

FEDERAL TRADE COMMISSION
DECISIONS

FINDINGS, OPINIONS AND ORDERS
JULY 1, 1995 TO DECEMBER 31, 1995

PUBLISHED BY THE COMMISSION

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MEMBERS OF THE FEDERAL TRADE COMMISSION

DURING THE PERIOD JULY 1, 1995 TO DECEMBER 31, 1995

ROBERT PITOFSKY, *Chairman*
Took oath of office April 12, 1995.

MARY L. AZCUENAGA, *Commissioner*
Took oath of office November 27, 1984.

JANET D. STEIGER, *Commissioner*
Took oath of office August 11, 1989.

ROSCOE B. STAREK, III, *Commissioner*
Took oath of office November 14, 1990.

CHRISTINE A. VARNEY, *Commissioner*
Took oath of office October 14, 1994.

DONALD S. CLARK, *Secretary*
Appointed August 28, 1988.

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FEDERAL TRADE COMMISSION DECISIONS

Findings, Opinions, and Orders

IN THE MATTER OF

THE HOSPITAL BOARD OF DIRECTORS OF LEE COUNTY

Docket 9265. Interlocutory Order, July 7, 1995

ORDER SUA SPONTE DISMISSING PROCEEDING

On April 29, 1994, the Commission filed an action in federal district court under Section 13(b) of the FTC Act, 15 U.S.C. 53(b), for a preliminary injunction, pending completion of an administrative proceeding, to prevent respondent, The Hospital Board of Directors of Lee County d/b/a/ Lee Memorial Hospital ("The Hospital Board"), from acquiring the assets of Cape Coral Hospital from West Coast Health System, Inc. and Cape Coral Medical Center, Inc. (collectively "Cape Coral"). *FTC v. Hospital Board of Directors of Lee County*, 1994-1 Trade Cas. (CCH) ¶ 70,593 (M.D. Fla. 1994). Shortly thereafter, on May 6, 1994, the Commission issued an administrative complaint charging that the acquisition was likely substantially to lessen competition among acute care hospitals in Lee County, Florida, in violation of Section 7 of the Clayton Act, 15 U.S.C. 18.

Although the district court initially granted the Commission's request for a temporary restraining order, the court subsequently dissolved the restraining order and dismissed the Commission's complaint for preliminary relief on state action grounds, finding that The Hospital Board's acquisition of its competitor was pursuant to a clearly articulated state policy expressed in The Hospital Board's enabling legislation. 1994-1 Trade Cas. at 72,220. Acting in response to an emergency motion by the Commission, the United States Court of Appeals for the Eleventh Circuit stayed the district court's order dissolving the temporary restraining order pending an expedited appeal. On November 30, 1994, the appellate court affirmed the district court's decision, finding the requisite clearly articulated state policy in The Hospital Board's special enabling legislation and in the unique historical facts surrounding 1987 amendments to the enabling legislation. *FTC v. Hospital Board of Directors of Lee County*, 38 F.3d 1184, 1191-92 (11th Cir. 1994).

The Commission concluded there were substantial errors in the appellate court's analysis and application of the state action doctrine, and therefore immediately filed a petition for rehearing and suggestion for rehearing *en banc*. In February 1995, while the petition was pending, Cape Coral terminated its acquisition agreement with The Hospital Board and entered into a definitive asset acquisition agreement with Health Management Associates, Inc., a corporation that did not at that time own or operate any hospital in the Lee County market alleged in the Commission's complaint. On or about February 17, 1995, the Commission brought this development to the attention of the appellate court, noting that the change in circumstances effectively rendered the Commission's action for a preliminary injunction moot. The Commission observed that no court could any longer properly enjoin The Hospital Board from acquiring Cape Coral, since Cape Coral had terminated its agreement with The Hospital Board and had agreed to be acquired by another party. The Commission advised the court that the proper course of action was to dismiss the Commission's appeal and vacate the prior decisions because the Commission, through no fault of its own, was being denied an opportunity to pursue its appellate remedies. *Anderson v. Green*, 115 S. Ct. 1059 (1995); *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 115 S. Ct. 386, 391 (1994); *United States v. Munsingwear, Inc.*, 340 U.S. 36, 40 (1950). On March 9, 1995, the court denied the Commission's petition for rehearing and suggestion for rehearing *en banc*. On March 15, 1995, the court, without comment, rejected the Commission's motion to dismiss and vacate.

The Commission has determined that it is not in the public interest either to seek *certiorari* from the Eleventh Circuit's denial of vacation or to continue this proceeding through hearings before the Administrative Law Judge and any possible subsequent appeals.¹ The Commission undertook both the court action and this proceeding to protect competition in the provision of hospital services in Lee

¹ In dismissing this proceeding on public interest grounds, the Commission does not express any opinion on whether principles of collateral estoppel would bar prosecution of the administrative proceeding. While "[t]he doctrine of collateral estoppel prohibits relitigation of an issue of fact or law that has been decided in earlier litigation," *SEC v. Bilzerian*, 29 F.3d 689, 693 (D.C. Cir. 1994), it is a doctrine that may not always be applied rigidly and blindly. See *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 350 (1971). Here, the Commission was precluded from pursuing its appeals through no fault of its own, and the Commission undertook every reasonably available step to preserve its appeal rights. See e.g., *United States v. Munsingwear, Inc.*, 340 U.S. at 40; IB James W. Moore, *Moore's Federal Practice* ¶ 0.416 [6], at III-349-50 (2d ed. 1995).

County, Florida. Had the Commission ultimately found the transaction unlawful, the best possible relief for consumers in Lee County would have been the sale of Cape Coral to a third party. Since that is precisely what has happened, further proceedings cannot better accomplish the Commission's principal law enforcement objective. Thus, the Commission does not think there is adequate reason to continue additional adjudicative proceedings against The Hospital Board.

Because application of the "clear articulation" prong of the state action doctrine necessarily turns upon the specific statutory scheme applicable to each case, any determination by the Commission about the conduct of future cases must and will be made on an individual basis.

For these reasons, the Commission believes that the public interest would not be served by additional proceedings. Although the Commission continues to disagree with the appellate court's analysis and application of the state action doctrine, the Commission will neither seek *certiorari* in the court proceeding nor pursue an administrative trial. The Commission believes that the public interest would be best served by the Commission's waiting for some future opportunity to advance its position on the state action issue.

Accordingly, *It is hereby ordered*, That this matter be dismissed.

Commissioner Azcuenaga concurring in the result.

CONCURRING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

I have voted against authorizing the action to seek a preliminary injunction to block the subject transaction, against authorizing the appeal from the district court decision, against petitioning the Court of Appeals for rehearing, and against the issuance of the administrative complaint. I concur in the Commission's decision now to dismiss the complaint, but do not join the Commission's order.

Interlocutory Order

120 F.T.C.

IN THE MATTER OF

NEW BALANCE ATHLETIC SHOES, INC.

*Docket 9268. Interlocutory Order, July 10, 1995*ORDER TO STAY PROCEEDINGS
AND SHOW CAUSE

In view of both the Commission's determination to conduct public proceedings respecting its "Made in USA" enforcement standard and the Commission's action of today's date in Hyde Athletic Industries, Inc., File No. 922-3236, the Commission is considering whether the public interest warrants amendment or dismissal of the complaint and notice of contemplated relief in this matter.

Accordingly, *It is hereby ordered*, That all proceedings in this matter, other than those contemplated herein, are hereby stayed pending further order of the Commission.

It is further ordered, That the parties shall show cause why the complaint and notice of contemplated relief in this matter should not be amended in accordance with the attached form of complaint, or dismissed. The parties shall, on or before August 9, 1995, serve and file a responsive brief to this order. Complaint counsel shall, within fifteen (15) days of service of respondent's brief, file a response to respondent's submission. Respondent shall, within fifteen (15) days of service of complaint counsel's responsive brief, file a reply brief. Respondent may, at any time on or before August 9, 1995, file a motion to withdraw this matter from adjudication for purposes of discussing resolution of this matter, in which event the Secretary shall issue an order withdrawing this matter from adjudication and the application of Commission Rule of Practice 4.7, 16 CFR 4.7, shall thereby be suspended.

Commissioner Starek dissenting.

COMPLAINT

The Federal Trade Commission, having reason to believe that New Balance Athletic Shoe, 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 New Balance Athletic Shoe, Inc., is a Massachusetts corporation which manufactures and sells footwear. Its principal office or place of business is located at 38 Everett Street, Boston, Massachusetts.

PAR. 2. Respondent has manufactured, assembled, advertised, labeled, offered for sale, sold, and distributed athletic and other footwear to consumers.

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 print and television advertising and product labeling, and other promotional materials for footwear including, but not necessarily limited to, the attached Exhibits 1-5.

The "Mr. President" print advertisement (Exhibit 1) states:

"Here's one American-made vehicle that has no problem competing in Japan."

"Not only that, they're made right here in the USA."

The "Competition" print advertisement (Exhibit 2) states:

"If we can make great athletic shoes in America, why can't our competition?"

"New Balance is the only company that makes a full line of athletic shoes here in America."

The "Los Angeles" print advertisement (Exhibit 3) states:

"This American-made transportation system..."

"Mayor Bradley, perhaps you should consider New Balance athletic shoes. Not only are they made here in the USA...."

The "Junk" print advertisement (Exhibit 4) states:

"Who says buying American has to mean buying junk?"

"New Balance athletic shoes are one American-made product that's worth buying."

"The Japanese buy hundreds of thousands of pairs a year."

The "Mr. President" television advertisement (Exhibit 5) states:

"Here's one American made vehicle that has no problem competing in Japan."

"MADE IN USA"

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 1-5, respondent has represented, directly or by implication, that all New Balance athletic shoes are made in the United States.

PAR. 6. In truth and in fact, a substantial amount of New Balance athletic shoes is wholly made in foreign countries. 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 advertisements referred to in paragraph four, including, but not necessarily limited to, the advertisement attached as Exhibit 4, respondent has represented, directly or by implication, that it annually exports to Japan hundreds of thousands of pairs of athletic shoes that are made in the United States.

PAR. 8. In truth and in fact, respondent does not annually export to Japan hundreds of thousands of pairs of athletic shoes that are made in the United States. Fewer than 10,000 pairs of respondent's athletic shoes are made in the United States and exported to Japan each year. 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.

NOTICE

Notice is hereby given to the respondent hereinbefore named that the [] day of [], A.D., 19 , at a.m. o'clock is hereby fixed as the time and the Federal Trade Commission Offices, 6th Street & Pennsylvania Avenue, N.W., Washington, D.C., as the place when and where a hearing will be had before an Administrative Law Judge of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under said Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in the complaint.

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the thirtieth (30th) day after service of it upon you. An answer in which the allegations of the complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific admissions, denial, or explanation of each fact alleged in the complaint or, if you are without knowledge thereof, a statement to

that effect. Allegations of the complaint not thus answered shall be deemed to have been admitted.

If you elect not to contest these allegations of fact set forth in the complaint, the answer shall consist of a statement that you admit all the material allegations to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint, and together with the complaint provide a record basis on which the Administrative Law Judge shall file an initial decision containing appropriate findings and conclusions and an appropriate order disposing of the proceeding. In such answer you may, however, reserve the right to submit proposed findings and conclusions and the right to appeal the initial decision to the Commission under Section 3.52 of the Commission's Rules of Practice for Adjudicative Proceedings.

Failure to answer within the time above provided shall be deemed to constitute a waiver of your right to appear and contest the allegations of the complaint and shall authorize the Administrative Law Judge, without further notice to you, to find the facts to be as alleged in the complaint and to enter an initial decision containing such findings, appropriate conclusions and order.

The following is the form of order which the Commission has reason to believe should issue if the facts are found to be as alleged in the complaint. If, however, the Commission should conclude from record facts developed in any adjudicative proceeding in this matter that the proposed order provisions as to New Balance Athletic Shoe, Inc., a corporation, might be inadequate to fully protect the consuming public, the Commission may order such relief as it finds necessary or appropriate.

ORDER

I.

It is ordered, That respondent, New Balance Athletic Shoe, 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 footwear 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:

1. That all of its footwear is made in the United States.
2. The quantity of footwear it exports.

II.

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.

III.

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 or placement of advertisements, promotional materials, product labels or other such sales materials covered by this order.

IV.

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.

V.

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 witness whereof, the Federal Trade Commission has caused this complaint to be signed by its Secretary and its official seal to be hereto affixed at Washington, D.C. this _____ day of _____, _____.

Interlocutory Order

120 F.T.C.

EXHIBIT 1

B159447

Mr. President:
Here's one
American-made vehicle
that has no problem
competing in Japan.



Perhaps while jog-
ging in Tokyo's
Palace Gardens.

Mr. President, you
noticed that an awful lot of Japanese people (over
1,000,000 at last count) wear New Balance athletic shoes.

New Balance shoes come in a full range of widths.
Mr. President, This means they deliver a perfect fit—
no matter how wide or narrow your feet happen to be.
Mr. President, they're made right here in the USA.

It may go to prove, Mr. President, that when you
find a product people really truly need, something
amazing happens. People buy it.

new balance **AB**
MADE IN THE U.S.A.

EXHIBIT 2

B159447



If we can make
great athletic shoes
in America,
why can't
our competition?

© 1997 New Balance Athletic Shoe, Inc. All rights reserved. New Balance is a registered trademark of New Balance Athletic Shoe, Inc. in the United States and other countries. All other trademarks are the property of their respective owners.

new balance **NB**

Interlocutory Order

120 F.T.C.

EXHIBIT 3

B159447

Mayor Bradley:
 This American-made
 transportation system
 could reduce smog,
 eliminate traffic, and save
 you \$122,000,000.



...pend all that money and new commuter train Mayor Bradley
 ...and write off the ...
 ...range of widths
 ...narrow your feet
 ...and
 ...and
 ...and

new balance **AB**
 ...

Interlocutory Order

EXHIBIT 4

B159447



New Balance athletic shoes are one American-made product that's worth buying.

The Japanese buy hundreds of thousands of pairs a year. The German consumer newsletter *Markt Intern* ranks New Balance as the top

Who says buying
American has to mean
buying junk?

American brand. And the Made In America Foundation included New Balance in its recent collection of the best American products.

The fact is, Americans have been wearing New Balance shoes since 1906. Not just because it shows how they feel about their country, but because it shows how they feel about their feet.

new balance **NB**

Interlocutory Order

120 F.T.C.

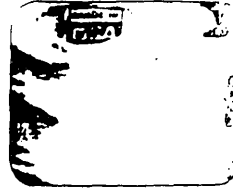
EXHIBIT 5



MUSIC/SFX:



1st MALE ANNCR: Dear Mr. President:



Here's one American made vehicle that has no problem.



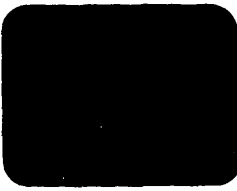
Competing in Japan



Mr. ...



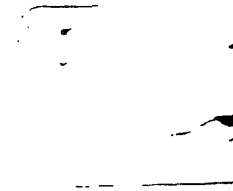
MUSIC/SFX IN & OUT:



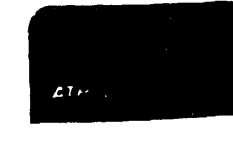
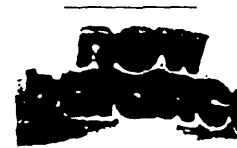
SFX: TENNIS:



2nd MALE ANNCR: When you don't pay tennis stars



to wear your shoes



DISSENTING STATEMENT OF COMMISSIONER ROSCOE B. STAREK, III

I have voted against this motion for the reasons set forth in my statement explaining my vote in *Hyde Athletic Industries, Inc.*, File No. 922-3236.

DISSENTING STATEMENT OF COMMISSIONER ROSCOE B. STAREK, III

I oppose rejecting the consent order in this matter. The public comments on the consent agreement confirm that "Made in USA" claims are highly material to consumers. No commenter has come forward with evidence of consumer understanding that contradicts or even calls into question the evidence relied upon by the Commission when it accepted the consent agreement for comment. Nor did any of the commenters suggest that the claims made by the proposed respondent were not deceptive.

I continue to believe that case-by-case litigation is the appropriate forum for evaluating "Made in USA" claims. If consumer understanding of "Made in USA" claims varies from industry to industry or supports some other standard, the most promising way to develop that evidence is by copy testing the particular ads at issue in individual cases, not by conducting workshops.

Many commenters argue, in effect, that the existing standard for unqualified "Made in USA" claims is outdated, too high, and too difficult to meet in a global economy in which nearly all products contain a significant amount of imported parts or materials. They contend that firms that employ American labor should be able to benefit from the strong consumer appeal of an unqualified "Made in USA" claim, so long as their products contain at least 50% U.S. labor and materials.

Encouraging the creation and retention of jobs in the United States is a laudable goal and one I fully support. But whether relaxing the standard for unqualified "Made in USA" claims would have that effect is unclear and, more important, falls far outside the public interest inquiry normally made by the Commission as a law enforcement agency. According to the evidence we have now, weakening the existing standard would allow the deception of a significant number of reasonable consumers and would not reduce the

costs of compliance.¹ The "all or virtually all" standard used in the proposed complaint and consent order is supported by the results of the 1991 copy test placed on the public record today and is consistent with the Commission's previous decisions and order.² It appropriately recognizes that a very small percentage of imported components in a product assembled in the United States will not preclude an unqualified "Made in USA" claim. It is also consistent with the Commission's general approach of not reading qualifications into an unqualified claim. Nothing in the proposed consent order would prohibit adequately qualified claims that products manufactured in the United States with higher levels of foreign components are "Made in USA." The safe harbors set forth in the proposed order illustrate some of the ways in which a "Made in USA" claim may be qualified to avoid deceiving consumers.

Accordingly, I cannot support authorizing the staff to conduct a "comprehensive review . . . of domestic content claims" to the extent that it would be a broad inquiry into why adopting a weaker standard for unqualified "Made in USA" claims is good public policy.

The commenters also seek guidance from the Commission on the level of substantiation that the Commission will require for "Made in USA" claims, including methods of calculating domestic content, and how much flexibility the Commission will use in enforcing a "virtually all" standard. I agree that such guidance would be useful and could reduce the costs of complying with the standard. Further review of these issues, however, does not warrant rejecting the consent agreement. The Commission frequently undertakes reviews to reduce uncertainties about its enforcement policies, and issues enforcement policy statements or guides, without dropping enforcement efforts against clear violations of law in the interim.

¹ Many commenters pointed to the difficulties associated with calculating domestic content. These difficulties, however, exist regardless of whether the standard is 50% or some other amount. Indeed, setting the standard at 50% is likely to increase industry's compliance costs, because it will be far more difficult to ascertain whether a product has at least 50% domestic content than whether it is "all or virtually all" domestic.

² See, e.g., *Windsor Pen Corp.*, 64 FTC 454 (1964); *Joseph H. Meyer Bros.*, 47 FTC 49 (1950). Similarly, the Commission's rules implementing statutory labeling requirements for textile products and wool products restrict unqualified "Made in USA" labels to those items "completely made in the United States of material that were made in the United States." Rules and Regulations Under the Textile Fiber Products Identification Act, 16 CFR 303.33 (1995); Rules and Regulations Under the Wool Products Labeling Act of 1939, 16 CFR 300.25a (1995).

This case presents us with a clear violation of Section 5 of the FTC Act disseminated in widespread national ad campaign. It does not turn upon whether a particular method of calculating domestic content is reasonable.

Set Aside Order

120 F.T.C.

IN THE MATTER OF

HARLEY-DAVIDSON MOTOR CO.

SET ASIDE ORDER IN REGARD TO ALLEGED VIOLATION OF
SEC. 3 OF THE CLAYTON ACT AND THE
FEDERAL TRADE COMMISSION ACT*Docket 5698. Consent Order, June 29, 1954--Set Aside Order, July 11, 1995*

The Federal Trade Commission has set aside a 1954 consent order with Harley-Davidson Motor Co., (50 FTC 1047), pursuant to the Commission's Sunset Policy, under which the Commission presumes, in the context of petitions to reopen and modify orders, that the public interest requires terminating competition orders that have been in effect for more than 20 years.

ORDER REOPENING PROCEEDING
AND SETTING ASIDE ORDER

On February 8, 1995, Harley-Davidson Motor Company ("Harley-Davidson"), the respondent subject to the order issued by the Commission on June 29, 1954, in Docket No. 5698, in the matter of *Harley-Davidson Co.*, 50 FTC 1047 (1954) ("order"), filed a Petition to Reopen Proceedings and Set Aside Cease and Desist Order ("Petition"). Among other things, Harley-Davidson requests that the Commission set aside the order in this matter pursuant to Section 2.51 of the Commission's Rules of Practice, 16 CFR 2.51, and the Statement of Policy With Respect to Duration of Competition Orders and Statement of Intention to Solicit Public Comment With Respect to Duration of Consumer Protection Orders, issued on July 22, 1994, and published at 59 Fed. Reg. 45,286-92 (Sept. 1, 1994) ("Sunset Policy Statement"). In the Petition, Harley-Davidson affirmatively states that it has not engaged in any conduct violating the terms of the order. The Petition was placed on the public record, and close to 200 comments were received.¹

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

¹ To accommodate numerous requests to provide additional time to prepare and submit written comments concerning Harley-Davidson's Petition, the Commission extended the initial public comment period in this matter by thirty days.

in effect for more than twenty years."² The Commission's order in Docket No. 5698 was issued on June 29, 1954, and has been in effect for over twenty years. Consistent with the Sunset Policy Statement, the presumption is that the order should be terminated. Nothing to overcome the presumption having been presented, the Commission has determined to reopen the proceeding and set aside the order in Docket 5698.

In light of some of the commenters' belief that granting Harley-Davidson's Petition would be commensurate with allowing it to engage in conduct that may violate the antitrust laws, and their concern that Harley-Davidson may use certain marketing practices to engage in unlawful conduct in the event the Commission sets aside the order in Docket No. 5698, the Commission notes that Harley-Davidson's conduct would continue to be subject to a case-by-case, rule of reason analysis under the antitrust laws. Harley-Davidson's conduct would also continue to be subject to state motor vehicle dealer protection laws.

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. 5698 be, and it hereby is, set aside, as of the effective date of this order.

² Sunset Policy Statement, 59 Fed. Reg. at 45289.

Complaint

120 F.T.C.

IN THE MATTER OF

REEBOK INTERNATIONAL LTD., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3592. Complaint, July 18, 1995--Decision, July 18, 1995*

This consent order prohibits, among other things, a Massachusetts corporation and its subsidiary from fixing, controlling or maintaining the resale prices at which any dealer may advertise, promote, offer for sale or sell any Reebok or Rockport product. The consent order also prohibits, for a period of ten years, the respondents from enforcing or threatening suspension or termination of a dealer that sells or advertises a product below a resale price designated by Reebok or Rockport.

Appearances

For the Commission: *Alan Loughnan, Michael Bloom and William Baer.*

For the respondents: *David Martland, Hutchinson, Wheeler & Dittmar, Boston, MA.*

COMPLAINT

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

PARAGRAPH 1. Respondent Reebok International Ltd. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Massachusetts, with its principal place of business located at 100 Technology Center Drive, Stoughton, Massachusetts. Respondent The Rockport Company, Inc. is a corporation organized, existing and doing business under and by

virtue of the laws of the State of Massachusetts, with its principal place of business located at 202 Donald Lynch Boulevard, Marlboro, Massachusetts.

PAR. 2. Respondents are now, and for some time have been, engaged in the offering for sale, sale, and distribution of athletic or casual footwear to retail dealers located throughout the United States, including many of the nation's largest retail chains.

PAR. 3. Respondents maintain, and have maintained, a substantial course of business, including the acts or practices alleged in the complaint, which are in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In connection with the sale and distribution of Reebok and Rockport branded products, respondents, in combination, agreement and understanding with certain of their dealers, have engaged in a course of conduct to maintain the resale prices at which dealers sell their products.

PAR. 5. The purpose, effect, tendency, or capacity of the acts and practices described in paragraph four are and have been to restrain trade unreasonably and to hinder competition in the sale of athletic or casual footwear in the United States, and to deprive consumers of the benefits of competition in the following ways, among others:

- (a) Prices to consumers of Reebok and Rockport products have been increased; and
- (b) Price competition among retail dealers with respect to the sale of Reebok and Rockport products has been restricted.

PAR. 6. The aforesaid acts and practices 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 and practices are continuing and will continue in the absence of the relief requested.

Commissioner Starek voting in the negative.

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

1. Proposed respondents Reebok International Ltd. and The Rockport Company, Inc. are corporations organized, existing and doing business under and by virtue of the laws of the State of Massachusetts. The mailing address and principal place of business of proposed respondent Reebok International Ltd. is: 100 Technology Center Drive, Stoughton, Massachusetts. The mailing address and principal place of business of proposed respondent The Rockport Company, Inc. is: 220 Donald Lynch Boulevard, Marlboro, Massachusetts.

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 the purpose of this order, the following definitions shall apply:

(A) The term "*Reebok*" means Reebok International Ltd., its predecessors, subsidiaries, divisions, groups, and affiliates controlled by Reebok International Ltd., and its respective directors, officers, employees, agents, and representatives, and the respective successors and assigns of each.

(B) The term "*Rockport*" means The Rockport Company, Inc., its predecessors, subsidiaries, divisions, groups, and affiliates controlled by The Rockport Company, Inc., and its respective directors, officers, employees, agents, and representatives, and the respective successors and assigns of each.

(C) The term "*respondents*" means Reebok and Rockport.

(D) The term "*product*" means any athletic or casual footwear item which is manufactured, offered for sale or sold under the brand name of "Reebok" or "Rockport" to dealers or consumers located in the United States of America.

(E) The term "*dealer*" means any person, corporation or entity not owned by Reebok or Rockport, or by any entity owned or controlled by Reebok or Rockport, that in the course of its business sells any product in or into the United States of America.

(F) The term "*resale price*" means any price, price floor, minimum price, maximum discount, price range, or any mark-up formula or margin of profit used by any dealer for pricing any product. "Resale price" includes, but is not limited to, any suggested, established, or customary resale price.

II.

It is further ordered, That Reebok and Rockport, directly or indirectly, or through any corporation, subsidiary, division or other device, in connection with the manufacturing, offering for sale, sale or distribution of any product in or into the United States of America in or affecting "commerce," as defined by the Federal Trade

Commission Act, do forthwith cease and desist from, directly or indirectly:

(A) Fixing, controlling, or maintaining the resale price at which any dealer may advertise, promote, offer for sale or sell any product.

(B) Requiring, coercing, or otherwise pressuring any dealer to maintain, adopt, or adhere to any resale price.

(C) Securing or attempting to secure any commitment or assurance from any dealer concerning the resale price at which the dealer may advertise, promote, offer for sale or sell any product.

(D) For a period of ten (10) years from the date on which this order becomes final, adopting, maintaining, enforcing or threatening to enforce any policy, practice or plan pursuant to which respondents notify a dealer in advance that: (1) the dealer is subject to partial or temporary suspension or termination if it sells, offers for sale, promotes or advertises any product below any resale price designated by respondents, and (2) the dealer will be subject to a greater sanction if it continues or renews selling, offering for sale, promoting or advertising any product below any such designated resale price. As used herein, the phrase "partial or temporary suspension or termination" includes but is not limited to any disruption, limitation, or restriction of supply: (1) of some, but not all, products, or (2) to some, but not all, dealer locations or businesses, or (3) for any delimited duration. As used herein, the phrase "greater sanction" includes but is not limited to a partial or temporary suspension or termination of greater scope or duration than the one previously implemented by respondent, or complete suspension or termination.

Provided that nothing in this order shall prohibit Reebok and Rockport from announcing resale prices in advance and unilaterally refusing to deal with those who fail to comply. Provided further that nothing in this order shall prohibit Reebok and Rockport from establishing and maintaining cooperative advertising programs that include conditions as to the prices at which dealers offer products, so long as such advertising programs are not a part of a resale price maintenance scheme and do not otherwise violate this order.

III.

It is further ordered, That, for a period of five (5) years from the date on which this order becomes final, Reebok shall clearly and

conspicuously state the following on any list, advertising, book, catalogue, or promotional material where it has suggested any resale price for any product to any dealer:

ALTHOUGH REEBOK MAY SUGGEST RESALE PRICES FOR PRODUCTS, RETAILERS ARE FREE TO DETERMINE ON THEIR OWN THE PRICES AT WHICH THEY WILL ADVERTISE AND SELL REEBOK PRODUCTS.

IV.

It is further ordered, That, for a period of five (5) years from the date on which this order becomes final, Rockport shall clearly and conspicuously state the following on any list, advertising, book, catalogue, or promotional material where it has suggested any resale price for any product to any dealer:

ALTHOUGH ROCKPORT MAY SUGGEST RESALE PRICES FOR PRODUCTS, RETAILERS ARE FREE TO DETERMINE ON THEIR OWN THE PRICES AT WHICH THEY WILL ADVERTISE AND SELL ROCKPORT PRODUCTS.

V.

It is further ordered, That, within thirty (30) days after the date on which this order becomes final, Reebok shall mail by first class mail the letter attached as Exhibit A, together with a copy of this order, to all of its directors and officers, and to dealers, distributors, agents, or sales representatives engaged in the sale of any product in or into the United States of America.

VI.

It is further ordered, That, within thirty (30) days after the date on which this order becomes final, Rockport shall mail by first class mail the letter attached as Exhibit B, together with a copy of this order, to all of its directors and officers, and to dealers, distributors, agents, or sales representatives engaged in the sale of any product in or into the United States of America.

VII.

It is further ordered, That, for a period of two (2) years after the date on which this order becomes final, Reebok shall mail by first class mail the letter attached as Exhibit A, together with a copy of this order, to each new director, officer, dealer, distributor, agent, and sales representative engaged in the sale of any product in or into the United States of America, within ninety (90) days of the commencement of such person's employment or affiliation with Reebok.

VIII.

It is further ordered, That, for a period of two (2) years after the date on which this order becomes final, Rockport shall mail by first class mail the letter attached as Exhibit B, together with a copy of this order, to each new director, officer, dealer, distributor, agent, and sales representative engaged in the sale of any product in or into the United States of America, within ninety (90) days of the commencement of such person's employment or affiliation with Rockport.

IX.

It is further ordered, That Reebok or Rockport shall notify the Commission at least thirty (30) days prior to any proposed changes in Reebok or Rockport 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 corporations which may affect compliance obligations arising out of the order.

