.T.C.

IN THE MATTER OF

THE COCA-COLA COMPANY

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION
OF SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT*Docket 9207. Final Order, June 13, 1994 -- Modifying Order, Dec. 5, 1994*

This order reopens the proceeding and modifies the Commission's final order issued on June 13, 1994, that required the respondent, for ten years, to obtain Commission approval before acquiring certain brand-name soft drink concentrate manufacturers, by eliminating a provision which had expressly defined Coca-Cola Enterprises, Inc. as a Coca-Cola Company subsidiary or affiliate subject to this prior approval requirement.

ORDER REOPENING AND MODIFYING FINAL ORDER

The Commission issued a final order in this proceeding on June 13, 1994, and respondent The Coca-Cola Company -- and Coca-Cola Enterprises, Inc. -- filed petitions for review of that order in the United States Court of Appeals for the District of Columbia Circuit on August 26, 1994. Coca-Cola Enterprises Inc. was not a party to the administrative proceeding and there is no need that it be singled out in the order for identification as a subsidiary or affiliate of The Coca-Cola Company.

Accordingly, the Commission, having determined *sua sponte* to reopen this proceeding and modify Part I.A of the final order, pursuant to Commission Rule 3.72 (a).

It is ordered, That the final order in this matter be, and it hereby is, modified to delete the following sentence from Part I.A of the final order:

For purposes of this order, Coca-Cola Enterprises Inc. is a subsidiary or affiliate of Coca-Cola.

Chairman Steiger and Commissioner Varney acting pursuant to delegated authority, with Commissioner Azcuenaga and Commissioner Starek recused.¹

¹ Effective November 30, 1994, the Commission delegated its functions in certain circumstances when no quorum is available for the transaction of business, so that the Commissioner or Commissioners who are available for quorum purposes may act on behalf of the Commission. *See 59 Fed. Reg.* 61336 (Nov. 30, 1994), Commissioner Azcuenaga abstaining in a separate statement.

Complaint

118 F.T.C.

IN THE MATTER OF

COLUMBIA/HCA HEALTHCARE CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION
OF SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT*Docket C-3544. Complaint, Dec. 6, 1994--Decision, Dec. 6, 1994*

This consent order permits, among other things, the hospital company to complete its acquisition of Medical Care America, but requires it to divest the Alaska Surgery Center within twelve months to a Commission-approved entity. If the transaction is not completed in the designated time frame, the respondent is required to permit the Commission to appoint a trustee. In addition, the consent order requires the respondent, for ten years, to obtain Commission approval before acquiring an interest worth more than \$1 million in any outpatient surgical services facility in Anchorage, Alaska, and before selling such an interest to any entity that operates an outpatient surgical services facility in Anchorage, Alaska.

Appearances

For the Commission: *Mark J. Horoschak* and *Philip Eisenstat*.

For the respondent: *Ky P. Ewing, Jr., Vinson & Elkins*,
Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that respondent Columbia/HCA Healthcare Corporation ("Columbia/HCA"), a corporation subject to the jurisdiction of the Commission, has entered into an agreement whereby Columbia/HCA will acquire Medical Care America, Inc. ("Medical Care America"); that the acquisition agreement violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; that the proposed acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, pursuant to Section 11(b) of the

Clayton Act, 15 U.S.C. 21(b), and Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), stating its charges as follows:

DEFINITIONS

PARAGRAPH 1. For purposes of this complaint, the following definitions shall apply:

a. “*Outpatient surgery facility*” means a health facility which has as a function the provision of outpatient surgery services. Outpatient surgery facilities include general acute care hospitals that offer outpatient surgery services, as well as ambulatory surgery centers that are not part of a general acute care hospital. The term “outpatient surgery facility” shall not include a physician’s, other healthcare professional’s, or group practice’s office or offices that provide outpatient surgery services for use solely by that physician, healthcare professional, or group practice, so long as such facility is not licensed as an ambulatory surgical facility by the State of Alaska.

b. “*Outpatient surgery services*” means facilities, personnel, and tools and equipment used by doctors in performing surgical procedures on patients who are not confined for more than 23 hours in an acute care hospital or other facility for recovery following the surgery. Outpatient surgery services include operating rooms, recovery rooms, surgical tools and devices, nurses, anesthesia equipment and personnel.

c. “*Acute care hospital*” means a health facility, other than a federally owned facility, having a duly organized governing body with overall administrative and professional responsibility, and an organized medical staff, that provides 24-hour inpatient care, as well as outpatient services, and having as a primary function the provision of inpatient services for medical diagnosis, treatment, and care of physically injured or sick persons with short-term or episodic health problems or infirmities.

THE PARTIES TO THE PROPOSED ACQUISITION

PAR. 2. Columbia/HCA is a corporation organized, existing, and doing business under and by virtue of the laws of Delaware, with its principal place of business at 201 West Main Street, Louisville, Ken-

tucky. Columbia/HCA and/or its subsidiaries own and operate the Alaska Regional Hospital in Anchorage, Alaska.

PAR. 3. Medical Care America is a corporation organized, existing, and doing business under and by virtue of the laws of Delaware, with its principal place of business at 13455 Noel Road, Dallas, Texas. Medical Care America, through a limited partnership, owns Alaska Surgery Center, in Anchorage, Alaska.

JURISDICTION

PAR. 4. Columbia/HCA and Medical Care America are, and at all times relevant herein have been, engaged in commerce, as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12. The businesses of Columbia/HCA and Medical Care America are, and at all times relevant herein, have been, in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

THE PROPOSED ACQUISITION

PAR. 5. On or about May 24, 1994, Columbia/HCA and Medical Care America entered into an agreement whereby Columbia/HCA will acquire all the stock of Medical Care America. The total value of the Medical Care America stock to be acquired by Columbia/HCA is approximately \$692 million.

NATURE OF TRADE AND COMMERCE

PAR. 6. For the purposes of this complaint, the relevant line of commerce in which to analyze the proposed acquisition is the production and sale of outpatient surgery services and/or any narrower group of services contained therein.

PAR. 7. For the purposes of this complaint, the relevant section of the country is the municipality of Anchorage in Alaska.

MARKET STRUCTURE

PAR. 8. The relevant market -- *i.e.*, the relevant line of commerce in the relevant section of the country -- is highly concentrated, whether measured by Herfindahl-Hirschmann Indices ("HHI") or by four-firm concentration ratios.

ENTRY CONDITIONS

PAR. 9. Entry into the relevant market is difficult. In particular, potential new entrants must obtain a certificate of need from the State of Alaska in order to establish a new outpatient surgery facility in the relevant section of the country. It is unlikely that a certificate of need can be obtained for a new outpatient surgery facility in Anchorage within two years.

COMPETITION

PAR. 10. In the relevant market, Columbia/HCA and Medical Care America are actual and potential competitors.

EFFECT

PAR. 11. The effect of the aforesaid acquisition may be substantially to lessen competition in the relevant market in the following ways, among others:

(a) It would eliminate actual and potential competition between Columbia/HCA's and Medical Care America's outpatient surgery facilities in the relevant market;

(b) It would significantly increase the already high level of concentration in the relevant market;

(c) It would eliminate Medical Care America's outpatient surgery facility from the relevant market as a substantial, independent competitive force;

(d) It may increase the possibility of collusion or interdependent coordination by the remaining firms in the relevant market; and

(e) It may deny patients, physicians, third-party payers, and other consumers of outpatient surgery services in the relevant market the benefits of free and open competition based on price, quality, and service.

VIOLATIONS CHARGED

PAR. 12. The acquisition agreement described in paragraph five above violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

PAR. 13. The acquisition described in paragraph five, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation into the proposed acquisition of Medical Care America, Inc. by Columbia/HCA Healthcare Corporation ("Columbia/HCA"), and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, 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 Columbia/HCA is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business at 201 West Main Street, Louisville, Kentucky.

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

ORDER

I.

It is ordered, That as used in this order, the following definitions shall apply:

A. “*Respondent*” or “*Columbia/HCA*” means Columbia/HCA Healthcare Corporation, its partnerships, joint ventures, companies, subsidiaries, divisions, groups and affiliates controlled by respondent, and their respective directors, officers, employees, agents, and representatives, and their respective successors and assigns.

B. The “*Acquisition*” means the acquisition by Columbia/HCA of Medical Care America, Inc., including the Alaska Surgery Center.

C. “*Outpatient surgery facility*” means a health facility which has as a function the provision of outpatient surgery services. Outpatient surgery facilities include general acute care hospitals that offer outpatient surgery services, as well as ambulatory surgery centers that are not part of a general acute care hospital. The term “outpatient surgery facility” shall not include a physician's, other healthcare professional's, or group practice's office or offices that provide outpatient surgery services for use solely by that physician, healthcare professional, or group practice, so long as such facility is not licensed as an ambulatory surgical facility by the State of Alaska.

D. “*Outpatient surgery services*” means facilities, personnel, and tools and equipment used by doctors in performing surgical procedures on patients who are not confined for more than 23 hours in an acute care hospital or other facility for recovery following the surgery. Outpatient surgery services include operating rooms, recovery rooms, surgical tools and devices, nurses, anesthesia equipment and personnel.

E. To “*operate an outpatient surgery facility*” means to own, lease, manage, or otherwise control or direct the operations of an outpatient surgery facility, directly or indirectly.

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

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

H. “*Commission*” means the Federal Trade Commission.

I. “*Schedule A Assets*” means assets acquired by the respondent and listed on the attached Schedule A.

J. “*Viability and competitiveness*” means that the Schedule A Assets are capable of functioning independently and competitively.

K. “*Assets and Businesses*” include, but are not limited to, all assets, properties, businesses, rights, privileges, contractual interests, licenses, and goodwill of whatever nature, tangible and intangible, including, without limitation, the following:

1. All real property interests (including fee simple interests and real property leasehold interests, whether as lessor or lessee), together with all buildings, improvements and fixtures located thereon, all construction in progress thereat, all appurtenances thereto, and all licenses and permits related thereto (collectively, the “Real Property”);

2. All contracts and agreements with physicians, other health care providers, unions, third party payors, HMOs, customers, suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, cosigners, and consignees (collectively, the “contracts”);

3. All machinery, equipment, fixtures, vehicles, furniture, inventories, and supplies (other than such inventories and supplies as are used in the ordinary course of business during the time that Columbia/HCA owns the assets) (collectively, the “Personal Property”);

4. All research materials, technical information, management information systems, software, software licenses, inventions, trade secrets, technology, know how, specifications, designs, drawings, processes, and quality control data (collectively, the “Intangible Personal Property”);

5. All books, records and files, excluding, however, the corporate minute books and tax records of Columbia/HCA and its Affiliates; and

6. All prepaid expenses.

II.

It is further ordered, That:

A. Respondent shall divest, absolutely and in good faith, within twelve (12) months of the date this order becomes final, the Schedule A Assets, and shall also divest such additional assets and businesses ancillary to the Schedule A Assets and effect such arrangements as are necessary to assure the marketability and the viability and competitiveness of the Schedule A Assets.

B. Respondent shall divest the Schedule A Assets only to an acquirer that receives the prior approval of the Commission, and only in a manner that receives the prior approval of the Commission. The purpose of the divestiture of the Schedule A Assets is to ensure the continuation of the Schedule A Assets as an ongoing, viable outpatient surgery facility and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's complaint.

C. Respondent shall comply with all terms of the Agreement to Hold Separate, attached hereto and made a part hereof as Appendix I. Said Agreement shall continue in effect until such time as respondent has fulfilled the divestiture requirements of this order or until such other time as the Agreement to Hold Separate provides.

D. Pending divestiture of the Schedule A Assets, respondent shall take such actions as are necessary to maintain the viability and competitiveness and the marketability of the Schedule A Assets, and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the Schedule A Assets, except for ordinary wear and tear.

E. A condition of approval by the Commission of the divestiture shall be a written agreement by the acquirer of the Schedule A Assets that it will not sell for a period of ten (10) years from the date of divestiture, directly or indirectly, through subsidiaries, partnerships, or otherwise, without the prior approval of the Commission, the Schedule A Assets to any person who operates, or will operate immediately following the sale, any other outpatient surgery facility in the Municipality of Anchorage, Alaska.

III.

It is further ordered, That:

A. If the respondent has not divested, absolutely and in good faith and with the Commission's prior approval, the Schedule A Assets, in accordance with this order, within twelve (12) months of the date this order becomes final, the Commission may appoint a trustee to divest the Schedule A Assets. In the event that the Commission or the Attorney General brings an action for any failure to comply with this order or in any way relating to the Acquisition, pursuant to Section 5(1) of the Federal Trade Commission Act, 15 U.S.C. 45(1), or any other statute enforced by the Commission, the respondent shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it for any failure by the respondent to comply with this order.

B. If a trustee is appointed by the Commission or a court pursuant to paragraph III.A. of this order, the respondent shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:

1. The Commission shall select the trustee, subject to the consent of the respondent, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures. If respondent has not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after notice by the staff of the Commission to respondent of the identity of any proposed trustee, respondent shall be deemed to have consented to the selection of the proposed trustee.

2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest the Schedule A Assets.

3. Within ten (10) days after appointment of the trustee, respondent shall execute a trust agreement that, subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, transfers to the trustee all rights and powers

necessary to permit the trustee to effect the divestiture required by this order.

4. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in paragraph III.B.3. to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve-month period, the trustee has submitted a plan of divestiture or believes that divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or in the case of a court-appointed trustee, by the court; provided however, the Commission may extend this period only two (2) times.

5. The trustee shall have full and complete access to the personnel, books, records, and facilities related to the Schedule A Assets, or to any other relevant information as the trustee may request. Respondent shall develop such financial or other information as such trustee may reasonably request and shall cooperate with the trustee. Respondent shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays in divestiture caused by respondent shall extend the time for divestiture under this paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed trustee, by the court.

6. The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to the respondent's absolute and unconditional obligation to divest at no minimum price. The divestiture shall be made in the manner and to the acquirer as set out in paragraph II of this order; provided, however, if the trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest to the acquiring entity selected by respondent from among those approved by the Commission.

7. The trustee shall serve, without bond or other security, at the cost and expense of the respondent, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have the authority to employ, at the cost and expense of respondent, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the sale and all expenses incurred. After approval by the Commis-

sion and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of the respondent and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's divesting the Schedule A Assets.

8. Respondent shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of any claim, whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.

9. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in paragraph III.A. of this order.

10. The Commission or, in the case of a court-appointed trustee, the court, may on its own initiative, or at the request of the trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this order.

11. The trustee shall have no obligation or authority to operate or maintain the Schedule A Assets.

12. The trustee shall report in writing to the respondent and to the Commission every sixty (60) days concerning the trustee's efforts to accomplish divestiture.

IV.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, respondent shall not, without the prior approval of the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise:

A. Acquire any stock, share capital, equity, or other interest in any person presently engaged in, or within the two years preceding such acquisition engaged in, operating an outpatient surgery facility in the Municipality of Anchorage, Alaska;

B. Acquire any assets used, or previously used, in the Municipality of Anchorage, Alaska (and still suitable for use) for operating an outpatient surgery facility from any person presently engaged in, or within the two years preceding such acquisition engaged in, operating an outpatient surgery facility in the Municipality of Anchorage, Alaska;

C. Enter into any agreement or other arrangement to obtain direct or indirect ownership, management, or control of any outpatient surgery facility, or any part thereof, in the Municipality of Anchorage, Alaska, including but not limited to, a lease of or management contract for any such outpatient surgery facility;

D. Acquire or otherwise obtain the right to designate directly or indirectly directors or trustees of any outpatient surgery facility in the Municipality of Anchorage, Alaska;

E. Permit any outpatient surgery facility it operates in the Municipality of Anchorage, Alaska to be acquired by any person that operates, or will operate immediately following such acquisition, any other outpatient surgery facility in the Municipality of Anchorage, Alaska.

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

1. The establishment of a new outpatient surgery service or facility (other than as a replacement for an outpatient surgery service or facility, not operated by respondent, in the Municipality of Anchorage, Alaska, pursuant to an agreement or understanding between respondent and the person operating the replaced service or facility);

2. Any transaction otherwise subject to this paragraph IV of this order if the fair market value of (or, in case of an asset acquisition, the consideration to be paid for) the outpatient surgery facility or part thereof to be acquired does not exceed one million dollars (\$1,000,000); or

3. The acquisition of products or services in the ordinary course of business.

V.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, respondent shall not, directly or indirectly, through subsidiaries, partnerships or otherwise, without

providing advance written notification to the Commission, consummate any joint venture or other arrangement with any other outpatient surgery facility in the Municipality of Anchorage, Alaska, for the joint establishment or operation of any new outpatient surgery facility, or part thereof, in the Municipality of Anchorage, Alaska. Such advance notification shall be filed immediately upon respondent's issuance of a letter of intent for, or execution of an agreement to enter into, such a transaction, whichever is earlier.