X.

It is further ordered, That, within sixty (60) days after the date this order becomes final, and at such other times as the Commission or its staff shall request, Reebok and Rockport shall file with the Commission a verified written report setting forth in detail the manner and form in which Reebok and Rockport have complied and are complying with this order.

XI.

It is further ordered, That this order shall terminate on July 18, 2015.

Commissioner Starek voting in the negative.

EXHIBIT A

[REEBOK LETTERHEAD]

Dear Retailer:

The Federal Trade Commission has conducted an investigation into Reebok's sales policies, and in particular Reebok's Centennial Plan, which was announced in November 1992 and whose retail pricing provisions have since been withdrawn. To expeditiously resolve the investigation and to avoid disruption to the conduct of its business, Reebok has agreed, without admitting any violation of the law, to the entry of a consent order by the Federal Trade Commission prohibiting certain practices relating to resale prices. A copy of the order is enclosed. This letter and the accompanying order are being sent to all of our dealers, sales personnel and representatives.

The order spells out our obligations in greater detail, but we want you to know and understand that you can sell and advertise our products at any price you choose. While we may send materials to you which contain suggested retail prices, you remain free to sell and advertise those products at any price you choose.

We look forward to continuing to do business with you in the future.

Sincerely yours,

President
Reebok International Ltd.

EXHIBIT B

[ROCKPORT LETTERHEAD]

Dear Retailer:

The Federal Trade Commission has conducted an investigation into Rockport's sales policies, and in particular Rockport's Suggested Retail Pricing Policy, which was announced in July 1992 and which, together with Rockport's subsequent "Marathon Policy," has since been withdrawn. To expeditiously resolve the investigation and to avoid disruption to the conduct of its business, Rockport has agreed, without admitting any violation of the law, to the entry of a consent order by the Federal Trade Commission prohibiting certain practices relating to resale prices. A copy of the order is enclosed. This letter and the accompanying order are being sent to all of our dealers, sales personnel and representatives.

The order spells out our obligations in greater detail, but we want you to know and understand that you can sell and advertise our products at any price you choose. While we may send materials to you which contain suggested retail prices, you remain free to sell and advertise those products at any price you choose.

We look forward to continuing to do business with you in the future.

Sincerely yours,

President
The Rockport Company, Inc.

DISSENTING STATEMENT OF COMMISSIONER ROSCOE B. STAREK, III

I find reason to believe that Reebok International, Ltd. ("Reebok") has engaged in resale price maintenance ("RPM") in violation of Section 5 of the FTC Act, 15 U.S.C. 45.¹ However, I dissent from the Commission's decision to approve the consent order in this matter because certain provisions of the order are not necessary to prevent unlawful conduct and may unduly restrain procompetitive activity by Reebok.

Under most circumstances, including those here, the competitive effects of RPM are ambiguous at worst, and a full rule of reason analysis likely would not reveal cognizable anticompetitive effects.² Therefore, I would prefer that injunctive relief ordered to address RPM be strictly tailored to the *per se* allegations. The fencing-in restrictions in this order -- related to resale price advertising (in subparagraphs II(A) and (C)) and to Reebok's "structured termination policy" (subparagraph II(D)) -- are unnecessarily broad and may enjoin efficient conduct.³

¹ See *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911) (RPM held unlawful upon mere proof of agreement).

² See, e.g., Pauline Ippolito, Resale Price Maintenance: Evidence From Litigation, 34 J.L. & Econ. 263 (1991). See also Kevin J. Arquit, Resale Price Maintenance: Friend or Foe?, 60 Antitrust L.J. 447 (1992).

³ Even if the evidence in this case suggests that Reebok's dealer advertising and termination policies supported RPM, deleting the related fencing-in injunctions likely would be procompetitive. The order should be revised to permit Reebok to exercise its lawful dealer termination rights and to engage in any procompetitive minimum advertised price programs "unless [this conduct] includes some agreement on price or price levels." *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 735-36 (1988).

Set Aside Order

120 F.T.C.

IN THE MATTER OF

RUBBER MANUFACTURERS ASSOCIATION, INC., ET AL.

SET ASIDE ORDER IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket 5448. Consent Order, Feb. 2, 1948--Set Aside Order, July 19, 1995*

The Federal Trade Commission has reopened a 1948 consent order (44 FTC 453) -- which prohibited the Association from formulating or enforcing resale price agreements, exchanging resale price information or entering into price-fixing agreements -- and has set aside the consent order as to respondent Rubber Manufacturers Association 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 AS TO RESPONDENT
RUBBER MANUFACTURERS ASSOCIATION, INC.

On March 17, 1995, Rubber Manufacturers Association, Inc. ("Rubber Manufacturers") one of forty-three respondents named in this consent order,¹ filed its Petition to Reopen and Set Aside Consent Orders ("Petition") in this matter. Rubber Manufacturers requests that the Commission set aside the 1948 consent order in this matter pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), Rule 2.51 of the Commission's Rules of Practice, 16 CFR 2.51, and the Statement of Policy With Respect to Duration of Competition Orders and Statement of Intention to Solicit Public Comment With Respect to Duration of Consumer Protection Orders, issued on July 22, 1994, and published at 59 Fed. Reg. 45,286-92 (Sept. 1, 1994) ("Sunset Policy Statement"). In the Petition, Rubber Manufacturers affirmatively states that it has not engaged in any conduct violating the terms of the order. The Petition was placed on the public record, and the thirty-day comment period expired on May 10, 1995. One comment, relating to general policy issues concerning the Commission's Sunset Policy Statement, was received.

¹ The remaining respondents did not petition the Commission to reopen and set aside the order as to them.

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."² The Commission's consent order in Docket No. 5448 was issued on February 2, 1948, and has been in effect for forty-seven years. Consistent with the Commission's July 22, 1994, Sunset Policy Statement, the presumption is that the order should be terminated. Nothing to overcome the presumption having been presented, the Commission has determined to reopen the proceeding and set aside the order in Docket No. 5448 as to respondent Rubber Manufacturers.

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

It is furthered ordered, That the Commission's order in Docket No. 5448 be, and it hereby is, set aside, as to respondent Rubber Manufacturers, as of the effective date of this order.

CONCURRING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

I concur in the decision to grant the request of the Rubber Manufacturers Association, Inc. to set aside the 1948 order in Docket No. D. 5448 and the 1962 order in Docket No. D. 7505. I dissent from the decision to limit the setting aside of the order to the association, instead of setting aside the order in its entirety.

The decision to limit relief to the Rubber Manufacturers Association, one of forty-three respondents under the order, appears to be inconsistent with the Commission's announced policy to presume "that the public interest requires reopening and setting aside the order in its entirety" (emphasis added) "when a petition to reopen and modify a competition order is filed" and the order is more than twenty years old.¹ The Commission's recognition of the limitations of the findings underlying an order² further suggests that the presumption that an order will be terminated after twenty years

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

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

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

should apply to the order in its entirety and not be limited to the petitioner.³

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

The petition filed by the Rubber Manufacturers Association invoked the twenty-year presumption that the order should be set aside. No evidence of recidivist conduct by any of the forty-three respondents, having been presented to overcome the presumption,⁵ the order should be set aside in its entirety.

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

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

⁵ See Sunset Policy Statement at 8 n.19.

IN THE MATTER OF

RUBBER MANUFACTURERS ASSOCIATION, INC., ET AL.

SET ASIDE ORDER IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 7505. Consent Order, Jan. 6, 1962--Set Aside Order, July 19, 1995

The Federal Trade Commission has reopened a 1962 consent order (60 FTC 89) -- which prohibited the Association from formulating or enforcing resale price agreements, exchanging resale price information or entering into price-fixing agreements -- and has set aside the consent order as to respondent Rubber Manufacturers Association 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 AS TO RESPONDENT
RUBBER MANUFACTURERS ASSOCIATION, INC.

On March 17, 1995, Rubber Manufacturers Association, Inc. ("Rubber Manufacturers"), one of seventeen respondents named in this consent order,¹ filed its Petition to Reopen and Set Aside Consent Orders ("Petition") in this matter. Rubber Manufacturers requests that the Commission set aside the 1962 consent order in this matter pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), Rule 2.51 of the Commission's Rules of Practice, 16 CFR 2.51, and the Statement of Policy With Respect to Duration of Competition Orders and Statement of Intention to Solicit Public Comment With Respect to Duration of Consumer Protection Orders, issued on July 22, 1994, and published at 59 Fed. Reg. 45,286-92 (Sept. 1, 1994) ("Sunset Policy Statement"). In the Petition, Rubber Manufacturers affirmatively states that it has not engaged in any conduct violating the terms of the order. The Petition was placed on the public record, and the thirty-day comment period expired on May 10, 1995. One comment, relating to general policy issues concerning the Commission's Sunset Policy Statement, was received.

¹ The remaining respondents did not petition the Commission to reopen and set aside the order as to them.

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."² The Commission's consent order in Docket No. 7505 was issued on January 6, 1962, and has been in effect for thirty-years. Consistent with the Commission's July 22, 1994, Sunset Policy Statement, the presumption is that the order should be terminated. Nothing to overcome the presumption having been presented, the Commission has determined to reopen the proceeding and set aside the order in Docket No. 7505 as to respondent Rubber Manufacturers.

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

It is furthered ordered, That the Commission's order in Docket No. 7505 be, and it hereby is, set aside, as to respondent Rubber Manufacturers, as of the effective date of this order.

CONCURRING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

I concur in the decision to grant the request of the Rubber Manufacturers Association, Inc. to set aside the 1948 order in Docket No. D. 5448 and the 1962 order in Docket No. D. 7505. I dissent from the decision to limit the setting aside of the order to the association, instead of setting aside the order in its entirety.

The decision to limit relief to the Rubber Manufacturers Association, one of forty-three respondents under the order, appears to be inconsistent with the Commission's announced policy to presume "that the public interest requires reopening and setting aside the order in its entirety" (emphasis added) "when a petition to reopen and modify a competition order is filed" and the order is more than twenty years old.¹ The Commission's recognition of the limitations of the findings underlying an order² further suggests that the presumption that an order will be terminated after twenty years

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

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

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

should apply to the order in its entirety and not be limited to the petitioner.³

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

The petition filed by the Rubber Manufacturers Association invoked the twenty-year presumption that the order should be set aside. No evidence of recidivist conduct by any of the forty-three respondents, having been presented to overcome the presumption,⁵ the order should be set aside in its entirety.

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

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

⁵ See Sunset Policy Statement at 8 n.19.

Complaint

120 F.T.C.

IN THE MATTER OF

R.R. DONNELLEY & SONS CO., ET AL.

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 9243. Complaint, Oct. 11, 1990--Final Order, July 21, 1995

This final order dismisses charges against R.R. Donnelley & Sons Co., the largest supplier of commercial printing services in the world, in connection with Donnelley's 1990 acquisition of Meredith/Burda Company L.P., on the grounds that the product market for analyzing the effects of the acquisition is not as narrow as alleged and that anticompetitive effects are unlikely. This action reverses the initial decision of the Commission's Administrative Law Judge and nullifies his order that Donnelley divest various printing plants.

Appearances

For the Commission: *Robert W. Doyle.*

For the respondents: *Elroy H. Wolff, Austin & Austin,*
Washington, D.C. and *H. Blair White and Thomas F. Ryan, Sidley & Austin,* Chicago, IL.

COMPLAINT

The Federal Trade Commission, having reason to believe that the respondent, R. R. Donnelley & Sons Co., ("Donnelley") a corporation subject to the jurisdiction of the Commission entered into agreements with respondents Meredith Corporation ("Meredith") and Pan Associates, Limited Partnership ("Pan"), that violated Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and that pursuant to those agreements, Donnelley has acquired certain business interests of the respondents Meredith and Pan in the Meredith/Burda Company Limited Partnership, and that such acquisition constitutes 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 it appearing that a proceeding in respect thereof would be in the public interest, the Commission hereby issues its complaint, pursuant to Section 11 of

the Clayton Act, 15 U.S.C. 21 and Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), stating its charges as follows:

I. THE PARTIES

A. *R. R. Donnelley & Sons Co.*

1. Respondent Donnelley is a corporation organized and doing business under the laws of the state of Delaware, with its principal place of business at 2223 Martin Luther King Drive, Chicago, Illinois.

2. In fiscal year 1988 Donnelley had sales of approximately \$2.878 billion and assets of \$2.249 billion.

3. Donnelley is primarily engaged in the provision of commercial printing services throughout the United States.

B. *Meredith Corporation*

4. Respondent Meredith is a corporation organized and doing business under the laws of the state of Iowa, with its principal place of business at 1716 Locust Street, Des Moines, Iowa.

5. Meredith owned 50% of the Meredith/Burda Co., L.P. ("Meredith/Burda") and the remaining 50% was owned by Pan Associates, L.P.

6. In fiscal year 1989, Meredith/Burda had net sales of approximately \$456 million.

7. Prior to and at the time of the acquisition, Meredith/Burda was primarily engaged in the provision of commercial printing services throughout the United States.

C. *Pan Associates, L.P.*

8. Pan is a limited partnership and a holding company for the Burda family, with its principal place of business at 1270 Avenue of the Americas, #1918, New York, New York.

II. JURISDICTION

9. At all times relevant herein, respondent Donnelley, has been, and is now, 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 affects commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

10. At all times relevant herein, respondent Meredith, has been, and is now, 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 affects commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

11. At all times relevant herein, respondent Pan, has been, and is now, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a partnership 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

12. On December 21, 1989, Donnelley, Meredith and Pan entered into a Purchase and Sale Agreement whereby Donnelley would acquire all of Meredith's and Pan's interests in Meredith/Burda in two transactions totalling \$570 million. The acquisition was consummated on or about September 4, 1990.

IV. NATURE OF TRADE AND COMMERCE

13. A relevant line of commerce or product market within which to analyze the effects of the acquisition is the supply of high volume publication gravure printing. Such printing is typically used for long runs of magazines, newspaper inserts and catalogs.

14. A relevant section of the country or geographic market within which to analyze the effects of the acquisition is the entire continental United States.

15. A second relevant section of the country or geographic market within which to analyze the effects of the acquisition is the region comprising twelve western states west of the Rockies: Arizona, California, Colorado, Hawaii, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming.

V. MARKET STRUCTURE

16. The acquisition substantially increased concentration in the already highly concentrated relevant markets, whether measured by the Herfindahl-Hirschmann Index or by four-firm and eight-firm concentration ratios.

VI. BARRIERS TO ENTRY

17. The barriers to entry into the provision and sale of the relevant product are substantial. Even if new entry were to occur, substantial harm to competition could occur until entry could be accomplished.

VII. ACTUAL COMPETITION

18. Prior to and at the time of the acquisition, Donnelley and Meredith/Burda were actual competitors in the provision and sale of the relevant product in the relevant geographic markets.

VIII. EFFECTS OF THE ACQUISITION

19. The effects of the aforesaid acquisition have been or may be substantially to lessen competition 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 Federal Trade Commission Act, as amended, 15 U.S.C. 45, in the following ways, among others:

- (a) It eliminated actual competition between Donnelley and Meredith/Burda and between Meredith/Burda and others in the relevant markets;
- (b) It significantly increased the already high levels of concentration in the relevant markets;
- (c) It created a firm whose share of the relevant markets is so high that it has achieved the position and market power of a dominant firm;
- (d) It eliminated Meredith/Burda as a substantial independent competitive force in the relevant markets; and

- (e) It increased the likelihood of successful anticompetitive conduct, non-rivalrous behavior, and actual or tacit collusion among the firms in the relevant markets.

IX. VIOLATIONS CHARGED

20. The acquisition of Meredith/Burda by Donnelley constitutes 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, 15 U.S.C. 45, as amended.

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

INITIAL DECISION

BY LEWIS F. PARKER, ADMINISTRATIVE LAW JUDGE
DECEMBER 30, 1993

I. PROCEDURAL HISTORY

Pursuant to 15 U.S.C. 53(b), the Commission moved for a preliminary injunction from the United States District for the District of Columbia to prevent R.R. Donnelley & Sons Co.'s ("Donnelley") acquisition of the Meredith/Burda Company Limited Partnership ("Meredith/Burda"). Following a hearing, the court denied the Commission's motion on the merits. *See FTC v. R.R. Donnelley & Sons Company*, 1990-2 Trade Cas. (CCH) ¶ 69,239 (D.D.C. 1990). Thereafter, on October 11, 1990, the Commission issued its complaint in this proceeding charging that Donnelley had entered into agreements with Meredith Corporation ("Meredith") and Pan Associates Limited Partnership ("Pan") that violated Section 5 of the Federal Trade Commission Act, ("FTC Act"), as amended, 15 U.S.C. 45, and that pursuant to these agreements Donnelley had acquired certain business interests of Meredith and Pan in Meredith/Burda, and that such acquisition violated Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, as well as Section 5 of the FTC Act.

The complaint alleges that Donnelley and Meredith/Burda are primarily engaged in the provision of commercial printing services throughout the United States, and that on or about September 4, 1990,

Donnelley acquired all of Meredith's and Pan's interests in Meredith/Burda.

The complaint claims that the challenged acquisition substantially increased concentration in an already highly concentrated relevant product market -- the supply of high volume publication gravure printing which is typically used for long runs of magazines, newspaper inserts and catalogs. The geographic markets are alleged to be the entire continental United States and the twelve states west of the Rockies.

The complaint concludes that the acquisition has had or will have the following effects:

1. Elimination of actual competition between Donnelley and Meredith/Burda and Meredith/Burda and others in the relevant markets.
2. A significant increase in already high levels of concentration in the relevant markets.
3. The creation of a dominant firm.
4. The elimination of Meredith/Burda as a substantial independent competitor in the relevant markets.
5. An increase in the likelihood of successful anticompetitive conduct, non-rivalrous behavior, and actual or tacit collusion among the firms in the relevant markets.

By stipulation, Meredith was dismissed as a respondent (Stipulation of April 19, 1991).

After extensive pretrial discovery, hearings were held in Washington, D.C. and Chicago, Illinois from January 25, 1993, to June 17, 1993.

During the trial, three experts testified for complaint counsel. They were:

Roy Hodgson, who has had 47 years of experience in the printing industry and who is currently a printing industry consultant (Tr. 114-35);¹ Dr. John Hilke, a Commission employee who is qualified as an

¹ Abbreviations used in this decision are:

Cplt: Complaint	Tr.: Transcript of the proceeding
Ans: Answer	F: Finding of fact
CPF: Complaint Counsel's proposed findings	CDX: Commission Demonstrative Exhibit
RPF: Respondent's proposed findings	RX: Respondent's Exhibit
CX: Commission Exhibit	

expert in industrial organization economics (Tr. 2985-86); and, Professor G.S. Maddala, an econometrician who is a scholar in residence at Ohio State University and Director of the Center For Econometrics at the University of Florida (Tr. 5723).

Respondents called two experts to testify:

Mr. Eugene Hoskins, a retired supervisor in Donnelley's printing department (Tr. 4981); and Dr. Jerry Hausman, a professor of economics at the Massachusetts Institute of Technology who is qualified as an expert in econometrics and applied microeconomics (Tr. 5180-82).

The parties filed their proposed findings of fact on September 17, 1993. Answers were filed on October 29, 1993. After ruling on several outstanding motions, I closed the record on October 8, 1993.

This decision is based on the transcripts of testimony, the exhibits which I received in evidence, and the proposed findings of fact and answers thereto filed by the parties. I have adopted several proposed findings verbatim. Others have been adopted in substance. All other findings are rejected either because they are not supported by the facts or because they are irrelevant.

Many documents and much testimony were received in camera. While I have honored the status of such information in many cases, I have, particularly with respect to Donnelley documents (Tr. 35-36), revealed it pursuant to Section 3.45(a) of the Rules of Practice.

II. FINDINGS OF FACT

A. *Donnelley*

1. Donnelley, a Delaware corporation whose headquarters are in Chicago, is the largest supplier of commercial printing services in the world (CX-4-B; CX-1157-Z-10). Donnelley provides both gravure and offset printing services (CX-4-D; CX-7-B); its major products include catalogs, newspaper inserts, magazines, books, directories, computer documentation and financial printing (CX-4-D; CX-1157-Z-10; CX-1455-D).

2. Prior to the Meredith/Burda acquisition, Donnelley had seven plants with gravure equipment in: Lancaster, PA (the Lancaster East plant); Gallatin, TN; Chicago, IL; Mattoon, IL; Spartanburg, SC; Warsaw, IN; and Reno, NV (CX-7-I). On January 28, 1993, Donnelley announced its intention to close the Chicago facility

whose primary customer was Sears (CX-1179-D; CX-1180-B; Tr. 4591). These plants contain a total of 57 gravure presses.

3. [] (CX-102-W-X) [] (CX-128-Z-58).

4. Donnelley's Graphic Services Division is primarily responsible for the printing and distribution of publications and contains the Catalog Group (which prints catalogs and newspaper inserts), the Magazine Group, the Telecommunications Group (which prints telephone and other directories) and the Book Group (CX-1245-B; CX-1455-E).

5. The Catalog Group prints its publications at the Chicago, Gallatin, Spartanburg, Reno, Warsaw, Casa Grande, Lynchburg, and Newton facilities (CX-1245-D) as well as at Mattoon, Lancaster, and Old Saybrook (CX-492-C). The Magazine Group prints its publications at the Danville, Glasgow, Los Angeles, Mattoon, Old Saybrook, Daytona, and Des Moines facilities (CX-1245-B-C) as well as at Lancaster (CX-492-C).

6. Donnelley's fiscal 1990, 1991 and 1992 net sales were \$3.498, \$3.915 and \$4.193 billion, respectively. Assets as of year-end for 1990, 1991 and 1992 were \$3.147, \$3.207 and \$3.410 billion, respectively (CX-1455-Z-22). Gross profits were \$689, \$727, and \$818 million, respectively (CX-1455-Z-22). Total revenues for gravure printing in 1989 and 1992 were substantial (CX-7-E; Tr. 5927-28).

B. Meredith/Burda

7. Immediately prior to its acquisition by Donnelley, Meredith/Burda was the third largest gravure printer in the United States (*see* CX-501-B), offering "state-of-the art equipment" including "the most versatile and efficient rotogravure and web offset presses available" (CX-5-0).

8. At the time of the acquisition, Meredith/Burda had four publication printing plants located in Casa Grande, AZ; Des Moines, IA; Newton, NC; and Lynchburg, VA (CX-5-0, V; CX-8-I-; CX-492-B). All of these printing plants have gravure equipment (CX-8-I-M; CX-492-B). Only the Des Moines plant is equipped with heatset web offset equipment (CX-492-B). There are a total of 20 gravure presses in the 4 former Meredith/Burda plants (CX-8-0; CX-501-N).

9. In fiscal year 1989, the year prior to its acquisition by Donnelley, Meredith/Burda reported sales of \$456.7 million (CX-162-D; CX-492-A). [] (CX-162-E) [] (CX-162-D).

C. The Acquisition

10. On December 21, 1989, Donnelley's Board of Directors approved the acquisition of Meredith/Burda, and Donnelley, Meredith Corporation and Pan Associates entered into a purchase and sale agreement for Donnelley to acquire all of Meredith's and Pan's interest in Meredith/Burda (CX-2-N-Z-64; CX-3). The acquisition was consummated on September 4, 1990 (CX-3-B; CX-4-Z-8).

11. The final purchase price was \$486.6 million, plus the assumption of \$49.9 million in debt, for a total of \$536.5 million (CX-4-Z-8; CX-9-E). The price included over \$200 million of goodwill, reflecting the excess of the purchase price over the value of Meredith/Burda's net tangible assets (CX-4-Z-8).

D. Interstate Commerce

12. Respondents Donnelley and Pan 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 are corporations whose business is in or affects commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44 (Cplt ¶¶ 9, 11; Ans ¶¶ 9, 11).

E. The Publication Printing Industry

1. Introduction

13. Publication printing consists of the printing of magazines, catalogs, and advertising inserts. Advertising inserts are the supplements that one finds in newspapers or the mail and which firms such as retail chains use to advertise their goods (Tr. 141). Two printing processes are primarily used to print publications: heatset web offset ("offset") and rotogravure ("gravure"). Two minor processes which are also used are letterpress and flexography (Tr. 143; CX-1142-N).

2. The Gravure Process

14. In the gravure process, ink is transferred to paper from an engraving that is etched into the surface of a copper-plated cylinder (Tr. 149; CDX-1; CX-1142-0, Z-39).

15. The copper cylinders are mechanically etched by a device called the "helioklischograph" which engraves many tiny recessed cells--some 4,000 per second--on the surface of the cylinder (Tr. 189-90; CX-120-Z-84-A; CX-301-Z-7).

16. The engraved cylinder rotates in a bath of ink; excess ink is wiped off the surface by a flexible steel blade called a "doctor blade." The ink remaining in the recessed cells forms the printed image by direct transfer to the paper web as it rolls across the printing cylinder (CX-1142-0).

17. Gravure presses use paper that is either web-fed from a continuous roll or "web" of paper or sheet-fed by individual sheets of paper. Web-fed gravure presses are referred to as "rotogravure" presses (Tr. 156-58; CX-977-W-X). Sheet-fed gravure is not a viable alternative to gravure printing where high volume work is required (Tr. 159; CX-977-X).

18. A typical gravure press has 8 to 10 printing units (Tr. 164-65). Each unit prints one of four basic colors--black, red (magenta), yellow or blue (cyan)--and uses a cylinder that has been engraved with the images that are to be printed (CX-977-Z-1-3; CDX-4). Four units print on the front of the paper; another four units print on the back of the paper (CX-977-Z-1; Tr. 164, 192). As the paper is fed through each successive unit, another color is printed on top of the ink of the preceding unit. Dryers situated between each unit dry the ink before the paper goes into the next unit. A folder at the end of the press cuts and folds the paper into signatures (F 37) (CX-977-Z-1, Z-8; Tr. 206-07, 09; *see* CDX-4).

3. The Offset (Lithography) Process

19. Offset, also known as lithography, is a photochemical process based on the principle that oil and water do not mix (CX-122-Z-6; CX-290-B; CX-1142-P, Z-36).

20. Rather than using an engraved cylinder, the offset process uses a flat aluminum printing plate folded around a cylinder; the inked image is not conveyed directly to the paper, but rather it is

"offset," first from the plate to a rubber blanket, and then from the blanket to the paper (CX-1142-P; Tr. 148, 152, 2049; *see generally* CDX-2).

21. In the offset process, a thin metal plate is treated with a photosensitive coating and exposed to ultraviolet light with film negatives to create an image on the plate. The portion of the plate with a printing image is rendered ink-receptive and water-repellent; the non-printing area of the plate is treated to be water-receptive and ink-repellent (CX-977-Z-22; CX-1142-P, Z-36; Tr. 154). The exposed plate is mounted on a cylinder in the press. As the plate cylinder rotates on the press, it comes into contact with rollers wet with water or dampening solution, and another set of rollers coated with ink (CX-977-Z-25-28; CX-1142-P).

22. The dampening solution wets the non-printing areas of the plate and prevents ink from wetting those areas (CX-977-Z-23-25). The ink then wets the ink-receptive printing image areas (CX-977-Z-25-28; Tr. 153-54).

23. The plate cylinder transfers the image from the plate to a rubber blanket wrapped around a cylinder known as a blanket cylinder. The blanket cylinder then transfers the image to paper (CX-977-Z-15, Z-28-29; CX-1142-P; Tr. 148, 152-53; *see generally* CDX-2).

24. Commercial offset presses generally print on both sides of a continuous web of paper at the same time. These presses are referred to as perfecting "web offset" presses (CX-1142-P, Z-44; Tr. 152-53).

25. A typical web offset press has four units, each printing one of the four basic colors of publication printing: black, red, yellow, and blue (CX-977-H; Tr. 142). As the web passes through each successive unit, the different ink colors are applied (CX-977-Z-16; Tr. 208; CDX-5).

26. In heatset printing, after running through all the units, the web of paper enters a single drying unit at the end of the press (CX-977-Z-16, Z-29-30; Tr. 208; CDX-5). Because the dryer is at the end of all the printing units, the successively applied ink colors are applied wet on top of each other (Tr. 209-11; CX-977-Z-16).

27. Web offset presses may be heatset or non-heatset ("coldset") (CX-977-Z-15; Tr. 154-57). Heatset printing refers to the use of inks blown dry by a high temperature dryer; the process is typically used when printing on coated papers (CX-977-Z-15; *see also* Tr. 154-55, 2049). Coldset web offset presses use absorbent, uncoated papers;

ink is dried by absorption of the ink into the paper surface and a dryer is not needed (CX-977-Z-15; Tr. 154, 2049-50).

28. Coldset competes primarily with flexography (Tr. 155, 4873; accord, CX-1169-E; CX-1306-E) and is not a viable alternative to gravure printing where high volume publication printing is required (Tr. 147, 155-56; *see* Tr. 6423).

4. The Letterpress and Flexography Processes

29. Letterpress printing uses cast metal type or plates on which the image to be reproduced is raised above non-printing areas (CX-1142-N; Tr. 144). Flexography is a variant of letterpress and uses plates made from vulcanized rubber or plastic rather than metal (CX-977-K; CX-1142-0). Neither process is a practical alternative to gravure or offset for high volume publication printing (Tr. 143-47, 6422-23).

5. Printing Steps

30. The printing process requires the purchase of paper, ink and services including artwork, separation of artwork into colors (preliminary), the transfer of film separations onto a plate (pre-press), proofing, presswork, binding, and distribution.

31. Paper can be furnished by the printer or his customer (Tr. 173-74; CX-744-E) and could cost from 30 to 55% of the total cost of a printing job (Tr. 177, 1491, 6166-72; CX-1428; CX-744-E; CX 1427-A-B). In order of descending quality, the grades of paper used in publication printing are: coated stock, supercalendar grade A ("SCA"), supercalendar grade B ("SCB"), supercalendar grade C ("SCC"), machine finished, and newsprint (Tr. 175-76; *see also* CX-1346-C-E; CX-1347-B). In recent years, print customers have increasingly purchased paper directly from the mills for delivery to their printers (Tr. 171, 173-74).

32. Gravure and offset inks, which are normally supplied by the printer, differ and are not interchangeable; gravure ink contains solvents and is very fluid. Offset ink is viscous and paste-like (Tr. 183-85, 3655).