Said notification required by this paragraph V of this order shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations (as amended), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification, notification need not be made to the United States Department of Justice, and notification is required only of respondent and not of any other party to the transaction. Respondent is not required to observe any waiting period for said notification required by this paragraph V.

Respondent shall comply with reasonable requests by the Commission staff for additional information concerning any transaction subject to this paragraph V of this order, within fifteen (15) days of service of such requests.

Provided, however, that no transaction shall be subject to this paragraph V of this order if:

1. The fair market value of the assets to be contributed to the joint venture or other arrangement by outpatient surgery facilities not operated by respondent does not exceed one million dollars (\$1,000,000);

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

3. Notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. 18a, or prior

approval by the Commission is required, and has been requested, pursuant to paragraph IV of this order.

VI.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, respondent shall not permit all or any substantial part of any outpatient surgery facility it operates in the Municipality of Anchorage, Alaska to be acquired by any other person (except pursuant to the divestiture required by paragraph II of this order) unless the acquiring person files with the Commission, prior to the closing of such acquisition, a written agreement to be bound by the provisions of this order, which agreement respondent shall require as a condition precedent to the acquisition.

VII.

It is further ordered, That:

A. Within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until the respondent has fully complied with paragraph II of this order, the respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with paragraph II of this order. Respondent shall include in its compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with paragraph II of the order, including a description of all substantive contacts or negotiations for the divestiture and the identity of all parties contacted. Respondent shall also include in its compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning divestiture.

B. One (1) year from the date this order becomes final, annually for the next nine (9) years on the anniversary of the date this order becomes final, and at other times as the Commission may require, respondent shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and it is complying with paragraphs IV, V, and VI of this order.

VIII.

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

IX.

It is further ordered, That, for the purpose of determining or securing compliance with this order, the respondent shall permit any duly authorized representative of the Commission:

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

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

Commissioner Varney not participating.

SCHEDULE A

The assets to be divested ("Schedule A Assets") shall consist of, without limitation, all Assets and Businesses relating to the Alaska Surgery Center, which were acquired by Columbia/HCA pursuant to the Acquisition (including all improvements, additions and enhancements made to such assets prior to divestiture).

* * *

It is further provided, That to the extent that any of the contracts, warranties with respect to Personal Property, licenses or other interests in the Intangible Personal Property, or other Schedule A Assets:

(A) Also applies to facilities or operations other than those included in the Schedule A Assets, then during the period (the "Con-

tract Period”) beginning on the closing date of the Acquisition and ending on the earlier of (1) the expiration of the term of the given contract or other right and (2) the second anniversary of Columbia/HCA’s divestiture of the Schedule A Assets, Columbia/HCA, at the request of the owner or acquirer of the Schedule A Assets, shall use its reasonable best efforts to cause the services, property, or other benefits provided or made available under such a contract or other Schedule A Asset to continue to be available to the owner or acquirer of the Schedule A Assets on terms and conditions substantially similar to those presently in effect; or

(B) Requires the consent of a third party in order to transfer or assign such Contract or other Schedule A Asset, then Columbia/HCA, at the request of the owner or acquirer of the Schedule A Assets, shall use its reasonable best efforts to obtain such consent and, if such consent cannot be obtained, to cooperate in any reasonable arrangement with the owner or acquirer of the Schedule A Assets designed to provide to such owner or acquirer the benefits of the given contract or other Schedule A Asset during the Contract Period on terms and conditions substantially similar to those presently in effect.

Commissioner Varney not participating.

APPENDIX I

AGREEMENT TO HOLD SEPARATE

This Agreement to Hold Separate (“Agreement”) is by and between Columbia/HCA Healthcare Corporation (“respondent” or “Columbia/HCA”), a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business at 201 West Main Street, Louisville, Kentucky; and the Federal Trade Commission (“Commission”), an independent agency of the United States Government, established under the Federal Trade Commission Act of 1914, 15 U.S.C. 41, *et seq.*

Whereas, on or about May 23, 1994, Columbia agreed to acquire all of the stock of Medical Care America, Inc. (“Medical Care America”), and thereby acquire Alaska Surgery Center, an outpatient surgical facility in Anchorage, Alaska, and other Medical Care America assets, including 95 other outpatient surgical facilities (the “Acquisition”); and

Whereas, the Commission is now investigating the Acquisition to determine if it would violate any of the statutes enforced by the Commission; and

Whereas, if the Commission accepts the attached Agreement Containing Consent Order (“Consent Order”), which would require the divestiture of certain assets listed in Schedule A of the Consent Order (“Schedule A Assets”), including the Alaska Surgery Center in Anchorage, Alaska, the Commission must place the Consent Order on the public record for a period of at least sixty (60) days and may subsequently withdraw such acceptance pursuant to the provisions of Section 2.34 of the Commission’s Rules; and

Whereas, the Commission is concerned that if an understanding is not reached, preserving the *status quo ante* of the Schedule A Assets during the period prior to the final acceptance and issuance of the Consent Order by the Commission (after the 60-day public comment period), divestiture resulting from any proceeding challenging the legality of the Acquisition might not be possible, or might be less than an effective remedy; and

Whereas, the Commission is concerned that if the Acquisition is consummated, it will be necessary to preserve the Commission’s ability to require the divestiture of the Schedule A Assets as described in paragraph II of the Consent Order and the Commission’s right to have Alaska Surgery Center continue as a viable independent outpatient surgical facility; and

Whereas, the purpose of this Agreement and the Consent Order is to:

- (i) Preserve Alaska Surgical Center as a viable independent outpatient surgical facility pending its divestiture, and
- (ii) Remedy any anticompetitive effects of the Acquisition;

Whereas, respondent’s entering into this Agreement shall in no way be construed as an admission by respondent that the Acquisition is illegal; and

Whereas, respondent understands that no act or transaction contemplated by this Agreement shall be deemed immune or exempt from the provisions of the anti-trust laws or the Federal Trade Commission Act by reason of anything contained in this Agreement.

Now, therefore, the parties agree, upon understanding that the Commission has not yet determined whether the Acquisition will be challenged, and in consideration of the Commission's agreement that, unless the Commission determines to reject the Consent Order, it will not seek further relief from respondent with respect to the Acquisition, except that the Commission may exercise any and all rights to enforce this Agreement and the Consent Order to which it is annexed and made a part thereof, and in the event the required divestiture is not accomplished, to appoint a trustee to seek divestiture of the Schedule A Assets pursuant to the Consent Order, as follows:

1. Respondent agrees to execute the Agreement Containing Consent Order and be bound by the attached Consent Order.

2. Respondent agrees that from the date this Agreement is accepted until the earliest of the dates listed in subparagraphs 2.a or 2.b, it will comply with the provisions of paragraph 3 of this Agreement:

a. Three (3) business days after the Commission withdraws its acceptance of the Consent Order pursuant to the provisions of Section 2.34 of the Commission's Rules; or

b. The day after the divestiture required by the Consent Order has been completed.

3. Respondent will hold the Schedule A Assets as they are presently constituted separate and apart on the following terms and conditions:

a. The Schedule A Assets, as they are presently constituted, shall be held separate and apart and shall be operated independently of respondent (meaning here and hereinafter, Columbia/HCA excluding the Schedule A Assets), except to the extent that respondent must exercise direction and control over the Schedule A Assets to assure compliance with this Agreement or the Consent Order, and except as otherwise provided in this Agreement.

b. Prior to, or simultaneously with its acquisition of the stock of Medical Care America, respondent shall organize a distinct and separate legal entity, either a corporation, limited liability company, or general or limited partnership ("New Company") and adopt constituent documents for the New Company that are not inconsistent with other provisions of this Agreement or the Consent Order. Respondent shall transfer all ownership and control of all Schedule A Assets to the New Company.

c. The board of directors of the New Company, or, in the event respondent organizes an entity other than a corporation, the governing body of the entity ("New Company Board") shall have five members. Respondent may elect the members of the New Company Board; provided, however, that the New Company Board shall include no more than two members who are a director, officer, employee, or agent of respondent ("the respondent's New Company Board member(s)"). The New Company Board shall include a chairman who is independent of respondent and is competent to assure the continued viability and competitiveness of the Schedule A Assets. Meetings of the New Company Board during the term of this Agreement shall be stenographically transcribed and the transcripts retained for two (2) years after the termination of this Agreement.

d. Respondent shall not exercise direction or control over, or influence directly or indirectly, the Schedule A Assets, the independent Chairman of the Board of the New Company, the New Company Board, or the New Company or any of its operations or businesses; provided, however, that respondent may exercise only such direction and control over the New Company as is necessary to assure compliance with this Agreement or the Consent Order.

e. Respondent shall maintain the viability and competitiveness and the marketability of the Schedule A Assets and shall not sell, transfer, encumber (other than in the normal course of business), or otherwise impair their viability and competitiveness or their marketability.

f. Except for the respondent's New Company Board members, respondent shall not permit any director, officer, employee, or agent of respondent to also be a director, officer, or employee of the New Company.

g. The New Company shall be staffed with sufficient employees to maintain the viability and competitiveness of the Schedule A Assets, which employees shall be selected from Alaska Surgery Center's existing employee base and may also be hired from sources other than Alaska Surgery Center.

h. With the exception of the respondent's New Company Board Members, respondent shall not change the composition of the New Company Board unless the independent chairman consents. The independent chairman shall have power to remove members of the New Company Board for cause. Respondent shall not change the composition of the management of the New Company except that the New Company Board shall have the power to remove management employees for cause.

i. If the independent chairman ceases to act or fails to act diligently, a substitute chairman shall be appointed in the same manner as provided in paragraph 3.c. of this Agreement.

j. Except as required by law, and except to the extent that necessary information is exchanged in the course of evaluating the Acquisition, defending investigations, defending or prosecuting litigation, or negotiating agreements to divest assets, or complying with this Agreement or the Consent Order, respondent shall not receive or have access to, or use or continue to use, any material confidential information not in the public domain about the New Company or the activities of the New Company Board. Nor shall the New Company or the New Company Board receive or have access to, or use or continue to use, any material confidential information not in the public domain about respondent and relating to respondent's outpatient surgical facilities in Anchorage, Alaska. Respondent may receive on a regular basis aggregate financial information relating to the New Company necessary and essential to allow respondent to prepare United States consolidated financial reports, tax returns, and personnel reports. Any such information that is obtained pursuant to this subparagraph shall be used only for the purposes set forth in this subparagraph. ("Material confidential information," as used herein, means competitively sensitive or proprietary information not independently known to respondent from sources other than the New Company, and includes, but is not limited to, customer lists, price lists, marketing methods, patents, technologies, processes, or other trade secrets.)

k. Except as permitted by this Agreement, the respondent's New Company Board members shall not in their capacity as New Company Board members, receive material confidential information and shall not disclose any such information

received under this Agreement to respondent, or use it to obtain any advantage for respondent. The respondent's New Company Board members shall enter a confidentiality agreement prohibiting disclosure of material confidential information. The respondent's New Company Board members shall participate in matters that come before the New Company Board only for the limited purposes of considering a capital investment or other transaction exceeding \$250,000, approving any proposed budget and operating plans, and carrying out respondent's responsibilities under this Agreement and the Consent Order. Except as permitted by this Agreement, the respondent's New Company Board members shall not participate in any matter, or attempt to influence the votes of the other members of the New Company Board with respect to matters, that would involve a conflict of interest if respondent and the New Company were separate and independent entities.

l. If necessary to assure compliance with the terms of this Agreement, the Consent Agreement, or the Consent Order, respondent may, but is not required to, assign an individual to the New Company for the purpose of overseeing such compliance ("on-site person"). The onsite person shall have access to all officers and employees of the New Company and such records of the New Company as he deems necessary and reasonable to assure compliance. Such individual shall enter into a confidentiality agreement prohibiting disclosure of material confidential information.

m. Any material transaction of the New Company that is out of the ordinary course of business must be approved by a majority vote of the New Company Board; provided that the New Company shall engage in no transaction, material or otherwise, that is precluded by this Agreement.

n. Respondent shall provide the New Company with sufficient working capital to operate at its current rate of operation, and to carry out any capital improvement plans for the New Company which have already been approved.

o. During the period commencing on the date this Agreement is effective and terminating on the earlier of (i) twelve months after the date the Consent Order becomes final, or (ii) the date contemplated by subparagraph 2.b (the "Initial Divestiture Period"), respondent shall make available for use by the New Company funds sufficient to perform all necessary routine maintenance to, and replacements of, the Schedule A Assets ("normal repair and replacement"). After termination of the Initial Divestiture Period and until the earlier of the date contemplated by either subparagraph 2.a or 2.b, respondent shall make available for use by the New Company each year an amount not less than that required for normal repair and replacement. Provided, however, that in any event, respondent shall provide the New Company with such funds as are necessary to maintain the viability and competitiveness and marketability of the Schedule A Assets.

4. Should the Federal Trade Commission seek in any proceeding to compel respondent to divest any of the Schedule A Assets, as provided in the Consent Order, or to seek any other injunctive or equitable relief for any failure to comply with the Consent Order or this Agreement, or in any way relating to the Acquisition, as defined in the draft complaint, respondent shall not raise any objection based upon the expiration of the applicable Hart-Scott-Rodino Antitrust Improvements Act waiting period or the fact that the Commission has permitted the Acquisition. Respondent also waives all rights to contest the validity of this Agreement.

5. To the extent that this Agreement requires respondent to take, or prohibits respondent from taking, certain actions that otherwise may be required or prohibited by contract, respondent shall abide by the terms of this Agreement or the Consent Order and shall not assert as a defense such contract requirements in a civil penalty action brought by the Commission to enforce the terms of this Agreement or Consent Order.

6. For the purpose of determining or securing compliance with this Agreement, subject to any legally recognized privilege, and upon written request with reasonable notice to respondent made to its principal office, respondent shall permit any duly authorized representative or representatives of the Commission:

a. Access during the office hours of respondent and in the presence of counsel to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession, or under the control of respondent relating to compliance with this Agreement;

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

7. This Agreement shall not be binding until approved by the Commission.

IN THE MATTER OF
CHEMOPHARM LABORATORY, INC.

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

Docket C-3545. Complaint, Dec. 6, 1994--Decision, Dec. 6, 1994

This consent order prohibits, among other things, a Utah corporation that markets the ice melting product, Superior Sno-N-Ice, from making any environmental benefit claim about any product unless it possesses and relies on competent and reliable scientific evidence to substantiate the claims. In addition, the respondent is prohibited from misrepresenting the existence or contents of any test or study.

Appearances

For the Commission: *C. Steven Baker, Mary Tortorice and John Hallerud.*

For the respondent: *Jack Schoenhals, Salt Lake City, UT.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Chemopharm Laboratory, Inc., d/b/a CP Industries, a corporation ("respondent"), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent Chemopharm Laboratory, Inc. is a Utah corporation with its principal office or place of business at 503 North 400 West, Salt Lake City, Utah.

PAR. 2. Respondent has offered for sale, sold, advertised, labeled and distributed de-icing products, including Superior Sno-N-Ice Melter, to the public.

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

PAR. 4. Respondent has disseminated or has caused to be disseminated advertisements, including product labeling, for Superior Sno-N-Ice Melter, including but not necessarily limited to the

attached Exhibits 1 through 4. These advertisements and product labeling contain the following statements:

- A. Superior Sno-N-Ice Melter For The Total Environment (Exhibit 1)
- B. Superior Sno-N-Ice with CMA gives total environmental protection. (Exhibits 1 and 3)
- C. Superior Sno-N-Ice Melter now Contains CMA . . . Calcium Magnesium Acetate (CMA) offers the world an environmentally safe de-icer. (Exhibits 1 and 3)
- D. The blending of Superior Sno-N-Ice with CMA offers the benefits of a fast acting, environmentally safer, more effective ice melter. (Exhibits 1, 3, and 4)
- E. The combinations of Superior Sno-N-Ice with CMA makes a great product even better . . . Superior Sno-N-Ice with CMA offers total protection for the total environment in an effective ice melter. A safer environment begins with you! Finally! The best ice melter and de-icer are combined into one Superior product. (Exhibits 1 and 3)
- F. NOW CONTAINS . . . CMA NATURE'S CHOICE™ A Safer Environment Begins With You (Exhibits 1 and 3)
- G. The only ice melter that protects the total environment. (Exhibit 2)
- H. QUESTION: Why is SUPERIOR SNO-N-ICE MELTER with CMA safer than other de-icers? ANSWER: . . .Vegetation: CMA can improve soil conditions and will assist aeration of tight soil conditions. CMA is not a fertilizer as many ice melters are and does not cause plant tissue burn. (Exhibit 2)
- I. NEW CONTAINS CMA NATURE'S CHOICE™ ENVIRONMENTALLY SAFER (Exhibit 4)
- J. Proven in ten years of independent studies by corporate laboratories, government agencies and universities, CMA is the first de-icer to actually improve the environment. (Exhibits 1 and 3)
- K. Independent test results show CMA can improve soil conditions and be of benefit to vegetation and flowers. (Exhibits 1 and 3)

PAR. 5. Through the use of the statements contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits 1 through 4, respondent has represented, directly or by implication, that:

- A. Superior Sno-N-Ice Melter does not harm or damage the environment.
- B. Superior Sno-N-Ice Melter provides the environmental benefits of Calcium Magnesium Acetate ("CMA").
- C. Scientific studies of CMA demonstrate that Superior Sno-N-Ice Melter is beneficial to the environment.