33. Artwork, which is provided by the customer, is the design of the material to be printed (Tr. 185-86, 862-63, 1152-53, 3080). Preliminary involves the separation of artwork or photographs into

the four basic colors. Color separation is the same for either gravure or offset and can be provided by the customer, the printer, or an outside source (Tr. 186-88, 3506). Pre-press for gravure, usually provided by the printer, involves transferring the image to be printed from film to a copper surfaced cylinder by the helioklischograph (F 15) (Tr. 189-94, 957-58, 2614, 4000). In offset, film separations are transferred photographically to a plate which is then baked in an oven (Tr. 189, 2614, 4000).

34. Proofs are made to ensure that the final printed image is accurate (Tr. 170, 193-95). Offset proofs are made from "chromalins" using pigments to simulate ink, before the plates are made. Gravure proofs are made after the cylinders are engraved (Tr. 194-95). A special "proof press" is usually used to print the gravure proof (a "wet proof"). Wet proofing is unusual in offset printing (Tr. 194-97, 1163, 3725). A much less costly alternative to the proof press is the drum proofer (Tr. 229, 2539-42). If errors are found in the wet proof, corrections are made directly on the cylinder by etching (Tr. 196-97).

35. Gravure and offset presswork are substantially different (Tr. 204). The wet ink is dried in both processes, but dryers are located between each printing unit in gravure; in offset the four wet inks are applied to the paper on top of each other and are dried at the end of the process (Tr. 209-11; CDX-5). Offset presses require "chill rolls" at the end of the dryer; gravure presses do not (*see* Tr. 210-11).

36. Offset folders have a fixed cut-off that corresponds to the circumference of the roller, whereas modern gravure folders are usually variable (Tr. 209, 211, 213-18).

37. Binding and distribution occur after the printed product (called "signatures" in the trade) comes off the press. Signatures can be bound by using staples (saddle stitching) or glue (perfect binding) (Tr. 200-02, 4592). After a print job is completed, it is distributed directly to the customer or to a mailing center (Tr. 202-03).

F. The Relevant Product Market

1. Introduction

38. The relevant product market proposed by complaint counsel and their expert Dr. Hilke is high volume publication gravure printing, which is approximated by gravure jobs of at least 5 million

copies, of at least 16 pages, and with less than 4 four-color versions (or the equivalent in single color versions). The "core" of this market is claimed to be approximated by jobs of at least 10 million copies, more than 32 pages, and less than 4 four-color versions (or the equivalent in single-color versions). Versioning of a publication is a relevant consideration because its cost is greater in gravure than in offset (F 224).

39. Analysis of complaint counsel's proposed markets involves consideration of the differences between and similarities of gravure and offset, printing industry perceptions about the two processes, how such differences affect customer choice, and the ability of gravure printers to price discriminate.

2. High Volume Publication Printing

a. Type of Publications

40. Most high volume publication printing involves three kinds of publications--catalogs, magazines and advertising inserts (Tr. 140-42, 166-69; CX-4-D). Donnelley derived over half its 1990 revenue from printing four-color multi-page catalogs, newspaper inserts and magazines (CX-4-D-E); Meredith/Burda's entire printing operation involved these publications (CX-107-Z-123).

41. For various reasons such as low volume, lack of need for high quality reproduction, or a high number of versions (different forms of a basic publication), the following publications can be excluded from discussion of high volume publication printing: telephone directories, newspapers, books (Tr. 166-68), comics (Tr. 146, 168, 2721, 4773), and coupon books which are inserted into magazines or newspapers (Tr. 168, 2482-83, 2450, 2490-92, 3129, 3460).

b. Procurement of Printing Services

42. Customers can obtain high volume gravure or offset printing services either under contracts or short-term informal agreements on the "spot" market. Long term contracts are more common for high volume printing jobs (Tr. 570, 2029-30, 3043, 4597, 5476; CX-63-P; CX-327).

43. Customers provide bid packages to prospective printers. Some seek bids from many printers; others limit their bids to selected printers (Tr. 791, 798, 800-01; CX-1397; CX-1411; RX-465-C).

44. Printers, including Donnelley and Meredith/Burda, use computer cost models to calculate bids for the gravure and offset processes (Tr. 5130; CX-136-0, P; CX-901-Z-62-63, Z-65).

45. Because the estimation of job costs is computerized, the cost of calculating bids is relatively low. Printers often make many bids before making a sale (Tr. 2683-84, 5994).

c. Printers

1) Offset Printers

46. Nine offset printers with no gravure capacity testified in this proceeding. Most of their print jobs did not involve high volume publication printing:

a) Riverside County Publishing Co.

47. Riverside, a California printer, has printed only 3 jobs with more than 5 million copies; all had at least 10 versions. The largest job had 5.9 million copies. The largest job with fewer than 4 versions had 3.4 million copies (Tr. 2186-87; CX-1181).

b) St. Ives

48. The catalogs, magazines and inserts printed by this company, which is located in Hollywood, Florida, are usually versioned. The average run length was 112,000 copies. The longest run ever printed by St. Ives was approximately 2,000,000 copies (Tr. 2594-95, 2600-03).

c) Printco

49. The average run length and page count of Printco's inserts, which are printed in two offset plants in Michigan, are 1.5 to 2 million copies with 12 pages (Tr. 2672-73).

d) Judd's, Inc.

50. The average run length produced by this Pikesville, Maryland company is 200,000 copies (Tr. 2778).

e) Holladay-Tyler

51. The average run length for the catalogs and magazines printed by this Glendale, Maryland company is 500,000 copies (Tr. 2779).

52. []. This magazine is no longer published (CX-1167-E-G; CX-1441; CX-1446-B; Tr. 2790-92, 6115-16).

f) Webworks

53. This Atlanta, Georgia company prints inserts ranging from 100,000 to 25 million run lengths and 8 to 16 pages (Tr. 2829, 2838-39). Webworks concentrates on jobs with page counts of 16 or less (Tr. 2830).

g) Graphic Arts Center

54. This Portland, Oregon company's specialty is high quality commercial catalogs and brochures. The average run length of its job is less than one million with an average page count of 32 or below (Tr. 2923, 2936). Graphic printed the Victoria's Secret catalog until its run lengths became so large in 1990 and took up so much press time that Mr. Williamson, its vice president of manufacturing, decided not to continue printing it and recommended that Victoria's Secret move to gravure (Tr. 2925).

h) Alden Press

55. This company's print jobs are typically 2 to 3 million in run length, 48 pages long and versioned (Tr. 4657). [] (CX-1167-E). [] (CX-1167-E). [] (CX-1167-C, E; Tr. 4996-97).

i) Sullivan Graphics

56. This company primarily prints inserts and tabloid-size magazines. [] (CX-1167-C, E).

2) Gravure Printers

57. Complaint counsel presented four gravure printers as witnesses: Ringier America, Quad Graphics, Brown Printing, and Quebecor. [] (*see* CX-1167-E).

d. Print Buyers

58. Several print buyers that published catalogs, newspaper inserts and magazines testified in this proceeding.

1) Catalog Customers

a) J. C. Penney

59. Penney currently produces approximately 80 or more catalogs each year which range from 12 to 16 pages to large catalogs of 1,400 to 1,500 pages (Tr. 557-58).

60. Penney's general catalogs are issued once a year in the spring, summer, fall and winter; a Christmas book is also produced once each year (Tr. 558-59).

61. Penney's general catalogs have approximately 1,500 pages and the Christmas book has 550 pages. Twelve to thirteen million copies are produced for each general catalog (Tr. 557-59, 561).

62. Penney's general catalogs are printed at Donnelley's Warsaw plant and are printed gravure except for the covers which are printed offset. The general catalogs are not versioned (Tr. 559-60, 565, 567).

63. Penney's tabloids are printed at Donnelley's Spartanburg plant using the gravure process. Approximately 18 tabloids are printed annually, with a page count of 70 to 160 each and a run length of 11 to 12 million copies each. They are not versioned (Tr. 557-62, 564, 567).

64. Penney's specialty catalogs number 20 to 25 issues annually. All are printed gravure, except one issue (Tr. 563, 568). They are not versioned (Tr. 564).

65. The Penney catalog division's market support program is a highly changeable program and is contracted out as spot work. Each market support catalog ranges from 200,000 to 1.3 million copies and contains 16 to 48 pages. The market support issues are printed either gravure or offset, depending on the size of the book. Donnelley

prints the gravure half and several offset printers print the offset half. There are no versions (Tr. 564, 570-72). Donnelley prints the larger and longer run lengths of these catalogs, such as the run over 650,000 copies (Tr. 572).

66. The Penney 1992 print program for its catalog division cost approximately \$247 million. Out of this total, paper accounted for approximately \$95 million (Tr. 573, 609). Out of the total program of \$247 million, about \$20 million was for offset work (Tr. 573).

b) Sterling, Inc.

67. Sterling produces Spring and Christmas catalogs for its Sterling, Shaw, Guild and J.B. Robinson divisions (Tr. 931-33).

68. The Sterling division spring catalog has a page count of 20 and a run length of 12 million copies. The Shaw division spring catalog contains 16 pages and 6.8 million copies are printed; both catalogs are printed gravure (Tr. 933).

69. Sterling's Guild division spring catalog has a page count of 28 and 2.5 million copies are printed. The J.B. Robinson division spring catalog contains a page count of 16 and a run length of 900,000 copies. Both of these catalogs are printed offset (Tr. 933-34).

c) Lands End

70. Lands End publishes 13 major catalogs, 5 prospector catalogs, 4 specialty catalogs, 6 domestic catalogs, 3 shirt and tie catalogs, and several sale flyers (Tr. 1194).

71. Lands End's major catalog is produced 13 times a year. Twelve have a page count of 100 to 260 and a copy count of 5 to 11 million. The remaining catalog may have fewer pages and 1 to 2.5 million copies are printed. The body of the catalog is printed gravure and the cover, sale insert, order form, response cards, and description card are printed using offset. There are rarely any versions in the gravure body of the main catalog (Tr. 1194-97, 1199).

72. Lands End's prospector catalogs are printed using the gravure process. Each has a page count ranging from 52 to 64 and runs from 4.5 to 11 million (Tr. 1242).

73. Lands End's children's catalogs are printed offset. Each catalog has a page count ranging from 52 to 64 and runs from 1.8 to 2.8 million copies (Tr. 1259-60).

74. Lands End's domestic specialty catalogs are printed offset. Each has a page count ranging from 52 to 80 and runs from 1.5 to 2.5 million copies (Tr. 1261).

75. Lands End's shirt and tie catalogs are now printed offset because they were changed to a smaller trim size. Each has a page count ranging from 36 to 48 and from 1.5 to 1.8 million coies (Tr. 1268-69). When these catalogs were printed in an 11 3/8 inch square format, they could not be economically printed offset, despite the run length of less than two million copies (Tr. 1268-70).

76. Lands End's sale flyers are printed gravure. Each has from 3 to 3.5 million copies and the page count varies, including counts of 24, 48, and 64 pages (Tr. 1273).

d) Lillian Vernon

77. Lillian Vernon produces a core catalog, a sales catalog, a Lilli's Kids catalog, and a Memories catalog.

78. Lillian Vernon's core catalogs are printed nine times a year using the gravure process. Each issue has a page count ranging from 96 to 128 and runs from 10 to 15 million copies. There are three versions (Tr. 1326-28).

79. Lillian Vernon's sales catalogs are printed five times a year using the gravure process. Each issue has a page count of 96 and runs from 5 to 7.5 million copies. There are less than three versions per issue (Tr. 1330-31).

80. Lillian Vernon's Lilli's Kids catalog is printed three times a year by the gravure process. Each issue has a page count ranging from 64 to 72 and runs from 4 to 7.5 million copies. There are two versions (Tr. 1331-32).

81. Lillian Vernon's Memories catalog is printed gravure. It has a page count of 48 and runs from 3 to 4 million copies (Tr. 1332-33).

e) Austads

82. Austads' catalog is printed 13 times a year. Each issue has a page count ranging from 48 to 76 and runs from 800,000 to 2.5 million copies. Austads' recently changed the size of three of its catalogs to a "Slim Jim" sale format. The "Slim Jim" catalogs are printed offset, and the rest of the catalogs are printed gravure (Tr. 1417-21, 1424-25).

f) Sears

83. Sears produced three major media catalogs, a seasonal catalog, a monthly catalog and a specialty catalog (Tr. 1763). The three major media catalogs were printed gravure. Each issue had a page count of 1,500 and runs from 12 million to 13 million copies (Tr. 1763-65). The seasonal catalog was printed four times a year using the gravure process. Each issue had a page count ranging from 200 to 300 and a run length of 6 million (Tr. 1765). The monthly catalog was printed 13 times a year using the gravure process. Each issue had a page count ranging from 72 to 144 and a run length ranging from 6 to 10 million. There were two to five versions (Tr. 1763, 1766-67). The specialty catalog was printed 34 times a year using the gravure process. Each issue had a page count ranging from 48 to 200 and a run length ranging from 1 to 9 million (Tr. 1768). The specialty catalogs were bid out annually and gravure won all of the most recent year's bids (Tr. 1769-70).

g) Current

84. Current's catalog is printed 12 times a year using the gravure process (Tr. 1908-09). Each catalog has a page count of 48 and a run length ranging from 2 to 14 million (Tr. 1911-12).

h) Victoria's Secret

85. [] (Tr. 2014-15, 2012-13, 2019-26; CX-1446-B-D).

i) Bedford Fair

86. [] (Tr. 2138).

87. [] (Tr. 2138-40).

88. [] (Tr. 2138, 2144-45).

89. [] (Tr. 2138, 2147-48).

90. [] (Tr. 2138, 2148).

j) Rivertown Trading

91. Rivertown Trading Company produces two catalogs, titled "Wireless" and "Signals." The Wireless catalog has a print run of 10

to 30 million copies, has a page count of 40 to 48, and is printed offset (Tr. 3544-45, 3550). The Signals catalog has a run length of 7.5 to 20 million and is also printed offset (Tr. 3544-46). Each of the Wireless and Signals catalogs has up to 10 to 12 versions (Tr. 3350-51, 3569-70, 3573). Both catalogs use a special 50-pound type of paper that is only available for offset, called Escanaba (Tr. 3578-81, 3584). The nearest gravure equivalent for 50-pound Escanaba paper is more expensive than the offset paper (Tr. 3579).

k) Service Merchandise

92. Service Merchandise's largest catalog has a page count of approximately 564 and a run length of 13 million (Tr. 4265). Its other 2 catalogs are approximately 100 to 170 pages in length and have a run length of approximately 13 million (Tr. 4266). All three of the Service Merchandise catalogs are printed gravure with two versions, including the base version (Tr. 4265-67).

1) Ross Simons

93. Ross Simons produces eight catalogs per year (Tr. 4543-44). Each catalog has a page count of 36 to 60 and 5 to 12.5 million copies are printed. Each catalog has three different cover versions and is printed offset (Tr. 4543-44, 4564-65). The last time the Ross Simons catalog went out to bid, the gravure bids were approximately five percent less than the offset bids. Ross Simons stayed with offset because it has "last minute" changes in prices and in the items being included. Offset is better for making last minute changes because making new offset plates takes less time than producing new gravure cylinders (Tr. 4556-57).

2) Newspaper Insert Customers

a) Penney

94. Penney's retail division produces Sunday newspaper inserts. Thirty-two events are printed per year and within each event, there are three programs: the full-line department store program, the limited-line department store program, and the soft-line department store program (Tr. 693).

95. Penney's full-line department store program has a page count ranging from 12 to 48 and a run length of 37 million. Each event has approximately five to six versions and is produced by the gravure process (Tr. 693-97).

96. Penney's limited-line department program has a page count ranging from 8 to 36 and a run length of 6 million. Each event has five to six versions and has been produced by the offset process (Tr. 695-96, 700). As part of a program of upgrading the image of its stores, Penney is considering shifting this program to gravure in 1994 to improve its quality (Tr. 734-35; *see* CX-1443-B-C; CPF 420-440).

97. Penney's soft-line department store program has a page count ranging from 8 to 24 and a run length of 6 million. Each event has five to six versions and is produced by the offset process (Tr. 695-96, 700).

98. [] (Tr. 691).

b) Venture Stores

99. Venture Stores produces Sunday newspaper inserts. It produces 53 issues per year, with a page count ranging from 12 to 48. The circulars are printed 100% gravure. In 1992 the run length was in excess of 9 million; in 1993 it was in excess of 10 million (Tr. 814-15, 829). The inserts are unversioned except for two or three weeks a year when a new item is released (Tr. 815).

100. Venture Stores also produces inserts for grand openings with a page count ranging from 20 to 32 and a run length of 100,000 to 200,000. The inserts are printed using the offset process (Tr. 819). Venture purchases its SCB and SCA paper directly from paper mills (Tr. 812, 816).

c) Sterling Inc.

101. Sterling Inc. produces six different issues of flyers (February-Valentine, March, June, August, October, and Christmas), all of which are printed offset. The run length ranges from 900,000 to 12 million and the page count ranges from 4 to 8; occasionally, in the past, it was 12 pages (Tr. 934-35).

d) Bradlee's

102. Bradlee's produces 53 circulars per year using the gravure process. Each circular has a page count ranging from 12 to 56 and a run length of 6.3 million. There are two versions per event. Bradlee's also produces special projects circulars that are printed offset. Each of these circulars has a run length of 200,000 (Tr. 1023, 1027-28, 1030).

e) Target Stores

103. Target Stores produces 53 circulars per year using the gravure process. Each circular has a page count ranging from 12 to 36 pages and 35 million copies, with an occasional smaller copy count of approximately 20 million (Tr. 1077-78, 1081-82). For its stores in the three western states of California, Arizona, and Nevada, approximately nine million copies per week are printed (Tr. 1109).

f) Caldor

104. Caldor produces 53 circulars per year using the gravure process. Each circular has a page count ranging from 12 to 48 and a run length ranging from 10 to 14 million. There are two black type versions (Tr. 1155-57).

105. Caldor also produces circulars for store openings or reopenings using the offset process. Each circular has a page count ranging from 4 to 8 and a run length of 300,000 to 1 million. There are many versions (Tr. 1161-62).

g) Wal-Mart

106. Wal-Mart's inserts are printed 13 times a year. During 1993, Wal-Mart began shifting its predominantly gravure printed program to offset. Each issue has a run length ranging from 60 to 70 million and is divided into several separate jobs, each with many localized versions (Tr. 2257-58, 2260-61).

h) Levitz

107. Levitz Furniture Corporation has a national advertising program consisting of weekly newspaper inserts. The inserts are 8 to 16 tab size pages in length and range from 18 to 20 million in run length and are printed offset or gravure (Tr. 3954). The inserts have two to three four-color versions (Tr. 3956). Levitz has moved this program to an offset only format in order to allow its regional group to make more last minute version changes at low cost (Tr. 3992-93; RX-355).

i) K-Mart

108. K-Mart's major national advertising program consists of a weekly insert that has an average page count of 24 but going as high as 36 pages, with 73 million copies. The inserts are printed offset or gravure and have numerous versions (Tr. 4157-59, 4205-06, 4214-15). [] (Tr. 4234-35).

j) Service Merchandise

109. Service Merchandise's inserts have a page count of approximately 32 and a run length of approximately 28 to 30 million, printed gravure, with 2 versions including the base version (Tr. 4263-65).

3) Magazine Customers

a) AARP

110. The American Association of Retired Persons ("AARP") produces Modern Maturity and the National Retired Teacher's Association Bulletin ("Bulletin") (CPF 239-240).

111. AARP's Modern Maturity magazine is printed six times a year using the gravure and offset processes. Each issue has a page count of approximately 96 and a run length of approximately 22.4 million. Of these pages, approximately 84 to 88 are gravure with 1 or 2 versions. The rest of the pages (8 to 12) are printed offset with 4 to 20 versions (Tr. 1568-70).

112. AARP's Bulletin is a two-color print job. It is printed on newsprint by the gravure process. The Bulletin has a run length of approximately 22 million and a page count of 20 (Tr. 1564-65).

b) TV Guide

113. TV Guide magazine is printed 52 times a year with a run length of 17 million per issue (Tr. 1644, 1654). TV Guide has basically four components: cover, features, listing editions and advertising (Tr. 1641).

114. TV Guide's cover is four-color, contains four to six pages and is printed gravure (Tr. 1641, 1649).

115. TV Guide's feature section is four-color and has a page count (produced in eight page increments) ranging from 24 to 48, containing 4 to 6 versions (Tr. 1652-53, 1664). The feature section is printed gravure at two locations, San Jose (for Western distribution) and Lancaster (for Eastern distribution) (Tr. 1655).

116. TV Guide's television program listings have 113 versions. All but three of these versions are printed offset (Tr. 1660-61). The remaining three are among the largest listings and are printed gravure (Tr. 1161-62). The listings are two-color (Tr. 1663).

c) National Geographic

117. The National Geographic Society publishes the Traveler Magazine, World Magazine, Research Journal Magazine, and National Geographic Magazine (Tr. 1705).

118. National Geographic's Traveler Magazine is printed six times a year using the offset process. Each issue has a page count ranging from 140 to 160 and a run length ranging from 700,000 to 800,000. There are two to three advertising versions (Tr. 1705-06).

119. National Geographic's World Magazine is printed 12 times a year using the offset process. Each issue has a page count of 32 and a run length of 1.2 million. There are no versions (Tr. 1706-07).

120. National Geographic's Research Journal Magazine is printed by sheet fed offset. Each issue has a page count ranging from 120 to 140 and a run length ranging from 6,000 to 7,000. There are no versions (Tr. 1707-08).

121. The National Geographic Magazine is printed 12 times a year using the gravure and offset processes (Tr. 1709-10). Each issue

has a page count ranging from 140 to 165 and a run length of 9.8 million (Tr. 1710-11). One hundred forty pages are printed gravure and 20 to 25 pages are printed offset (Tr. 1711). The gravure portion is not versioned (Tr. 1494). The offset portion is highly versioned (Tr. 1712-13).

e. Print Buyers Who Have Switched From Gravure to Offset

122. Several print buyers have switched their high-volume work from the gravure to the offset process in recent years, including present buyers who testified in the District Court preliminary injunction case that they could only use the gravure process for their high-volume printing needs (Tr. 5204-06).

123. Wal-Mart primarily used the gravure process to print its high-volume inserts until 1993 (Tr. 2260-61). The job characteristics of Wal-Mart's pre-1993 print program were run lengths exceeding 40 million copies, at least 16 pages, and few versions (Tr. 2260-61; RX-383). In 1993, however, Wal-Mart switched nearly half of its print program to the offset process (Tr. 2261, 5204-06). Wal-Mart chose to use offset because of its flexibility with respect to versioning, reduced distribution costs, and the ability to obtain lower prices for its overall print program (Tr. 2264, 2275-76, 2307-08). [] (Tr. 5204-06). In the future, Wal-Mart expects its print program to reach 100 million households (Tr. 2259).

124. [] publishes [] catalogs, which have job characteristics that place them in the "core" of Dr. Hilke's proposed market (RX-519). These catalogs were done through the gravure process, but are now done offset (Tr. 4004; RX-519).

125. K-Mart, which has been described as "the largest user of pre-printed inserts in the United States and probably in the world," had all its national inserts printed gravure in the past (Tr. 4163; RX-22-E). Today, K-Mart finds the gravure and offset processes to be interchangeable, receives bids in both processes, and uses both processes for its national inserts (Tr. 4158-59, 4163; RX-652). One of the reasons K-Mart has moved more to offset is increased versioning (Tr. 4234-35).

126. Montgomery Ward formerly had its catalogs printed gravure (Tr. 1541, 1389). It left the big catalog business in 1985 (Tr. 1541). Now, Montgomery Ward is having catalogs published under its name using the offset process (Tr. 1542, 1389). This includes catalogs with

run lengths in excess of 5 million copies as well as jobs in Dr. Hilke's "core" market of more than 10 million copies, more than 32 pages, and few versions (Tr. 1542; RX-173). Montgomery Ward is, however, considering a longer run catalog printed by gravure (Tr. 1542).

127. The retail division of Penney publishes inserts called limited-line inserts. These inserts are distributed to areas which have Penney stores that do not have the full Penney product line (Tr. 693). They generally have a run length of approximately 6 million copies, 8-36 pages, and 5-6 four-color versions (Tr. 695-96). In 1987, [] of Penney's limited line bids were awarded to gravure print suppliers (RX-708). By 1992, gravure usage in the limited line program had been reduced to [] (RX-708).

128. Other publishers with long-run catalogs who switched from gravure to offset include Damark and Compuadd Corporation (RX-38; RX-7). Damark publishes catalogs with run lengths of 2-9 million copies, with a range of 40-56 pages (Tr. 5214-15). Compuadd Corporation's catalogs have a run length of 20 million copies and 32 pages (RX-7). However, versioning information with respect to these two print buyers was not available.

129. [] has been a longtime user of offset (Tr. 2014). It publishes approximately [] catalogs annually, with run lengths of [] million up to [] million, an average of [] pages per catalog, and [] versions (Tr. 2015).

130. Recently, [] has been testing the gravure process (Tr. 2015-16). This involves running some of the [] catalogs gravure (*e.g.*, 1 million catalogs out of a 20 million run), soliciting both gravure and offset bids, and comparing the sales results of catalogs printed gravure and catalogs printed offset (Tr. 2015-17, 2018-22).

131. The results of the testing program have not been determined yet (Tr. 2034). The first catalog that [] ran gravure, however, did not meet expectations (Tr. 2018). Further testing of gravure continues (Tr. 2020-22).

132. [] 1993 print program continues to be printed by [], an offset printer (Tr. 4644-46). [] will print 10 catalogs for [] in 1993, with run lengths ranging from [] million copies, page counts of [] pages, and [] versions (Tr. 4644-46).

3. Differences Between the Gravure and Offset Processes

a. Throughput

133. Throughput is the ability of a printing press to produce a given amount of printed product in a particular time period (Tr. 2399-2401) and depends on a combination of web cylinder width, circumference and press speed. Gravure presses have a greater throughput than the usual offset press.

134. Gravure presses in the United States range from 68 to 125 inches in width; heatset web offset presses used in publication printing range from 36 to 66 inches in width (Tr. 2212, 3796).

135. The most common offset presses (the Harris M-1000, the Rockwell/Baker-Perkins G-14 and the Mitsubishi L-1100) are used to print magazines and catalogs and are from 36 to 38 inches wide with an approximate cylinder circumference of 22 inches (Tr. 219-22, 2052, 2600, 4715-16, 2062-63, 4317, 4322, 4508; CX-874). As one Donnelley document stated, two web offset presses of M-1000 dimensions would still be "a peanut size gravure press" (CX-1109-D).

136. These offset presses when configured with 4 printing units and 1 web can deliver 16 pages of four-color printed matter (2 pages around the cylinder and 4 across equals 8 on either side of the web) with dimensions of approximately 8x11 inches. With 8 units and 2 webs, these presses can deliver 32 8x11 four-color pages (Tr. 223-24, 2061-62).

137. Offset press widths are limited by the tendency of cylinders to bend slightly when they rotate at high speeds. This causes a loss of "registration"--the correct alignment of colors in the finished process (Tr. 2079-81; CX-948-B; CX-1111-A-B; CX-122-Z-14).

138. Offset presses used to print magazines and catalogs are limited in cylinder circumference (20 to 42 inches whereas gravure circumferences range from 31 to 60 inches) (CX-265) because of a unique problem called "in-line color compromise" which is caused by the way ink is applied (CX-290-H).

139. To achieve various shades of color, different densities of ink must be applied around and across the cylinder (Tr. 2072). The offset press operator makes the necessary adjustments to add or subtract color on the ink fountain keys (*see* Tr. 3750; CX-295-B).

140. In-line color compromise occurs when pages running in line (below and above each other on the offset printing plate) have incompatible ink adjustment requirements (CX-290-H). Because any adjustment to the density of the color in offset necessarily must affect the same area across the entire circumference of the cylinder, other colors can be adversely affected or vary from the desired shade (*see generally* Tr. 199, 2072).

141. In-line color compromise is not a problem in gravure printing (Tr. 199-200, 895, 1433, 2075, 2112-13, 2209, 3902-03; CX-290-H; CX-298-C; CX-307-B; CX-631-B) because the recessed ink wells can be engraved to specified depths independently of the cells for the other pages in the same line around the cylinder (Tr. 197, 199-200, 2209; CX-290-H; CX-297-D; CX-307-B).

142. Gravure presses are not as limited in width as offset because they overcome the deflection problem by using a system which compensates for it (Tr. 2082).

143. Since gravure presses can use cylinders which offer six-around impressions (meaning six rows of page impressions wrapped around the cylinder) while offset presses use two and four around cylinders, gravure presses deliver more pages per impression than offset presses (CX-265; CX-118-Z-35; Tr. 212-13, 225-26, 1489, 2524-25, 2557).

144. A gravure press of approximately 96 inches in width can print up to 96 standard-size (8.5 x 11 inch) pages per impression (Tr. 225-26; CX-633-M). A gravure press over 110 inches wide can print up to 120 standard-size pages per impression (Tr. 250-51, 1486, 1550). A three-meter gravure press of the type installed at Brown's Franklin, Kentucky facility (with a web width of approximately 125 inches) is capable of producing 132 or 144 pages per impression (CX-981-C; Tr. 2524; *accord*, Tr. 4794).

145. The narrower web of the offset press and the smaller circumference of offset cylinders make it impossible for an offset press to deliver as many pages at a time as a gravure press (*see generally* Tr. 225-26). The most common offset press (the Harris M-1000 and other offset presses with similar dimensions) produces only 16 pages at a time (or 32 pages if operated with 2 webs) (CX-307-C; CX-634-I; Tr. 219, 223-24, 2600, 2937-38).

146. Double webbed presses of the M-1000 type often are referred to as 32-page presses (Tr. 219, 2600, 2937-38). Offset presses with wider web widths and larger cylinder circumferences are

less common than narrower and smaller models, such as the M-1000 (Tr. 222). It is also possible for gravure presses to be double-webbed provided the folders can accommodate the output (Tr. 225-26).

147. Another factor contributing to the greater throughput of gravure presses is the speed (usually expressed in terms of feet per minute) of the press. Modern, state-of-the-art gravure presses can be expected to operate in the 2,600 to 3,000 feet per minute range (Tr. 229-30, 1493, 2400, 2422, 2524, 2617, 3827, 4365; *see* CX-11-Z-21; CX-21-Z-1; CX-119-Z-12-13). These gravure presses have been able to achieve close to the full potential (*i.e.*, rated speed) in actual practice (CX-117-Z-49; CX-119-Z-12-13; Tr. 1493, 2524).