Par. 6. In truth and in fact:

A. Superior Sno-N-Ice Melter does harm or damage the environment. Superior Sno-N-Ice Melter contains about 95% sodium chloride (*i.e.*, rock salt) which does harm or damage the environment.

B. Superior Sno-N-Ice Melter does not provide the environmental benefits of CMA.

C. Scientific studies of CMA do not demonstrate that Superior Sno-N-Ice Melter is beneficial to the environment.

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

PAR. 7. Through the use of the statements contained in the advertisements referred to in paragraph four, including but not necessarily limited to the attached Exhibits 1 through 4, respondent has represented, directly or by implication, that at the time that it made the representations set forth in paragraph five, respondent possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 8. In truth and in fact, at the time that it made the representations set forth in paragraph five, respondent did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation set forth in paragraph seven was, and is, false and misleading.

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

EXHIBIT 2

EXHIBIT 2

INFORMATION SHEET

THE ONLY ICE MELTER THAT PROTECTS THE TOTAL ENVIRONMENT

SUPERIOR SNO-N-ICE MELTER

CP Industries

PENNSYLVANIA
765 West Philadelphia Street
York, PA 17404

UTAH
503 North 400 West
Salt Lake City, Utah 84103

FOR ORDERS & INFORMATION
(800) 453-4731

QUESTION: What is the SUPERIOR SNO-N-ICE MELTER with CMA positive traction program?

ANSWER: Calcium Chloride will leave a very slick oily surface residue on all areas of application. SUPERIOR SNO-N-ICE MELTER with CMA creates a rough surface on ice that builds a surface traction area which, in turn, reduces slick conditions. SUPERIOR SNO-N-ICE MELTER with CMA penetrates the surface area and creates traction where needed.

QUESTION: Who is my prospective customer?

ANSWER: Any business or government agency that is concerned about safety and liability that occurs with ice, slippery sidewalks, parking lots, driveways, and streets. SUPERIOR SNO-N-ICE MELTER with CMA has been accepted as a proven product in all locations where winter conditions are a problem.

QUESTION: What sales aids are available to assist in the sale of SUPERIOR SNO-N-ICE MELTER with CMA?

ANSWER: SUPERIOR SNO-N-ICE MELTER with CMA offers more sales support than other de-icers including individual sales training from factory representatives, literature that is complete and professional, video tapes and slides that graphically tell the SUPERIOR SNO-N-ICE MELTER with CMA story, and samples for key accounts. There will also be testimonials from trade journals and other publications and the best packaging that is available in all sizes. All information is designed to illustrate safety and the improvement of the ecological system.

QUESTION: How is SUPERIOR SNO-N-ICE MELTER with CMA different from KCl potassium chloride?

ANSWER: Potassium chloride is a fertilizer often used as a low-cost ice-melter. The melting properties of SUPERIOR SNO-N-ICE MELTER with CMA are much better and faster than potassium chloride which is very corrosive and contains no de-icing inhibitors. Tests indicate that concrete spalling occurs faster when potassium chloride is applied.

SUPPORTING DOCUMENTATION

"Studies have shown the material (CMA) to have little effect on plants and animals."

Tom Harvey, Chickasaw County Agriculturalist
New Hampton Economist January, 1991

"Calcium Magnesium Acetate (CMA) also doesn't do any known harm. Scientists believe it actually does some good for the soil and plant life."

Frank Edward Allen - "Environment"
Wall Street Journal January, 1991

"CMA is environmentally safe. It breaks down and goes safely into the soil."

Dr. Shang-Tian Yang, Chemical Engineer
Ohio State University
Scholastic Newsline New York, January 1991

01000015

A Safe Environment Begins with You

EXHIBIT 3

EXHIBIT 3



**Sno-N-Ice Melters
For The Total Environment
Now contains CMA**

Unique Corrosion Inhibitor System

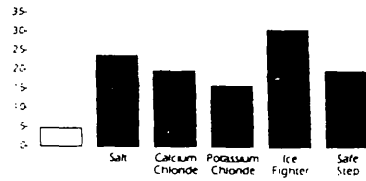
Superior Sno-N-Ice with its unique CMA inhibitor system has shown in test results to be environmentally safer. As shown in the tests below, Superior Sno-N-Ice with CMA inhibits corrosion in metals normally found in the environment as compared with other commonly used ice melters.

Graphs show milligrams of corrosion per year on metal plates in normal solutions of equal amounts.

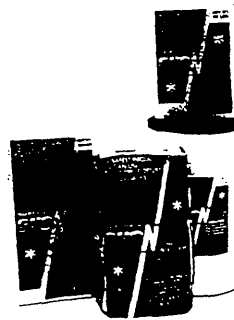
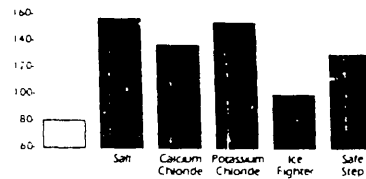
Total Environmental Protection

Superior Sno-N-Ice with CMA gives total environmental protection. Its unique formula offers a fast acting ice melter that works up to -8°F., with a residual coating action for long lasting effectiveness. Superior Sno-N-Ice is available in boxes, drums and bags.

Aluminum Comparison



Steel Comparison



01000013

DECISION AND ORDER

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

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and no comments having been filed thereafter by interested parties pursuant to Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Chemopharm Laboratory, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Utah with its principal office or place of business at 503 North 400 West, Salt Lake City, Utah.
2. The acts and practices of the respondent alleged in this complaint have been in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.
3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

DEFINITIONS

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

1. The term “*product*” means any product that is offered for sale, sold or distributed to the public by respondent, its successors and assigns, under the “Superior Sno-N-Ice Melter” brand name or any other brand name of respondent, its successors and assigns; and also means any product sold or distributed to the public by third parties under private labeling agreements with respondent, its successors and assigns.

2. The term “*competent and reliable scientific evidence*” means 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.

I.

It is ordered, That respondent, Chemopharm Laboratory, Inc., a corporation, its successors and assigns, and its officers, 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 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 is “environmentally safe,” “protects the total environment,” or otherwise offers any environmental benefit; or

B. Such product provides the environmental benefits of Calcium Magnesium Acetate,

unless such representation is true and, at the time of making such representation, respondent possesses and relies upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates such representation.

II.

It is further ordered, That respondent, Chemopharm Laboratory, Inc., a corporation, its successors and assigns, and its officers, 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 in or affecting commerce, as “commerce” is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting, in any manner, directly or by implication, the existence, contents, validity, results, conclusions, or interpretations of any test or study.

III.

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

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

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

IV.

It is further ordered, That the respondent shall distribute a copy of this order to each of its operating divisions and to each of its officers, agents, or employees engaged in the preparation and placement of advertisements, promotional materials, product labels or other such sales materials covered by this order.

V.

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

VI.

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

IN THE MATTER OF

RITE AID CORPORATION

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

Docket C-3546. Complaint, Dec. 15, 1994--Decision, Dec. 15, 1994

This consent order requires, among other things, Rite Aid, in conjunction with its acquisition of LaVerdiere's Enterprises, Inc., to divest the pharmacy assets either in its own Rite Aid stores, or in the LaVerdiere's stores it will acquire, in three specified cities, to a Commission-approved entity within 12 months of the order. If the divestitures are not accomplished within the time-frame, the Commission can appoint a trustee to accomplish them. In addition, the consent order requires the respondent, for a period of ten years, to obtain Commission approval before acquiring any assets or stocks in any entity engaged in the business of selling prescription drugs at retail outlets in the three designated cities.

Appearances

For the Commission: *Ann D. Malester, Catharine M. Moscatelli and E. Eric Elmore.*

For the respondent: *Lewis A. Noonberg, Piper & Marbury, Washington, D.C. Eric Saunders and Larry Bryant, Bernestein, Shur, Sawyer & Nelson, Portland, ME.*

COMPLAINT

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

I. THE RESPONDENT

1. Respondent Rite Aid Corporation ("Rite Aid") is a corporation organized and existing under the laws of the state of Delaware, with its principal place of business at 30 Hunter Lane, Camp Hill, Pennsylvania.

2. For purposes of this proceeding, respondent is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

II. THE ACQUIRED COMPANY

3. LaVerdiere's Enterprises, Inc. ("LEI") is a corporation organized and existing under the laws of the state of Maine, with its business address at Post Office Box 1014, Waterville, Maine.

4. LEI is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

III. THE ACQUISITION

5. On or about April 29, 1994, Rite Aid and LEI entered into a stock purchase agreement providing for the sale of LEI to Rite Aid, for consideration totaling approximately \$50 million ("Acquisition").

IV. THE RELEVANT MARKETS

6. For purposes of this complaint, the relevant line of commerce in which to analyze the effects of the Acquisition is the sale of prescription drugs in retail stores.

7. For purposes of this complaint, the relevant sections of the country in which to analyze the effects of the Acquisition are: Bucksport, Maine; Lincoln, Maine; and Berlin, New Hampshire.

8. The relevant markets set forth in paragraphs six and seven are highly concentrated, whether measured by Herfindahl-Hirschmann Indices ("HHI") or two-firm and four-firm concentration ratios.

9. Entry into the relevant markets is difficult or unlikely.
10. Rite Aid and LEI are actual competitors in the relevant markets.

V. EFFECTS OF THE ACQUISITION

11. The effect of the Acquisition may be substantially to lessen competition and to tend to create a monopoly in the relevant markets in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. 45, in the following ways, among others:

- a. By eliminating direct actual competition between Rite Aid and LEI;
- b. By increasing the likelihood that Rite Aid will unilaterally exercise market power; and
- c. By increasing the likelihood of collusion in the relevant markets.

12. All of the above increase the likelihood that firms in the relevant markets will increase prices and restrict output both in the near future and in the long term.

VI. VIOLATIONS CHARGED

13. The acquisition agreement described in paragraph five constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

14. The acquisition described in paragraph five, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of respondent's proposed acquisition of certain voting stock of La-Verdiere's Enterprises, Inc., and respondent having been furnished thereafter with a copy of a draft of complaint that the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge respondent with viola-

tions of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and

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

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

1. Respondent Rite Aid Corporation ("Rite Aid") is a corporation organized and existing under the laws of the State of Delaware with its office and principal place of business located at 30 Hunter Lane, Camp Hill, Pennsylvania.

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

ORDER

I.

It is ordered, That, as used in this order, the following definitions shall apply:

A. "*Rite Aid*" means Rite Aid Corporation, its predecessors, subsidiaries, divisions, groups and affiliates controlled by Rite Aid,

and their directors, officers, employees, agents, representatives, and their successors and assigns.

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

C. "*Acquisition*" means the acquisition of all the voting stock of LaVerdiere's Enterprises, Inc. ("LEI") by respondent Rite Aid.

D. "*Acquirer*" means the party or parties to whom respondent Rite Aid divests the assets herein ordered to be divested.

E. "*Prescription drugs*" means ethical drugs available at retail only by prescription.

F. "*LEI Pharmacy Business*" means LEI's business of selling prescription drugs at any of the retail stores listed in paragraph I.(J). of this order, but does not include LEI's business of selling other products in those retail stores.

G. "*LEI Pharmacy Assets*" means all assets constituting the LEI, Pharmacy Business, excluding those assets pertaining to the LEI trade names, trade dress, trade marks and service marks, and including but not limited to:

1. Leases, at the Acquirer's option;
2. Zoning approvals and registrations, at the Acquirer's option;
3. Books, records, manuals, and operations reports relating to the LEI Pharmacy Business, but only if the divestiture is to an Acquirer that does not already operate a pharmacy in any location;
4. Inventory instructions, or, at the Acquirer's option, lists of stock keeping units ("SKUs"), *i.e.*, all forms, package sizes and other units in which prescription drugs are sold and which are used in records of sales and inventories;
5. Lists of all prescription drug customers, including but not limited to third party insurers, including all files of names, addresses, and telephone numbers of the individual customer contacts, the unit and dollar amounts of sales, by product, to each customer, and store profit and loss statement(s);
6. All names and addresses of prescription drug manufacturers and distributors that supply to LEI or have supplied to LEI within the six months preceding the date this order becomes final; and
7. Goodwill, tangible and intangible, utilized in the sale of prescription drugs.

H. "*Rite Aid Pharmacy Business*" means Rite Aid's business of selling prescription drugs at any of the retail stores listed in paragraph

I.(J). of this order, but does not include Rite Aid's business of selling other products in those retail stores.

I. "*Rite Aid Pharmacy Assets*" means all assets constituting the Rite Aid Pharmacy Business, excluding those assets pertaining to the Rite Aid trade names, trade dress, trade marks and service marks, and including but not limited to:

1. Leases, at the Acquirer's option;
2. Zoning approvals and registrations, at the Acquirer's option;
3. Books, records, manuals, and operations reports, relating to the Rite Aid Pharmacy Business, but only if the divestiture is to an Acquirer that does not already operate a pharmacy in any location;
4. Inventory instructions, or, at the Acquirer's option, lists of SKUS, *i.e.*, all forms, package sizes and other units in which prescription drugs are sold and which are used in records of sales and inventories;
5. Lists of all prescription drug customers, including but not limited to third party insurers, including all files of names, addresses, and telephone numbers of the individual customer contacts, the unit and dollar amounts of sales, by product, to each customer, and store profit and loss statement(s);
6. All names and addresses of prescription drug manufacturers and distributors that supply to Rite Aid or have supplied to Rite Aid within the six months preceding the date this order becomes final; and
7. Goodwill, tangible and intangible, utilized in the sale of prescription drugs.

J. "*Assets To Be Divested*" means either the LEI Pharmacy Assets constituting the LEI Pharmacy Business or the Rite Aid Pharmacy Assets constituting the Rite Aid Pharmacy Business in the following cities or towns:

1. Bucksport, Maine;
2. Lincoln, Maine; and
3. Berlin, New Hampshire.

K. "*Competitiveness, viability and marketability*" of the Assets To Be Divested mean that respondent shall continue the operation of the Assets To Be Divested in the ordinary course of business without

material change or alteration that would adversely affect the value or goodwill of the Assets To Be Divested.

II.

It is further ordered, That:

A. Respondent shall divest absolutely and in good faith, within twelve (12) months of the date this order becomes final, the Assets To Be Divested.

B. Respondent shall divest the Assets To Be Divested only to an acquirer or acquirers that receive the prior approval of the Commission and only in a manner that receives the prior approval of the Commission. The purpose of the divestiture of the Assets To Be Divested is to ensure the continued use of the Assets To Be Divested as ongoing viable pharmacies engaged in the same businesses in which the Assets To Be Divested are presently employed and to remedy the lessening of competition resulting from the acquisition as alleged in the Commission's complaint.

C. Pending divestiture of the Assets To Be Divested, respondent shall take such actions as are necessary to maintain the competitiveness, viability and marketability of the Assets To Be Divested and to prevent the destruction, removal, wasting, deterioration, or impairment of any Assets To Be Divested except for ordinary wear and tear.

D. If a divestiture includes a lease of physical space, and if pursuant to that lease respondent through default of the lease or otherwise regains possession of the space, respondent must notify the Commission of such repossession within thirty (30) days and must redinvest such assets or interest pursuant to paragraph II of this order within six (6) months of such repossession. If respondent has not redinvested such assets or interest pursuant to paragraph II of this order within six (6) months of such repossession, the provisions of paragraph III shall apply to these assets.

III.

It is further ordered, That:

A. If respondent has not divested, absolutely and in good faith and with the Commission's prior approval, the Assets To Be Divested

within twelve (12) months of the date this order becomes final, the Commission may appoint a trustee to divest the Assets To Be Divested. In the event the Commission or the Attorney General brings an action pursuant to Section 5(1) of the Federal Trade Commission Act, 15 U.S.C. 45(1), or any other statute enforced by the Commission, respondent shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to Section 5(1) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by respondent to comply with this order.

B. If a trustee is appointed by the Commission or a court pursuant to paragraph III.A. of this order, respondent shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:

1. The Commission shall select the trustee, subject to the consent of respondent, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures. If respondent has not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after notice by the staff of the Commission to respondent of the identity of any proposed trustee, respondent shall be deemed to have consented to the selection of the proposed trustee.