148. On the other hand, Donnelley's January 1990 Technical Directors' Report remarked on a large and growing gap between the rated speeds of offset presses and actual running speeds (CX-733-N; *see also* CX-733-K-M). A September 1990 report prepared by Donnelley's Dr. Peekna arrived at similar conclusions, noting that increases in actual offset press speeds were less than increases in rated speeds (CX-1206-E; Tr. 3885).

149. [] (CX-937-B; *see also* CX-128-Z-60).

150. St. Ives, a Florida-based offset printer, reports actual run speeds in the 1400 to 1500 feet per minute range for its M-1000 presses (Tr. 2601).

151. The net speeds reported by Riverside County Publishing Company for its C-700 tabloid offset presses are approximately 60% of a rated speed of 2,000 feet per minute. Riverside achieves rates of 65 to 70% for its other offset presses (Tr. 2192).

152. The highest rated speed of any offset press currently used for publication printing is in the 2000 to 2200 feet per minute range (Tr. 3819, 3905-06; CX-874-E).

153. There are newer offset presses which come closer to the performance of gravure presses, but it appears that gravure still has a throughput advantage.

154. The offset press with the widest web width (66 inches) is the N-9000, manufactured by Heidelberg/Harris (Tr. 3907, 4331). The N-9000 press is primarily used to print newspaper inserts, coupon books, and telephone directories (Tr. 2108, 4331) and has a rated speed of 2200 feet per minute (CX-874-E; Tr. 3905-06). It is capable of producing up to 72 pages in one impression, when used to produce coupon books (Tr. 3133). When double-webbed, it can produce 112 pages in a single impression (Tr. 4331-32).

155. However, printers using the N-9000, [], have experienced problems with color consistency (Tr. 3141), [] (Tr. 4403-04), [] (CX-118-Z-76).

156. [] (CX-106-Z-67).

157. Another web offset press with a 72-page per impression capability (double-web) is the Lithoman V press manufactured by MAN-Roland (Tr. 893, 2076, 3897-98, 3772; CX-1270-A; CX-1215-C).

158. [] (Tr. 895-96; 2076, 3903; CX-946; *see* CX-1271-A-B; CX-1270). Dr. Andreas Peekna of Donnelley's R&D department called its design "a jump from the frying pan into the fire" (CX-1214-A), and MAN-Roland referred to this press as a "3 around gamble" in an August 1991 letter to Donnelley (CX-1215-C; Tr. 3900).

159. Regardless of press configuration (tandem, single-web or double-web), the record indicates that gravure throughput exceeds that of offset presses in general use, which means that the gravure process gives the printer a lower variable cost.

160. The vice president of pressroom operations for Quad, comparing the throughput of its 96-inch gravure presses to its M-1000 offset presses, concluded that the gravure presses had approximately 50% greater throughput measured in terms of pages per hour (3,472,896 for the gravure press versus 2,228,032 for the offset press) (Tr. 2401).

161. The most productive gravure press equipment identified in the record consists of two 20-unit, three-meter wide gravure presses located at Bauer in Cologne, Germany (Tr. 2582-83, 3942-43; CX-853-G; CX-1173-I). According to literature supplied by its manufacturer, this press is capable of producing 32 million pages of printed product per hour (CX-1173-I; *accord*, CX-766-Z-2). This is much greater than the comparable throughput claimed for the newer technology offset presses still in development (Tr. 3264-66).

162. The greater throughput capacity of gravure makes the process more cost-effective for printing jobs with large numbers of copies and many pages per copy (CX-307-C; CX-634-I; *see* Tr. 2612, 2614). According to one Donnelley document, a 48-page catalog with an approximate 2.5 million run length would take 3 days to produce using one gravure press compared to 14 days on an offset press (CX-290-F; *see also* RX-495-A; RX-496-A; RX-502-A; RX-678-A, indicating 2 weeks or more of press time were required when printing longer run jobs using the offset process).

163. Nancy Kaminsky, who has compared gravure printing costs to offset printing costs as a print buyer at both Bloomingdale's and Victoria's Secret, estimated that an average size book might be on press for two weeks if done offset compared to four days for the same book done gravure (Tr. 2038-39).

164. [] (Tr. 4675) [] (Tr. 4671) (*see* RX-188-A; RX-378-A).

b. Durability

165. Offset plates are less costly and time-consuming to prepare than gravure cylinders; thus, the offset process has a lower start-up cost than gravure. Offset's initial cost advantage is, however, overcome in higher volume jobs in part because offset plates require more frequent replacement than gravure cylinders (Tr. 246-47, 1484-84, 2614; *see* CX-522-B; CX-633-O, Z-9; CX-634-J, Z-5-12; CX-900-Z-1).

166. Offset plates offer from 400,000 to 1,500,000 impressions before wear and product quality deterioration require their replacement (Tr. 2214-15 (500,000-600,000); Tr. 2846 (700,000 to one million); Tr. 1600, 1714 (one million); Tr. 2374, 243 (1.2 to 1.5 million)).

167. Recent improvements in technology have resulted in increases in plate life--up to 2.8 million impressions (Tr. 3757, 4611, 4922-23); however, these plates are more expensive than conventional offset plates (Tr. 4616).

168. Gravure cylinders are coated with a thin layer of chrome for durability (Tr. 244, 2558) and can last up to ten million impressions or more before re-chroming of the cylinder is needed (CX-292-H). This operation, referred to as a "de and re" does not need to be performed as frequently as the plate changes which are required in offset (Tr. 243-48; compare CX-1358 with CX-1360).

169. James Melton of Quad Graphics testified that in his experience "de and re" occurs every 5 to 10 million impressions (Tr. 2375) and Roy Hodgson, formerly of Quebecor, estimated that "de and re" typically occurs after 6 to 9 million impressions (Tr. 244). Walter Voss, who served as President of Meredith/Burda prior to its acquisition by Donnelley (CX-900-F), testified that it was commonplace for Meredith/Burda to achieve run lengths of eight to nine million on its gravure presses without changing or re-chroming cylinders (*see* CX-900-Y). At Brown Printing Company's Franklin,

Kentucky gravure facility, cylinder "de and re" is generally not needed (Tr. 2558). Since gravure presses can print many pages at once, it is not infrequent for jobs of 5 million copies or more to be printed in a continuous run without a cylinder change (Tr. 247-48, 2558, 2560; CX-900-Y).

c. Cut-Offs

170. The cut-off on a press is equal to the circumference of its cylinders. One press revolution equals one cut-off. The cut-off of the press limits the size of the end product because each page or group of pages must fit within the cut-off (Tr. 211, 215-18; CX-123-Z-17-18).

171. Offset presses can accommodate plate and blanket cylinders of only one circumference (Tr. 215, 1487, 2086, 4715; CX-102-Z-173) and thus have "fixed cut-offs" (Tr. 2837; CX-1142-Z-43). As a consequence, offset presses only print products in sizes that fit the particular press, whereas most gravure presses produced in the past ten years have a variable cut-off feature which allows the press to accommodate cylinders of different circumferences (Tr. 215-17, 1487, 1508, 4870-71, 3939; CX-102-Z-52, Z-53, Z-57).

172. Because of its variable cut-off feature, the gravure process can achieve greater loading efficiency and more paper savings than offset for many jobs (*see* Tr. 826-27, 2445-46, 2612-13).

d. In-Line Stitching and Trimming

173. Offset presses do not generally stitch and trim on the press line, primarily because their low page capacity often renders them incapable of printing all of the pages in a single print run (Tr. 2376-77, 2789, 2947).

174. The ability of gravure presses to stitch and trim a greater number of pages in one impression is an additional advantage of the gravure process (Tr. 201-02, 937, 952-53, 1491-92, 2205-06, 2553-54). The fact that the entire product must be stitched in a separate operation adds substantially to the cost of the offset process (Tr. 953, 2727-28). In fact, one witness estimated that stitching and trimming a product off line (as opposed to stitching and trimming on press) could add as much as 20% to the cost of the print job (Tr. 946).

e. Paper Waste

175. Plate and blanket gaps in offset contribute to a certain amount of paper waste; by contrast, in gravure the image is continuously engraved around the entire circumference of the cylinder, eliminating any "gap" paper waste that results from offset gaps (CX-307-C; Tr. 2088, 2091-93; *see also* Tr. 869, 1488).

176. Gravure's lower web tension and lower temperature dryers result in fewer web breaks and less paper waste (Tr. 2373; CX-178-Z-10-11; CX-535-Z-29).

177. The result of these factors is a general industry experience that gravure paper waste is less than that of offset (Tr. 233-34, 869, 2949, 1716, 6056, 2035-36, 2446, 4871-72; CX-499-D; CX-717-J, Z-1; CX-593-Z-28). Even a change in trim size can affect paper waste and costs (Tr. 6090-91; CX-1412).

f. Paper Grade and Weight

178. Paper used in the web offset process often contains a clay-like substance known as "sizing" which is needed to absorb the water applied to the paper; as a result, lower weight paper cannot be used (Tr. 176-79, 3699-3703; CX-634-T). Also, offset paper must withstand the tackiness of offset ink and the high temperatures used in drying it (CX-633-F).

179. Sizing is not required in the gravure process (Tr. 178), and since high temperatures and water are not used, the paper need not be treated to prevent water absorption (CX-1435-E). Because gravure inks are more fluid and ink is transferred from the cylinder wells directly to paper, lesser grades of paper receive the ink as well as higher grades (CX-634-U).

180. Consequently, the gravure process yields better results than offset when printing on cheaper, lighter weight, uncoated grades of paper such as supercalendared grade B and machine-finished stock (Tr. 136, 180, 238, 353, 727, 796-97, 816, 827, 831, 850, 868, 921, 923, 1044-45, 1089, 1093, 1124, 1162, 1183-84, 1420-21, 1472, 1490-91, 1760, 1830-31, 1918-19, 2005, 2196, 2208-09, 2304, 2372, 2395, 2446, 2557-58, 2640, 2692, 2845, 2888-89, 4443).

181. The use of lighter weight paper can result in significant reductions in cost because it is less expensive than paper used on offset presses (Tr. 1093-94, 1107, 2005; CX-301-Q; CX-634-U; CX-

1452-A). Significant postal savings can also be realized by using lighter weight paper (CX-293-B; CX 303-B; CX-354-B; Tr. 183, 2004-05). As postal rates increase, gravure's cost advantage over offset will also increase (Tr. 183; accord, CX-293-D).

182. Roy Hodgson, complaint counsel's industry expert, confirmed the relative advantages of the gravure process on lighter paper:

My experience is that lightweight papers are less economical when they're running in offset, and I think that there is a quality difference on lightweight papers.

Q. And which process would have the quality advantage in lightweight papers?

A. I think that gravure has the quality advantage on that particular stock.

(Tr. 353).

183. However, paper producers have recently developed lighter paper grades that are suited to the offset process (Tr. 3651, 3653-54, 3681, 3683-84, 3687).

g. Quality

184. The ultimate consumer (*i.e.*, the person who purchases a magazine or receives an insert or catalog) cannot tell whether it has been printed by the gravure or the offset process (Tr. 1718-19, 4267) and several retailers and catalogers who sell quality products use the offset process for their high-volume publications (Tr. 2968-69, 1390-91; RX-176; RX-188; RX-381; RX-173; RX-172).

185. High quality magazines such as National Geographic and Modern Maturity use both offset and gravure for different parts of their publications (Tr. 1710-11, 1569).

186. A number of witnesses testified that for their purposes offset and gravure offer comparable quality (Tr. 1366, 1719, 2394, 3567-68, 3675-77, 3975, 4267, 4546, 4551). On the other hand, print buyers such as Mr. Henry of Penney proclaimed the superiority of gravure over offset:

The one thing to remember is we don't sell preprints. I sell merchandise. That jacket is burgundy in Seattle and it's burgundy in Duluth. So there is nothing worse than disappointing . . . a customer who thinks and looks at the preprint and sees a red sports jacket and then walks into the J. C. Penney store and finds out on the rack that the jacket that's on sale is burgundy. She will, number one, be angry at the J. C. Penney Company, walk away, go shop in Dillard's and we may never see her again.

... the important thing is the integrity of the color throughout the length of the run ... that burgundy jacket must be burgundy from copy number one through copy number 37 million. And that's what's extremely important in the gravure process is that it does protect that quality, it does show the detail throughout the entire run of the jacket which is also extremely important.

(Tr. 697-98). (*see also* F 96.)

187. During the course of the trial, some witnesses were presented with samples of gravure and offset printing and asked to distinguish between them; they were not able to without the use of a magnifying glass, including Mr. Hodgson, who claimed that print buyers can see the difference between the two processes (Tr. 347), as well as a print buyer who had previously testified that gravure had a quality advantage over offset (Tr. 384, 1056).

188. Nevertheless, many printers and print buyers believe that gravure produces a better or, in the words of Mr. Hodgson, a "more elegant" printed product (Tr. 258, 351); and, Donnelley's Chairman and CEO declared in a speech that the quality of gravure is "unequaled by other printing methods" (CX-260-F).

189. Many print customers prefer what they perceive as the high-quality "gravure look," particularly when high volume printing is required (*see* Tr. 577, 698, 709-10, 791, 817-18, 1024, 1044-45, 1094-96, 1158-59, 1204, 1422-24, 1429-30, 1442, 1572, 1595, 1650-51, 1659, 1718, 1765, 1767, 1803, 1915, 2034-35, 2149-50). Even some offset printers agree that gravure printing provides better color fidelity than offset printing (Tr. 2196, 2786-87).

190. Complaint counsel argue that the quality preference of print buyers is based upon real differences between the two which are the result of gravure's simplicity as compared to offset (CX-633-I; Tr. 232, 2373, 2586, 2615, 4872-73). These differences include: "gap streaks" (Tr. 2090), "fan-out" (the tendency of the offset web to expand as water is applied to it) (Tr. 2083, 2210), plate wear, which affects color consistency (Tr. 708, 722-23, 739, 2088; CX-290-D), the need to monitor ink, water, and temperature balance in offset (CX-634-W), the wider tonal range of the gravure process (*see* CX-260-F; CX-290-C-D; CX-291-G; CX-292-M; CX-295-B; CX-297-B; CX-522-D; CX-523-E, F; CX-524-A, C; CX-525; CX-526-A-F; CX-527-K; CX-534-O; CX-633-H; CX-634-R), and in-line color compromise (F 140).

191. These problems are real; however, since even complaint counsel's own expert could not distinguish between offset and

gravure products without the use of a magnifying glass, it appears that offset printers are able to overcome offset's problems in many cases. (*See* Tr. 3750-56). Nevertheless, while the actual quality differences between gravure and offset may be minimal, the subjective opinion of print buyers who prefer gravure is as much a constraint on their choice of process as would be an objective, verifiable opinion.

4. Recent Developments In Offset and Gravure Technology

a. Gravure

192. The web width of gravure presses has gradually increased--from 70 to 80 inches in the early 1970s to over 100 inches or more at present (CX-102-Z-127-29). Three-meter gravure presses (118 inches wide) have been used in Europe for several years and were recently introduced in this country. The widest gravure press used for publication printing is 125 inches wide (CX-504-Z-10; CX-834; Tr. 2523), and future gravure presses may be even wider (*see* CX-1453-B; CX-256-F; CX-775-L; CX-939-H; CX-1240-L; CX-113-Z-107-C-E; CX-487-B, F).

193. Gravure press speeds have increased steadily from less than 1200 feet per minute in the 1960s to 3000 feet per minute at present (CX-120-Z-30-31, Z-38). The most widely used offset press, the Harris M-1000, has a web width of approximately 38 inches and a rated speed of 2000 feet per minute (Tr. 4321; CX-128-Z-59-60).

b. Offset

194. One printer testifying for complaint counsel stated that as offset presses have improved, "the area of competition between the two presses . . . has definitely gotten broader and . . . there is more work crossing over between the two processes" (Tr. 2609). And, an industry publication concluded that "the latest innovations in web offset . . . [have made] web offset competitive with gravure in long-run printing" (CX-1142-Z-43).

195. Donnelley claims that new presses such as the Heidelberg-Harris M-3000 and the Lithoman V will accelerate this trend (RPF 129), citing the formation of Donnelley technical and managerial committees to suggest ways of making "gravure more competitive

with offset" in light of the "significant gains in terms of both quality and productivity" that offset has made (RX-150; RX-161-A; RX-163; RX-164; Tr. 3778-88, 4582-86). And, Donnelley management has met with gravure equipment suppliers and urged them to develop new technologies in order to keep gravure competitive with offset (RX-156; RX-262; Tr. 4586-88). Gravure industry groups have also recognized that "with the ever advancing technology in offset, the competitive advantage of gravure is becoming questionable" and that improvements in gravure technology "will be mandatory to protect our market share within the commercial printing community (vs. offset/flexo)" (RX-153-A). Donnelley has even considered replacing some of its gravure presses with M-3000's (RX-142-A), and [] (Tr. 4444, 4462).

196. The Harris M-3000 or "Sunday" press has a 54-inch web width, which is 50% wider than the M-1000, with approximately the same cut-off or cylinder circumference as the M-1000 (Tr. 4345, 4511). This enables the press to produce 24 standard-size pages per impression, or 48 pages per impression in a double-web configuration (Tr. 4346).

197. Because the use of a gapless blanket technology and other concepts is viewed as a radical departure from conventional offset press design, many offset printers are reluctant to place orders for the M-3000 without seeing the technology proven (*see* Tr. 1481, 2220, 2543-44, 2622, 2804, 4653, 4792-93). The unconventional nature of the press (its increased web width while retaining a narrow cylinder circumference) raises particular concerns about cylinder deflection (Tr. 4792-93; accord, Tr. 2079-81).

198. Donnelley is ordering three M-3000's, but [] (Tr. 3929-30, 4468-69, 4579-81). Donnelley is also negotiating the purchase of three-meter gravure presses and its president testified that he does not view the M-3000 as rendering gravure obsolete (Tr. 4579-81).

199. New gravure and offset developments may result in crossover presses that create more competition between these processes (*see* Tr. 2609; CX-1272-G), but Mr. Hodgson testified that the new technology was aimed more at enhancing the presses in their own markets and that offset and gravure are still "quite separate marketplaces" (Tr. 290-91). And Mr. Sullivan, an offset printer, stated that while the M-3000 was designed to go after some of the high end gravure market, some of the work which has been

traditionally done gravure would be unaffected by the M-3000, even if it is successful (Tr. 2806-08).

200. [] (CX-1272-G).

201. The following table of high volume publications which are printed by the offset process fall within complaint counsel's and Dr. Hilke's alleged relevant product markets, *i.e.*, four-color print jobs with a run length of more than 10 million copies, more than 32 pages and, in most cases, not highly versioned (less than 4 four-color versions) (Tier I) or four-color print jobs with a run length of more than 5 million copies, more than 16 pages and not highly versioned (Tier II) (Tr. 299).

HIGH-VOLUME PRINT BUYERS
WHO USE OFFSET PRINTING

PRINT BUYER	RUN LENGTH (MILLIONS)	PAGES	SOURCE
[]	8-24 21.6	80-120 108	[] Tr. 4645-4646; RX-188; [] Tr. 4627
[]	11.1 10.3	96 104	RX-173 RX-519
[]	11.1	96	RX-173
[]	10.1	40	RX-4946, RX-198
[]	10.1	48	RX-496, RX-202 [] Tr. 2811-2814
[]	5-12.5	48-60 (36-page "core")	[] Tr. 4544-4545
[]	8-30	40-48 (36-page "core")	Anders Tr. 3544-3545
[]	10.0 13.1	16-28 16	RX-80-C, RX-81 McCoig Tr. 776,804 RX-184
[]	47.9	16	RX-383 Baron Tr. 2260-2261
[]	15.2	28	RX-276-Q, data point 420
[]	12.1	20	RX-212
[]	7-8	96	[] Tr. 2933
[]	7.5	48	RX-201-B, RX-201-0- Z-40
[]	7.6	48	[] Tr. 4626; RX-381
[]	6.1 6.1 5.3	20 16 20	RX-205 RX-207 RX-208
[]	7.0	80	RX-374

This table suggests that newer offset technology may be making some inroads into what was traditionally viewed as the domain of gravure.

202. Nevertheless, after considering the record evidence relating to new offset technology, Dr. Hilke concluded that it did not affect his opinion that a separate market for high volume gravure publications existed (Tr. 6070-71) because new offset technology is likely to diffuse into the market slowly, so that any substantial changes in the boundaries of the two markets are likely to be several years away (Tr. 3260-61).

5. Gravure and Offset Prices

203. Donnelley documents suggest that offset and gravure prices are independent of each other.

204. In a document entitled "Maxwell Communications: Strategic Considerations," a Donnelley employee stated that the retirement of a portion of Maxwell's 40 gravure presses could "Raise prices on gravure work" independent of changes in versioning and offset technology (CX-45; *see also* CX-47-A, C-D).

205. Donnelley prepared quarterly pricing reports for each quarter from the first quarter of 1982 until the fourth quarter of 1989 (CX-10-H; CX-674-92). These reports were assembled by almost 100 people and were used to assess pricing trends and to prepare budgets (CX-88-F; CX-147-Q; Tr. 4595). They were discontinued in early 1990 in conjunction with decentralization of the pricing function (Tr. 4594-96, 6106-07).

206. Dr. Hilke analyzed these reports and found that for the 31 quarters in which gravure and offset prices were tracked, they moved in opposite directions 48% of the time (CX-700-A; Tr. 3192-93).

207. In 8 quarters (or 26% of the time) the absolute difference between the percentage price changes was over 10 percent and in 19 quarters (or 61%) the absolute difference between the percentage price changes was over 5% (CX-700-A; Tr. 3193-94).

208. CX-81, the price tracking report for the fourth quarter of 1989, tracked pricing trends on an annual basis. Analysis of this report reveals that the annualized gravure and offset prices moved in opposite directions in two years out of eight (1988 and 1989) and that the difference in price movements exceeded five percent in every year except one (1986) (CX-700-D).

209. Dr. Hilke testified that the pricing data in the quarterly pricing reports may understate the degree of pricing independence of

high volume publication gravure printing because it includes gravure prices for low volume publication gravure printing (Tr. 3203).

210. Industry witnesses testified that during the post-acquisition period, gravure and offset prices dropped, but not to the same degree. For example, according to Mr. Hodgson, prices for gravure held up better than prices for offset (Tr. 335-36; *see also* Tr. 888-89, 1165-66, 1909-10, 2040-41, 2454, 2616, 2630-32).

211. A record of divergent price movements and price changes of different magnitudes for the gravure and offset processes, as shown here, is inconsistent with the claim that there is a single overall printing market (Tr. 3194-95). Furthermore, if offset were a close substitute for gravure, an increase in the relative price of gravure should lead to a decline in gravure volume. CX-700 shows no such result (CX-700; Tr. 3195-97, 3522-25).

6. Economics of Gravure for High Volume Publication Printing

a. Breakeven

212. The "breakeven" or "crossover" point is the number of copies at which a particular print job with given specifications is equally costly to print using either the gravure or the offset process (Tr. 867-70, 924-26, 1567, 1929).

213. The breakeven point between gravure and offset is frequently expressed in terms of the number of impressions (CX-250-H). The number of pages and versioning, among other factors, can affect when the breakeven point occurs (Tr. 1472, 1485, 1488-90).

214. The relatively low fixed or up-front costs of offset and the relatively low variable costs of gravure imply that offset is generally more cost-effective for shorter runs, while gravure is more cost-effective for longer runs. If the run length is too short, the long run advantages of gravure will not counteract its higher fixed costs (Tr. 263, 574, 867-70, 1472, 1484, 1496, 1499, 1525, 1572, 1577-78, 1713, 1737, 1765, 1817, 2155, 2215, 2434, 2553, 2612, 2683, 2693, 2848, 2921, 3090-91). However, a five percent differential between gravure and offset, absent quality considerations, is not reached until a run length even greater than the breakeven point (Tr. 3152-54).

215. The breakeven point is determined by the specifications of a particular job and the characteristics of the presses being compared (Tr. 1485; *see generally* Tr. 3152-53). Nevertheless, the general

proposition that a breakeven point exists for most page counts and page sizes is confirmed by cost studies comparing specific jobs on specific gravure and offset presses and is reflected in CX-1225 and documents found in the files of both Donnelley and Meredith/Burda (*see, e.g.*, CX-209; CX-250; CX-1204).

b. Run Length

216. General industry consensus is that at a certain volume (five million copies or more) gravure is less expensive than offset (Tr. 136-37, 912, 918-19, 1426, 1427-28, 2002, 2465-66, 4223-24, 4967, 5965-66; CX-120-Z-69-A). For example, the former president of Holladay-Tyler, an offset only printer who is now with Judd, also an offset only printer, acknowledged that:

From a million and a half up to 5 million is a very grey area, and over that, I think, gravure has the market locked up.

(Tr. 2783).

217. The gravure advantage for long runs is reflected in print buyers' decisions to switch to that process as the run length of their publications increased. The magazine Plain Truth was shifted from offset to gravure by Donnelley when its circulation reached 4.5 million copies (Tr. 2650-52), and Bloomingdale's Christmas catalog, with a run length of some 4 million copies and 96 pages, was switched from offset to gravure in 1989, with substantial savings (Tr. 2002-03, 2977-78).

218. [] (Tr. 916-18, 1523, 1551-53, 2012-38, 2925-28, 5968-74, 6208-12; *see also* CX-1446-B-C; CX-1452).

219. Sterling, Inc., prints a spring and Christmas catalog with approximately 20-24 pages which is distributed by both newspaper insertion and the postal service (Tr. 932-33). Before 1988, the catalog had been printed using the offset process (Tr. 947). In 1988, when the run length reached approximately six million copies, Donnelley suggested to Sterling that the catalog could be printed more economically using the gravure process, and Sterling followed Donnelley's recommendation (Tr. 928, 947-48).

c. Page Count

220. Page count can also affect the relative costs of printing a job using gravure or offset--for if the page count is too small, a job is less likely to take full advantage of gravure's lower running costs (CX-297-C; CX-305-A, D).

221. Generally, offset presses can print 32 pages, while gravure presses print at least twice as many; hence, an 8 page, 2 million copy job running on a 64 page gravure press would require only 250,000 impressions. Five hundred thousand impressions would be required on an offset press (*see* CX-300-B; CX-307-C).

222. Mr. Hodgson testified that the typical offset press used in the United States can deliver a maximum of 32 pages, so there is some reason to use a page count of over 32 to identify the core of the high volume publication gravure printing market (*see* Tr. 349).

223. Offset operates at a cost disadvantage compared to gravure for print jobs with page counts and page sizes that are sufficiently large to require multiple press runs in offset when a single press run would be sufficient in gravure (Tr. 251, 573, 2196, 2216, 2681-83, 2833-34, 3092).

d. Versioning

224. Versioning, which occurs when not all copies of a particular issue of a magazine, catalog, or insert have identical printed content, affects the relative costs of gravure and offset printing (Tr. 252-53). Versioning may require major changes involving the substitution of all plates (in offset) or cylinders (in gravure) (Tr. 254, 256-57, 3090, 3093). The costs of versioning are greater in gravure than in offset, and the gravure disadvantage increases as the extent of versioning increases. Because four-color versioning requires that at least four gravure cylinders or four offset plates be changed, the cost disadvantage to gravure is greater for four-color versioning than it is for black-only versioning (Tr. 253-54, 951-52, 3093).

225. If the number of versions is great enough, even a high-volume job with many copies and a high page count may be printed more economically using offset rather than gravure (Tr. 2449-50, 2496-98, 3101-02, 3127-28).

226. Run length, page count and the extent of versioning are not the only factors which affect relative cost; trim size and capacity commitment also affect costs (Tr. 3098-99, 3103-04).

e. Industry Opinion

227. Donnelley employees recognize the economies that favor gravure over offset for high volume publication printing: A Donnelley document written in September 1989 concluded that, at run lengths above two and a half million, economics and customer preference weighed heavily in favor of the gravure process (CX-11-T, V, Z-2; CX-17-Y, Z-1). Other Donnelley analyses show breakeven points in the range of 1.6 million copies or less (*see e.g.*, CX-250-S; CX-291-C; CX-305-A; CX-306-A-C; CX-571-I-K).

228. A presentation to Donnelley's board of directors in the fall of 1988 stated:

The choice of printing process is primarily economic, with offset the process of choice for medium length jobs and jobs with multiple versions, while in gravure, we can offer our customers a wide variety of size on the same printing press as well as the advantage of lower cost on longer runs.

(CX-1072-D).

229. A seminar presentation by a Donnelley employee (CX-634; *see* Tr. 1089-90) stated:

Printing Process Comparison		
<u>Feature</u>	<u>Offset</u>	<u>Gravure</u>
Economics	Shorter runs fewer pages	Longer runs more pages
Versioning	Less costly * * *	More costly

(CX-634-Y).

230. A letter to a potential Donnelley customer in March 1988 stated:

Offset presses are smaller than gravure presses. They cost less to purchase, to operate, and to makeready. Also, the printing surface (plates) are considerably less expensive.

Simply put, the fixed costs are quite a bit lower than gravure but the running costs (on press) are considerably higher. Therefore, the "short" runs, offset is less expensive. For "long runs", gravure is less expensive. The longer runs "spread out" the higher gravure fixed costs.

The "break even" quantity between web offset and gravure is not a constant since a large number of pages and lower quantity may equate to a fewer number of pages and large quantity. For example, 3mm copies of an eight page may be most economically printed web offset, whereas 24 pages at a 3mm count may be best produced gravure.

(CX-297-C).

231. In making investment decisions, printers often examine the average type of work they do. A concept sometimes used is a "model job." Various documents refer to this concept and show that offset equipment is usually expected to do jobs with short run lengths (Tr. 3162-68; *see, e.g.*, CX-546; CX-547).

232. Donnelley's training manual contains a chart which shows gravure roughly 30% cheaper than offset at run lengths of 3 million and 10 million (CX-633-W). Offset's "inability to compete with gravure at higher counts" was specifically noted by Donnelley marketing personnel (CX-589-C).

233. Third-party documents and testimony also confirm that offset's ability to compete with gravure is limited for high volume work (CX-900-X-Z-1).