2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest the Assets To Be Divested.

3. Within ten (10) days after appointment of the trustee, respondent shall execute a trust agreement that, subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestiture required by this order.

4. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in paragraph III.B.3. to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve-month period the trustee has submitted a plan of divestiture or believes that divestiture can be achieved within a reasonable time,

the divestiture period may be extended by the Commission, or in the case of a court-appointed trustee by the court.

5. The trustee shall have full and complete access to the personnel, books, records, and facilities related to the Assets To Be Divested, or to any other relevant information, as the trustee may reasonably request. Respondent shall develop such financial or other information as such trustee may reasonably request and shall cooperate with the trustee. Respondent shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays in divestiture caused by respondent shall extend the time for divestiture under this paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed trustee, by the court.

6. The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission subject to respondent's absolute and unconditional obligation to divest at no minimum price. The divestiture shall be made in the manner and to the acquirer or acquirers as set out in paragraph II of this order. Provided, however, if the trustee receives bona fide offers from more than one acquirer, and if the Commission determines to approve more than one such acquirer, the trustee shall divest to the acquirer or acquirers selected by respondent from among those approved by the Commission.

7. The trustee shall serve, without bond or other security, at the cost and expense of respondent, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have authority to employ, at the cost and expense of respondent, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are reasonably necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of respondent and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's divesting the Assets To Be Divested.

8. Respondent shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the trustee's duties, and respondent shall either defend against such claims or pay the trustee's expenses, including all reasonable fees of counsel and other expenses incurred in connection with the preparations for, or defense of any such claim, whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.

9. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in paragraph III.A. of this order.

10. The Commission or, in the case of a court-appointed trustee, the court, may on its own initiative or at the request of the trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this order.

11. The trustee shall have no obligation or authority to operate or maintain the Assets To Be Divested.

12. The trustee shall report in writing to respondent and to the Commission every sixty (60) days concerning the trustee's efforts to accomplish divestiture.

IV.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, respondent shall not, without the prior approval of the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise: (A) Acquire any stock, share capital, equity, leasehold or other interest in any concern, corporate or non-corporate, where such concern within the six months preceding such acquisition engaged in the business of selling prescription drugs at retail stores located in any of the cities or towns listed in paragraph I.(J). of this order; or (B) Acquire any assets used, within six months of the offer to acquire, for (and still suitable for use for) the business of selling prescription drugs at retail stores located in any of the cities or towns listed in paragraph I.(J). of this order. Provided, however, that these prohibitions shall not relate to the construction of new facilities.

V.

It is further ordered, That:

A. Within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until respondent has fully complied with the provisions of paragraphs II. and III. of this order, respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with those provisions. Respondent shall include in its compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with paragraphs II and III of the order, including a description of all substantive contacts or negotiations for the divestiture and the identity of all parties contacted. Respondent also shall include in its compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning divestiture.

B. One (1) year from the date this order becomes final, annually thereafter for the next nine (9) years on the anniversary of the date this order became final, and at such other times as the Commission may require, respondent shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and is complying with paragraph IV. of this order.

VI.

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

VII.

It is further ordered, That, for the purpose of determining or securing compliance with this order upon reasonable notice and subject to any legally recognized privilege, respondent shall permit any duly authorized representative of the Commission:

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

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

IN THE MATTER OF

LEVI STRAUSS & CO.

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

Docket 9081. Consent Order, July 12, 1978--Modifying Order, Dec. 20, 1994

This order reopens a 1978 consent order (92 FTC 171), that settled allegations that the respondent had engaged in a number of anticompetitive practices, including fixing the resale prices at which retailers sold its products, and modifies the consent order by adding a provision to clarify that the order does not prohibit conduct by the respondent that is necessary to form and operate wholly-owned retail stores, or retail stores partially-owned by the respondent in lawful joint ventures. The Commission found that the respondent had satisfactorily met its burden of showing that changed conditions of fact required the modification.

ORDER REOPENING AND MODIFYING ORDER

On August 25, 1994, Levi Strauss & Co. ("LS&CO") filed a Petition To Reopen Proceedings And For Modification of Consent Decree ("Petition") pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b) ("FTC Act"), and Section 2.51 of the Commission's Rules of Practice and Procedure, 16 CFR 2.51 ("Rules"). The Petition asks the Commission to reopen the proceeding in Docket No. 9081 and modify the consent order issued by the Commission on July 12, 1978, *Levi Strauss & CO.*, 92 FTC 171 (1978) ("order"). Specifically, LS&CO requests that the Commission add a paragraph to the order stating that the order shall not be construed to prohibit conduct that is ancillary to and reasonably necessary for the formation and operation of retail stores either wholly-owned and operated or partially owned by LS&CO in a lawful joint venture. LS&CO's Petition was placed on the public record for thirty days, pursuant to Section 2.51 of the Rules, and two comments were received.

After reviewing the Petition and other relevant information, the Commission has determined to grant the Petition. LS&CO has shown changed conditions of fact that require reopening and modify-

ing the order.¹ These changed conditions make the continued application of the order without the modification LS&CO now seeks inequitable and harmful to competition.

The Complaint and Order and LS&CO's Petition

The Commission issued its complaint in this matter on May 5, 1976, charging LS&CO with illegally fixing the retail prices of its blue jeans and other products, in violation of Section 5 of the FTC Act.² The consent order was issued on July 12, 1978, and prohibits LS&CO from engaging in resale price maintenance ("RPM") and from using various non-price vertical restraints to further or implement RPM.³

LS&CO now requests the Commission to modify the order by adding a paragraph stating that the order shall not be construed to prohibit conduct that is ancillary to and reasonably necessary for the formation and operation of retail stores, either wholly-owned and operated or partially-owned by LS&CO (or its subsidiaries or affiliates) in a lawful joint venture.⁴ LS&CO plans to establish retail stores that sell only LS&CO products ("OLS stores"). One aspect of this plan includes the formation of a joint venture with an LS&CO customer, Designs, Inc. ("Designs"), that will operate OLS stores in one part of the country.⁵ Because the order restricts LS&CO's ability to influence prices charged by retailers authorized to sell LS&CO products, LS&CO believes that "as to the contemplated joint venture

¹ Because LS&CO has demonstrated that changed conditions of fact require reopening and modifying the order, the Commission need not consider whether reopening is warranted under the public interest standard.

² 92 FTC at 171-75.

³ Paragraph I of the order prohibits LS&CO from, among other things, "[f]ixing, establishing, controlling or maintaining, directly or indirectly, the price at which any dealer may advertise, promote, offer for sale or sell any product at retail." 92 FTC at 176. "Dealer" is defined as "any person, partnership, corporation, or firm authorized by Levi Strauss & Co. to sell any product." *Id.* LS&CO is also prohibited from limiting participation in cooperative advertising funds or otherwise disciplining dealers who fail to adhere to RPM. Nor may it require its dealers to report cheaters, or itself conduct any other type of surveillance program to enforce resale prices. Finally, paragraph I also prohibits LS&CO from restricting the classes of customers to whom its dealers may sell when such restrictions are in furtherance of RPM. *Id.* at 176-77.

⁴ Petition at 2.

⁵ Memorandum in Support of Request to Reopen the Proceedings and for Modification of Consent Decree at 1 ("Petition Memorandum").

. . . the literal language of the order may prohibit LS&CO's involvement, making modification necessary before the joint venture is consummated."⁶

In support of its Petition, LS&CO argues that the relief it seeks is required by changed conditions and is in the public interest. When the order was issued, LS&CO, for practical purposes, did not own, or partially own, any retail operations.⁷ Instead, it was engaged almost exclusively in manufacturing and sold its apparel products to independent retailers throughout the United States. Recently, LS&CO concluded that the planned OLS retail stores are important to LS&CO's "overall marketing and product vision."⁸ A similar marketing approach has been adopted by many of LS&CO's competitors who have formed and currently operate "brand-only" retail stores. LS&CO thus asserts that the order, without the clarifying language it now seeks, restricts it from competing in the retail market and, consequently, "cause[s] [LS&CO] significant competitive harm not envisioned by the consent order."⁹ LS&CO also argues that the order was "never intended to impose a restriction on LS&CO's ability to compete at retail," and that the order does not expressly prohibit LS&CO from undertaking any form of vertical integration.¹⁰ LS&CO believes that modifying the order will allow it to engage in the same lawful conduct (without disturbing the main purposes of the order) in which its competitors are free to engage and are in fact engaging, to the benefit of competition and, ultimately, consumers of apparel products.

⁶ *Id.* at 2. LS&CO believes that the order should not be construed to apply to a retail outlet wholly-owned by LS&CO, because LS&CO does not actually "authorize" such an outlet to sell any products. Nevertheless, to avoid any uncertainty concerning application of the order to LS&CO's wholly-owned retail operations, LS&CO requests that the order be modified to authorize the formation and operation of wholly-owned LS&CO retail stores. *Id.* at 2, 5-6. The Commission believes that "dealer" as used in the order does not apply to retailers that are wholly-owned by LS&CO, in light of *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984) (coordinated activity of parent and wholly-owned subsidiary to be viewed as that of a single enterprise).

⁷ LS&CO "owned a small retail operation selling closeouts in the east, but had no meaningful presence in the retail market." *Id.* at 5.

⁸ *Id.* at 1.

⁹ *Id.* at 1-2.

¹⁰ *Id.*

Standards for Opening and Modification

Section 5(b) of the FTC Act, 15 U.S.C. 45(b), provides that the Commission shall reopen an order to consider whether it should be modified if the petitioner “makes a satisfactory showing that changed conditions of law or fact” require such modification. A satisfactory showing sufficient to require such reopening is made when a request to reopen identifies significant changes in circumstances and shows that the changes eliminate the need for the order or make continued a placation of it inequitable or harmful to competition.¹¹

The burden is on the petitioner to make the requisite satisfactory showing. The language of Section 5(b) plainly anticipates that the petitioner must make a “satisfactory showing” of changed conditions to obtain reopening of the order. The legislative history also makes it clear that the petitioner has the burden of showing, other than by conclusory statements, why an order should be modified.¹² If the Commission determines that the petitioner has made the required showing, the Commission must reopen the order to consider whether modification is required and, if so, the nature and extent of the modification. The Commission is not required to reopen the order, however, if the petitioner fails to meet its burden of making the satisfactory showing required by the statute. The petitioner’s burden is not a light one given the public interest in repose and the finality of Commission orders.¹³

LS&CO Has Shown that Changed Conditions of Fact Require Reopening and Modifying the Order

The 1976 complaint in this matter describes LS&CO as the largest apparel manufacturer in the world engaged in the manufacture, sale and distribution of a “wide variety of wearing apparel for men,

¹¹ Louisiana-Pacific Corp., Docket No. C-2956, Letter to John C. Hart (June 5, 1986) (“L-P Letter”) at 4. Cf. *United States v. Louisiana-Pacific Corp.*, 967 F.2d 1372, 1376-77 (9th Cir. 1992), where the court noted that “[a] decision to reopen does not necessarily entail a decision to modify the order. Reopening may occur even where the petition itself does not plead facts requiring modification.”

¹² The Commission may properly decline to reopen an order if a request is “merely conclusory or otherwise fails to set forth specific facts demonstrating in detail the nature of the changed conditions and the reasons why these changed conditions require the requested modification of the order.” S. Rep. No. 96-500, 96th Cong., 1st Sess. 9-10 (1979). See also Rule 2.51(b), which requires affidavits in support of petitions to reopen and modify.

¹³ See *Federated Department Stores, Inc. v. Moitie*, 425 U.S. 394 (1981) (strong public interest considerations support repose and finality).

women and children, including but not limited to jeans, slacks, shorts, shirts, jackets and related items.”¹⁴ At the time, LS&CO sold its products directly to numerous retail dealers located throughout the United States who in turn resold the products to the general public. Currently, LS&CO is the second largest producer of denim jeans in the United States¹⁵ but faces competition from numerous other branded jeans manufacturers, many of which have vertically integrated into retailing through company-owned stores.¹⁶ In addition, competition also is provided by a proliferation in private label jeans manufactured for and marketed by large retailers.¹⁷

When the order was issued, LS&CO, like its competitors, had no meaningful retail presence. Since the order was entered, however, many of LS&CO’s competitors have integrated into retailing, in order to showcase their products, market their complete lines, and demonstrate to their own retailer-customers the benefits of promoting the manufacturer’s products. In view of these changed conditions, the order exerts an unintended chilling effect on LS&CO’s ability to participate in retailing in response to this development, because LS&CO may not influence “directly or indirectly, the price at which any dealer may advertise, promote, offer for sale or retail.”¹⁸ The order’s restriction on influence prices charged by retailers products inhibits LS&CO from becoming lawful retail joint ventures.

LS&CO has made a satisfactory showing that changed conditions require the Commission to reopen the proceeding. The significant change in circumstances identified by LS&CO in support of its Petition is the fact that since the order was issued, “brand-only” retail stores have been established by many of LS&CO’s competitors. LS&CO would like to open similar stores in a proposed joint venture with Designs, as part of an overall business strategy responsive to, among other things, competition in the marketing of casual apparel and jeans in the United States.

LS&CO believes that establishment of the OLS stores is “vital to LS&CO.’s long-term competitive interests.”¹⁹ It hopes that the OLS

¹⁴ 92 FTC at 172.

¹⁵ Petition Memorandum at 7.

¹⁶ *Id.*

¹⁷ *Id.* at 7-8.

¹⁸ 92 FTC at 176.

¹⁹ Declaration of Robert D. Rockey, President of Levi Strauss North America paragraph 2.

stores will position the Levi's brand in an environment that emphasizes LS&CO's image, values and reputation, and provides consumers with the opportunity, in one store, to see a broad assortment of Levi's products. LS&CO also believes that once the OLS stores demonstrate the viability of dedicating retail space and substantial product assortments to LS&CO products, retailers may be persuaded to dedicate space to "focus areas" and in-store shops developed for the Levi's brands they carry.²⁰

OLS stores are unlikely adversely to affect competition among apparel retailers in the United States. United States retail apparel sales are highly fragmented. More than 250,000 stores carry apparel products; of these, more than 200,000 stores sell only apparel and accessories, and 50,000 stores are primarily department, chain or general merchandise stores.²¹ Even the largest retailers account for only a small percentage of apparel and jeans sales.²² Based on this data, LS&CO's OLS stores will account for a small fraction of the overall jeans volume and even less of overall casual apparel sales.²³

The record evidence suggests that LS&CO lacks market power in the manufacturing of jeans and other casual wear and that the proposed joint venture will not have market power in apparel retailing. Without market power at either level of distribution, LS&CO's retailing venture would be unlikely to give rise to anticompetitive effects. In the absence of likely anticompetitive effects, the order as modified would permit LS&CO flexibility to adopt new marketing strategies that may increase competition and benefit consumers.

A modification of the order to clarify that it does not prohibit LS&CO from entering into otherwise lawful retail joint ventures is consistent with past Commission action involving other orders against *per se* unlawful conduct. In *American Standard, Inc.*, 108 FTC 181 (1986), and *General Railway Signal Co.*, 110 FTC 143 (1987), the Commission modified a 1964 consent order²⁴ to permit

²⁰ Petition Memorandum at 13.

²¹ Petition Memorandum at 10-11.

²² *Id.*

²³ LS&CO's annual jeans volume in the United States amounts to approximately 57.5 million units of a total of about 300 million jeans units sold. The United States casual apparel industry has annual sales of approximately 2 billion units with LS&CO's products accounting for about 97 million units. *Id.* at 11-12.

²⁴ See *General Railway Signal Co.*, 66 FTC 882 (1964), order reopened and modified to provide for expiration (Aug. 29, 1994).

the respondents to engage “in conduct . . . ancillary to and reasonably necessary for the formation or operation of a joint venture that is lawful under the antitrust laws.”²⁵ The order against the signaling companies broadly prohibited agreements with “any other person, persons or business entity not a party hereto.” Concluding that the order was aimed at collusive agreements, the Commission modified the order so that the respondents could participate in otherwise lawful joint venture activity.²⁶ Like the proposed modifications in *General Railway Signal, LS&CO* is requesting that the order be modified to permit lawful joint ventures.²⁷

The requested modification also is consistent with the Commission’s previous action in *Liquid Air Corporation of North America, et al.*, Docket No. C-2990, 94 FTC 390 (1979), and *L’Air Liquide S.A.*, Docket No. C-3216, 110 FTC 19 (1987).

In those matters, the respondents,²⁸ in a joint petition, requested the Commission to modify the respective orders because, in essence, they required the respondents to obtain the prior approval of the Commission before undertaking purely internal business activities.²⁹ The Commission granted the petition on public interest grounds, stating that the respondents had shown that the orders “impose[d] substantial costs on the respondents because they require[d] the respondents to obtain the prior approval of the Commission in connection with the respondents, wholly internal activities.”³⁰ The Commission determined that “[s]uch internal activities would raise no competitive

²⁵ 108 FTC at 183.