234. Summarizing the effects of run length, page count and versioning, several third-party printers testified that high volume publication printing is the natural domain of gravure:

Q. What if we did qualify and say for runs of over 10 million copies, over 32 pages with four or less color versions, do offset and gravure compete for these jobs?

A. No.

Q. Are these clearly gravure jobs?

A. Yes.

(Tr. 2397).

... I would say a run of four or five million without a version is pretty much a very good one for roto.

(Tr. 2214).

Q. Do you view any gravure companies as competitors?

A. Not generally.

Q. And why is that?

A. Well, I see them as different processes. It's a number of reasons. Generally, I see gravure as very long run, high page count, low versioning.

(Tr. 2682-82).

Well, 10 million and page counts of 32 or more, typically, in my experience, today, yesterday, tomorrow, is going to be done gravure.

(Tr. 2612).

235. Other print customers concluded that gravure and offset do not compete for long run jobs (Tr. 713, 1361-63, 1403, 1737).

7. Analysis of High Volume Publications Produced by Gravure and Offset Printers

236. CX-1167 is an exhibit prepared by Dr. Hilke using information obtained from 29 gravure and offset printers which analyzes, for 1990, their four-color print jobs with over 5 million copies and with 16 or more pages.

237. Dr. Hilke concluded from this document that the product market and the core of that market are substantial: 521 and 252 billion pages printed per year in those markets (Tr. 3098-99, 3101-05; CX-1167-C, C-1) (complaint counsel's largest product market consists of four-color gravure printing jobs with at least 5 million copies, at least 16 pages and less than 4 four-color versions (Tr. 2997-98, 3419-20, 6149-50); the "core" of this market consists of four-color gravure jobs with at least 10 million copies, more than 32 pages and less than 4 four-color versions (Tr. 2997, 3097)).

238. Dr. Hilke's analysis, which uses number of copies, number of pages and number of versions to identify the relevant product market, confirms that these factors are highly predictive of which jobs will be done gravure and which offset (CX-1167).

239. In the wider alleged product market, more than fifty customers had jobs printed by third-party gravure printers in 1990 (CX-1167-I, K); counting Donnelley and Meredith/Burda, the number of high volume publication gravure printing customers was well in excess of fifty. There were approximately three dozen gravure customers in the so-called "core" market (RX-665) (however, *see* F 363).

240. CX-1167 demonstrates that a substantial amount of high volume publication printing was done by the gravure process and that the proportion increased even further as the number of copies in the job increased. For example, for jobs of more than 32 pages which are not highly versioned, approximately 88.6% of the volume in jobs over 5 million copies, 93.9% of the volume in jobs over 7.5 million, and 95.7% of the volume in jobs over 10 million copies were done gravure:

GRAVURE AND OFFSET PORTION OF LOW VERSIONED JOBS OVER 32 PAGES

<u>Number of Copies</u>	<u>Billions of Pages</u>	<u>Gravure Percentage</u>	<u>Offset Percentage</u>
5 million plus	460	88.6%	11.4%
7.5 million plus	318	93.9%	6.1%
10 million plus	264	95.7%	4.3%
12.5 million plus	205	97.6%	2.4%

(CX-1167-C).

241. The proportion of high volume publication printing being done gravure remained higher than offset even if the number of pages per copy was reduced or if the number of versions was increased. For example, 77.4% of jobs with 10 million copies or more were done gravure even if the page criterion is relaxed to 16 pages and no restriction is placed on the number of versions (CX-1167-C-1). Adding the versioning restriction alone (less than 4 four-color versions) increases the gravure proportion from 77.4% to 86.6% (*Id.*). Adding the page count criterion (more than 32 pages) alone results in 93.8% of the work being done gravure (CX-1167).

242. Although CX-1167 does not include all gravure or offset jobs above 5 million copies and 16 pages or more, the figures shown in the exhibit present a reliable picture of publication printing meeting these characteristics that accords with record testimony and documents (Tr. 6118; CX-1167-D). For example, market share statistics derived from the data in CX-1167 correspond closely to the market share statistics based on capacity (CX-1167-D; Tr. 3100, 3326) (F 378, 379).

243. Despite what appears to be convincing evidence that print customers prefer gravure over offset for high volume jobs, Dr. Hausman, emphasizing offset's share of such jobs (over 11% for run

lengths exceeding 5 million copies), testified that these processes do compete meaningfully for such jobs (Tr. 5385-87). For the reasons given in my conclusions of law, I reject his opinion.

244. Other evidence of gravure's advantage over offset is found in analyses by or for Donnelley of gravure and offset costs which reveal that beyond a few million copies, gravure is less costly than offset when the page count is high and there are relatively few versions. For example, a 1988 study entitled "Gravure Competitiveness and Title Improvement" by the Boston Consulting Group (BCG) which compared the costs of printing a catalog on offset and gravure presses (CX-250) was analyzed by Dr. Hilke who concluded that for a 16-page catalog the breakeven point occurs somewhere between 6 and 7 million copies, and at 10 million copies the offset cost disadvantage is 9.2%, rising to 17.6% at 20 million copies and 21% at 30 million copies (CX-1164-D; Tr. 3146-51).

245. For a 48-page catalog, the breakeven point occurs at 2 million copies (CX-1164-C). The offset cost disadvantage rises to 16.1% at 5 million copies, 22% at 10 million copies and 24.9% at 20 million copies (CX-1164-C).

246. Dr. Hilke compiled CX-1433, which modified the assumption in CX-1164 about the replacement of offset plates from every 700,000 impressions to every 2 million impressions. He revised CX-1164 further by assuming, in accord with CX-316, that solvent recovery would generate revenue equal to 25% of gravure ink cost. For a 16-page catalog Dr. Hilke found that the breakeven point would occur between 5 and 6 million copies. The offset cost disadvantage would be 13.8% at 10 million copies and 22.6% at 20 million copies (CX-1433-B). For a 48-page catalog, the breakeven point would be reached between 1 and 2 million copies. The offset cost disadvantage would be 21.6% at 5 million copies, 26.5% at 10 million copies and 30.6% at 20 million copies (CX-1433-A).

247. Dr. Hilke also analyzed, in CX-1165, a Donnelley comparison of gravure and offset presses in 1989 (CX-209). He calculated that for a 48-page catalog whose page dimensions were those of the Penney big book, the breakeven point between a 95-inch gravure press and a Harris M-1000BE offset press would occur between 1 and 2 million copies (CX-1165-C). Using the same methodology as in CX-1164, the offset cost disadvantage was 27.4% at 5 million copies, 33.9% at 10 million copies and 37.1% at 20 million copies (CX-1165-C).

248. Dr. Hilke also found, in a comparison between state-of-the-art three-meter gravure and anticipated offset presses such as the M-3000, that gravure would continue to enjoy over a five percent cost advantage (*see* CX-1432; Tr. 6080-86, 6094).

249. A March 1992 memo by a Donnelley employee compared the cost of printing using either the M-3000 offset press or a 94-inch gravure press (CX-1225). The memo included a cost comparison based on printing 13 million copies of a 48 page form for the [] catalog and a similar cost comparison for the [] catalog. The [] comparison showed a cost advantage for the 94-inch gravure press of \$2.11 per thousand 48-page forms, or 8.9% (CX-1225-G).

250. According to a Donnelley analysis in September 1989, printing TV Guide using a combination of gravure and offset would be 20% less costly than using offset only (CX-1204-A; Tr. 3856-58. *See also* Tr. 1696-97).

251. The testimony of industry members and documents presented by complaint counsel support Dr. Hilke's opinion that gravure has a cost advantage over offset for high volume, low version jobs.

252. Webworks, an all-offset printer, produces highly versioned jobs with 8 to 12 pages (Tr. 2830-32). It does not compete for high count magazines because, in the opinion of Mr. Pope, such work is clearly gravure in nature (Tr. 2834).

253. The CEO of St. Ives, another all-offset printer, testified that:

Well, 10 million and page counts of 32 or more typically, in my experience, today, yesterday, tomorrow, is going to be done gravure.

(Tr. 2612).

254. After purchasing the Star magazine, which had previously been printed offset, the publisher of the National Enquirer realized a \$14 million saving by switching the printing of the Star from offset to gravure and printing both the Star and the National Enquirer in a single print run on the same gravure presses (Tr. 4704-05).

255. Bloomingdale's realized significant savings by switching its Christmas catalog with over 100 pages and 4 million copies from offset to gravure (Tr. 2003, 2927-28).

256. Mr. Habeck of K-Mart testified that gravure would be the less costly method of printing a continuous run of ten million copies with no versions (Tr. 4190, 4223).

257. Dr. Hilke presented a graph (CX-1190) based on comparisons of offset and gravure prices presented by two witnesses in this proceeding, Ian Deutsch of Sterling and Charles Wells of Current (*see* CX-764; CX-1177), which shows an offset price disadvantage exceeding 20% for long run jobs for both customers (CX-1177-A; CX-1190-A).

258. Dr. Hilke also prepared a study which shows that the offset bid disadvantage was 26.2% for the [] [], a two-color publication of approximately 22 million copies and generally 20 pages (CX-1411; Tr. 1564).

259. Mr. Charles Allen, the publishing director for the American Association of Retired Persons, testified that to print the 88 page gravure portion of *Modern Maturity*, a magazine with a circulation of 22.4 million, using the offset process would cost at least 5% more than gravure (Tr. 1563-64, 1568, 1621) and Mr. Angstrom of St. Ives claimed that at sufficiently long run lengths the cost spread between gravure and offset becomes too great for offset to take away sales from gravure even if gravure prices rose by 5% (Tr. 2603-04).

260. Sears' smaller catalogs and specialty catalogs have a page count ranging from 48 to 200 and a run length ranging from 1 to 9 million. The specialty catalogs were bid out annually and gravure won all of the bids (Tr. 1768-70).

261. The Penney catalog division's smallest jobs are in its market support program. Each market support catalog ranges from 200,000 to 1.3 million copies and contains 16 to 48 pages with no versions. Penney finds that gravure generally wins the larger jobs in this range, such as the runs over 650,000 copies (Tr. 564, 570-72).

262. [] had the largest high volume, low version offset program in 1990, accounting for approximately 30% of high volume offset work supplied by third-parties (CX-1446-B); however, because of the large potential savings from switching to gravure in high volume work (RX-308), [] is engaged in an extensive gravure testing program for its long-run, high page-count catalogs (Tr. 2012-26).

263. One of [] offset printers, Graphic Arts Center, suggested that its big book would be more appropriately printed gravure (Tr. 2925-26). Others in the industry believe [] could have been realizing significant savings by using gravure (Tr. 916, 2025-26). [] (CX-1446-C; CX-1452-B; Tr. 5969-72).

264. Dr. Hilke presented graphs (CX-1438; CX-1439) that depict the offset bid disadvantage for the higher run lengths of [] work.

According to them, between 5 and 10 million copies, the offset bid disadvantage ranged from less than 1% to over 15%. Beyond 11 million copies, the offset cost disadvantage ranged from 10 to 22% (CX-1348-C). The buyer for [] testified that the gravure prices she received were generally lower than the offset prices (Tr. 2029).

265. Donnelley and third-party data, consistent with Dr. Hilke's testimony, show that the average run length for offset is much shorter than for gravure (CX-1108-A; *see* CX-1187-A; CX-884-A, C, I; CX-885-A; CX-886-B; CX-887-C; CX-888-G, I-K; RX-146-Z-22, Z-23; CX-128-Z-62; CX-937-A; CX-931-A, B; Tr. 3166-68, 2923, 2558).

266. According to the 1993 World Almanac, the magazines with the largest circulations are Modern Maturity, the NRTA/AARP Bulletin, Reader's Digest, TV Guide, National Geographic and Better Homes & Gardens (CX-769-B). Each of these publications has a circulation in excess of eight million copies (CX-769-B), and each uses the gravure process (Tr. 1494-95, 1564-65, 1568-70, 1653, 1660-61, 5441-42; CX-279; CX-902-Z-8-9, Z-37-381 Z-43).

267. The Spring 1989 issue of Gravure magazine reported that 10 of the 25 leading consumer magazines had circulations of 5 million copies or more, and that all 10 were reported as using the gravure process. Five other publications contained on the list (Guideposts, National Enquirer, Redbook, Playboy and Cosmopolitan) are identified as using the gravure process. Since 1989, at least one publication on the list (the Star magazine) that was previously done offset is now done gravure (F 254). All of these publications have circulations of three million copies or more (CX-933-H).

268. Donnelley criticizes Dr. Hilke's cost analyses because they are based on unwarranted alterations of Donnelley studies; however, they appear to be accurate restatements of Donnelley's own cost comparisons around the time of the acquisition; furthermore, they are simply one bit of evidence which, along with other record facts, is consistent with the claim that, gravure costs for long run print jobs are lower than offset costs (F 249-67).

269. According to Donnelley, complaint counsel's price comparisons are primarily anecdotal and do not establish divergent trends for offset and gravure (RPF 150). This is incorrect; Dr. Hilke's analysis of nine years of quarterly pricing data compiled by Donnelley provides solid evidence that gravure and offset prices are independent of each other (F 203-09).

270. To counter complaint counsel's price and cost comparisons, Dr. Hausman prepared bid comparisons from five print buyers and regression analyses of those bids (RPF 152-66).

271. I agree with complaint counsel that these comparisons do not seriously undermine their analyses because they are based, not on actual, but on hypothetical, constructed, bids (complaint counsel's reply, p. A-29) and because, as Dr. Hilke testified:

What I did was I tried to go back and look at RX-665, which was the listing of work in the core of the market which I have identified, and compare that to the work which is included in the bid data that Professor Hausman has used. What I found was that the bid data that Professor Hausman used is just about a clean miss with respect to the core of the market as I have defined it, rather than getting information from customers that were in the core.

(Tr. 5999) (*see also* Tr. 6306). Finally, any conclusion about other customers which might be drawn from this analysis, even if there were no problem with the underlying data, would be questionable because the sample was not randomly chosen (Tr. 5776-77).

272. I concede that the printers whose jobs were summarized in CX-1167 were not chosen randomly; however, the sample is much larger and I am confident, from the ample corroborating evidence presented by complaint counsel, that this analysis can be relied upon.

8. The Five Percent Test

273. Several print customers testified that they would not or might not switch from gravure to offset if the price of all gravure printing services was raised by five percent, and some stated that there is at least a five percent differential between gravure and offset prices for work that is now done gravure for them (Tr. 619-20, 745, 819, 847, 948, 1067, 1104-05, 1114, 1181-83, 1335-36, 1696-97, 1932). A representative from Penney even claimed that it would not switch its full line retail program from gravure to offset if the relative price from all gravure printers were to rise by 15% (Tr. 699-700).

9. Industry Recognition

a. Donnelley and Meredith/Burda

274. Donnelley assessments of its potential acquisition of Meredith/Burda and of other possible acquisitions computed market shares based on a gravure-only market (CX-40-D; CX-41-Z-11; CX-156-E; CX-267-F; CX-268; CX-994-G; CX-47-C; CX-282).

275. Many other documents written by Donnelley employees assume the existence of a separate market for gravure printing (CX-93-N; CX-95-M; CX-96-J-K; CX-189; CX-603-B, L; CX-57-J; CX-107-Z-46-47; CX-158-N, Z-12-13, Z-16; CX-48-G; CX-141-Z-43-A; CX-98-Z-147; CX-189; CX-264; CX-267-F, G; CX-268; CX-269-F, G; CX-270-J; CX-273; CX-272; CX-276; CX-141-Z-73; CX-279; CX-282-A-B; CX-359-N; CX-520-C; CX-539; CX-557-T; CX-560-J).

276. Donnelley's head of corporate development, Jeffrey Anderson, testified that he had never seen market share statistics aggregated to include gravure and offset capacity together (CX-139-Z-69).

277. Meredith/Burda documents also reveal that its employees often assumed the existence of a separate gravure market (*see* CX-51-E, Z-7, Z-29, Z-55; CX-52-E-G, H; CX-53-I).

278. Donnelley documents relating to capacity expansions also assumed a separate gravure market (*see, e.g.*, CX-11-Z-77; CX-21-O-R; CX-26-T; CX-63-C-D, V-W; CX-90-B, G-K).

279. Other Donnelley documents and testimony suggest that its employees and consultants considered gravure and offset separately in making business decisions or recommendations (compare CX-205-Z-113 with CX-265-D; CX-277; CX-112-Z-25-26; CX-1003-Z-13; CX-702-B; CX-51-T; CX-57-G-I; CX-59-M; CX-77-F-G; CX-90-B, G, H; CX-158-T, Z-37-38; CX-213-E-G; CX-548; CX-557-B; CX-594-E; CX-596-D; CX-597-Z-10; CX-873-A, Tr. 4028-29; *see* CX-264).

b. Excess Capacity

280. Firms have made major investments in gravure printing capability even when there has been excess offset capacity. For example, at the time that Donnelley's gravure press expansion in

Reno was being considered in November 1989, there was excess capacity in the offset presses at that facility but very little excess gravure capacity (CX-219; Tr. 3231). In fact, one of the stated objectives of the Reno gravure press plan was to "limit off-loading of gravure work to offset presses" (CX-21-Z-35).

281. In the years since the acquisition, there has been substantially greater excess capacity in the offset presses at Reno compared to the gravure presses (CX-1070-A-C; CX-1078-S, Z-1; Tr. 3233-34). At the same time, there was excess capacity in other Donnelley West Coast offset facilities (*see* CX-285-B, G).

282. In 1989, there was a shortage of available capacity at each of the three largest United States gravure printers: Donnelley, Meredith/Burda and Maxwell (now Quebecor) (Tr. 308-09, 1115-17; *see also* CX-1244-A; Tr. 4071-72). One customer who requested scheduling at Donnelley's Reno facility in 1989 was informed that Reno was "too full" (CX-91-X). Brown also was "filled to the brim" at its Franklin, Kentucky gravure facility during 1989 (Tr. 2525-26). Throughout this same period, there was substantial excess web offset capacity in the marketplace (Tr. 306, 2796, 4788-89; accord, CX-219; CX-557-B; CX-587-B; CX-604-G; Tr. 4325).

283. Quad, a gravure and offset printer, had excess capacity in its offset facilities at the time it entered the gravure business (Tr. 2367-68), and Maxwell had excess capacity in offset at the time it invested in new gravure presses (Tr. 306).

284. In recent years, there has been substantially greater excess capacity in offset as compared to gravure (CX-113-Z-28; CX-286-B; CX-287-E; CX-545-A; Tr. 306, 350, 889, 1510, 2455, 2632), and many offset facilities are being shut down due to lack of business (*see* CX-1102).

285. Since a printer with idle capacity in gravure or offset would most likely increase output on the unused assets rather than invest in the other process, investment in gravure at a time of excess offset capacity indicates, that these processes occupy separate markets (Tr. 3232-34).

c. Recognition of a Separate Offset Market

286. Donnelley's computations of offset market shares, offset capacity estimates and the growth potential of offset were done within the context of a heatset web offset marketplace or "web offset

market" only (*see, e.g.*, CX-158-S, Z-12-16; Z-37-40; CX-190-F; CX-261-I-J; CX-265-D; CX-266-A; CX-267-F; CX-270-A; CX-273-B; CX-283-A-B; CX-296; CX-483-Z-7; CX-537-N-Q; CX-547-A; CX-552-A-B; CX-560-C-E; CX-594-Z-6; CX-598-Z-4; CX-652-D).

287. For example, as far back as 1984 Donnelley referred to the "high quality web offset catalog market" in proposing an offset expansion at its Chicago facility (CX-927-T), but no mention was made of competition with gravure.

288. When Donnelley constructed a new offset facility in Danville, Kentucky, in the early 1980s, that plant was geared specifically for competing in the web offset catalog and publications market (Tr. 2606-07).

289. In 1990-91, Donnelley launched a new offset plant in Daytona, Florida (CX-993-M). Documents relating to that new facility refer to competing offset plants in Georgia (*see e.g.*, CX-537-N; CX-1091-E), but not to competing gravure plants even though Ringier operates one in Georgia (CX-507-B). Horst Fleck, division director at Donnelley's all-gravure facility in Lynchburg, testified in his deposition that the decision to construct a new offset plant in Daytona would necessarily be based on the demand for offset printing, without regard to the supply and demand for gravure printing at Lynchburg (*see* CX-120-Z-76-77-A).

290. Separate share calculations are made in Donnelley documents assessing the "offset catalog market" (*see, e.g.*, CX-556-A) and the "web offset market" (*see, e.g.*, CX-560-C-E), again without reference to gravure competition.

291. In recommending the purchase of new web offset presses for its Des Moines plant, Meredith/Burda officials in 1988 also used the term "web offset market" (CX-296).

d. Other Gravure Printers

292. Other gravure printers made the same assumption as Donnelley and Meredith/Burda--that there are separate gravure and offset markets for certain print jobs.

293. The management of Quebecor, the second largest gravure printer, views gravure and offset as separate markets (Tr. 303-05, 2607-08; CX-292) and the president of Ringier America testified that in his opinion they are two separate markets (Tr. 1472, 1499).

294. Officials of other gravure printers came to the same conclusion:

Quad Graphics:	(Tr. 2347-49, 2460)
Arcata Graphics:	(CX-1151)
Brown Printing:	(Tr. 2522, 2563-65)

295. Mr. Hodgson, who has 47 years of experience in the printing industry, testified that in his opinion gravure and offset were separate markets (Tr. 290, 306, 341).

296. Gravure printers belong to a separate trade association, the Gravure Association of America, or GAA, an organization devoted exclusively to gravure printing. The association holds annual conventions at which papers are presented that discuss gravure printing technology (Tr. 132-33; *see* CX-766; CX-1304). GAA also prints Gravure magazine (CX-933; Tr. 1644). Offset printing is represented by a separate trade association, the Printing Industries of America, or PIA (Tr. 133).

e. Offset Printers

297. [] (CX-969-A).

298. Century Graphics, another offset-only printer, withdrew from the bidding process for Caldor's insert program once it understood that the economics of Caldor's 12 to 14 million run no longer made offset an economically feasible option (*see* Tr. 1163-64). [] (CX-1153).

299. [] (*see* CX-1168-A-E).

300. Sullivan Graphics ("Sullivan"), a printer with only heatset offset and flexography presses, referred [] (CX-1169-F; Tr. 4722-23). However, when assessing its market share in heatset offset inserts, Sullivan excluded gravure printing from the calculation (CX-1169-C; Tr. 4724).

301. In representations made in its most recent SEC filing (CX-1306), Sullivan referred to competition with coldset offset for its flexography business (CX-1306-E; Tr. 4731) but did not mention any competition with gravure for its heatset offset business (CX-1306-E-G; Tr. 4730-33).

302. Other offset printers who testified at trial acknowledged the existence of a high volume publication gravure marketplace (*see* Tr. 2605, 2627, 2669-70, 2682-83, 2783, 2833).

303. Ringier views its Phoenix web offset facility as competing generally in the same market as other West Coast offset printers, and not for longer run gravure work (Tr. 1501).

304. Wayne R. Angstrom, Chief Executive Officer of St. Ives' United States operations, including an offset plant located in Hollywood, Florida, testified:

I am not a gravure printer. I'm a web offset printer. I have 32-page presses. I cannot compete against a gravure printer.

(Tr. 2603). Mr. Angstrom also concluded that if the price of all high volume gravure printing were to rise by five percent, St. Ives would not expect to gain volume as a result because the cost spread between the two processes is already too great (Tr. 2604; *see also* Tr. 2225, 2861).

305. Georg Decker of Riverside County Publishing Company, a Los Angeles area offset printer, testified that he would not expect to gain work if gravure printers on the West Coast raised prices by five percent (Tr. 2225).

306. When asked whether or not gravure and offset printing competed across the entire spectrum of printing jobs, Mr. Pope of Webworks responded:

No, we don't. We have our marketplace and they have their marketplace. We don't run into gravure very much at all. We have one account that we have been asked to quote against as far as gravure that I know of, and we don't effectively compete there so I would say no. We have our marketplace, they have theirs. We both do good.

(Tr. 2832).

307. Other offset printers testified that they do not monitor gravure prices (Tr. 2818, 2954, 4655, 4743-44).

10. Gravure and Offset Equipment Suppliers

308. When Heidelberg-Harris, [] (CX-1272-C; Tr. 4433-35).

309. Robert Brown, President of Heidelberg-Harris, was asked at his January 1993 deposition to list competitors for his N-9000 model

offset press. He listed only other offset press manufacturers, and no gravure press manufacturers (Tr. 4399-4400).

310. Mitsubishi (another offset press manufacturer) does not consider gravure press manufacturers to be its primary competitors (Tr. 2044).

11. Buyers' Preferences

311. Some print buyers have expressed a distinct preference for the gravure process (*see* CX-21-O; CX-104-Z-52; CX-109-Z-78; CX-116-Y; CX-118-Z-85), and it is generally recognized that they usually do not switch between processes for a particular printing program (Tr. 2223-24, 2648, 2797, 2954). As Howard Sullivan, the former President of Holladay-Tyler Company, expressed it, "when one has the mentality of going gravure, I think they pretty much stay there" (Tr. 2797).

312. At Donnelley's Reno plant, a facility with both offset and gravure equipment, no customer switched away from the gravure process to offset during the tenure of Gary Nesemeier, who served as its customer service group manager (CX-117-Z-6, Z-9-A).

313. Horst Fleck has been in charge of the former Meredith/Burda gravure facility in Lynchburg since 1987 (CX-120-Z-48) and has worked at the facility since 1973 (CX-120-Z-44). The longest run length job he could recall ever having lost to offset had a run length of 2.2 million (CX-120-Z-68-69-A).

314. Penney's James Sackett referred to the existence of a "high-quality rotogravure marketplace" (Tr. 675; CX-785-B). In his trial testimony, Mr. Sackett explained:

We have a \$4 billion business which is entirely dependent upon the supply of rotogravure capacity.

(Tr. 618).

315. Other customers have switched away from offset to gravure, in some cases based on the recommendations of the gravure printer (*see, e.g.*, Tr. 2050-52, 2002-03, 4704-07, 4861-62; CX-140-Z-80-81; CX-303-B). Donnelley's training manual suggests one reason for such switching: as the customer grows and requires more copies, the more likely the print program will be a good candidate for gravure (CX-633-Z-8; accord, CX-560-D).

316. A December 1989 Donnelley document discussing the "web offset insert market" stated:

Offset allows us to penetrate growing accounts that are not yet ready for gravure. Offset accounts are easily converted to gravure as they grow.

(CX-560-D).

317. In some instances, the customer has agreed, by contract, to pay a "stand-by charge" to reserve gravure capacity (*see* Tr. 1778-79, 1782; CX-102-Z-168; CX-104-Z-53-55; CX-106-Z-181; CX-109-Z-124; CX-671-P-Q; CX-902-Z-36-42; CX-993-V). Two examples of such customers are Sears (Tr. 1778-79, 1782) and Meredith Corporation, the parent company of the acquired firm (CX-902-Z-36-42).

318. Mr. Hodgson testified that customers desiring gravure printing on a continuous basis tend to reserve that capacity in advance through long-term contracts. This is generally not the case in offset (Tr. 339-41; *see also* Tr. 1509).

319. When faced with a shortage of gravure capacity to perform all scheduled work, Maxwell was unable to convince its gravure customers to have the work done on its offset presses which did have available capacity; instead, the company was forced to arrange for the work to be done by other gravure printers (Tr. 308-09).

320. When Standard Gravure's gravure plant was shut down due to a fire, its customers' work was shifted to other gravure printers, not offset printers (Tr. 310-12).

321. Once the acquisition was announced, many customers that had relied on Donnelley and Meredith/Burda as suppliers of gravure printing services sought to qualify another gravure printer as a second source, rather than considering an offset printer for the same work (*see, e.g.*, CX-155-C; CX-188-W; CX-601-B).

12. Conclusion

322. Donnelley's pretrial brief states that offset and gravure compete "across the board" for all types of printing work and that "offset is a viable substitute for gravure for virtually all jobs." Many knowledgeable industry witnesses disagree with these conclusions (Tr. 625-26, 901, 1525, 1171-71, 1801-02, 1950, 2662-64).

. . . in all honesty, I read this last night and it just seemed ridiculous to me. And I called a friend of mine in the printing industry and said, you won't believe this.

. . . I just read the table of contents to this friend of mine and he laughed. You know, are they kidding? Are you guys at Donnelley kidding when you say there isn't really a market? Because there is, folks. . . the one recurring theme they had was there was no roto market and that's ridiculous. I print roto market and I can't say it any more emphatically.

. . . that's ridiculous . . . absolutely ridiculous. Why would Donnelley want to buy a gravure plant in the first place?

(Ian Deutsch of Sterling (Tr. 963, 965)).

. . . offset and gravure compete in certain areas, and there are certain areas that your expectation is that offset would be the predominant process. There are other areas where you would expect gravure to be the predominant process.

(Edward Nytko of Ringier (Tr. 1525)).

. . . offset is offset and gravure is gravure. The requirements of the processes are different, and the economics of the processes are different.

(Ed Coleman of Sears (Tr. 1802)).

323. The testimony of these and other witnesses is supported by extensive price and cost analyses of the economics of offset vs. gravure printing and by the actions of printers and print buyers which reflect the real differences between these processes when high volume publication printing is involved.

324. Thus, I agree with complaint counsel and their expert witnesses that the relevant product market in this case is high volume publication gravure printing; however, I reject the claim that Donnelley's introduction of RX-497 conceded the existence of this market (CPF 1166), for it was offered on cross-examination only as an illustration of the witness' testimony on direct (Tr. 2811).

G. The Relevant Geographic Market

1. The United States

325. The parties agree that the United States is a relevant geographic market within which the effects of the acquisition may be measured (CPF 1175; RPF 231).

326. Because of shipping costs, duties, and time constraints, European printers cannot service print customers in the United States (Tr. 314-15, 1474, 2598, 3275, 378-80; CX-604-G), and imports from Canada and Mexico accounted for less than 0.3% of the total product printed within the United States in 1991 (compare RX-4-N with RX-4-L). Thus, the geographic market for high volume publication printing is no larger than the United States (Tr. 2998).

2. The Western States

327. There are three gravure facilities in the Western United States (those states separated from the rest of the country by the Rocky Mountains) (Tr. 3282-83). These facilities are located at Reno, Nevada and Casa Grande, Arizona (both owned by Donnelley) and San Jose, California (owned by Quebecor) (Tr. 3282-83).