²⁶ *Id.* at 181.

²⁷ Lawful joint ventures can generate efficiencies such as economies of scale, sharing risks, synergies resulting from pooling complementary resources and facilitating entry into new markets. *See, e.g., Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 20-23 (1979); *Brunswick Corp.*, 94 FTC 1174, 1265 (1979), *aff’d in part and modified in part sub nom. Yamaha Motor Co. v. FTC*, 657 F.2d 971 (8th Cir. 1981), *cert. denied*, 456 U.S. 915 (1982). *See also Copperweld Corp.*, 467 U.S. at 768, where the Court stated that “joint ventures, and various vertical agreements, hold the promise of increasing a firm’s efficiency and enabling it to compete more effectively. Accordingly, such combinations are judged under a rule of reason, an inquiry into market power and market structure designed to assess the combination’s actual effect.”

²⁸ At the time, L’Air Liquide was the parent of Liquid Air Corporation.

²⁹ For example, under the orders, L’Air Liquide would have to obtain the prior approval of the Commission for a transaction in which it caused its subsidiary, Liquid Air Corporation, to acquire all or any part of another L’Air Liquide subsidiary.

³⁰ *See* Order Reopening and Modifying Orders Issued on September 5, 1979, Against Liquid Air Corporation of North America and on July 15, 1987, Against *L’Air Liquide Societe Anonyme Pour L’Etude Et L’Exploitation Des Precedes Georges Claude*, 111 FTC 135, 137 (1988).

questions. . . .”³¹ The Commission, citing *Copperweld Corp.*, 467 U.S. 752, concluded that application of the orders’ prior approval provisions to respondents’ “wholly internal activities” would not be consistent with the principle that the coordinated activity of a parent and its wholly-owned subsidiaries must be viewed as that of a single enterprise for Federal antitrust law purposes.³²

The Commission has recognized the need to avoid applying a consent order aimed at particular unlawful conduct to inhibit conduct that is lawful. For example, in *Adolph Coors Company*, 112 FTC 191, 197 (1989), the Commission found that a general prohibition against Coors’ hindering, suppressing or eliminating competition between or among distributors was unduly restrictive and overbroad and could have a chilling effect on Coors’ ability to implement certain distributional efficiencies.

In light of the competitive developments in the casual apparel and jeans retail distribution channels, the minimal foreclosure of these channels by implementation of the proposed LS&CO/Designs joint venture, and the fact that LS&CO’s competitors are not restricted by similar orders and indeed operate retail stores exclusively featuring their respective brands, the order should be modified to permit LS&CO to enter into lawful joint ventures in retailing. LS&CO will remain subject to all the requirements of the order in its dealings with independent retailer-customers. Any attempt by LS&CO to influence pricing by its independent dealers (including Designs, when acting in its capacity as an independent dealer) will remain subject to the requirements of the order in this case.

LS&CO has made a satisfactory showing that reopening the proceeding and modifying the order is warranted by changed conditions of fact. Granting the Petition permits LS&CO to operate in the same manner as its competitors who have moved to a new marketing strategy. The order, as modified, retains the prohibition against fixing the prices at which independent retailers resell LS&CO products (as well as its other prohibitions).

Accordingly, *it is ordered*, That this matter be and it hereby is reopened and that the Commission’s order in Docket No. 9081 be and it hereby is modified to include a new ending paragraph, as follows:

³¹ *Id.*

³² *Id.*

Provided, however, that the provisions of this order shall not be construed to prohibit conduct that is ancillary to and reasonably necessary for the formation and operation of retail stores either wholly-owned and operated or partially-owned by respondent, or its subsidiaries or affiliates, in a lawful joint venture.

Set Aside Order

IN THE MATTER OF

ARMSTRONG CORK COMPANY

SET ASIDE ORDER IN REGARD TO ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION ACT
AND SEC. 2(a) OF THE CLAYTON ACT*Docket C-1010. Consent Order, Nov. 3, 1965--Set Aside Order, Dec. 23, 1994*

The Federal Trade Commission has set aside a 1965 consent order with Armstrong Cork Company, (68 FTC 849), 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 September 6, 1994, Armstrong World Industries, Inc. ("Armstrong"), the successor to Armstrong Cork Company, filed a Petition to Reopen Proceedings and Set Aside Order ("Petition") in this matter. Armstrong requests that the Commission set aside the 1965 consent order in this matter pursuant to 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 July 22, 1994, published at 59 Fed. Reg. 45, 286-92 (Sept. 1, 1994) ("Sunset Policy Statement"). In the Petition, Armstrong affirmatively states that it has not engaged in any conduct violating the terms of the order. The Request was placed on the public record, and the thirty-day comment period expired on October 14, 1994. No comments were received.

The Commission in its July 22, 1994, 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 twenty years."¹ The Commission's order in Docket No. C-1010 was issued on November 3, 1965, and has been in effect for more than twenty-nine years. Consistent with the Commission's July 22, 1994, Sunset Policy Statement, the presumption is that

¹ See Sunset Policy Statement, 59 Fed. Reg. at 45,289.

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. C-1010.

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. C-1010 be, and it hereby is, set aside, as of the effective date of this order.

Re: Petition of HTI/ORHS South Seminole Joint Venture to Quash or Limit Civil Investigative Demand. File No. 922-3278.

August 12, 1994

Dear Mr. Jones:

This is to advise you of the Federal Trade Commission's ruling on the Petition to Quash or Limit Civil Investigative Demand ("Petition") which you filed on behalf of your client, HTI/ORHS South Seminole Joint Venture ("South Seminole" or "Petitioner"), in the above-captioned matter.

The ruling set forth herein has been made by Commissioner Deborah Owen pursuant to authority delegated under Commission Rule of Practice 2.7(d)(4). Pursuant to Rule 2.7(f), within three days after service of this ruling, Petitioner may file with the Secretary of the Commission a request that the full Commission review the ruling. The timely filing of such a request shall not stay the return date in this ruling, unless the Commission otherwise specifies.

Commissioner Owen has carefully reviewed the Petition and accompanying exhibits. She has also considered the oral presentation on the Petition conducted on July 28, 1994, and the affidavits offered by Petitioner at that time. The Petition is denied in part, and granted in part. Petitioner's obligations under the Civil Investigative Demand ("CID") are modified as set forth below.

I. Background

On February 24, 1994, the Federal Trade Commission approved a Resolution Authorizing Use of Compulsory Process in a Nonpublic Investigation, thereby authorizing the use of compulsory process in an investigation to determine:

whether Columbia/HCA Healthcare Corporation, any of its direct or indirect subsidiaries, any affiliated companies, any acquired corporations including but not limited to HCA-Hospital Corporation of America and any of its direct or indirect subsidiaries, any purchaser of any hospital of any such companies including but not limited to Behavioral Healthcare Corporation, any successors or assigns of any such companies, or others, may be engaging in or may have engaged in unfair or deceptive acts or practices in connection with the advertising, promotion or marketing of

mental health care or substance abuse services or treatment in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

One area of inquiry involves School Respond, a telephone counseling and referral program that served students, parents, and others in the Seminole County, Florida area. School Respond was operated by West Lake Hospital, a for-profit psychiatric hospital. Among the questions being investigated by the staff of the Bureau of Consumer Protection are whether Westlock Hospital (i) misrepresented the nature of the School Respond service and the credentials of School Respond personnel, and (ii) used unfair or deceptive means to recruit adolescents for admission to inpatient programs at Westlock Hospital. Westlock Hospital was owned by Hospital Corporation of America until December 1992. The facility was subsequently acquired by Petitioner, and renamed South Seminole Community Hospital.

On June 21, 1994, as part of this investigation, a CID was issued to South Seminole. On June 27, 1994, a copy of the CID was served upon South Seminole. By letter dated June 28, 1994, pursuant to Rules 2.7(c) and 2.7(d)(3), the Associate Director of the Bureau of Consumer Protection extended until July 15, 1994 the time to produce documents and file a motion to quash.

The CID requires, *inter alia*, the production of documents sufficient to show the identity (name, address, telephone number, and social security number) of each person who contacted School Respond for counseling or referral services, the persons or organizations to which each caller was referred by School Respond staff, and certain other information about the callers recorded by School Respond personnel. The CID specifically instructs South Seminole to redact any information "that would reveal the specific nature of the psychiatric or chemical abuse problem for which any person contacted or was referred to School Respond, or the specific nature of the treatment sought or obtained by any such person."

On July 15, 1994, South Seminole filed this Petition, requesting that the Commission quash or limit the CID "insofar as it calls for the production of information identifying individuals" who called the School Respond hot line.¹ Petitioner states that such patient-

¹ Motion of HTI/ORHS South Seminole Joint Venture to Quash or Limit Civil Investigative Demand at 1.

identifying information is privileged, and that Petitioner does not intend to disclose such information except pursuant to a court order.²

II. Analysis

A. *Psychotherapist-Patient Privilege*

South Seminole contends that all documents identifying the individuals who called School Respond (the “callers”) are protected from disclosure by the psychotherapist-patient privilege codified in Florida Statute Section 90.503. In support of this claim, South Seminole has submitted affidavits from two psychiatrists urging that Commission staff not contact the callers and ask them questions about the School Respond program, because in their view, such action could be severely detrimental to the callers’ mental health. As discussed below, South Seminole’s claim of privilege is not supported by law or precedent.

The purpose of this Commission investigation is to determine whether there has been a violation of a federal statute, specifically Section 5 of the Federal Trade Commission Act. The CID was issued and, if necessary, will be enforced in federal district court under another provision of the same statute, Section 20 of the Federal Trade Commission Act. The law is clear that a claim of privilege asserted against a federal agency conducting an investigation into possible violations of federal law is governed by the principles of federal common law; the existence of a privilege in state law does not control. *See e.g., Linde Thomson Langworthy Kohn & Van Dyke, P.C. v. Resolution Trust Corp.*, 5 F.3d 1508, 1513 (D.C. Cir. 1993); *Gilbreath v. Guadalupe Hosp. Found. Inc.*, 5 F.3d 785, 791 (5th Cir. 1993); *General Motors Corp. v. Director of Nat’l Inst. for Occupational Safety & Health*, 636 F.2d 163, 165 (6th Cir. 1980), *cert. denied*, 454 U.S. 877 (1981); *FTC v. TRW, Inc.*, 628 F.2d 207, 210-11 (D.C. Cir. 1980).

The holdings of various federal appeals courts as to the existence and scope of the federal psychotherapist-patient privilege are not entirely consistent. One line of cases holds that under the federal common law, there is no such privilege. *See, e.g., Hancock v. Hobbs*, 967 F.2d 462, 466 (11th Cir. 1992); *In re Grand Jury Proceedings*,

² *Id.* at 10.

867 F.2d 562 (9th Cir.), *cert. denied*, 493 U.S. 906 (1989); *Alexander v. Herbert*, 150 F.R.D. 690, 695 (M.D. Fla. 1993). A second line of cases has recognized a narrow privilege applicable to confidential communications between a psychotherapist and a patient made for the purpose of diagnosis or treatment of a mental condition. *See, e.g., In re Zuniga*, 714 F.2d 632, 639-40 (6th Cir.), *cert. denied*, 464 U.S. 983 (1983); *In re the August, 1993 Regular Grand Jury*, 1993 U.S. Dist. LEXIS 20065 (S.D. Ind. 1993); *In re Grand Jury Subpoenas Duces Tecum*, 638 F. Supp. 794, 799 (D. Me. 1986). However, even this limited privilege does not preclude the disclosure of the identity of a patient or the fact of treatment:

The essential element of the psychotherapist-patient privilege is its assurance to the patient that his innermost thoughts may be revealed without fear of disclosure. Mere disclosure of the patient's identity does not negate this element. Thus, the Court concludes that, as a general rule, the identity of a patient or the fact and time of his treatment does not fall within the scope of the psychotherapist-patient privilege.

In re Zuniga, 714 F.2d at 640.³

South Seminole finds support for its privilege claim in only one case, *National Transportation Safety Board v. Hollywood Memorial Hosp.*, 735 F. Supp. 423 (S.D. Fla. 1990). This authority is inapplicable for two reasons. First, the Hollywood Memorial court, after noting that it was ruling on an issue that was (then) unsettled in the Eleventh Circuit, recognized a privilege in federal question civil litigation only as to the substance of communications between a psychotherapist and a patient. Second, this holding was implicitly overruled by the Court of Appeals for the Eleventh Circuit in *Hancock v. Hobbs*, where the court stated: "Federal common law does not recognize a psychiatrist-patient privilege." 967 F.2d at 466. We conclude therefore that South Seminole's privilege claim is without merit.

B. Burden

In his discussion of the psychotherapist-patient privilege, counsel for Petitioner urged the Commission to follow the precedent of

³ Counsel for Petitioner points out that this Petition is designed to protect the privacy interests of third parties (the School Respond callers) who have not had an opportunity to be heard. Contrary to counsel's suggestion, these factors are not unique to this case. *See In re Zuniga*, 714 F.2d at 640.

Hollywood Memorial, and consider whether the injury to the therapist-patient relationship incurred by disclosure is greater than the benefit gained in the correct resolution of this investigation, and any subsequent litigation. 735 F. Supp. at 424-25.⁴ In this connection, Petitioner offered expert affidavits discussing the effects of disclosure, and raising serious concerns about potential damage to the patients involved and the psychotherapist-patient relationship generally. Because we have determined that the analysis and holding of Hollywood Memorial are not applicable here, we do not address this balancing test in connection with the privilege issue.

However, this is not to say that the important concerns raised by Petitioner are not relevant to the Commission. Recipients of Commission CIDs have often raised analogous concerns about the burdens of compliance. For example, we have heard and ruled on the assertion that staff contacts with customers may damage the relationship between those customers and the firm under investigation. *See* Brana Publishing, Inc., Federal Trade Commission Letter Ruling Re: Petition to Limit or Quash Civil Investigative Demand, File No. 872-3209 (March 26, 1992); *see also* Hang-Ups Art Enterprises, Inc., Letter Ruling to David Steiner at 10-11 (March 31, 1992). We will therefore consider Petitioner's arguments as an objection to compliance with the CID on grounds of burden, even though they are not styled as such.

The concerns raised by Petitioner here are more acute than the customer concerns raised in previous cases. However, the test is basically the same: "whether the demand in unduly burdensome . . ." *FTC v. Texaco, Inc.*, 555 F.2d 862, 882 (D.C. Cir. 1978), *cert. denied*, 431 U.S. 974 (1977) (emphasis in original). The legitimate interests of the School Respond callers must be weighed against the Commission's obligation to conduct investigations.

Further, we are cognizant of our obligation to promote the public interest, and to minimize any burden or adverse impact of the Commission's investigation on innocent third parties, even where that harm cannot be eliminated altogether. The CID has been narrowly drawn to protect from disclosure the specific nature of the psychiatric or chemical abuse problem that may have motivated a caller to contact School Respond. Staff's intention is to contact some number of callers and to inquire whether the caller would be willing, voluntarily,

⁴ Tr. at 12-14, 24-26; Petition at 7 n.3.

to cooperate with this investigation. No one will be compelled to reveal the content of a School Respond conversation, the nature of any personal or psychiatric problem, or the nature of any treatment.

South Seminole has provided affidavits arguing that even these precautions may not be sufficient to avoid all harm. First, the affidavits suggest that a caller may consider that his privacy has been infringed when his identity as a School Respond caller is (without his consent) revealed to the Commission. In order to accommodate this concern, staff proposed at the outset that South Seminole itself contact the School Respond callers and inquire whether they would consent to the release of their identities to the Commission. South Seminole could then redact from responsive documents the names of callers who did not wish to have their identities disclosed. The Commission will make no attempt to compel South Seminole to cooperate with staff's investigation in the manner described; nonetheless, this appears to be a reasonable accommodation of the first privacy concern raised by Petitioner.⁵

Second, the affidavits suggest that contacting a School Response caller and inquiring about the conduct and communications of School Respond personnel may be harmful to the caller's emotional well-being: "A reactivation of 'old wounds,' conflicts, and painful events that have already been put to rest could occur as a result of such a call."⁶ The Commission must, however, balance the potential that its investigation may cause injury against the potential that its investigation may enable the Commission to uncover and remedy what are alleged to have been very serious violations of Section 5 of the Federal Trade Commission Act. The documents at issue here are critical to this investigation only by communicating with the callers can staff determine whether or not School Respond representatives made unfair or deceptive representations during telephone calls or other oral conversations with callers. We recognize that the relationship between a patient and a psychotherapist is extremely sensitive and private. But it is an unfortunate fact of life that people are sometimes betrayed by those in whom they place their deepest trust. Further, this CID is directed at determining whether School Respond functioned as a marketing tool, rather than strictly as a

⁵ During the hearing on this Petition, counsel for Petitioner indicated that he did not know whether, if a court ultimately rejects South Seminole's privilege claim, this compromise would be acceptable to South Seminole. Tr. at 17-18.