328. Industry participants recognize that this situation puts Midwestern and Southwest printers at a competitive disadvantage for some print jobs. A Donnelley presentation arguing the need for expansion of Reno's gravure capacity stated:

We have an unusual competitive situation in the West since the region is insulated by distance and [the Rocky] Mountains from the rest of the country. Freight from the Midwest or Southwest puts those printers at a competitive disadvantage. Within the West, there are only two gravure insert printers, ourselves in Reno and Meredith/Burda in Casa Grande, Arizona (near Phoenix).

(CX-21-0).

329. Dr. Hilke conceded that data is lacking for a precise shipment analysis of a possible Western market, such as the Elzinga-Hogarty test (Tr. 3304, 3507, 6130). He was therefore forced to rely on anecdotal evidence of customer preference for having their gravure jobs printed on the West Coast.

330. There is no doubt that the Meredith/Burda acquisition was viewed as a competitive plus for Donnelley on the West Coast, as a BCG document suggested:

West coast pricing: Because of the Burda acquisition, only RRD will have a west coast presence among major printers. An analysis will be done to determine how RRD should price to capture the value that other printers cannot match in distribution economies on the west coast.

(CX-152-D) (*see also* CX-156-B).

331. Certain customers such as Target Stores, which uses newspaper inserts, are particularly concerned about timely printing (Tr. 1084, 1115, 1138). Use of West Coast gravure facilities for inserts satisfies this need (Tr. 1109).

332. Nevertheless, the print buyer for Target Stores-- specifically identified by Dr. Hilke as a likely target for price discrimination-- (CX-1163; Tr. 3285-87, 3310), testified that if he faced a 5% increase in gravure prices printed in the Western United States, he might consider switching the work to a printer located outside of that area (Tr. 1115). Indeed, Quebecor printed Target's western inserts at its facility in Memphis, Tennessee, and Target's inserts for the states of Washington and Oregon are currently printed by Donnelley in the Midwest (Tr. 1111, 1126-27). [] (RX-263-Z-30, data points 10412-21).

333. Furthermore, Dr. Hausman pointed out that shipment data gathered by complaint counsel and testimony of print buyers show that a substantial amount of gravure publication printing is done in plants located outside of the Western United States and is shipped into that area (Tr. 5402-04)

PROPORTION OF PRINTING VOLUME
SHIPPED INTO WESTERN REGION
FROM OUTSIDE WESTERN REGION

PRINTER	LOCATION	1989 PORTION SHIPPED WEST	1Q 1990 PORTION SOURCE SHIPPED WEST
ARCATA (RX-85)	Buffalo, NY	[]	[]
BROWN (RX-87)	Franklin, KY	[]	[] (Full Year)
QUEBECOR (RX-89)	Dallas, TX	[]	[]
QUEBECOR (RX-90- RX-279)	Memphis, TN	[]	[] (Full Year)
QUEBECOR (RX-279)	Dickson, TN	[]	[] (Full Year)
QUAD (RX-88)	Lomira, WI	[]	[]

PUBLICATIONS PRINTED GRAVURE OUTSIDE WESTERN REGION
AND DISTRIBUTED INTO WESTERN REGION

PRINT BUYER	PRODUCT	PRINTING LOCATION	SOURCE
[]	Inserts	Corinth, MS Franklin, KY	Henry Tr. 719
[]	Inserts	Midwest	Watts. Tr. 2874-75
[]	Inserts	Mattoon, IL	Gordon Tr. 3970-73
[]	Inserts	Midwest Louisville, KY	Watts Tr. 2874-75 RX-263-Z-31
[]	Inserts	[] Memphis, TN Midwest	RX-263-Z-62 Steen Tr. 1111, 1126- 1127
[]	Inserts	[]	RX-263-Z-41
[]	Inserts Catalogs Catalogs	[]	RX-263-Z-62 RX-263-Z-42 RX-263-Z-45
[]	Catalogs	[]	RX-263-Z-41
[]	Catalogs	Corinth, MS	Deutsch Tr. 973-974
[]	Catalogs	Spartanburg, SC Lomira, WI Corinth, MS	Haight Tr. 1373 RX-263-Z-41 RX-263-Z-29
[]	Catalogs	[]	RX-263-Z-29
[]	Catalogs Catalogs Catalogs	[]	Glaser Tr. 2132, 2143 Glaser Tr. 2147
[]	Magazine	[]	RX-263-S
[]	Magazine	[]	RX-263-Z-3
[]	Magazine	[]	RX-263-Z-4
[]	Magazine	[]	RX-263-Z-5

334. Given the substantial number of print buyers who have their publications printed outside of the Western Region and distributed into the Western Region, Dr. Hausman stated that it is likely that other print buyers, faced with a price increase for Western Region gravure printing, could turn to printers outside of the Western Region to defeat the price increase and receive distribution of their publications in a timely fashion (Tr. 5404-05).

335. Dr. Hilke dismissed shipment data by national publications as "distortions" which have nothing to do with competition for work, such as inserts, distributed on the West Coast (Tr. 6131), but his dismissal of this data ignores his own claim that the product market --which must be considered in conjunction with the geographic market--includes such publications.

336. It may be that for particular print customers who distribute their product--such as inserts--on the West Coast, the only feasible supplier is a printer located there; that does not, however, say anything about the geographic market for all high volume publications (inserts, catalogs and magazines)--the market which complaint counsel propose.

337. Thus, I find that no West Coast market exists for high volume publication gravure printing.

H. Market Structure

1. Competition and Product Quality

a. Meredith/Burda

338. A Donnelley document dated June 3, 1988 and addressed to Carl Doty, its current president, observed that:

Meredith/Burda is recognized by many to have superior gravure quality and technical capabilities which approach those of Donnelley.

Donnelley employees viewed Meredith/Burda as a major, if not their major, competitor (CX-21-P; CX-53-N; CX-69-N; CX-91-Z-78; CX-387; CX-66-O).

339. Many gravure printers and customers testifying in this proceeding ranked Donnelley and Meredith/Burda as the highest quality gravure printers, and viewed them as vigorous competitors prior to the acquisition (Tr. 327-28, 676-77, 704-06, 821-23, 881-82, 891-92, 969-60, 1029, 1034, 1110-11, 1142-43, 1166-67, 1289, 1358-59, 1437-39, 1507-08, 1579-80, 2008-10, 2628, 4880-81, 4288-89).

b. Other Gravure Printers

340. Some industry participants were not convinced that other gravure printers produced as high quality work as Donnelley and Meredith/Burda:

1) Quebecor

341. Robert Wyker, Chairman of AGA, testified that:

Quebecor has a lot of equipment but most of it is in the newspaper end of the field. They have one plant that we feel has good enough quality to work with and we have worked with that one plant.

(Tr. 883).

342. The print buyer for Penney's catalog testified that "[w]e regard Quebecor as having quality skills that are below the standards to which we aspire" (Tr. 587). (*See also* Tr. 1079-81, 1286, 1591, 2034, 2159, 4868-70, 4880-81, 4906; CX-21-P.)

2) Ringier America

343. According to a 1989 Donnelley profile of Ringier, its weaknesses were that it had gravure plants only in the Southeast, which limited distribution nationally for bulk shipments; that it was perceived by retail customers to be weak in preliminary; that it had few wide webs in gravure; and that it had a small, somewhat ineffective sales force (CX-469-D).

344. Since Penney has only one gravure press available to it at Ringier, the amount of business that can be given to it is "extremely limited" (Tr. 726). It would take two to three years for Penney to satisfy itself that Ringier America could print some of the general catalog and at least five years for Ringier to be a substantial contributor (Tr. 594-95).

345. Cory Owens of Lands End testified that, in evaluating secondary printing sources, he did not look at Ringier because he doubted the company could satisfy its quality expectations (Tr. 1287).

3) Arcata Graphics

346. Donnelley's president, Carl Doty, believed that [] (CX-102-Z-204).

347. Mr. Sackett of Penney's catalog division has never considered doing business with Arcata and would rate it a notch below Quebecor (Tr. 590); and, [] (Tr. 2023).

348. [] (CX-632-B).

4) World Color Press

349. World Color is primarily a magazine printer and provides only limited competition in catalogs and inserts (*see* CX-1060-L). Mr. Henry of Penney believes that World Color's work is inconsistent: "they run hot and cold" (Tr. 703).

5) Quad Graphics

350. A 1989-90 Donnelley document concluded that Quad's weaknesses were that it was not known as a top quality catalog printer, that it was inexperienced in retail inserts, was ineffective or slow in responding to customer inquiries, had limited retail work capacity, particularly in the West, which hindered distribution to newspapers, and that it had a small sales force which was not able to cover the entire market (CX-470-C).

351. Penney's catalog production manager testified:

They (Quad) do not seem to have the likely prospect of expansion with their base of equipment . . . Quad is new to the gravure scene. Their base of equipment, as I understand it, is limited.

(Tr. 588).

352. Ian Deutsch of Sterling, Incorporated believes that Quad is not a gravure printer of the quality of Donnelley, Meredith/Burda or Ringier (Tr. 994).

353. [] (Tr. 1592).

6) Standard Gravure

354. Standard Gravure, based in Louisville, KY at the time of the acquisition, has left the gravure business (Tr. 2475).

7) Brown Printing Company

355. Cory Owens of Lands End, in evaluating secondary printing sources, did not look at Brown because the company's gravure printing capability was too limited (Tr. 1285).

356. [] (Tr. 2023).

357. Tom Engdahl, general manager at Brown's gravure plant in Franklin, KY, testified that Brown's lack of alternative gravure capacity outside the Franklin plant is a competitive disadvantage and that customers have expressed concerns about this problem (Tr. 2563-64).

2. Gravure Price and Capacity Trends

358. Several industry members testified that prices for gravure printing have been declining since at least 1985, before the recession (Tr. 2573, 4299, 1509, 4004-05) and that there is and has been excess gravure capacity (Tr. 888, 4700, 4790, 1510, 1614, 1860).

359. One print buyer described conditions as a "buyer's market" (Tr. 888). Another printer, with 25 years experience in both gravure and offset printing, testified that he has "yet to see prices go up -- ever" (Tr. 4762). The print buyer for Service Merchandise characterized competitive conditions in the printing industry as follows:

I don't know of any other industry where buyers have been in a buyer's market so consistently so long. The print market is a dog fight and what's happening to it is the printer can't control necessarily the price of ink or the price of paper and he sure as hell can't control the price of postage. So what has he got left to compete with? He competes with his services under the general heading of manufacturing . . . They've been cutting each others' throats for a decade. . .

(Tr. 4298-99).

360. At the same time, many firms are cutting back or completely canceling their long-run, high-volume printing programs. The decision of Sears to cancel their long-standing catalog program is the

most recent example of this trend, and forced Donnelley to close down an entire gravure facility that was almost wholly dedicated to production of Sears' catalogs (Tr. 4591). A few years ago, Montgomery Ward also cancelled its big book catalog program (Tr. 1541).

361. Also, catalog firms and retailers have been shortening run lengths of their publications to reduce marketing and postage expenses, and to target their customers more effectively. This trend is expected by Mr. Wyker, a catalog consultant, to continue in the future (Tr. 908). Even before the acquisition, Meredith/Burda's President noted: "The trend towards shorter print order continues. The potential customer base is shrinking through merger and acquisition. Demographic inserts prevail over mass market penetration" (RX-96-B).

362. Firms such as Bradlee's, Ames, Hill's, Best Stores, The Company Store, and Lillian Vernon were identified during the hearing as having cut back on their print programs (Tr. 4006, 4008, 4010, 4929, 4930; RX-59-K). Moreover, several retail chains and catalogers have consolidated or gone into bankruptcy in recent years, further reducing the number of print buyers (Tr. 5425-26).

3. The Size of the "Core" Market

363. After analyzing the buyers whose printing programs placed them at one time or another in the high volume gravure publication market, Dr. Hausman found that, while there were 36 customers in the "core" market in 1990, there may have been, by the time of trial, only two remaining in that market. The following table describes this "migration" (Tr. 5446-48; RX-665-A-D):

NUMBER OF PRINT BUYERS WITH JOBS IN "CORE" IN 1990	36
NUMBER OF PRINT BUYERS NO LONGER IN "CORE" BECAUSE RUN LENGTH NOW LESS THAN 10 MILLION	-8
NUMBER OF PRINT BUYERS NO LONGER IN "CORE" BECAUSE PAGE COUNTS NOW LESS THAN 33	-3
NUMBER OF PRINT BUYERS NO LONGER IN "CORE" BECAUSE WORK NOW "HIGHLY VERSIONED"	-5
NUMBER OF PRINT BUYERS NOT IN "CORE" BECAUSE THEY WILL SWITCH TO OFFSET IN EVENT OF GRAVURE PRICE INCREASE	-2
NUMBER OF PRINT BUYERS NO LONGER IN "CORE" BECAUSE THEIR PRINT PROGRAMS NO LONGER	-2
NUMBER OF PRINT BUYERS NEVER IN "CORE" BECAUSE THEIR JOB IS NOT FOUR-COLORS	-1
NUMBER OF PRINT BUYERS NOT IN "CORE" BECAUSE THEY ARE PROCESS NEUTRAL	-3
NUMBER OF PRINT BUYERS NOT IN "CORE" BECAUSE MAGAZINE, IN WHOLE, IS "HIGHLY VERSIONED"	-3
NUMBER OF PRINT BUYERS FOR WHOM PRINT PROCESS PREFERENCE AND PROGRAM DETAILS NOT AVAILABLE	-7
NUMBER OF PRINT BUYERS WITH JOBS IN "CORE" AT TIME OF TRIAL	2

364. Dr. Hausman's analysis of the "core" market led him to conclude that with six gravure printers competing for the work of as few as two print buyers (or, at most, thirty-six), the possibility of price discrimination is unlikely simply because of the number of buyers and sellers (Tr. 6337). It also means that some of the printers with gravure capacity do not have "core" work (Tr. 6337-38). [] (RX-665-A-B). Thus, if one of the printer with "core" work attempted price discriminate, one of the printers without "core" work would take the business at a lower price (Tr. 6337-38). Because of the trend toward increased versioning, buyer consolidation, and shorter run lengths, Dr. Hausman believes that the number of participants in the relevant product market will become even smaller (Tr. 6339).

4. Entry Into High Volume Publication Gravure Printing

365. *De novo* entry or expansion into gravure printing takes two or more years. For example, over 24 months--from January 1985 to March 1987--were required from project approval to first publication at Donnelley's Reno facility (CX-7-K; CX-66; CX-69).

366. Other examples of entries or expansion over a two, or more, year period include:

367. [] (CX-8-J).

368. [] (CX-141-L).

369. Two years--from 1987 to early 1990--were required from project approval to start-up of the seventh gravure press at Donnelley's Spartanburg plant (CX-7-Q; CX-90-V).

370. Two years' lead time was required for Donnelley's most recent gravure press installation, the Warsaw tandem press (CX-9-F-G; CX-63-Z-5; *see also* CX-117-Z-47).

371. Two years' lead time was required for Ringier to analyze, plan, purchase and install gravure presses at its Corinth, Mississippi facility (Tr. 1476). Its president acknowledged that the time to acquire new gravure presses generally runs in the two year range (Tr. 1479-80, 1504).

372. Over two years' lead time (from late 1983 to 1986) was required for Quad Graphics to plan for, purchase, install and print with its first gravure press (Tr. 2351-52). Its gravure operations were not profitable until 1989 (Tr. 2367).

373. Brown Printing required three years, from "early 1989" to "May of 1992," to plan, order, install and begin operation of its new three-meter press in its Franklin, Kentucky plant (Tr. 2525).

374. Wayne Angstrom, a former Donnelley executive, estimated that it would take two to three years for a new firm to enter the gravure market (Tr. 2618-19). Mr. Walter, Donnelley's CEO, estimated that it would take two years to enter and a few more years to reach full efficiency (CX-101-Z-108) (*see also* CX-106-Z-38-39). Longer time frames (from two and one half to three years) were contemplated for the three-meter presses that Meredith/Burda planned to install at its Lynchburg facility (CX-55-Z-1; CX-251-B; CX-252-B).

375. Factors which contribute to entry or expansion delay include:

Regulations requiring that appropriate environmental permits be obtained (Tr. 2742-47, 2754-56, 2767-69). Mr. Voss, former president of Meredith/Burda, testified that clean air permits are so difficult to get that obtaining them would require at least four to six months (CX-900-Z-56-66-67). Environmental restrictions will probably be more onerous in the future (Tr. 2533-34, 2755, 2768-69). The reluctance of gravure customers to switch from their current printer to a new one (Tr. 941-42, 1351, 1943-44, 1961, 2156, 2658-59).

Jerry Ryan, of Service Merchandise, testified:

[W]hen you get involved in a large complex program like the one we happen to have, whether you're talking about the overall program or you're talking just about even the fall catalog itself, you are not going to go to the first bozo who happens to have gravure facilities; you're going to go with somebody that you know has a good track record, understands your problems, comes through in a pinch. . . And you may end paying that guy, whether it's three percent or five percent more, than you might be able to pay to somebody else that you wouldn't have the same kind of faith in.

(Tr. 4298).

The reluctance to switch is increased by the long term contracts which Donnelley and other gravure printers have with their customers (in Donnelley's case, at least [] of its business involves multi-year contracts) (CX-757-A; CX-1157-Z-7, Z-11; *see also* CX-63-U; CX-102-Z-7-8; CX-159-G; CX-483-Z-236). Due to these contracts, new entrants would find that much of the relevant market would be inaccessible for at least two years.

Sunk costs, *i.e.*, costs of entry that are unlikely to be recovered through the redeployment of those assets. The investment made in gravure is "sunk" in the sense that it cannot readily be recouped by sale for other uses (Tr. 4591; *see* Tr. 1504-05).

All existing gravure facilities in the United States have at least three presses except Quebecor's Dallas facility which has two presses (Tr. 301; *see* CX-501). Those familiar with the industry recommend a minimum of two gravure presses per plant (Tr. 300, 2619, 2798-99, 1503-04).

Donnelley's Reno facility was opened in 1987 at a cost of approximately \$94 million (*see* CX-7-L; CX-501-M). [] (CX-501-M; CPF 19).

Quad Graphics, the most recent gravure entrant (Tr. 1502-03, 3341), needed a minimum of two 96-inch gravure presses to enter high volume publication gravure printing and its total cost of entry approximated \$50 million (in 1993 dollars) (*see* Tr. 2356, 2358, 2361, 2364).

[]

Individual gravure presses, with associated equipment, cost approximately [], depending on web width and other operating parameters (*see* CX-11-Z-51, Z-55; CX-106-Z-104-A; CX-247-L; CX-248-F; CX-1449-F; CX-1453-A; Tr. 299, 2532-34, 6255).

376. Consolidation, rather than new entry, has occurred in the past several years. In 1981, there were twelve gravure printers in the United States; today there are six (CX-933-G; CX-501; CX-519). The most recent exit of a gravure producer, Standard Gravure, occurred in 1992 (CX-510).

377. The six gravure printers operating in the United States in 1993 are:

1. Brown Printing
2. R. R. Donnelley (acquired Meredith/Burda)
3. Krueger/Ringier
4. Quebecor Corp. (acquired Arcata Graphics, Maxwell Communications Corp.)
5. Quad Graphics
6. World Color Press

(CX-501; CX-519).

I. Effects Of The Acquisition

1. Market Share and Concentration

378. The market share and concentration figures in the relevant geographic market--the continental United States--in terms of throughput capacity, number of presses, and sales were, for 1990:

36

Initial Decision

TABLE 1

CONTINENTAL UNITED STATES GRAVURE CAPACITY 1990

Company	Throughput Capacity	Percent Share	HHI Contribution
Donnelley	2,753	33.1	1,093
Meredith/Burda	1,296	15.6	242
Combined	4,049	48.7	2,368
	[]		
	[]		
Pre-Acquisition HHI			2,041
Post-Acquisition HHI			3,070
Increase in HHI			1,029

(CX-501-B).

TABLE 2

CONTINENTAL UNITED STATES GRAVURE CAPACITY 1990

Company	Number of Presses	Percent Share	HHI Contribution
Donnelley	56	35.9	1,289
Meredith/Burda	20	12.8	164
Combined	76	48.7	2,373
	[]		
	[]		
Pre-Acquisition HHI			2,172
Post Acquisition HHI			3,093
Increase in HHI			920

(CX-501-A)

Initial Decision

120 F.T.C.

TABLE 3

CONTINENTAL UNITED STATES GRAVURE SALES 1989
(for prepress and presswork in millions of dollars)

Company	Sales	Percent Share	HHI Contribution
Donnelley	202.7	27.4	749
Meredith/Burda	117.9	15.5	241
Combined	325.6	42.9	1,840
	[]		
	[]		
Pre-Acquisition HHI			1,868
Post-Acquisition HHI			2,719
Increase in HHI			850

(CX-501-E).

379. Table 4 shows market shares for certain gravure printing work of more than five million copies produced in 1990:

TABLE 4

1990 GRAVURE OUTPUT SHARES.
(PERCENT)

	(A) 5.0+ million copies	(B) 10.0+ Million copies
DONNELLEY	36.4	37.4
MEREDITH/BURDA	18.3	16.0
TOTAL	54.7	53.4

[]

[]

2. Cancelled or Delayed Expansion Plans

380. Dr. Hilke compiled CX-502-A, a chart which depicts the cancellation or deferment of various Donnelley and Meredith/Burda expansion plans which he believed had a "quite high" probability of going forward absent the Meredith/Burda acquisition (Tr. 3349-50).

[]

381. In Dr. Hilke's opinion, the cancellation or deferral of these expansion plans had a substantial adverse competitive effect because had they gone forward, significant gravure capacity would have been added to the market at or about the time of the acquisition and this would have resulted in an increase in gravure supply and a reduction in prices (Tr. 3347-54, 3359, 6133-34).

382. Dr. Hilke concluded that, in actuality, Donnelley's acquisition of capacity rather than expansion "represents an alternative which involves higher prices and less competition. . . ." (Tr. 3359).

383. Several documents prepared by or for Donnelley tend to support Dr. Hilke's observations.

384. Donnelley's strategic consultant, BCG, pointed out that if Donnelley continued to bring on new capacity, price erosion would result (CX-701-D-E).

385. Robert A. Revak, of Donnelley's catalog group, stated in a draft of its 1989 strategic plan:

The only way that I can see Donnelley changing the trend of continuing price erosion in the marketplace is to remove our competition through acquisition.

(CX-157-B).

386. Donnelley's October 1990 Rating Agency Presentation stated that, "[w]ith the addition of Meredith/Burda's modern, well equipped plants, Donnelley obtains needed additional capacity to better serve and expand share in these markets without adding additional capacity to the industry" (CX-1156-J; *see also* CX-35-K; CX-40-D; CX-41-V; CX-1061-B).

387. A February 12, 1990 memorandum sent to senior Donnelley management by John S. Oberhill, then president of the magazine group (CX-140-M-N), recognized the price effect of gravure acquisitions:

Selective acquisitions to reduce supply is the preferred method to stabilize pricing levels and obtain growth in both sales and earnings. Large capacity additions, which significantly exceed market growth rates, must be brought forward cautiously unless there is enabling contract volume.

(CX-154-A).

388. An internal memorandum prepared by Shearson Lehman Hutton, the firm handling Donnelley's debt offering for the acquisition (CX-149-H-I), observed:

Meredith/Burda was one of Donnelley's larger competitors, particularly in the very long-run, very capital intensive gravure segment of U.S. printing. Thus, Donnelley effectively acquires additional, as well as some excess, capacity at less than "new" construction cost without adding to industry capacity, and eliminates some competition in the process. Correspondingly, some \$175 million [of] Donnelley's future capital needs were offset through this acquisition.

(CX-757-A).

3. Constraints on Meredith/Burda's Independence

389. The initial Donnelley/Meredith Burda acquisition agreement required the latter to obtain Donnelley's approval before any printing contracts exceeding [] could be signed by Meredith/Burda, and Meredith/Burda did seek Donnelley's approval for contracts with its customers including Target, a high volume gravure customer, from December 1989 to September 1990 (CX-2-Z-23-24, Z-32-34; CX-496-D; CX-1052; CX-1062).

390. The initial agreement required [] (CX-496-D). Capital expenditures exceeding \$100,000 required Donnelley's approval (CX-2-Z-33). Meredith/Burda sought Donnelley's approval for its contracts with suppliers during the period December 1989 to September 1990 (CX-1106-A) and Donnelley imposed changes on proposed contracts (CX-1106-H-K).

391. Other restrictions on Meredith/Burda's business decisions were also imposed in the initial acquisition agreement of 1989 (CX-2-Z-32-34; CX-496-E-G).

392. Dr. Hilke acknowledged that agreements curtailing a seller's actions for a short period after an initial sale agreement and before the closing are common and avoid the costs of redetermining and renegotiating the price at the time of the final closing; however, he

believes that extension of such agreements over an extended period of time curtails competition by severely limiting the independence of the acquisition target while it is supposed to remain independent (Tr. 3370-71).

4. Unilateral Market Power

393. The size of Donnelley's post-acquisition gravure market share in the United States (42.9 to 48.7%) suggests that it can unilaterally raise prices to some high volume publication gravure print customers, restrict output or engage in other anticompetitive conduct. 1992 Merger Guidelines of the Department of Justice and the Federal Trade Commission ("1992 Guidelines") Section 2.2.

394. Donnelley officials recognized that the acquisition would strengthen its position in the market. In his handwritten notes to Carl Doty recommending the acquisition of Meredith/Burda, catalog group president Schroder wrote "market control and stabilize" as the first on a list of "strategic issues" associated with the acquisition (CX-40-C; CX-41-I); and BCG's Michael Silverstein noted that the acquisition accorded with his observations that "[p]rice stability is facilitated by very large share of leader" (CX-701-F).

395. Ronald L. Nicol, another BCG consultant, informed Donnelley that the acquisition "creates market power for Donnelley" and "limits customer options" (CX-703-P).

396. Before the acquisition, Donnelley had a leading share in gravure catalogs and inserts (CX-158-Z-13), and some of its customers view it as the major supplier of high volume publication gravure printing (CX-622-M; CX-421-C; CX-632-C; CX-785-B; Tr. 674-75).

397. Dr. Hilke testified that Donnelley could exercise market power with respect to those high volume publication customers who would not switch to gravure in the face of a 5% increase in gravure prices by targeting them for non-cost based price increases, while keeping prices at competitive levels for lower volume gravure printing customers whose demand is more elastic (Tr. 3012-14, 3071, 6163-64).

398. Dr. Hausman agreed that some high volume gravure customers prefer that process over offset (Tr. 5224), but denied that Donnelley could successfully practice price discrimination:

in certain types of situations of price discrimination, you are able to tell whether a customer will switch or not. But in this type of situation . . . you will not be perfectly [able to] identify those customers that you could price discriminate against

(Tr. 5196-97), because where fixed costs are high and excess capacity exists, the failure to accurately predict which customers would accept a non-cost based price increase might result in a loss of revenue and, perhaps, require lower prices to obtain replacement business (Tr. 5198-99, 6330-32, 6340-41, 5921).

399. Donnelley has, over the years, asked its salesmen and operations officers to assess customer needs, to report the prices charged them, and to assess the profitability of work done for different accounts. For example, a Donnelley document entitled "Pricing Strategy, Plan, and Policy" stated:

At the meeting I outlined the concept we discussed which related toward niche marketing strategies.

Within this plan, I would also suggest identification of targeted accounts and plans for them, as well as a listing of accounts, levels, and categories of accounts. The plans, dates, needs, etc. would be part of this. What do we need to do for these particular salespeople regarding sensitivity, goals, training, special information, etc.? Probably most important to include is the actual strategy and concept of how it would work.

As a side benefit of this, I believe comparative price level information on levels, customers (Graded A, B, C, D, etc.), selected price sensitivity test customers, etc. comparisons should be made.

(CX-560-B).

400. The record contains many other examples of customer analysis (CPF 747-845) which, according to Donnelley, have no sinister implications but is rather what every successful business must do if it is to satisfy customer needs.

401. Dr. Hilke agreed that the "process of targeting" is:

not in itself offensive, it just is the underlying set of conditions and practices that could lend themselves to a targeting of customers after an acquisition of anticompetitive concern I'm talking about.

(Tr. 3024).

402. Although he denied that Donnelley could successfully engage in an extensive program of selective price increases to high volume publication gravure customers (F 398), Dr. Hausman conceded that some customers might be targeted for such increases:

Judge Parker: One second. Professor, there are still some customers that testified, I believe, the high volume customers, that they simply would never consider switching to offset.

The Witness: Yes. Penney's did, for instance.

Judge Parker: What about that?

The Witness: Well, I think for those customers --

Judge Parker: Can they be price discriminated against from now on by Donnelley or others?

The Witness: If you knew who they were. Theoretically, if you knew who they were and if that same person stays there, because it's usually a personal preference.

(Tr. 5224).

403. Dr. Hausman denies that Donnelley knows who these customers are but, in light of Donnelley's extensive, continuing analysis of customer needs, I agree with Dr. Hilke that targeting might well be successful.

5. Customer Complaints

404. As soon as the Meredith/Burda acquisition was announced, customers expressed concern to the FTC and the parties about the decrease in competition that might result (CX-8-Z-9-25; CX-119-Z-90; CX-121-Z-69; CX-171; CX-174-A; CX-174-B; CX-176; CX-177; CX-178-A; CX-179-B; CX-186-B; CX 332-C; CX-467-A; CX-620-E; CX-624; CX-1006-N; RX-79-T; Tr. 671-72, 705-06, 743, 823, 961-62, 964-65, 1033-34, 1439-40, 1934-36, 2010, 4092-94).

405. Donnelley claims that some of those customers who complained about the acquisition did not express that much concern during their testimony (RPF 256), but it is evident that even those customers who have as yet experienced no adverse effects from the acquisition may still be concerned about its long-term impact. For example, Mr. Sackett of Penney testified:

A. I should answer that our relationship with Donnelley is, as I pointed out earlier, excellent. And there has been no specific adverse impact on our business relationship with them as a result of that purchase. Nevertheless we have a \$4 billion dollar [sic] business which is entirely dependent upon the supply of rotogravure capacity and we cannot reasonably applaud an action which results in having one source of supply available to us.

(Tr. 617-18).

6. Coordinated Interaction

406. A concern of Dr. Hilke is that Donnelley's acquisition of one of its primary competitors increases concentration in an already concentrated market with a small number of firms and that it may therefore lead to coordinated interaction, or collusion, among the remaining firms (Tr. 3000, 3391-92, 6155-57, 6190).