⁶ Quinones Aff. paragraph 6, Supplement to Petition (July 28, 1994).

therapeutic program. We would be doing no favor to patients by declaring that the conduct of hospitals in attracting the patronage of patients is immune from the scrutiny of the Federal Trade Commission and other law enforcement authorities. To bar the Commission from learning the identity of all psychotherapy patients would eliminate an irreplaceable source of information, with the practical effect of creating just such an immunity.⁷

Finally, the affidavits raise a concern that someone other than the addressee (*e.g.*, a parent) may open an inquiry letter from the Commission and thus inadvertently learn that the addressee had contacted School Respond. After the hearing on this Petition, staff proposed a strategy to minimize this risk: Staff's initial letter to the callers will invite their cooperation, but will not mention that the addressee had contacted School Respond, or that the staff obtained the addressee's name from South Seminole.⁸ We believe that staff's proposal strikes an appropriate balance between the legitimate concerns raised by Petitioner and the Commission's investigative needs, and we direct staff to proceed in this manner. In order to permit staff to send such a general letter to the callers, some technical

⁷ In *FTC v. Invention Submission Corp.*, 1991-1 Trade Cas. (CCH) paragraph 69,338 (D.D.C. 1991), *aff'd*, 965 F.2d 1086 (D.C. Cir. 1992, *cert. denied*, 113 S.Ct. 1993), the United States District Court for the District of Columbia refused to block the Commission's access to customer lists, notwithstanding Invention Submission's claim that staff contacts with customers might damage the company's relationship with its customers. The court concluded:

If this court were to acknowledge [Invention Submission's] highly speculative fears of damage to corporate reputation as adequate to defeat the agency's information requests, the FTC's subpoena power would be rendered powerless and serious investigation of corporate behavior would be a futile exercise.

1991-1 Trade Cas. (CCH) paragraph 69,338 at 65,353. While the court did not restrict the staff's use of information gained through compulsory process, it acknowledged that the FTC had indicated that various protective measures would be taken, including limiting the number of customers contacted and informing those customers that the contact was part of an industry-wide investigation. Furthermore, the Commission did direct staff in that case to "take care to avoid undue harm to the company's legitimate business interests." File No. 882-3060 (Commission Letter Ruling to Edward B. Friedman, Sept. 25, 1989 at 5). *See also* Letter Ruling to Edward B. Friedman, Oct. 4, 1991 at 15 n.18 ("Absent specific evidence to the contrary, we assume that to be staff's standard operating procedure.").

⁸ More specifically, staff intends to send a letter to the callers explaining that the Federal Trade Commission is investigating the School Respond program and would like to speak with former Seminole County, Florida school students and others who might have relevant information from any source. Again, the letter will not mention that the addressees had contacted School Respond or that staff obtained their names from South Seminole. The letter will include a reply form to be returned by those callers who are willing to speak to Commission staff. This letter will be the only contact between Commission staff and any callers who do not wish to speak to staff.

modifications to the CID are required. Accordingly, the modifications ordered by this letter are set forth in Attachment "A" hereto.⁹

On balance, although Petitioner raises several privacy-related concerns, we believe that the Commission's responsibility to protect vulnerable consumers, together with the unavoidable need for the information being sought in this matter, justify the disclosure of documents identifying individuals who called the School Respond hot line, under the conditions outlined in this opinion. As detailed herein, the method by which staff is directed to contact the School Respond callers should minimize any risk of discomfort, embarrassment, or emotional harm.¹⁰

III. Conclusion

For the foregoing reasons, the Petition to Quash or Limit Civil Investigative Demand is denied in part, and granted in part. South Seminole is directed to comply with the Civil Investigative Demand, as modified herein, on or before 5:00 p.m. on August 26, 1994.

ATTACHMENT A

Modifications to CID

- Instruction 8: Delete the phrase, "until after a court order has been obtained pursuant to the above-referenced regulations"
- Instruction 9: Insert the following after the paragraph beginning with the phrase "Information to be Redacted":
"The CID shall not require the submission of the name, address, telephone number and social

⁹ The primary modification to the CID is to require the deletion by Petitioner of identifying information concerning any persons who could be identified as drug or alcohol abusers. This modification is necessary to implement the plan to send a "neutral" letter to callers. Federal regulations would require detailed notice to any callers identified as drug or alcohol abusers of the agency's compliance with applicable federal regulations, and, necessarily, the contact with School Respond that occasioned the inquiry. *See* 42 CFR 261 *et seq.*

¹⁰ We note that the disclosure sought here is a restricted one. Because the documents are to be provided to the Commission pursuant to compulsory process in a law enforcement investigation, they will be subject to the statutory custodial protections and restrictions on disclosure provided by Section 21(b) of the FTC Act, 15 U.S.C. 57b-2(b). *See also* Subsection 21(f) of the same section (15 U.S.C. 57b-2(f)), which provides an exemption from mandatory disclosure under the FOIA for such documents, and Section 10 of the FTC Act (15 U.S.C. 50), which provides criminal fines and penalties for unauthorized public disclosure of such information.

security number of any person who could be identified as a drug or alcohol abuser by any information relating to the persons or organizations to which School Respond referred such person, and South Seminole shall redact such information from any responsive documents. The CID also shall not require the submission of the name, address, telephone number and social security number of the parent of any person who could be identified as a drug or alcohol abuser by any information relating to the persons or organizations to which School Respond referred such person, and South Seminole shall redact such information from any responsive documents.”

Delete the phrase “(even after a court order has been obtained pursuant to 42 CFR 2.1 *et seq.*)”

Specification 1: Insert the following at the end of the specification:

“Provided, however, that South Seminole shall redact from documents responsive to this specification any information required to be redacted by Instructions 8-9.”

Specification 2: Insert the following at the end of the specification:

“Provided, however, that South Seminole shall redact from documents responsive to this specification any information required to be redacted by Instructions 8-9.”

Specification 3: Delete the following: “(even after a court order has been obtained pursuant to 42 CFR 2.1 *et seq.*)”

Delete the following at the end of the specification: “, and The Company shall redact such information from any responsive documents”

Insert the following at the end of the specification: “South Seminole shall redact from documents responsive to this specification any information required to be redacted by Instructions 8-9.”

Re: Petition of Mortgage Credit Reports, Inc. to Quash Four Civil Investigative Demands. File No. 922-3339.

August 26, 1994

Dear Mr. Blanton:

This is to advise you of the Federal Trade Commission's ruling on the Petition to Quash Civil Investigative Demands ("CIDs"), which you filed on behalf of your client, Mortgage Credit Reports, Inc. ("MCR" or "Petitioner").

The ruling set forth herein has been made by Commissioner Deborah Owen pursuant to authority delegated under Commission Rule of Practice 2.7 (d) (4).¹ Although Rule 2.7(f) provides that, within three days after service of this decision, Petitioner may file with the Secretary of the Commission a request for full Commission review, the Commission has determined to extend the period within which Petitioner must file a request for full Commission review, should Petitioner desire to make such a request.² In light of the recent unexpected hospitalization of Petitioner's counsel and his ongoing convalescence, the Commission has determined that Petitioner may file a request for review, pursuant to Rule 2.7(f), within seven days after service of this decision. Whatever briefs or other material the Petitioner wishes the Commission to consider in reviewing this decision must accompany any such request in order to be considered as timely filed. The timely filing of such a request shall not stay the return date set forth in this ruling, unless the Commission otherwise specifies.

Commissioner Owen has carefully reviewed the Petition and accompanying exhibits. She has also considered the oral presentation on the Petition conducted on August 18, 1994. The Petition is denied in its entirety for the reasons stated below.

¹ 16 CFR 2.7(d)(4) (1994). The Commission's Rules of Practice are published at Title 16 of the Code of Federal Regulations, Parts 0 - 5.

² Commissioner Owen requested that the full Commission authorize an extension of time, from three to seven days, within which Petitioner may file a request for full Commission review. On August 26, 1994, the Commission authorized this extension of time.

I. Background

These CIDs arise in the context of the Commission's investigation of certain business practices of consumer reporting agencies to determine whether they are or may be engaged in acts or practices in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, as amended, and of the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. 1681 *et seq.* MCR is a company that provides consumer credit reports on mortgage applicants to mortgage lenders, also known as a credit reporting agency. *See* 15 U.S.C. 1681a(f).

On June 27, 1990, the Commission approved a resolution authorizing the use of compulsory process in its investigation of unnamed consumer credit reporting agencies. Commission staff issued its initial access letter to MCR on August 27, 1992. MCR submitted a letter responding to the access request on September 25, 1992. Commission staff was permitted to visit MCR's offices on March 9, 1993 to review documentary materials. Because staff sought documents which MCR was unwilling to produce without compulsory process,³ on July 8, 1994 the Commission issued to MCR the four civil investigative demands at issue in this Petition. The CIDs in this matter seek: (1) documents relating to a sample of consumer disputes filed with MCR, including related consumer reports prepared by MCR; (2) documents and information relating to consumer reports furnished in response to applications for mortgages of less than \$50,000; (3) the identity of the MCR employees most knowledgeable about MCR's computer records; and (4) the oral testimony of the Vice President and the Profit and Loss Supervisor of MCR. The CIDs specified varying return dates.⁴

Petitioner objected to producing information sought under the CIDs. On July 13, 1994, Petitioner's counsel and the Commission's investigating staff discussed MCR's concerns, which were later memorialized in writing. *See* Letter from Edward Blanton, Jr. to Ronald G. Isaac, FTC Division of Credit Practices (July 14, 1994).

MCR advances several arguments in support of its Petition: (1) MCR has cooperated fully with staff in its investigation to date; (2) almost all of the information sought in the CIDs is information which

³ [Redacted]

⁴ The CID for documentary material indicated a return date of August 11, 1994, while the CID for written interrogatories specified a July 28, 1994 return date. The two CIDs for oral testimony included a September 8, 1994 return date.

MCR does not maintain in the ordinary course of its business; (3) Commission staff has misled MCR about the reasons for this investigation; (4) one Commission staff member is pursuing this investigation as a personal vendetta against MCR in retaliation for "minor inconveniences" caused by MCR's preparation of an inaccurate credit report on him; and (5) MCR is entitled to know what complaints are being investigated, and what evidence suggests that violations may have occurred, before it provides any further information to the FTC. At the August 18 hearing on its Petition, MCR raised a variation on the fifth argument in support of its Petition, contending that it has a constitutional right to confront its accusers whose complaints underlie this investigation.

Petitioner's objections to the CIDs are discussed below.

II. Petitioner's Objections

A. *Petitioner has cooperated fully in staff's investigation to date.*

Petitioner contends that it has been cooperative with Commission staff throughout the last two years and that its cooperation has been premised upon its understanding that this investigation is being conducted as part of the Commission's general oversight authority in enforcing the FCRA. Petitioner argues that it first learned that staff had complaints against the company during the July 13 discussion between staff and Petitioner's counsel, following issuance of the CIDs. Having learned of these complaints, Petitioner now refuses to comply with the CIDs until staff discloses what complaints are being investigated, and what evidence in staff's possession suggests that violations of the FCRA may have occurred.⁵

Petitioner agreed to respond to staff's August 27, 1992 initial access letter and provided voluntarily, in lieu of compulsory process, information and documents.⁶ *See* 15 U.S.C. 52b-2(f). [Redacted]⁷

⁵ The argument that Petitioner is entitled to such information from Commission staff is discussed, *infra*, at Section II.E.

⁶ As previously noted, MCR sent a letter responding to staff's initial access request on September 25, 1992. MCR also permitted two Commission staff members to visit the company's offices and meet with certain MCR personnel and review documentary materials approximately six months later in March 1993.

⁷ Staff sought, *inter alia*, files in connection with consumers who had disputed the accuracy or completeness of information that MCR had reported about them.

[Redacted]⁸ Following telephone discussions with Commission staff, MCR agreed to permit Commission staff to inspect, *inter alia*, consumer files, including dispute files; however, MCR refused to supply staff with copies of consumer credit reports⁹ found within the files staff inspected, unless staff obtained an "administrative subpoena" for such documents.¹⁰ Staff sought process to compel production of this and other information within MCR's files.

The foregoing facts belie Petitioner's assertion that it has been fully cooperative with Commission staff in this investigation. To the extent that MCR has in its possession, custody, or control any consumer report covered by the CIDs, MCR's refusal to produce has no legal basis. The FTC has the authority to obtain consumer credit reports from consumer reporting agencies for enforcement purposes without regard to the Act's restrictions on the purposes for which such agencies may otherwise furnish consumer reports.¹¹ Petitioner

⁸ [Redacted] More recently, MCR has taken the position that credit reports prepared by the Petitioner are not retained in the company's consumer files. See MCR Petition to Quash Hearing Transcript at 17. [Redacted] We note that the CIDs expressly require MCR to produce all responsive materials, including computer records that are retained on magnetic media. See Civil Investigative Demand for Documentary Material, Instruction 5. In addition, two specifications in the CID for document material specify that MCR shall "produce all documents, including computer records." To the extent that any documentary materials are responsive to the CID specifications and are within MCR's possession, custody or control, as defined in the CID, MCR must produce them, whether in hard copy or electronic format.

⁹ The term "consumer report" refers to any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in determining the consumer's eligibility for, *inter alia*, credit. 15 U.S.C. 1681a(d).

¹⁰ [Redacted]

¹¹ The FCRA states, in pertinent part, that:

The Federal Trade Commission shall have such procedural, investigative, and enforcement powers, including the power to issue procedural rules in enforcing compliance with the requirements imposed under this title and to require the filing of reports, the production of documents, and the appearance of witnesses as though the applicable terms and conditions of the Federal Trade Commission Act were part of this title.

15 U.S.C. 1681s (Emphasis added). The FTC Act further provides that, for purposes of the FTC Act, the Commission:

[S]hall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any person, partnership, or corporation being investigated or proceeded against; and the Commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation

15 U.S.C. 49. Courts have construed these statutory provisions to mean that the Commission need not obtain a court order or permission of affected consumers in order to compel disclosure of consumer reports from credit reporting agencies in view of the Commission's role as enforcer of the FCRA. *FTC v. Manager, Retail Credit Co., Miami Branch Office*, 515 F.2d 988, 997 (D.C. Cir. 1975).

asserted at the August 18 hearing, [Redacted].¹² To the extent that Petitioner does not have such a document, in any form, in its possession, custody, or control, it, of course, has no obligation to produce such a document. See File No. 912-3071 (Commission Ruling in Petition of Yarnell Enterprises, Inc. to Quash Specification of Civil Investigative Demand, October 25, 1991). However, to the extent that any computer files would be covered by the CID, Petitioner is obligated to produce these in accordance with the CID's instructions.

Any cooperation that Petitioner previously may have extended toward the Commission, provides no basis on which to challenge compulsory process. A firm might be ninety-five percent cooperative with staff's requests for information, for example, but even such a high degree of cooperation would not serve as a basis to withhold the remaining five percent of materials sought via compulsory process. Petitioner's cooperation is peripheral; the salient issues before the Commission in its consideration of a Petition to Quash are burden and relevance, issues that have not been raised here. Accordingly, Petitioner's objection to complying with the CIDs on grounds that it has been cooperative with staff's investigation is hereby denied.

B. Information specified in the CIDs is not maintained in the ordinary course of business.

Petitioner seeks to quash the CIDs because they seek materials that are not retained in MCR's files. Petitioner refers specifically to consumer credit reports for mortgages in amounts less than \$50,000.¹³ At the hearing on MCRs Petition, [Redacted].¹⁴ The fact that twenty-one of the twenty-eight consumer files produced by MCR following staff's on-site visit contain the consumer's loan application which specified the loan amount sought by the consumer applicant suggests that this information is available with respect to some consumers. Accordingly, to the extent such documents exist and are covered by the CIDs, they must be produced. Documents not within MCR's possession, custody or control are not within the scope of the Commission's compulsory process. 15 U.S.C. 57b-1(c)(1). Simply put, MCR is not required to manufacture materials in responding to the

¹² [Redacted] MCR Petition to Quash Hearing Transcript at 28.

¹³ See Petition paragraph 9.

¹⁴ MCR Petition to Quash Hearing Transcript at 25.

CIDs, however, to the extent that responsive materials are within the company's possession, custody or control, it must produce them. Hence, Petitioner's objection to the CIDs on this basis is denied.