407. Where there are, as here, few suppliers, and there is a dominant firm such as Donnelley, coordination of prices is more likely because cheating is easier to detect and punishment is severe (Tr. 3030, 3392, 6149-53, 6157).

408. Coordination of gravure prices is possible because information about competitive activity of industry members is readily available from press manufacturers (Tr. 331-34, 2547), from movement of employees from firm to firm (Tr. 3397; CX-141-Z-95) and from industry meetings (*see* CX-379-A; CX-391-V; CX-453; CX-454; CX-462; CX-634-Z-3; CX-644; CX-765-B; CX-891-A; CX-892-A; CX-943; CX-944; RX-152-C; RX-153-A).

409. The nature of gravure printing may also facilitate coordination: there are only two major manufacturers of gravure presses (CX-102-Z-48-49; Tr. 6901); all gravure printers use the same process to produce the finished product, and much of the printers' business is obtained through bidding, which requires an intimate knowledge of industry cost structure and other competitive variables.

410. The probability of Donnelley being able to successfully impose unilateral price increases on its high volume publication gravure customers or of colluding with its competitors with respect to price is limited somewhat by the size of its customers and their ability to switch suppliers. There have been several post-acquisition instances where print buyers have qualified additional gravure printers besides Donnelley or have switched substantial quantities of their printing to other gravure printers (RPF 268, Table F).

411. Nevertheless, many print buyers believe that the Donnelley-Meredith/Burda combination produces higher quality work than other gravure printers; and, there are substantial impediments to switching gravure suppliers with ease (Tr. 3075-77, 5894-95, 5973-75).

412. [] (Tr. 2012-13, 2015-26, 2033-34, 5968-74).

413. Mr. Angstrom of St. Ives testified:

a very large customer who commands -- significant levels of capacity . . . is going to find great difficulty finding another home quickly.

(Tr. 2669).

414. Donnelley's David Moeller testified that, when large customers have been with a printer over a long period of time, they are likely to continue the relationship even if they have to pay a higher price to do so (Tr. 4064-65), and the supervisor of the purchasing department at Current, Inc., stated [] (Tr. 1943).

415. Indeed, the concerns expressed by their larger customers over the Donnelley-Meredith/Burda acquisition reflects their belief that switching to alternative sources of high volume gravure publication printing would, in some cases, be difficult and time consuming.

7. Efficiencies

416. Dr. Hilke testified that with respect to the existence of merger specific efficiencies or synergies:

to the extent I've been able to identify such efficiencies, they don't seem to be ones which would be peculiar to this particular acquisition.

(Tr. 3412).

8. Conclusion

417. For the reasons given above, complaint counsel's concern that Donnelley's acquisition of Meredith/Burda may substantially lessen competition in high volume publication gravure printing in the United States is justified; and, since new entry or expansion into this market would require at least two years or more lead time, it would not mitigate the probable anticompetitive effects of the acquisition.

III. CONCLUSIONS OF LAW

A. *The Relevant Product Market*

1. Introduction

The purpose of market definition in antitrust cases is to "identify those sections of the economy which may be exposed by the [challenged] transaction to anticompetitive price increases" Owens-Illinois, Inc., D. 9212, at 4 (Feb. 26, 1992). The 1992 Guidelines, Section 1.0, defines a market by application of the so-called "five percent test":

A market is defined as a product or group of products and a geographic area in which it is produced or sold such that a hypothetical profit-maximizing firm, not subject to price regulation, that was the only present and future producer or seller of those products in that area likely would impose at least a "small but significant and nontransitory" increase in price, assuming the terms of sale of all other products are held constant. A relevant market is a group of products and a geographic area that is no bigger than necessary to satisfy this test.

See also Owens-Illinois, Inc., pp. 4-5.

Complaint counsel and Donnelley do not disagree that many print buyers can and do use either offset or gravure printing services for some jobs. Donnelley goes even further: it asserts that practically all print jobs, regardless of run length, page count or number of versions can be done by gravure or offset printers, and are acceptable to their customers. Complaint counsel deny this and claim that there is a product over which Donnelley has market power (*i.e.*, "the ability profitably to maintain prices above competitive levels for a significant period of time" 1992 Guidelines, Section 0.1): the supply of high volume publication gravure printing services, a product which is sufficiently distinct from offset that buyers could not defeat an increase in its price by shifting their purchases to offset. *See Hospital Corporation of America*, 106 FTC 361, 464 (1985), *aff'd*. 807 F.2d 1381 (7th Cir. 1986), *cert. denied*, 481 U.S. 1038 (1987).

Whether a product is "sufficiently distinct" so that switching would not occur depends on the "reasonable interchangeability" between the products, which is determined by:

examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.

Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962). See also *United States v. E.I. duPont de Nemours & Co.*, 351 U.S. 377, 395 (1956).

2. The Peculiar Characteristics of the Gravure and Offset Processes

In addition to the physical differences of gravure and offset presses (F 14-28), there are differences between the two processes which affect customer choice: gravure's greater throughput which makes it more cost-effective than offset for jobs with large numbers of copies and many pages per copy (F 162); the greater durability of gravure cylinders (F 165-169); gravure paper savings resulting from variable cut-off capability (F 172); the ability of gravure presses to stitch and trim on line (F 173-74); less paper waste in the gravure process (F 175); and, gravure's ability to produce better results than offset on cheaper, lighter weight, uncoated paper (F 180).

3. Gravure and Offset Quality

Some industry members believe that, for their purposes, gravure and offset offer comparable quality (F 186); some high quality high volume magazines use offset and gravure for different parts of their publication (F 185); and, industry members testifying in this proceeding could not distinguish between the two processes with the naked eye (F 187).

Nevertheless, the firm belief of many print buyers that gravure offers higher quality than offset is a real constraint on their choice of printing processes.

4. The Economics of Gravure and Offset

The record supports complaint counsel's claim that, for low version, long run, high page count publications, gravure is less costly than offset. The breakeven point (F 212) at which this usually occurs

is in publications with less than 4 four-color versions, more than 32 pages (F 222) and a run length in excess of 5 million copies (F 216).

The gravure advantage for these publications is confirmed by evidence that print buyers have switched to the gravure process as the run length of their publications increased (F 217-19) and in documents written by Donnelley employees (F 227-232). Additional confirmation was supplied by the testimony of buyers who described their print programs and their choice of gravure or offset to meet their demands (F 59-132). Of particular interest is the decision of some buyers, such as National Geographic, to use both processes for their publications because of their unique contribution to specific needs, such as, in the case of offset, its lower cost when a portion of the publication requires a high number of versions (F 121).

Donnelley criticizes Dr. Hilke's product market characteristics as vague and contradictory. Some uncertainty is part and parcel of any attempt to define the boundaries of a product market but it is not a fatal flaw if it is, on balance, supported by the record. *See United States v. Pabst Brewing Co.*, 384 U.S. 546, 549 (1966). In this case, there was explicit testimony that for run lengths in excess of 5 or 10 million copies, gravure is more economical than offset (*see, e.g.*, F 234):

Well, 10 million and page counts of 32 or more, typically, in my experience, today, yesterday, tomorrow is going to be done gravure.

5. Gravure and Offset Prices

The independence of gravure and offset prices indicates that the cross-elasticity of demand between the two processes is relatively low, and that at this level the processes occupy separate competitive niches:

The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it.

Brown Shoe, 370 U.S. at 325.

Direct evidence of cross-elasticity of demand is often unavailable:

Hence, we may apply reasoned judgment in estimating or inferring the relative magnitude of the elasticities in order to assess the degree of market power. . . .

Grand Union, 102 FTC 812, 1041 (1983). See also *B.F. Goodrich Co.*, 110 FTC 207, 290 (1988) ("persistent price differences" a "surrogate" for direct evidence of cross-elasticity).

Evidence of independent gravure and offset prices include Donnelley's price tracking reports (F 205-09) and the testimony of industry members (F 210) confirming complaint counsel's claim that the demand for high volume publication gravure printing is relatively inelastic, *i.e.*, that demand for it does not fall significantly if its price increases by a small but significant and nontransitory amount. *FTC v. Bass Brothers Enterprises*, 1984-1 CCH Trade Cas. ¶ 66,041 at 68,613.

6. Statistical Analyses of Gravure's Advantage Over Offset.

Statistical confirmation of gravure's dominance over offset for high volume publication gravure printing is provided by Dr. Hilke's analysis of such publications in CX-1167 (F 236-42) and his analysis of Donnelley's studies of gravure economics (F 244-48).

CX-1167 demonstrates that high volume publication gravure printing in 1990 accounted for a substantial amount of commerce and that such printing is predominantly the domain of gravure (F 239, 240).

High volume publication printing is not done exclusively by gravure: in 1990, offset accounted for 11.4% of print runs which exceeded 5 million copies (F 240); however, existence of some competition between the two processes does not negate the conclusion that they occupy separate markets for those customers whose demand for gravure is inelastic. See *Columbia Metal Culvert Co. v. Kaiser Aluminum & Chemical Corp.*, 579 F.2d 20, 30 (3d Cir.), *cert. denied*, 439 U.S. 876 (1978):

The existence of competition between these product lines does not alone preclude market power within each line, if each product has a cadre of customers in which it enjoys a decisive advantage.

Owens-Illinois, which Donnelley says is controlling in this case, is not inconsistent with *Columbia Metal*. In *Owens*, the Commission found that a significant competitor had entered the market with spaghetti sauce packed in metal cans and that its capture of 5% of the market in less than two years showed that metal cans compete with

glass for the packaging of spaghetti sauce. The Commission also predicted "further transfer of market share to cans" if glass container prices rise. Owens-Illinois, at 15-16.

There is no evidence in this case of any recent, dramatic inroads by offset into high volume publication printing and there is no reason to believe that there will be any technical changes in offset which will allow substantial penetration into gravure's domain, even if the M-3000 press should be successful (F 198-200).

7. Industry Recognition

The print industry, both buyers and sellers, recognize the existence of a high volume publication gravure market (F 274-310).

See B.F. Goodrich, 110 FTC at 290 ("industry firm perceptions are "surrogates" for direct evidence of elasticity"); *Grand Union Co.*, 102 FTC at 1041. This includes Donnelley, whose employees, in many documents, explicitly or implicitly recognized a gravure market (F 274-79), and who, along with other industry members, made major investments in gravure capacity in the face of excess offset capacity (F 285). This phenomenon, together with Donnelley's purchase of Meredith/Burda's gravure capacity (F 7-8) when it could have bought many more less costly offset presses, is inconsistent with the claim that there is no significant difference between the two processes.

8. Conclusion

Donnelley relies too heavily on its analysis of gravure print buyers who have switched to offset 122-32), for it ignores buyers who, like [], may switch from offset to gravure after reconsidering its cost (F 85) or who, like Montgomery Ward, may produce new gravure catalogs (F 126) (*see also* F 315-16).

This analysis also ignores the reason for some of the switches--increased versioning--which simply reinforces complaint counsel's claim that the two processes offer unique features (F 106, 108, 123, 125). In addition, versioning information for some buyers is unavailable (F 128).

Thus, although some high volume publication gravure buyers have switched to offset, the totality of the evidence convincingly demonstrates that the demand for high volume publication gravure printing is, for some customers, (*i.e.*, those who would not switch to

offset even if gravure prices were raised 5% (F 273)), inelastic and that these customers and their suppliers operate in the relevant product market alleged in the complaint.

B. The Relevant Geographic Market

The geographic area or areas within which the probable effects of this acquisition should be measured is where the "seller operates and to which buyers can practicably turn for supplies." *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961); *FTC v. Foodtown Stores*, 539 F.2d 1339, 1344 (4th Cir. 1976); *Midcon Corp.*, 112 FTC 93, 162 (1989).

The parties agree that the United States is one geographic market, but disagree as to complaint counsel's claim that a significant number of West Coast high volume gravure publication print customers can practicably turn only to West Coast gravure printers for their needs.

Since no Elzinga-Hogarty analysis of shipping patterns is possible (F 329), complaint counsel rely on industry perception and industry actions to establish their claims that there is a distinct West Coast market (F 328, 330).

Some West Coast customers, such as Target Stores, which must have timely printing of its inserts (F 331), are cited as examples of print customers who can turn only to West Coast gravure printers for their needs, yet Target's print buyer testified that he might consider switching from West Coast gravure suppliers if they raised their prices by 5% (F 332).

Since a substantial amount of gravure printing is done outside of, and shipped into, the Western United States (F 333) I reject complaint counsel's claim that West Coast print buyers can, in most cases, turn only to West Coast gravure printers to satisfy their needs, and I therefore reject their proposed West Coast geographic market for high volume publication gravure printing.

C. The Effects Of The Acquisition

1. Market Share and Concentration

The 1990 United States market share/concentration figures for gravure printing were:

Initial Decision

120 F.T.C.

UNITED STATES
GRAVURE SHARE MEASURES

	Capacity (Numbers of Presses)	Capacity (Press Throughput)	Gravure Sales
Percentage Shares			
Donnelley	35.9%	33.1%	27.4%
Meredith Burda	12.8%	15.6%	15.5%
Combined Shares	48.7%	48.7%	42.9%
HHI Contributions			
Donnelley	1,289	1,093	749
Meredith Burda	164	242	241
Combined HHI	2,373	2,368	1,840
United States HHI			
Pre-Acquisition HHI	2,172	2,041	1,868
Post-Acquisition HHI	3,093	3,070	2,719
Increase in HHI	920	1,029	850

(F 378).

Since these figures encompass all gravure printing, market share data for gravure output in the relevant product market is a more accurate indication of the impact of the acquisition:

TABLE 4
1990 GRAVURE OUTPUT SHARES
(PERCENT)

	(A) 5.0+ million copies	(B) 10.0+ million copies
DONNELLEY	36.4	37.4
MEREDITH/BURDA	18.3	16.0
TOTAL	54.7	53.4

[]

(F 379).

By any measure--total gravure printing or high volume publication printing--the concentration in the markets exceed the level at which illegality can be inferred. See 1992 Guidelines, Section 1.51(C):

Post-Merger HHI Above 1800. The Agency regards markets in this region to be highly concentrated. Mergers producing an increase in the HHI of less than 50 points, even in highly concentrated markets post-merger, are unlikely to have adverse competitive consequences and ordinarily require no further analysis. Mergers producing an increase in the HHI of more than 50 points in highly concentrated markets post-merger potentially raise significant competitive concerns, depending on the factors set forth in Sections 2-5 of the Guidelines. Where the post-merger HHI exceeds 1800, it will be presumed that mergers producing an increase in the HHI of more than 100 points are likely to create or enhance market power or facilitate its exercise. The presumption may be overcome by a showing that factors set forth in Sections 2-5 of the Guidelines make it unlikely that the merger will create or enhance market power or facilitate its exercise, in light of market concentration and market shares.

See also Hospital Corp. of America v. FTC, 807 F.2d 1381, 1384 (7th Cir. 1986), *cert. denied*, 481 U.S. 1038 (1987) (combined share of 26 percent, four-firm concentration of 91 percent; held unlawful); *FTC v. Warner Communications Inc.*, 742 F.2d 1156, 1163 (9th Cir. 1984) (combined share of 26 percent; four-firm concentration of 75 percent; presumptively unlawful); *RSR Corp. v. FTC*, 602 F.2d 1317, 1324 (9th Cir. 1979) (combined market share of 19.2 percent, acquisition held unlawful).

Additional analysis beyond market share statistics demonstrates that the challenged acquisition may pose a "significant threat to competition" *United States v. General Dynamics Corp.*, 415 U.S. 486, 496-99 (1974).

The particular threat to competition which the acquisition may create is its potential for the exercise of market power over high volume publication gravure printing either by one firm (unilateral market power)² or a group of firms (coordinated interaction).³

² Lessening of Competition Through Unilateral Effects

A merger may diminish competition even if it does not lead to increased likelihood of successful coordinated interaction, because merging firms may find it profitable to alter their behavior unilaterally following the acquisition by elevating price and suppressing output. Unilateral competitive effects can arise in a variety of different settings. In each setting, particular other factors describing the relevant market affect the likelihood of unilateral competitive effects. The settings differ by the primary characteristics that distinguish firms and shape the nature of their competition. 1992 Guidelines, Section 2.2.

³ Lessening of Competition Through Coordinated Interaction

A merger may diminish competition by enabling the firms selling in the relevant market more likely, more successfully, or more completely to engage in coordinated interaction that harms consumers. Coordinated interaction is comprised of actions by a group of firms that are profitable for each of them only as a result of the accommodating reactions of the others. This behavior includes tacit or express collusion, and may or may not be lawful in and of itself. 1992 Guidelines, Section 2.1.

2. Cancellation of Expansion Plans

Donnelley's acquisition of Meredith/Burda resulted in cancellation of its expansion plans, a cancellation which would have added capacity and which might have reduced prices in the relevant product market (F 380-88). It also removed from the competitive arena its major competitor and, to some industry observers, the only other high quality gravure printer (F 338-57).

3. The Unilateral Exercise of Market Power

In addition to allowing the reduction of output, the acquisition increased the likelihood that the combined firm, either on its own, or in combination with other gravure firms, would exercise market power. *See* 1992 Guidelines, Section 2.0.

Donnelley's post-acquisition market share suggests that it can unilaterally raise prices to some high volume publication gravure print customers, restrict output or engage in other anticompetitive conduct.

The probability of this occurrence was evident to Donnelley officials at the time of the acquisition (F 393-94), was of great concern to its print customers (F 404-05), and was conceded, at least as to customers such as Penney, by Dr. Hausman, who agreed that it could be targeted for price increases (F 402).

Donnelley disagrees that high volume publication gravure printing customers can be targeted and claims that even if the possibility exists, the number of "core" customers has diminished dramatically since the acquisition (F 364).

Donnelley's argument ignores recent test entry into the core market by [] (F 262), the probability that other high volume offset customers will do the same, and the possible effect of the recent recession on high volume publications. Reliance on post-acquisition effects which may be the result of an economic downturn ignores the possibility that as the economy improves the "trends" which Donnelley observes will vanish (F 358-62) and skepticism about their long-term effect is warranted, especially those over which Donnelley may have some influence. *See Hospital Corp. of America*, 807 F.2d 1381, 1384 (7th Cir. 1986), *cert. denied*, 481 U.S. 1038 (1987).

4. Coordinated Interaction

Proof of actual collusion arising from an acquisition is "not required to show a violation of [Section 7 of the Clayton] Act. Instead [a] predictive judgment . . . is called for." Owens-Illinois (Azcuena, concurring). *See also B.F. Goodrich*, 110 FTC at 303: "As the number of firms in an industry declines, and industry concentration increases . . . it becomes easier for those firms to coordinate their pricing and the likelihood of anticompetitive effects . . . increases."

A predictive judgment that Donnelley's acquisition of its major competitor increases the likelihood of collusion can be made with confidence because of the exit of several market participants over the past few years (F 376-77), the small number of remaining firms (F 407), and the ready availability of industry information which can facilitate collusion (F 408). *See United States v. Aluminum Company of America*, 377 U.S. 271, 280-81 (1964); 1992 Guidelines, Sections 2.0, 2.11, 2.12.

5. Conclusion

The acquisition of Meredith/Burda by Donnelley creates an "appreciable danger" of future anticompetitive effects. Owens-Illinois at 29.

That concern could be ignored if there were no barriers to entry into gravure printing, for, in that case, "it is unlikely that market power, whether individually or collectively exercised, will persist for long," *B.F. Goodrich*, 110 FTC at 207, 296 n.63, but there are substantial barriers to rapid and effective entry into high volume publication gravure printing. Barriers to entry into gravure printing (F 375) would create a more than two year delay between the time entry or expansion is contemplated and ultimately achieved (F 365-74). Thus, entry into high volume publication gravure printing would not occur swiftly enough to counter the probable anticompetitive consequences of the Meredith/Burda acquisition:

In order to deter or counteract the competitive effects of concern, entrants quickly must achieve a significant impact on price in the relevant market. The Agency generally will consider timely only those committed entry alternatives that can be achieved within two years from initial planning to significant market impact.

1992 Guidelines, Section 3.2.

IV. SUMMARY

1. The Commission has jurisdiction over the subject matter of this proceeding and over defendants R.R. Donnelley & Sons Co. ("Donnelley") and Pan Associates, a limited partnership.

2. Donnelley and Pan Associates were, at all times relevant herein, engaged in commerce, as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and their 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.

3. The appropriate line of commerce within which to evaluate the competitive effects of the acquisition of Meredith/Burda by Donnelley is the supply of high volume publication gravure printing.

4. The appropriate geographic market within which to evaluate the competitive effects of the acquisition of Meredith/Burda's high volume publication gravure printing business is the continental United States.

5. Barriers to entry into the relevant market are substantial, and substantial harm to competition would occur until new entry could be accomplished.

6. Prior to and at the time of the acquisition, Donnelley and Meredith/Burda were actual, direct and substantial competitors in the supply of high volume publication gravure printing.

7. The effect of this acquisition has been or may be substantially to lessen competition or to tend to create a monopoly in the aforesaid product and geographic market 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, in the following ways:

(a) It eliminated actual competition between Donnelley and Meredith/Burda and between Meredith/Burda and others in the relevant market;

(b) It significantly increased the already high levels of concentration in the relevant market;

(c) It created a firm whose share of the relevant market is so high that it has achieved the position and market power of a dominant firm;

(d) It eliminated Meredith/Burda as a substantial independent competitive force in the relevant market; and

(e) It increased the likelihood of successful anticompetitive conduct, non-rivalrous behavior and actual or tacit collusion among the firms in the relevant market.

8. All of the above increase the likelihood that firms will increase prices and restrict the output of high volume publication gravure printing.

9. The order entered hereinafter is appropriate to remedy the violation of law found to exist.

V. ORDER

I.

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

A. "*Donnelley*" means respondent R.R. Donnelley & Sons Co., its directors, officers, agents, representatives and employees, and its parents, predecessors, subsidiaries, divisions, groups, affiliates, successors and assigns, and their respective directors, officers, agents, representatives, employees, successors and assigns.

B. "*Meredith/Burda*" means the former business entity jointly owned by Meredith Corporation and Pan Associates, L.P.

C. "*Pan Associates, L.P.*" means a limited partnership and a holding company for the Burda family with its principal place of business in New York, New York.

D. "*Meredith/Burda's Printing Business*" means the business of commercial printing acquired by Donnelley from Meredith/Burda, including all of the assets, titles and properties, tangible and intangible, of said business, and its associated interests, rights and privileges, including without limitation all buildings, leaseholds, machinery, equipment, inventory, supply arrangements, funded employee benefit plans, customer lists, copyrights, trade names, trademarks, trade secrets, patents and other property of whatever description, together with all additions and improvements thereto made subsequent to the Acquisition by Donnelley and all other facilities, assets, titles, properties, interests and rights and privileges,

including any business interest in Siegwirk Inc., as may be necessary to reconstitute Meredith/Burda's Printing Business as a viable competitor to the same extent as existed prior to the Acquisition. Meredith/Burda's Printing Business shall include: all of Meredith/Burda's printing plants located at Casa Grande, Arizona; Des Moines, Iowa; Newton, North Carolina; and Lynchburg, Virginia.

E. "*Acquisition*" means the acquisition of Meredith/Burda by Donnelley, pursuant to a Purchase and Sale Agreement entered into on December 21, 1989, and more fully described in ¶ 12 of the Commission's complaint issued in this matter.

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

II.

It is further ordered, That Donnelley shall divest, absolutely and in good faith, Meredith/Burda's Printing Business within twelve (12) months from the date this order becomes final. The divestiture shall be 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 and, if the divestiture of Meredith/Burda's Printing Business is to be accomplished by a public offering of all stock and other share capital of a corporation containing Meredith/Burda's printing business, such public offering shall also only be in a manner that receives the prior approval of the Commission. Provided, however, that for a period of ten (10) years after the date of the public offering, no person who is an officer, director or executive employee of Donnelley or who owns more than one (1) percent of the stock of Donnelley shall be an officer, director or executive employee of the corporation or shall own or control directly or indirectly more than one (1) percent of the stock of the corporation. The purpose of the divestiture is to maintain Meredith/Burda's Printing Business as a viable competitive concern engaged in commercial printing and to remedy the lessening of competition, resulting from the Acquisition, as alleged in the Commission's complaint. In connection with the divestiture required by this paragraph:

A. If any printing plant associated with Meredith/Burda's Printing Business, or any other facilities, assets, titles, properties, interests, rights and privileges associated with such Printing Business, have

been sold, closed shut down, disposed of, or are no longer operational, Meredith/Burda's Printing Business shall include Donnelley's most comparable, as determined by the Commission, printing plant or facilities, assets, titles, properties, interests rights and privileges associated with such printing business that are in the same or better condition than those that were acquired.

B. Donnelley shall provide to the acquirer of Meredith/Burda's Printing Business, or to the corporation in the event of a public offering, on a nonexclusive basis, all technology (including patents, licenses and know-how) that was not obtained by Donnelley as part of the Acquisition and is used by Donnelley, or developed by Donnelley for use, in connection with Meredith/Burda's Printing Business; Donnelley shall not interfere with any attempt by such acquirer of Meredith/Burda's Printing Business, or the corporation in the event of a public offering, to employ any personnel previously or presently employed by Meredith/Burda, or previously or presently employed by Donnelley, in connection with the operation of Meredith/Burda's Printing Business nor seek to enforce any employment contract against such personnel.

C. Donnelley shall assign to the acquirer of Meredith/Burda's Printing Business, or to the corporation in the event of a public offering, all customer agreements or understandings, formal or informal, and all customer records and files relating to commercial printing supplied by Meredith/Burda's Printing Business.

III.

It is further ordered, That:

A. If Donnelley has not fully complied, absolutely and in good faith with paragraph II of this order within the times provided in such paragraph, Donnelley shall consent to the appointment of a trustee to divest the assets pursuant to paragraph II of this order. 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, for any failure by Donnelley to comply with this order, Donnelley 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 and other available relief, including a court-appointed trustee, pursuant to Section 5(1), or any other statute enforced by the Commission, for any failure by Donnelley 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, Donnelley shall consent to the following terms and conditions regarding the trustee's power, authority, duties and responsibilities:

(1) The Commission shall select the trustee, subject to the consent of Donnelley, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures. If Donnelley has not opposed the selection of a proposed trustee, in writing, within fifteen (15) days after notice by the Commission's staff to Donnelley of the identity of the proposed trustee, Donnelley 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 Meredith/Burda Printing Business.

(3) The trustee shall have eighteen (18) months from the date of appointment to divest Meredith/Burda's Printing Business. If however, at the end of the 18-month period, the trustee has not submitted a plan for divesting the Meredith/Burda Printing Business or believes that such divestiture cannot be accomplished within a reasonable time, the trustee's period for divesting 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 of any of the properties of Donnelley, or any other relevant information to divestiture of Meredith/Burda's Printing Business. Donnelley shall develop such financial or other information as the trustee may reasonably request. Donnelley shall cooperate with the trustee, and shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays caused by Donnelley in meeting the reasonable requests of the trustee shall extend the time for the trustee to divest in an amount equal to the delay, as determined by the Commission or, for a court-appointed trustee, by the court.

(5) Subject to Donnelley's absolute and unconditional obligations under paragraph II of this order, the trustee shall use his or her best

efforts to negotiate the most favorable price and terms available in divesting Meredith/Burda's Printing Business.

(6) The trustee shall serve, without bond or other security, at the cost and expense of Donnelley on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have the authority to retain, at the cost and expense of Donnelley, such consultants, attorneys, investment bankers, business brokers, accountants, appraisers and other representatives and assistants as are reasonably necessary to assist in the divestiture. The trustee shall account for all monies derived from divesting Meredith/Burda's Printing Business, and for all expenses incurred. After approval by the Commission, or, in the case of a court-appointed trustee, by the court, of the accounts of the trustee, including fees for his or her services, all remaining monies shall be paid to Donnelley 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 divesting Meredith/Burda's Printing Business.

(7) Except in the case of reckless disregard of his or her duties, Donnelley 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 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, Donnelley shall execute a trust agreement that transfers to the trustee all rights and powers necessary to divest Meredith/Burda's Printing Business.

(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, and 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 and appropriate to accomplish the requirements of this order.

(11) The trustee shall report in writing to Donnelley and the Commission every sixty days (60) concerning the trustee's efforts to divest Meredith/Burda's Printing Business.

IV.

It is further ordered, That pending any divestiture required by this order, Donnelley shall take all measures necessary to maintain Meredith/Burda's Printing Business in its present or improved condition, and to prevent any deterioration, except for normal wear and tear, and otherwise not cause or permit impairment of the marketability or viability of Meredith/Burda's Printing Business.

Donnelley shall not burden Meredith/Burda's Printing Business, or the corporation in the event of a public offering, with any obligations that may impair the viability of the business or frustrate the purposes of the divestiture, and in no event shall any obligations, apart from funded employment benefit pension funds, transferred by Donnelley be any greater than those carried by Meredith/Burda at the time of the Acquisition.

V.

It is further ordered, That for a period of ten (10) years from the date this order becomes final, Donnelley shall not, without the prior approval of the Commission, directly or indirectly, through subsidiaries or otherwise, (A) acquire the whole or any part of the stock, share capital, equity or other interest in, any concern, corporate or noncorporate, engaging in the supply of publication gravure printing within the United States; (B) acquire any assets used for or previously used for (and still suitable for use for) the supply of publication gravure printing within the United States; or (C) enter into any agreement, understanding or arrangement with any concern by which Donnelley would obtain the market share, in whole or in part, of such concern.

VI.

It is further ordered, That:

A. Within sixty (60) days from the date this order becomes final, and every sixty (60) days thereafter until it has fully complied with paragraphs II and III of this order, Donnelley shall file with 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 therewith. All such reports shall include, in addition to such other information and documentation as may hereafter be requested: (a) a specification of the steps taken by Donnelley to make public its desire to divest Meredith/Burda's Printing Business; (b) a list of all persons or organizations to whom notice of divestiture has been given; (c) a summary of all discussions and negotiations together with the identity and address of all interested persons or organizations; and (d) copies of all reports, internal memoranda, offers, counter offers, communications and correspondence concerning said divestiture; and

B. On the anniversary of the date this order became final, and every anniversary thereafter for the following nine (9) years, Donnelley shall file with the Commission a verified written report of its compliance with paragraph V of this order.