C. MCR was misled about the reasons for this investigation.

Both in its Petition and at the oral hearing, MCR has argued that Commission staff initially represented that its investigation was based on the Commission's general FCRA oversight and enforcement authority, and that, more recently, staff has indicated that the investigation is also based upon complaints against the company. Commission staff denies that it has misled MCR in any way in connection with the basis for this investigation. For the reasons set forth below, we find it unnecessary to resolve the factual dispute between Petitioner and Commission staff. Petitioner implicitly draws a legal distinction between Commission investigations that are prompted by consumer complaints versus those that are initiated solely on the basis of the agency's general statutory enforcement authority. We find this to be a distinction without any legal significance, and note that Petitioner has cited no legal authority to the contrary.

As set forth below, staff's August 1992 access letter clearly complies with Commission Rule 2.6, which provides that:

Any person under investigation compelled or requested to furnish information or documentary evidence shall be advised of the purpose and scope of the investigation and of the nature of the conduct constituting the alleged violation which is under investigation and the provisions of law applicable to such violation.

Staff's initial access letter to MCR succinctly stated the reasons for this investigation and the authority for staff's inquiry:

The Federal Trade Commission is responsible for enforcement of the Fair Credit Reporting Act . . . This office is currently conducting an inquiry to determine whether the practices of Mortgage Credit Reports, Inc. . . . violate the FCRA, including Section 607(b) of the Act . . . or other statutes enforced by the Federal Trade Commission.¹⁵

¹⁵ Letter from Ronald G. Isaac to Edward L. Blanton, Jr., (August 27, 1992) at 1. Here, the explicit reference to Section 607(b) of the FCRA, a statute that governs very specific types of conduct, satisfies both the requirement that the agency advise persons under investigation of the nature of the conduct constituting the alleged violation under investigation, as well as the requirement that the provisions of law applicable to such violation be specified. As one court has stated, "an agency will be deemed to have given adequate notice of the purposes of an investigation by reciting its statutory duties when the statutes themselves alert the parties to the purposes of the investigation." *FTC v. Carter*, 636 F.2d 781, 787 (D.C. Cir. 1980).

At the oral hearing on its Petition, MCR's counsel contended that the term "inquiry" in this letter was unclear and that he was not aware, on the basis of this letter, that Commission staff was conducting an investigation of his client.¹⁶ We fail to perceive any distinction between an inquiry and an investigation.¹⁷ [Redacted].¹⁸

In addition to staff's explanation of the purpose and nature of this investigation as described in its initial access letter, the Commission has also adequately advised MCR of the purpose and nature of this investigation, *viz.*, "[t]o determine whether unnamed consumer reporting agencies or others are or may be engaged in acts or practices in violation of Section 5 of the Federal Trade Commission Act . . . and of the Fair Credit Reporting Act"¹⁹ We conclude that this statement, in conjunction with the quoted excerpt from staff's initial access letter, clearly advises Petitioner of the scope of this investigation. Petitioner has failed to supply any authority to support its assertion that it has a right to know, in addition to the nature and scope of the investigation, the circumstances that prompted it, *i.e.*, whether staff's investigation is based on the Commission's general oversight authority of the FCRA or based upon consumer complaints against the company. Accordingly, we conclude that Petitioner has been adequately advised of the purpose and basis for this investigation and hereby deny its objection to the CIDs on grounds that it has been misled with respect to the basis for this investigation.

D. Investigation is retaliatory.

Petitioner argues that this investigation was initiated and is being conducted as a "personal vendetta" by a Commission staff member. We find that Petitioner's mere assertions fail to satisfy the threshold requirement established by applicable case law to demonstrate

¹⁶ MCR Petition to Quash Hearing Transcript at 8.

¹⁷ Moreover, staff's access letter explicitly referred to "a law enforcement investigation" in a later reference to Section 21(f) of the Federal Trade Commission Act, 15 U.S.C. 57b-2(f), which provides that all documents and information provided voluntarily in lieu of compulsory process in a law enforcement investigation will be exempt from public disclosure under the Freedom of Information Act. *See* Letter from Ronald G. Isaac to Edward L. Blanton, Jr., (August 27, 1992) at 7.

¹⁸ Letter from Edward L. Blanton, Jr. to Ronald G. Isaac, (September 25, 1992) at 1.

¹⁹ Resolution Directing Use of Compulsory Process in Nonpublic Investigation, File No. 902-3267 (June 27, 1990). This resolution accompanied the CIDs issued to MCR in July 1994.

agency misconduct.²⁰ The facts indicate that the staff member, having applied for a mortgage, learned that his credit report prepared by MCR contained inaccuracies. Aside from this complaint, however, staff has learned of other consumer complaints against MCR. Accordingly, Petitioner is incorrect in attributing this investigation to any one complaint, and its objection to the CIDs based on Commission staff misconduct is denied.²¹

E. MCR is entitled to know what complaints are being investigated.

The fundamental argument underlying MCR's Petition is that the company is entitled to know what complaints are being investigated and what evidence suggests that violations may have occurred before it provides further information to Commission staff. Petitioner cites no legal authority for this argument in its papers and cited none when specifically asked during the oral hearing on its Petition.²² In effect, Petitioner seeks to conduct discovery to learn what information staff

²⁰ See File No. 831-0085 (Commission Ruling on Petition of Diamond Dealers Club, Inc. to Quash Subpoenas, Letter to Hyman Bravin, Esquire, August 27, 1984 (finding that "bare bones" allegations of agency misconduct were "purely speculative"). In *Diamond Dealers Club, Inc.*, the petitioner alleged that Commission staff had exercised improper conduct and sought, on this basis, deposition discovery from staff attorneys. In its letter ruling, the Commission concluded that petitioners' speculative allegations failed to satisfy the threshold requirement established by applicable case law for permitting discovery from the Commission's staff attorneys. Cf. *United States v. Litton Indus., Inc.*, 462 F.2d 14, 17 (9th Cir. 1972) (stating that courts do not normally consider assertions of administrative prejudice prior to completion of an adjudicative proceeding and holding that Litton's allegations were "purely speculative" and did not rise to the level to warrant interruption of the adjudicative hearing).

²¹ We note that it is the responsibility of Commission staff to pursue indications of possible law violations. When an investigation is conducted at least in part on the basis of a complaint of a Commission employee -- particularly a member of Commission staff with possible direct involvement in the investigative process -- staff customarily exercises the utmost caution to avoid the appearance of impropriety.

²² COMMISSIONER OWEN: Can I ask you, Mr. Blanton, do you have some precedent at the investigative stage for refusing to turn over relevant information in light of an inability to know the identity of particular complainants? Do you have federal court precedents on that point?

MR. BLANTON: No, and in fact I have not looked. I'm relying on my general understanding of what the common law of England and the United States has been since 1215.

COMMISSIONER OWEN: Is that true with respect to the investigative stage as opposed to the trial stage?

MR. BLANTON: We're taking the position that we in the investigative stage do not wish to produce any evidence until we know what the charges are and the complaints are.

MCR Petition to Quash Hearing Transcript at 11-12.

Although Petitioner's counsel offered to provide a supplemental submission discussing the law on this point, such information has not been provided. We note that Petitioner was required to submit all supporting materials at the time its Petition was filed. See Commission Rule 2.7(d) (requiring that a timely filed petition "shall set forth all assertions of privilege or other factual and legal objections to the subpoena or civil investigative demand, including all appropriate arguments, affidavits and other supporting documentation") (Emphasis added).

has obtained during its investigation. Petitioner again fails to cite any authority to support its argument, which runs contrary to Supreme Court precedent:

[The Commission's] rules draw a clear distinction between adjudicative proceedings and investigative proceedings. Although the latter are frequently initiated by complaints from undisclosed informants and although the Commission may use the information obtained during investigations to initiate adjudicative proceedings, nevertheless, persons summoned to appear before investigative proceedings are entitled only to a general notice of 'the purpose and scope of the investigation,' and while they may have the advice of counsel, 'counsel may not, as a matter of right, otherwise participate in the investigation.'

Hannah v. Larche, 363 U.S. 420, 446 (1960) (citations omitted); see also File No. 761-0083 (Commission Ruling in Motion of General Motors Corp., et al. to Quash Proceedings, Letter to Thomas A. Gottschalk, Esquire, Sept. 26, 1979).

Though not raised specifically in its Petition, at the hearing counsel proffered another variation on its argument: that Petitioner is resisting compliance with the CIDs because it has a constitutional right to confront its accusers -- referring to individuals that have lodged complaints against the company. We hold that Petitioner's reliance on the Sixth Amendment's Confrontation Clause²³ is inappropriate in this instance. The Sixth Amendment expressly states that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him"²⁴

Petitioner's argument is misplaced as it does not apply to the investigative activities of a law enforcement agency with solely civil jurisdiction. This point is well established in the case law. See generally, *SEC v. Jerry T. O'Brien, Inc.*, 467 U.S. 735, 742 (1984); *United States v. Ward*, 448 U.S. 242, 248 (1980) (stating that "the protections provided by the Sixth Amendment are available only in 'criminal prosecutions'"); *Austin v. United States*, 113 S.Ct. 2801, 2804 (1973). Moreover, even in the criminal setting, "the right to confrontation is basically a trial right." *Barber v. Page*, 390 U.S. 719, 725 (1968). Accordingly, Petitioner's objection to the CIDs on grounds that it is entitled to confront its accusers is denied.

²³ Although Petitioner's counsel did not specify which constitutional provision was allegedly being abridged in this instance, we assume that counsel was referring to the Sixth Amendment to the U.S. Constitution.

²⁴ U.S. Const. amend. VI.

We conclude that Commission staff has no obligation to advise MCR of the information that it may possess concerning potential law violations at this stage of the investigation. The requested information sought by the Commission is only required to be reasonably relevant (and not unduly burdensome) to its investigation, the boundary of which may be drawn "quite generally," in large part because at the investigative stage of a proceeding, the Commission need only have a "suspicion that the law is being violated in some way."²⁵ Hence, Petitioner's objection to the CIDs on grounds that it has a right to obtain the identities of individuals who have lodged complaints against it is hereby denied.

III. Conclusion

For the foregoing reasons, the Petition to Quash four Civil Investigative Demands filed by Mortgage Credit Reports, Inc. is denied in its entirety. Pursuant to Rule 2.7(e), MCR is directed to comply with the CIDs as follows: (1) CID for documentary material - by 5:00 p.m. on September 30, 1994; (2) CID for written interrogatories and report - by 5:00 p.m. on September 15, 1994; (3) CIDs for oral testimony of Josephine Ore and Laura Anderson Gillen - as scheduled by Commission staff, but not to occur earlier than October 24, 1994.

Within seven days after service of this ruling, Petitioner may file with the Secretary of the Commission a request that the full Commission review the ruling. Commission Rule of Practice 4.4(b) provides that a document shall be deemed filed when it is received by the Office of the Secretary. *See* 16 CFR 4.4(b). The timely filing of such a request shall not stay the return date of this ruling, unless the Commission otherwise directs.

²⁵ *See FTC v. Invention Submission Corp.*, 965 F.2d 1086,1090 (D.C. Cir. 1992), *cert. denied*, 113 S.Ct. 1255 (1993).

**Re: Petition of Michael DiMattina, M.D. to Limit or Quash Civil Investigative Demands.
File No. 932-3314.**

October 21, 1994

Dear Mr. Eaton:

This is to advise you of the Federal Trade Commission's ruling on the Petition to Limit or Quash Civil Investigative Demands ("Petition") which you filed in the above-captioned matter on behalf of your client, Michael DiMattina, M.D. ("Petitioner").

The ruling set forth herein has been made by Commissioner Roscoe B. Starek, III, pursuant to authority delegated under Commission Rule of Practice 2.7(d)(4). Pursuant to Rule 2.7(f), within three days after service of this ruling, Petitioner may file with the Secretary of the Commission a request that the full Commission review the ruling. The timely filing of such a request shall not stay the return date with regard to these CIDs, unless the Commission otherwise specifies.

Commissioner Starek has reviewed the Petition and accompanying exhibits. He also has considered the oral presentation on the Petition made on September 26, 1994, and the letter submission made by Petitioner on September 28, 1994. The Petition is denied.

I. Background

Petitioner, through Michael DiMattina, M.D., P.C. and Dominion Fertility & Endocrinology ("DF"), offers infertility services to the public. In 1992 and 1993, Petitioner held seminars at which infertility services were discussed. Staff is investigating, among other questions, whether Petitioner or DF (i) misrepresented the success rates of fertility procedures he offers and (ii) misrepresented, or made a material omission regarding, the side-effects of certain prescription drugs utilized during these procedures.

On August 3, 1994, the Federal Trade Commission approved a Resolution Authorizing Use of Compulsory Process in a Nonpublic Investigation, thereby authorizing the use of compulsory process in an investigation:

To determine whether Michael DiMattina, M.D., Michael DiMattina, M.D., P.C., Dominion Fertility & Endocrinology Institute, or others, engaged in providing infertility services to consumers through the use of assisted reproductive technologies, have engaged in or are engaging in unfair or deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, in connection with the advertising or marketing of said services, including but not limited to false and unsubstantiated representations concerning patients' success in achieving live births and the side effects of using fertility drugs. This investigation is also to determine whether Commission action to obtain redress of injury to consumers or others would be in the public interest.

On August 23, 1994, as part of this investigation, a CID for Written Interrogatories and a CID for Documents were issued to Petitioner. On September 19, 1994, Petitioner submitted a "Petition of Michael DiMattina, M.D. To Limit or Quash Civil Investigative Demands."

II. Analysis

A. *Patient Names, Addresses, and Telephone Numbers*

Petitioner requests that the Commission quash or limit Specification 3 of the CID for interrogatories and Specification 2 of the CID for documents. Specification 3 of the CID for interrogatories directs Petitioner to:

Provide the names, home addresses, and home telephone numbers of each person who attended [Petitioner's] "Fertility Seminar -- ART" given in March, June and December of 1992, and April and June of 1993, including those for each anonymous "affiant" included in [Petitioner's] submission to the Federal Trade Commission dated June 14, 1994.¹

Similarly, Petitioner objects to Specification 2 of the CID for documents, which demands:

All reservation sign-up sheets or lists for [Petitioner's] "Fertility Seminar - Assisted Reproductive Technologies" for seminars conducted in [sic] March, 1992 to the present.

¹ In an effort to respond to staff's desire to obtain information regarding representations made at the seminars, Petitioner submitted affidavits from persons who had attended the events. These affiants, however, were identified only by initials.

Staff seeks this information with the intention of contacting individuals who attended the seminars, in order to determine what representations were made there. Petitioner asserts that compliance with these requests would violate the constitutional right of privacy of the persons so identified, and would violate his obligation under the Hippocratic Oath and state law to maintain confidentiality of patient information. Petitioner requests that the specifications be quashed or, in the alternative, limited to avoid unnecessarily burdening his patients and irreparably damaging his reputation and business.

i. Constitutional Right of Privacy²

Petitioner argues that compelled provision of the identities of the seminar attendees to staff, so that staff may contact them, would violate the attendees' right of privacy. In *Whalen v. Roe*, 429 U.S. 589 (1977), the Supreme Court indicated, without deciding, that individuals may have a constitutionally protected privacy interest in records reflecting their medical histories. Subsequently, lower courts have recognized the existence of a privacy interest in medical information. *E.g.*, *In re Search Warrant (Sealed)*, 810 F.2d 67, 71 (3d Cir. 1987); *U.S. v. Westinghouse Electric Corp.*, 638 F.2d 570, 577 (3d Cir. 1980).

Nonetheless, "even material which is subject to protection must be produced or disclosed upon a showing of proper governmental interest." *Westinghouse*, 638 F.2d at 577. The following factors are pertinent to a determination to require disclosure of personally sensitive information: the type of record requested; the information it does or might contain; the potential for harm in any subsequent non-consensual disclosure; the injury from disclosure to the relationship in which the record was generated; the adequacy of safeguards to prevent unauthorized disclosure; the degree of need for access; and whether there is an express statutory mandate, articulated public policy, or other recognizable public interest militating in favor of access. *Westinghouse*, 638 F.2d at 578.

In *Westinghouse*, for example, the court was faced with a request of the National Institute for Occupational Safety and Health to obtain employee medical records expected to reveal whether exposure to a

² For the purposes of this ruling we assume, without deciding, that Petitioner has standing to assert privacy rights on behalf of his patients. See *Griswold v. Connecticut*, 381 U.S. 479, 481 (1965); *In re Search Warrant (Sealed)*, 810 F.2d 67, 69 (3d Cir. 1987).

particular substance was associated with occupational asthma. It ruled that medical records containing primarily routine test results were private, but not sensitive, and that disclosure of this information was not likely to inhibit the employees from undergoing the required subsequent periodic examinations. The court ordered Westinghouse to permit access to the medical records after determining that there existed sufficient statutory and regulatory safeguards against further unauthorized disclosure, in order to facilitate the strong public interest in conducting research regarding occupational safety.

The information sought by the CIDs in the present case would result in only a minimal disclosure of the personal matters which citizens have an interest in protecting from disclosure. Staff desires to interview attendees about the representations made by Petitioner; staff does not intend to question the attendees about their own medical histories. Although the disclosure that an individual attended one of Petitioner's seminars constitutes an implied disclosure that a particular couple may be suffering a fertility problem, the attendance of each person at these seminars is already known to the other persons who attended the seminar.³ Finally, it is unlikely that disclosure of this information to Commission staff for the limited purpose of enquiring into Petitioner's representations will dissuade other couples from seeking information about fertility procedures. Thus, this information is no more sensitive than that at issue in *Whalen, supra* (identifying patients who have utilized legitimate but dangerous narcotics) and *Westinghouse, supra* (entire medical files).

Moreover, the risk that there will be further unauthorized disclosure is very slim. Because the documents are to be provided to the Commission pursuant to compulsory process in a law enforcement investigation, they will be subject to significant protections: 1) the statutory custodial protections and restrictions on disclosure provided by Section 21(b) of the FTC Act ("the Act"), 15 U.S.C. 57b-2(b); 2) Section 21(f) of the Act, 15 U.S.C. 57b-2(f), which provides an exemption from mandatory disclosure under the Freedom of Information Act for documents produced pursuant to compulsory process; and 3) Section 10 of the Act, 15 U.S.C. 50, which provides

³ In addition, the implication that a couple may be suffering from a fertility problem does not of itself reveal what specific problems have been encountered; whether the problem resides in the male, the female, or both; or whether the couple has determined to engage in any procedures to remedy the problem.

criminal fines and penalties for unauthorized public disclosure of such information.

Finally, the information sought by the CIDs is needed to allow staff to discover what representations were made to persons who attended Petitioner's seminars, so that staff may determine whether there has been a violation of Section 5 or 12 of the FTC Act, 15 U.S.C. 45, 52.⁴ These sections charge the Commission with protecting consumers from unfair or deceptive acts or practices, and from false advertising of drugs. This statutory authority and the public interest in preventing false or unsubstantiated representations about the success of infertility services and the side effects of using fertility drugs militate in favor of allowing Commission staff access to the information sought by the CIDs.

Accordingly, the Commission's legitimate interest in detecting deceptive practices warrants requiring disclosure of this information, despite the colorable privacy concerns posed by that disclosure.

ii. Patient-Physician Privilege

Petitioner also asserts that the requested information is protected from disclosure by Virginia law and the Hippocratic Oath. Assuming for the purposes of argument that the seminar attendees were Petitioner's patients, state law does not appear to protect patient names and addresses.⁵

Moreover, Virginia's privilege statute authorizes disclosure of otherwise privileged information where "necessary . . . in order to comply with state or federal law." Va. Code Ann. Section 8.01-399.F (Mitchie 1994 Cum. Supp.). As the challenged CIDs are issued pursuant to Sections 6, 9, 10 and 20 of the FTC Act, 15 U.S.C. 46, 49, 50 and 57b-1, compliance with these CIDs is necessary to comply

⁴ Anonymous affidavits obtained by Petitioner are not sufficiently reliable evidence of Petitioner's representations.

⁵ Petitioner cites a section of the Virginia Code that generally prohibits a practitioner of the healing arts from conducting his practice in a manner contrary to the standards of ethics of his branch of the healing arts. Va. Code Ann. 54.12914(9) (Mitchie 1950). The Hippocratic Oath prohibits a physician from divulging matters "which should not be published abroad."

The Virginia privilege statute, not cited by Petitioner, is more specific. It prohibits a practitioner of any branch of the healing arts from disclosing "information . . . acquired in attending, examining or treating the patient in a professional capacity." Va. Code Ann. 8.01.399 (Mitchie 1994 Cum. Supp.). This section appears designed to prevent disclosure of information regarding a patient's physical condition, rather than his or her name and address.

with federal law and thus, even if Virginia law applies, is permitted under the Virginia privilege statute.

In any case, any privilege protection accorded by state law is not binding upon the Commission. The purpose of this investigation is to determine whether there has been a violation of a federal statute. A claim of privilege asserted against a federal agency conducting an investigation into possible violations of federal law is guided by the principles of federal common law. *E.g.*, *Linde Thomson Langworthy Kohn & Van Dyke, P.C. v. Resolution Trust Corp.*, 5 F.3d 1508, 1513 (D.C. Cir. 1993); *Gilbreath v. Guadalupe Hosp. Found, Inc.*, 5 F.3d 785, 791 (5th Cir. 1993); *General Motors v. NIOSH*, 636 F.2d 163, 165 (6th Cir. 1980), *cert. denied*, 454 U.S. 877 (1981). It is well-established that there exists no physician-patient evidentiary privilege under federal law. *Gilbreath v. Guadalupe*, 5 F.3d at 791; *Hancock v. Dodson*, 958 F.2d 1367, 1373 (6th Cir. 1991); *In re Grand Jury Proceedings*, 801 F.2d 1164, 1169 (9th Cir. 1986); *see Whalen v. Roe*, 429 U.S. 589, 602 n.28 (1977). Accordingly, Petitioner's privilege assertion is unavailing.

iii. Burden

In the event the Commission does not quash the CIDs as requested, Petitioner asks that the Commission: 1) impose limits upon the number of seminar attendees staff may contact; 2) require that Petitioner disclose only the names of those seminar attendees who authorize Petitioner to do so; and 3) rule that the sole contact between staff and seminar attendees be in the form of a deposition where Petitioner, as well as staff, may pose questions. Petitioner asserts that these limitations are necessary to "avoid unnecessarily burdening Petitioner's patients and irreparably damaging Petitioner's reputation and business."

The Commission need limit a CID only if the demand is "unduly burdensome or unreasonably broad." *FTC v. Texaco, Inc.*, 555 F.2d 862, 882 (D.C. Cir. 1977) (en banc)(emphasis in original), *cert. denied*, 431 U.S. 974 (1977). The Texaco court noted:

Some burden on subpoenaed parties is to be expected and is necessary in furtherance of the agency's legitimate inquiry and the public interest. . . . Thus courts have refused to modify investigative subpoenas unless compliance threatens to unduly disrupt or seriously hinder normal operations of a business.

Id. Moreover, this agency has previously required that allegations of harm to a petitioner's business be supported by a reasonable estimate of the cost of compliance and its relationship to the petitioner's ongoing business operations; speculative assertions are insufficient. *E.g.*, Brana Publishing Inc., Federal Trade Commission Letter Ruling Re: Petition to Quash Civil Investigative Demand, File No. 872 3209 (March 26, 1992) at 4-5; Hang-Ups Art Enterprises, Inc., Federal Trade Commission Letter Ruling Re: Petition to Limit or Quash Civil Investigative Demand, File No. 872 3209 (March 31, 1992) at 9. This requirement is based upon the recognition that the Commission's use of compulsory process would be vitiated if it were to acknowledge speculative fears of damage to corporate reputation. *FTC v. Invention Submission Corp.*, 1991-1 Trade Cas. (CCH) 969,338 at 65,353 (D.D.C. 1991), *aff'd*, 965 F.2d 1086 (D.C. Cir. 1992), *cert. denied*, 113 S. Ct. 1255 (1993).

Petitioner has submitted no information which would justify the conclusion that compliance with this request will unreasonably burden his business or damage his reputation. To the extent that Petitioner fears staff's mere contact with his clients, this burden is consistent with that "expected and . . . necessary in furtherance of the agency's legitimate inquiry and the public interest." *FTC v. Texaco, supra*. To the extent that Petitioner fears the manner in which staff may contact his clients, it is in the Commission's policy that staff should take care to avoid undue harm to a company's legitimate business interests; absent specific evidence to the contrary, it is assumed that staff will act in a manner consistent with this policy. HTI/ORHS South Seminole Joint Venture, Federal Trade Commission Letter Ruling Re: Petition to Quash or Limit Civil Investigative Demand, File No. 922 3278 (August 12, 1994) at 7 n.7.

We have also considered the interests of the persons to be identified pursuant to the CIDs. As we noted in HTI/ORHS South Seminole, the Commission is "cognizant of our obligation to promote the public interest, and to minimize any burden or adverse impact of the Commission's investigation on innocent third parties, even where that harm cannot be eliminated altogether." *Id.* at 5. As in that investigation, however, we conclude here that the Commission's interest in conducting a legitimate inquiry mandates disclosure of the identities of all of the seminar attendees. Unless staff is provided with the names of all persons who attended the seminars, it cannot

select an appropriate sample of patients to contact, in order to determine what representations were made at the various seminars. *Id.* at 6; *see FTC v. Invention Submission*, 1991-1 Trade Cas. at 65,352 n.24 (where representations to clients are at issue, full client lists are needed to allow agency to poll a statistically valid sample).

Nor do we consider it appropriate or necessary to impose the requested limitations on the manner in which the contacts are initiated. In HTI/ORHS South Seminole, we found that there was a need to preserve the privacy interests of minors who had contacted a psychiatric hot-line. The Commission was aware that some of those children had called to report parental abuse, and others had called to discuss drug abuse (a matter subject to special statutory protections). Accordingly, the Commission's ruling required that staff initiate contact with the minors via a general letter accompanied by a reply form, and permitted staff to contact only those persons who returned the reply form indicating consent to being contacted. *Id.* at 7 n.8. The instant investigation simply does not raise the sensitivities presented in HTI/ORHS South Seminole, and we decline to limit the manner in which staff contacts the seminar attendees.

Petitioner also seeks to require that staff conduct full-scale investigational hearings, including live testimony, of any patient contacted. There is no precedent to support such an approach, which would unnecessarily burden potential witnesses and hamstring staff's ability to conduct a proper and expeditious investigation.

B. Informed Consent Forms

Petitioner finally requests that the Commission quash or limit Specification 1 of the CID for documents. This Specification seeks:

All of petitioner's informed consent forms, whether titled "Treatment Agreement" or otherwise, provided to patients or potential patients from March, 1992 to the present.

Petitioner asserts that the FTC has no jurisdiction to seek documents that pertain to Petitioner's advertising about the side effects of using prescription fertility drugs. In this regard, Petitioner asserts that Section 502(n) of the Federal Food Drug & Cosmetic Act ("FFDCA"), 21 U.S.C. 352(n), wholly divests the FTC of statutory

authority to regulate any statements in prescription drug advertising concerning side effects.

Section 502(n) of the FFDCFA grants the Food and Drug Administration ("FDA") jurisdiction over certain prescription drug advertising. It provides that a drug or device is misbranded unless the manufacturer, packer, or distributor thereof includes certain information in all advertisements and other descriptive printed matter issued or caused to be issued by the manufacturer, packer, or distributor. That section goes on to state that:

[N]o advertisement of a prescription drug, published after the effective date of regulations issued under this section applicable to advertisements of prescription drugs, shall with respect to the matters specified in this subsection or covered by such regulations, be subject to the provisions of Sections 52 to 57 of Title 15 [*i.e.*, Sections 12 to 17 of the FTC Act].

Considered in context, the stated exemption from jurisdiction under FTC Act Sections 12 through 17 applies only to those advertisements over which the FDA has jurisdiction, that is, those issued by a manufacturer, packer or distributor.⁶ The exemption from FTC jurisdiction therefore does not apply to representations of a physician, such as an informed consent form.⁷ Accordingly, the FTC retains jurisdiction to seek the documents described by Specification 1, even assuming they contain advertising by Petitioner about the side effects of using prescription drugs.

III. Conclusion

For the foregoing reasons, the Petition to Limit or Quash Civil Investigative Demands is denied in its entirety. Petitioner is directed to comply with the Civil Investigative Demands on or before 5:00 p.m. on November 4, 1994.

⁶ The FDA's regulations implementing this section of the FFDCFA apply only to advertisements issued or caused to be issued by the manufacturer, packer or distributor of the drug promoted by the ad. 21 CFR 202.1(k).

⁷ Petitioner asserts that *United States v. Evers*, 643 F.2d 1043 (5th Cir. 1981), supports the conclusion that doctors can be, considered "distributors" under 21 U.S.C. 352(n). This decision interprets a different section of the FFDCFA and is inapplicable. Moreover, the legislative history of 21 U.S.C. 352(n) indicates an intention to "prevent physicians from being misled by deceptive advertising," because "when a doctor is misled his patient's health is endangered." S. Rep. No. 1744 (1962), *reprinted in* 1962 U.S.C.C.A.N. 2884, 2900, 2903. Accordingly, it seems highly unlikely that Congress intended the term "distributor," as used in 21 U.S.C. 352(n), to include physicians.

Re: Request of Mortgage Credit Reports, Inc. for Review by Full Commission of Letter Ruling Denying the Petition to Quash Four Civil Investigative Demands. File No. 922-3339.

November 7, 1994

Dear Mr. Blanton:

The Commission has considered (a) the Petition to Quash Civil Investigative Demands ("Petition"), which you filed on behalf of your client, Mortgage Credit Reports, Inc. ("Petitioner") on July 28, 1994; (b) the letter ruling dated August 26, 1994, denying the Petition; and (c) the Petition for Commission Review filed by Petitioner on September 9, 1994 ("Review Petition").

The letter ruling denied the Petition in its entirety for the reasons stated therein. To the extent that the Review Petition raises some of the same issues as the Petition by contesting the letter ruling's factual statements regarding the degree of Petitioner's cooperation with the Commission staff and by claiming a right to confront persons that have made complaints against the Petitioner, the Petition was properly denied for the reasons stated in the August 26 letter ruling. The Review Petition contends that the Petitioner cannot be required or compelled to be a witness against itself and that this right is available because of the criminal penalties imposed by sections 1681q and 1681r of the Fair Credit Reporting Act ("FCRA").

The Commission is not required to, and normally would not, consider new arguments raised on appeal. *See* 16 CFR 2.7(d). In light of the unexpected hospitalization and ongoing convalescence of Petitioner's counsel, however, the letter ruling allowed Petitioner to file additional material for the Commission to consider with any request for Commission review of the ruling. Accordingly, the Commission has considered Petitioner's Fifth Amendment self-incrimination objection to the civil investigative demands ("CIDs").

The Fifth Amendment right against self-incrimination provides no basis for Petitioner's blanket refusal to respond to the CIDs. It is well-established that the right against self-incrimination does not apply to corporations. *Braswell v. United States*, 487 U.S. 99, 110 (1988) (custodian of corporate records was not entitled to resist

subpoena on grounds of self-incrimination, because the custodian's production of documents is an act of the corporation, which has no such privilege). *See also Thomas v. Tyler*, 841 F. Supp. 1119, 1127-28 (D. Kan. 1993) (under "collective entity doctrine," an individual cannot invoke the Fifth Amendment to avoid producing documents of a corporation or other collective entity in his custody, even if the act of production might be personally incriminating). Moreover, the Fifth Amendment privilege against self-incrimination applies only to compelled testimonial communications, not to pre-existing documents voluntarily created in the course of business. *Fisher v. United States*, 425 U.S. 391, 408-09 (1976); *Aviation Supply Corp. v. R.S.B.I. Aerospace, Inc.*, 999 F.2d 314, 317 (8th Cir. 1993).

An assertion that the mere act of producing requested documents or that the testimony of the Petitioner's corporate Vice President or Profit and Loss Supervisor may incriminate a person entitled to assert the privilege must be supported by a showing that there is a real -- not remote or speculative -- danger of self-incrimination. *Estate of Fisher v. C.I.R.*, 905 F.2d 645, 649 (2d Cir. 1990). The person asserting the privilege must show the incriminating nature of the particular information sought and an objectively reasonable fear of criminal prosecution. *United States v. Sharp*, 920 F.2d 1167, 1170-71 (4th Cir. 1990). *See also United States v. Argomaniz*, 925 F.2d 1349, 1355 (11th Cir. 1991) (requiring that assertion of privilege be supported with respect to each particular response or document withheld).

No such showing has been made here. The criminal penalties cited by Petitioner do not apply to the provision of information to the Commission in its investigation. Instead, the FCRA authorizes the Commission to require the production of documents and the testimony of witnesses relating to the Commission's investigation of possible law violations. *See* 15 U.S.C. 49, 1681s; *FTC v. Manager, Retail Credit Co., Miami Branch Office*, 515 F.2d 988 (D.C. Cir. 1975) (Commission need not obtain order or permission of affected consumers to compel disclosure of consumer reports from consumer reporting agencies).

Accordingly, for the reasons set forth above, the full Commission denies the Review Petition in its entirety and concurs in, and hereby adopts, the August 26 letter ruling in this matter. The filing of the Review Petition did not stay the return dates set forth in the letter ruling. 16 CFR 2.7(f). Because the return dates for the CIDs for docu-

mentary materials and written interrogatories have expired, the Commission directs Petitioner to comply immediately with those CIDs and to comply as specified by the letter ruling with the CIDs for oral testimony.

Commissioner Varney not participating.

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