VII.

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 Donnelley made to its principal office, Donnelley shall permit any duly authorized representatives of the Commission 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 Donnelley and to interview officers or employees of Donnelley relating to any matter contained in this order.

VIII.

It is further ordered, That Donnelley shall notify the Commission at least thirty (30) days prior to any proposed changes 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 changes that may affect compliance obligations arising out of the order.

OPINION OF THE COMMISSION¹BY STAREK, *Commissioner*:

I. INTRODUCTION

On September 4, 1990, R.R. Donnelley & Sons Co. ("Donnelley") acquired all interests in the Meredith/Burda printing business ("Meredith/Burda") from Meredith Corporation ("Meredith") and Pan Associates, L.P. ("Pan").² Prior to the subject acquisition, Donnelley and Meredith/Burda independently provided commercial printing services. Donnelley is the largest supplier of commercial printing services in the United States. IDF ¶1.³ It provides printing services for publications including mail-order catalogs, newspaper inserts, magazines, books, directories, computer documentation, and financial documents. IDF ¶ 1. Prior to the acquisition, Donnelley provided printing services from plants located throughout the United States employing the two primary printing technologies in publication printing: the gravure process and the offset process. IDF ¶¶ 1- 5.⁴ Immediately prior to the acquisition, Meredith/Burda was among the largest commercial printers in the United States, offering both gravure and offset printing services from four plants in the United States for a variety of publications. IDF ¶ 7-9.⁵

¹ The following abbreviations are used in this opinion:

ID	Initial Decision (page no.)
IDF	Initial Decision (¶ no.)
OA Tr.	Oral Argument Transcript (page no.)
RAB	Respondent's Appeal Brief (page no.)
CAB	Complaint Counsel's Appeal Brief (page no.)
RRB	Respondent's Reply Brief (page no.)
CPF	Complaint Counsel's Proposed Findings of Fact (¶ no.)
RPF	Respondent's Proposed Findings of Fact (¶ no.)
Tr.	Administrative Hearing Transcript (page no.)
CX	Complaint Counsel's Exhibit
RX	Respondent's Exhibit

² Prior to the acquisition, Meredith/Burda was a joint venture comprising Meredith/Burda Companies, Inc. (a wholly-owned subsidiary of Meredith) and Pan (a limited partnership owned by members of the Burda family). Pursuant to a purchase and sale agreement, Donnelley acquired Meredith/Burda by acquiring (i) all of the issued and outstanding stock of Meredith/Burda Companies, Inc., and (ii) all of the limited partnership interests in Pan. CX-3-B.

³ Donnelley's fiscal 1990, 1991, and 1992 net sales were \$3.498, \$3.915, and \$4.193 billion, respectively. IDF ¶ 6.

⁴ Donnelley also provides commercial printing services using other processes -- letterpress and flexography -- that are not important to the disposition of this case. See IDF ¶¶ 1, 29; RPF ¶ 11.

⁵ In fiscal year 1989, the year prior to its acquisition by Donnelley, Meredith/Burda reported sales of \$456.7 million. IDF ¶ 9.

The Commission's complaint, issued October 11, 1990, charges that this acquisition may tend substantially to lessen competition in the supply of high volume publication gravure printing in two geographic markets -- the continental United States and the western United States -- in violation of Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. 45.⁶ The Administrative Law Judge ("ALJ") assigned to this proceeding issued an Initial Decision on December 30, 1993, holding that the effect of the acquisition has been or may be substantially to lessen competition or to create a monopoly in the supply of high volume publication gravure printing in the continental United States. The ALJ ordered Donnelley to divest the acquired Meredith/Burda business.

Respondents state four bases for appeal from the Initial Decision:⁷ (1) that the doctrine of issue preclusion bars the ALJ from reexamining factual issues decided in a 1990 hearing by the United States District Court for the District of Columbia on the Commission's motion for a preliminary injunction, *FTC v. R.R. Donnelley & Sons Co.*, 1990-2 Trade Cas. (CCH) ¶ 69,23-9 (D.D.C. 1990); (2) that the ALJ erred in recognizing a relevant product market of "high-volume publication gravure printing"; (3) that the ALJ erred in finding that the acquisition would tend substantially to lessen competition or tend to create a monopoly; and (4) that the liability finding and the order of divestiture are not based on substantial competent evidence.

The Commission reviews this matter *de novo*. We conclude that the ALJ and, thus, the Commission are not barred from reexamining factual issues decided in the preliminary injunction hearing. We further conclude that "high volume gravure printing" as proposed by

⁶ Specifically, the complaint charges that Donnelley had entered into agreements with Meredith Corporation ("Meredith") and Pan Associates Limited Partnership ("Pan") that violated Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and that pursuant to these agreements Donnelley had acquired certain business interests of Meredith and Pan in Meredith/Burda, and that such acquisition violated Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, as well as Section 5 of the FTC Act.

⁷ Either side may appeal the ALJ's decision to the full Commission, which will then enter its own decision. 16 CFR 3.52. If the Commission finds a violation of law, it may enter an order to divest and for other appropriate relief. 15 U.S.C. 21(b). Under both the Clayton Act and the FTC Act, such an order is subject to review in the court of appeals, 15 U.S.C. 21(c), 45, and, after the record is filed, "the jurisdiction of the court of appeals to affirm, enforce, modify, or set aside orders of the Commission . . . shall be exclusive." 15 U.S.C. 21(d). Any order the Commission may issue does not take effect until judicial review is complete. 15 U.S.C. 21(g).

complaint counsel is not a relevant market for the purposes of assessing the legality of the acquisition under Section 7 of the Clayton Act. Because complaint counsel made no attempt to prove that the acquisition lessened competition in a broader market, this finding could be considered dispositive. It is undisputed that concentration and other characteristics of such a broader market are not conducive to an exercise of market power by the merged firm, unilaterally or in coordination with others. Moreover, if we assume for purposes of further analysis the existence of a relevant market for high volume publication printing, the analysis of potential anticompetitive effects reinforces our conclusion that the acquisition does not violate Section 7. We conclude that neither coordinated nor unilateral anticompetitive effects are a likely result of the acquisition in the assumed market. For the reasons set forth below, the complaint is dismissed.

II. PROCEDURAL HISTORY

In July 1990, the Commission moved for a statutory temporary restraining order and preliminary injunction under Section 13(b) of the FTC Act, 15 U.S.C. 53(b), to prevent consummation of the acquisition. The Commission sought such relief "in aid of an FTC administrative proceeding." *E.g., FTC v. Food Town Stores, Inc.*, 539 F.2d 1339, 1341 (4th Cir. 1976). As provided by Section 13(b) itself, the Commission asked that injunctive relief be granted "pending the issuance of a complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon has become final."⁸

⁸ Section 13(b) provides in pertinent part:
Whenever the Commission has reason to believe --

(1) that any person, partnership or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission, and

(2) That the enjoining thereof pending the issuance of a complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon has become final, would be in the interest of the public --

the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States to enjoin any such act or practice. Upon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest, and after notice to the defendant, a temporary restraining order or a preliminary injunction may be granted without bond . . .

The district court judge who heard the case permitted the parties to present a truncated evidentiary hearing under a provision in the applicable local court rules that vests in the district court judge the discretion to determine the scope and nature of any hearing for a preliminary injunction. D.D.C. Local Rule No. 205(d).⁹ The truncated evidentiary hearing lasted five partial days and ended with an additional half day for closing arguments. Neither the Commission nor the respondents objected to the truncated nature of the hearing, and no party moved under Fed. R. Civ. P. 65(a)(2) to have the hearing on the preliminary injunction consolidated with the trial on the merits.¹⁰ At all times all parties were engaged in a proceeding that sought only temporary and preliminary relief.

On August 27, 1990, the district court denied the Commission's request for a preliminary injunction. The court's findings and conclusions, adopted nearly verbatim from proposed findings submitted by Donnelley and Meredith, expressly recognized that the proceeding was one for preliminary relief:

This matter was heard on the motion of plaintiff Federal Trade Commission (FTC) for a preliminary injunction pursuant to Section 13(b) of the FTC Act, 15 U.S.C. 53(b), seeking to enjoin the acquisition of any stock, assets, or other interest in Meredith Corporation, Meredith/Burda Companies, and Pan Associates, L.P., by R.R. Donnelley & Sons Company, pending the issuance of an administrative complaint by the FTC challenging this acquisition and final action thereon.

FTC v. R.R. Donnelley & Sons Co., 1990-2 Trade Cas. (CCH) ¶ 69,239, at 64,854 (D.D.C. 1990). Similarly, an addendum composed by the district court, and added to the proposed findings of Donnelley and Meredith, acknowledged the rushed circumstances in which the court had considered the Commission's motion for preliminary relief:

The case became at issue (on August 21) during a week in which the undersigned was serving as the Court's Motions Judge, handling multiple other motions for temporary restraining orders and preliminary injunctions, etc., in cases assigned to

⁹ This Rule has since been revised slightly, but the present published form is in all material respects the same as it was in August 1990.

¹⁰ Any such consolidation would have been improper. While a court may certainly order consolidation of hearings on requests for preliminary and permanent injunctions where both types of relief have been sought in the same action, it may not consolidate a cause of action not pleaded in the complaint. The Commission's complaint sought only preliminary relief. The granting of such relief was "an end in itself," and "the district court [was] not authorized to determine whether the antitrust laws have been or are about to be violated. That adjudicatory function is vested in FTC in the first instance." *FTC v. Food Town Stores, Inc.*, 539 F.2d at 1342; *see also FTC v. Beatrice Foods Co.*, 587 F.2d 1225, 1229 (D.C. Cir. 1978); *FTC v. Lancaster Colony Corp.*, 434 F. Supp. 1088, 1090-91 (S.D.N.Y. 1977).

other judges who temporarily are away from the courthouse. Because of that fact, and recognizing that yet another criminal drug trial will begin tomorrow, the Court asked both sides to submit proposed orders respectively granting and denying plaintiff's motion for a preliminary injunction. In the interest of time, the Court obviously has largely adopted defendants' proposed order.

Id. at 64,856.

FTC counsel filed a notice of appeal and sought from the district court an injunction against the transaction pending appeal, in order to preserve the Commission's option to pursue appellate review. Following analysis of the decision, however, the Commission determined not to seek further review of the district court's denial of preliminary relief and on August 30, 1990, moved to dismiss its appeal. On September 4, 1990, Donnelley and Meredith consummated their transaction.

On October 11, 1990, the Commission issued an administrative complaint in this proceeding pursuant to Sections 7 and 11 of the Clayton Act, 15 U.S.C. 18 and 21, and Section 5 of the FTC Act, 15 U.S.C. 45, challenging the transaction.¹¹ Section 11(b) of the Clayton Act, 15 U.S.C. 21(b), expressly vests the Commission with jurisdiction to determine the legality of a corporate acquisition under Section 7 and, if warranted, to order divestiture.

On January 16, 1991, the ALJ denied Donnelley's cross motion for a summary decision and directed that its *res judicata* and collateral estoppel defenses to the complaint be stricken. The ALJ explained his rejection as follows:

Respondents argue that a five-day hearing is not a "curtailed" procedure, but it is in comparison with the typical Commission administrative hearing involving antitrust claims. These proceedings usually involve extensive formal discovery into such issues as relevant product and geographic markets, entry barriers and probable competitive injury. All of these issues are present in this case, and it has been my experience that matters of this nature involve, not five-day hearings, but hearings which may last several months and which involve many witnesses and hundreds of documents. Thus, I cannot conclude that the District Court was presented with every fact which bore on the issues before it, and I find that those facts can only be developed by discovery and a trial on the merits in this administrative proceeding.

On February 20, 1991, Donnelley filed an "emergency" appeal from the ALJ's decision. Donnelley's motion was not received by the

¹¹ Although named in the original complaint, Meredith was dismissed as a respondent by Stipulation of April 19, 1991.

Commission, as it was not authorized under Commission Rule 3.23.¹² Donnelley then filed a petition with the Court of Appeals for the Seventh Circuit seeking review of the ALJ's decision and, effectively, asking that court to direct the Commission to dismiss the complaint under the doctrine of issue preclusion. The Court of Appeals rejected Donnelley's petition for want of jurisdiction under 5 U.S.C. 704, holding that the ALJ's decision was not a reviewable "final order" of the Commission. *R.R. Donnelley & Sons Co. v. FTC*, 931 F.2d 430 (7th Cir. 1991).

After extensive pretrial discovery, hearings were held in Washington, D.C., and Chicago, Illinois, from January 25, 1993, to June 17, 1993. The parties filed their proposed findings of fact on September 17, 1993, and the ALJ closed the record on October 8, 1993.

On December 30, 1993, the ALJ issued an initial decision ("ID"), pursuant to the Commission's rules of practice. 16 CFR 3.51. The ID holds that the Commission has jurisdiction over the subject matter of this proceeding and over defendants Donnelley and Pan, and that Donnelley and Pan were engaged in "commerce" as defined in Section 1 of the Clayton Act, 15 U.S.C. 12, and Section 4 of the FTC Act, 15 U.S.C. 44. ID at 91.

With respect to the market conditions relevant to the competitive analysis of this acquisition, the ALJ found: (i) that the relevant market within which to evaluate the competitive effects of the acquisition is "the supply of high volume publication gravure printing" in "the continental United States"; (ii) that Donnelley and Meredith/Burda were actual, direct and substantial competitors in this relevant market; and (iii) that "barriers to entry into the relevant market are substantial, and substantial harm to competition would occur until new entry could be accomplished." ID at 91-92.

The ALJ held that the effect of this acquisition has been or may be substantially to lessen competition or to tend to create a monopoly in the alleged market in violation of Section 7 of the Clayton Act in the following ways:

¹² Rule 3.23, patterned after 28 U.S.C. 1292, allows Commission review only of specified types of interlocutory rulings by the ALJ (not involved here), or where the ALJ certifies his ruling for interlocutory Commission review. In this case the ALJ did not certify his ruling for Commission review. Instead, the motion was placed on the public record by the Commission's Secretary on February 28, 1990, as an *ex parte* communication.

- (a) It eliminated actual competition between Donnelley and Meredith/Burda in the relevant market;
- (b) It significantly increased the already high levels of concentration in the relevant market;
- (c) It created a firm whose share of the relevant market is so high that it has achieved the position and market power of a dominant firm;
- (d) It eliminated Meredith/Burda as a substantial independent competitive force in the relevant market; and
- (e) It increased the likelihood of successful anticompetitive conduct, non-rivalrous behavior and actual or tacit collusion among the firms in the relevant market.

ID at 92. The ALJ concluded that the ultimate effect of the acquisition is to "increase the likelihood that firms will increase prices and restrict the output of high volume publication gravure printing." ID at 92.

To remedy these anticompetitive effects, the ALJ ordered Donnelley to divest the acquired Meredith/Burda business comprising, *inter alia*, four gravure printing plants to an acquirer that obtains the prior approval of the Commission. Among other standard provisions, the order prohibits Donnelley, for a period of ten years from the date the order becomes final, from acquiring without prior Commission approval (i) any interest in a firm engaged in the supply of publication gravure printing in the United States, or (ii) any assets used (or suitable for use) for the supply of publication gravure printing within the United States. ID at 93-104.

III. ISSUE PRECLUSION

Principles of issue preclusion or collateral estoppel do not preclude the ALJ or the Commission from deciding the merits of the complaint.

Respondents argue that the district court's decision denying the Commission's request for preliminary injunctive relief under Section 13(b) of the FTC Act -- on grounds that the Commission had not adequately established the relevant product market -- estops the Commission from adjudicating the question of product market definition in an administrative proceeding under Section 11 of the Clayton Act and Section 5 of the FTC Act. The district court

determined, after a truncated hearing, that the Commission had not shown the requisite "likelihood of success" to warrant a preliminary injunction pending completion of its administrative proceeding.¹³ The district court did not, and did not purport to, decide the case, or any of its subsidiary factual issues, on the merits.¹⁴ The district court was not called upon to reach a "final resolution" on the antitrust issues, but only to determine whether the FTC made "a showing adequate to justify preliminary relief." *FTC v. Alliant Techsystems Inc.*, 808 F. Supp. 9, 19 (D.D.C. 1992); *FTC v. Beatrice Foods, Inc.*, 587 F.2d 1225, 1229 (D.C. Cir. 1978).¹⁵ Under established principles, the court's denial of a preliminary injunction does not estop the Commission from exercising its express statutory authority to adjudicate the legality of the transaction.¹⁶

A. General Lack of Collateral Preclusive Effect

Ordinarily a court is not estopped from deciding the merits of a disputed issue unless the decision alleged to create an estoppel effect was "final, and on the merits." 18 Wright, Miller & Cooper, Federal Practice and Procedure Section 4427, at 269 (1981); *see also* Restatement (Second) of Judgments Section 27 (1982) (an issue is precluded only when it is "determined by a valid and final judgment,

¹³ *See supra* pp. 7-9

¹⁴ Indeed, in rejecting the Commission's request for a preliminary injunction, the district court commented at length on perceived gaps in the Commission's preliminary showing and on adjustments the Commission trial staff made in the market definition throughout the five-day hearing. *FTC v. R.R. Donnelley & Sons Co.*, 1990-2 Trade Cas. (CCH) ¶ 69,239, at 64,854-55. Similarly, in subsequently denying the Commission's request for a stay pending appeal, the court again acknowledged the preliminary nature of the case, stating that it had "found little likelihood of success on the merits." The district court thus expressly recognized that it had not heard the case on the merits.

¹⁵ "The question whether the acquisition actually violates the antitrust laws is reserved for the Commission and is not before [the district court in a preliminary injunction hearing]. The Commission meets its burden 'if it shows preliminarily, by affidavits or other proof, that it has a fair and tenable chance of ultimate success on the merits.'" *FTC v. Southland Corp.*, 471 F. Supp. 1, 3 (D.D.C. 1979) (citation omitted). The Seventh Circuit has noted: "One of the main reasons for creating the Federal Trade Commission and giving it . . . jurisdiction to enforce the Clayton Act was that Congress . . . thought the assistance of an administrative body would be helpful in resolving such [antitrust] questions." *Hospital Corp. of America v. FTC*, 807 F.2d 1381, 1386 (7th Cir. 1986), *cert. denied* 431 U.S. 1038 (1987). Therefore, "Section 13(b) does not contemplate a full-blown trial-type hearing in District Court." *FTC v. Imo Indus.*, 1992-2 Trade Cas. (CCH) ¶ 69,943 (D.D.C. 1992). Any order issued by the Commission as a result of the administrative proceeding is reviewable in a court of appeals. *See* 15 U.S.C. 45(c).

¹⁶ *See R.R. Donnelley & Sons Co. v. FTC*, 931 F.2d 430 (7th Cir. 1991); *Southwest Sunsites, Inc.*, 98 FTC 866, 870-71 (1981) (interlocutory order) (decisions in a preliminary injunction action brought under Section 13(b) do not collaterally estop the Commission from deciding the merits in a full administrative trial); *see also* Statement of Federal Trade Commission Policy Regarding Administrative Merger Litigation Following Denial of Preliminary Injunction (June 21, 1995).

and the determination is essential to the judgment"); accord *Ashe v. Swenson*, 397 U.S. 436, 443 (1970) ("valid and final judgment"). Because a preliminary injunction hearing is not designed to decide the case either finally or on the merits, decisions made in that context are rarely granted collateral effect. As the Supreme Court has observed:

Since . . . likelihood of success on the merits was one of the factors the District Court and the Court of Appeals considered in granting . . . a preliminary injunction, it might be suggested that their decisions were tantamount to decisions on the underlying merits. . . . This reasoning fails, however, because it improperly equates "likelihood of success" with "success," and what is more important, because it ignores the significant and procedural differences between preliminary and permanent injunctions.

The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held. Given this limited purpose, and given the haste that is often necessary if those positions are to be preserved, a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits. A party thus is not required to prove his case in full at a preliminary injunction hearing . . . and the findings of fact and conclusions of law made by a court granting a preliminary-injunction are not binding at trial on the merits. . . .

University of Texas v. Camenisch, 451 U.S. 390, 394-95 (1981) (citations omitted, emphasis added); see *A.J. Canfield Co. v. Vess Beverages, Inc.*, 859 F.2d 36, 38 (7th Cir. 1988).

The law of the D.C. Circuit is particularly pertinent in determining the preclusive effect to be given findings of a district court in that circuit. The D.C. Circuit has repeatedly refused to accord preclusive effect to findings made in a preliminary injunction hearing. In rejecting the contention that categorically-stated findings of a district court in a preliminary injunction proceeding might have preclusive effect, the court observed:¹⁷

¹⁷ Because the ultimate merits are not "necessary" to the outcome of a preliminary injunction under Section 13(b), the collateral estoppel doctrine is not relevant to this case. *E.g. Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.5 (1979) ("Under the doctrine of collateral estoppel . . . the judgment in the prior suit precludes relitigation of issues actually litigated and necessary to the outcome of the first action."); see *Montana v. United States*, 440 U.S. 147, 153 (1979) ("Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation."); cf. *Public Service Co. of Indiana v. EPA*, 682 F.2d 626, 630-31 (7th Cir. 1982), *cert. denied*, 459 U.S. 1127 (1983). The district court was authorized to consider only the "likelihood of success." The actual merits were not litigated, and even if plaintiffs thought they were litigated, the "merits" were not "necessary to the outcome of the first action." *Id.* To hold otherwise "improperly equates 'likelihood of success' with 'success,' and . . . ignores the significant procedural differences between preliminary and permanent injunctions." *Camenisch*, 451 U.S. at 394.

To the extent that the findings and conclusions of the District Judge purported to settle finally the questions of law and fact raised by the complaint, those findings and conclusions went beyond the determination the judge was called upon to make, and should not be regarded as binding in further proceedings in the trial court.

Industrial Bank of Washington v. Tobriner, 405 F.2d 1321, 1324 (D.C. Cir. 1968) (footnotes omitted); *accord Hunter Douglas, Inc. v. Sheet Metal Workers Int'l*, 714 F.2d 342, 346 (4th Cir. 1983); *Berrigan v. Sigler*, 499 F.2d 514, 518 (D.C. Cir. 1974); 11 Wright & Miller, Federal Practice and Procedure Section 2962, at 630-31.

The Seventh Circuit has stated that "in certain rare instances, decisions granting or denying preliminary relief will be given preclusive, effect." *Canfield*, 859 F.2d at 38, citing and following *Miller Brewing Co. v. Jos. Schlitz Brewing Co.*, 605 F.2d 990 (7th Cir. 1976), *cert. denied*, 444 U.S. 1102 (1980). The "rare" situation found in *Miller Brewing*, however, is not present here. In *Miller Brewing*, Miller sued Schlitz for trademark infringement based on the latter's use of the term "Lite" for a reduced-calorie beer. The court of appeals summarily affirmed judgment for Schlitz because the court of appeals had, in an earlier preliminary injunction proceeding, decisively held that "Lite" was generic when applied to beer and hence not protected by trademark law. The court of appeals held that its earlier decision was decisive because, among other things, Miller in the earlier injunction proceeding had conceded that the evidentiary record before the court then was as complete as it could ever be on that issue and that the fundamental facts were not in dispute. 605 F.2d at 995. The court, thus, held that its earlier determination that "Lite" is a generic term was "an insuperable obstacle to Miller's claims."¹⁸

Miller Brewing is plainly inapposite. The Commission did not present at the expedited preliminary injunction proceeding all the evidence in support of its alleged market definition that it marshalled in the administrative proceeding. Although Donnelley was perfectly

¹⁸ Similarly, in *Canfield*, the court of appeals held that a plaintiff was collaterally estopped from bringing a trademark injunction suit against a competitor's use of the term "chocolate fudge" for diet soda, because, in at least one prior case involving the same plaintiff, another court had made a decisive finding that the term "chocolate fudge" was generic. Notably, however, the court rejected an argument that it had, in the context of a previous affirmance of a preliminary injunction, made a decisive ruling in plaintiff's favor on the issue. The court explained that in view of the "general presumption against giving preclusive effect to preliminary [injunction] rulings" and in view of the fact that its prior opinion affirming the preliminary injunction "dealt with probabilities only, since we were determining the likelihood of success on the merits," there was no resulting preclusive effect running in favor of the plaintiff. 859 F.2d. at 38.

within its rights to insist that the preliminary injunction hearing be conducted expeditiously, it may not elevate that truncated hearing into a decision on the merits.¹⁹

Moreover, in this case, the district court lacked authority (even had it purported to do so) to resolve with finality any issue in the case.²⁰ Through Section 11(b) of the Clayton Act and Section 5(b) of the FTC Act, Congress expressly authorized the Commission, in its sole discretion, to determine the legality of corporate acquisitions and other antitrust violations by means of an administrative proceeding, subject to review in the court of appeals. To grant preclusive effect to decisions of the district court in a Section 13(b) injunctive proceeding would usurp the Commission's statutory fact-finding role under these statutes, in plain contravention of the will of Congress. See *NLRB v. Denver Building & Construction Trades Council*, 341 U.S. 675 (1951).²¹

In creating the Federal Trade Commission and establishing a procedure for administrative determination of the legality of corporate acquisitions and other conduct, Congress recognized the

¹⁹ In this regard, the Supreme Court has noted the appropriate procedures for seeking to have a preliminary injunction hearing consolidated with the trial on the merits: Should an expedited decision on the merits be appropriate, Rule 65(a)(2) of the Federal Rules of Civil Procedure provides a means of securing one. That Rule permits a court to "order the trial of the action on the merits to be advanced and consolidated with the hearing of the application." Before such an order may issue, however, the courts have commonly required that "the parties should normally receive clear and unambiguous notice [of the court's intent to consolidate] either before the hearing commences or at a time which will still afford the parties a full opportunity to present their respective cases." *University of Texas v. Camenisch*, 451 F.2d at 395 (brackets in original, quoting *Pughley v. 3750 Lake Shore Drive Coop. Bldg.*, 463 F.2d 1055, 1057 (7th Cir. 1972)). Respondents did not follow this procedure. In any event, such consolidation would have been improper. See *supra* note 10.

²⁰ In *Miller Brewing*, the court that decided Miller's motion for preliminary injunction would also decide its request for final relief. It seems clear that *Miller Brewing* is no more than an application of the view that on an application for preliminary injunction, the trial court (or, as in *Miller Brewing*, an appellate court on an appeal from the grant or denial of preliminary injunction) may, in an appropriate case, go beyond the issue of preliminary relief and indicate (or direct) that the case should be dismissed in its entirety because it has fully and finally resolved an issue that presents an "insuperable" obstacle to maintaining the case. E.g., *Deckert v. Independence Shares Corp.*, 311 U.S. 282, 287 (1940) ("If insuperable objection to maintaining the bill clearly appears, it may be dismissed and the litigation terminated") (citation omitted).

²¹ Respondents attempt to distinguish *Denver Building* on the dual grounds that the NLRB has exclusive jurisdiction over labor matters, while the Commission does not have exclusive jurisdiction over antitrust cases, and that the NLRB statute in that case was designed "to assist in a preliminary investigation," while the Commission in this case had already conducted a pre-merger investigation into the challenged transaction. RAB at 5 n.3. These arguments are not compelling. First, under Section 13(b) of the FTC Act the Commission is the primary (and exclusive) factfinder in all cases in which it seeks preliminary relief under that statute in aid of its adjudicative proceeding. Second, Section 13(b) is also intended "to assist" the Commission's law enforcement efforts. And neither the Hart-Scott-Rodino Act, 15 U.S.C. 18a, nor Section 13(b), nor the federal civil discovery rules, intimate that the Commission's discovery (and investigation) rights terminate at the conclusion of a preliminary injunction action.

value of specialized expertise in a complex area of the law. *See, e.g., Atlantic Refining Co. v. FTC*, 381 U.S. 357, 367 (1965); *Stanley Works v. FTC*, 469 F.2d 498, 505 (2d Cir. 1972), *cert. denied*, 412 U.S. 928 (1973).²² Section 13(b) of the FTC Act, added to the statute in 1973, was designed to permit the Commission to secure preservation of the status quo pending determination of the case on the merits in an administrative proceeding, in recognition of the difficulty of reconstituting some merged parties as viable entities through divestiture. *FTC v. Weyerhaeuser Co.*, 665 F.2d 1072, 1081 (D.C. Cir. 1981); *see also Kenneth Elzinga, The Antimerger Laws: Pyrrhic Victories*, 12 J.L. & Econ. 43 (1969). But nothing in the statute or its legislative history purports to divest the Commission of its preexisting statutory authority to adjudicate the legality of acquisitions and other practices on their merits.²³ To the contrary, courts have expressly recognized that denial of preliminary injunctive relief under Section 13(b) of the FTC Act comes without prejudice to the Commission's authority to reach a contrary conclusion when it adjudicates the merits of the case. *See FTC v. Elders Grain Co.*, 868 F.2d 901 (7th Cir. 1989). Compare *FTC v. Simeon Mgmt. Corp.*, 532 F.2d 708, 717 (9th Cir. -1976) (preliminary injunction denied with the court, per Judge Kennedy, 'intimat[ing] no view . . . as to the appropriate disposition" on the merits), with *Simeon Mgmt. Corp. v. FTC*, 579 F.2d 1137 (9th Cir. 1978) (subsequent cease and desist order upheld on review of final agency action).²⁴

²² *See also Hospital Corp. of America v. FTC*, 807 F.2d 1381, 1387 (7th Cir. 1986) (Posner, J.), *cert. denied*, 481 U.S. 1038 (1987) ("One of the main reasons for creating the Federal Trade Commission and giving it concurrent jurisdiction to enforce the Clayton Act was that Congress distrusted judicial determination of antitrust questions. It thought the assistance of an administrative body would be helpful in resolving such questions and indeed expected the FTC to take the leading role in enforcing the Clayton Act *See Henderson, THE FEDERAL TRADE COMMISSION*, ch. 1 (1924)"). The risks inherent in a lack of specialized expertise in adjudicating complex antitrust issues are magnified in a preliminary injunction proceeding. *See Richard Posner, ECONOMIC ANALYSIS OF LAW* 554 (4th ed. 1992) ("The problem for the judge asked to grant a preliminary injunction is that he is being asked to rule in a hurry, on the basis of incomplete information. The risk of error is high.").

²³ A proviso to Section 13(b) permits the Commission to request, and the court to grant, a permanent injunction in a "proper case," in lieu of administrative resolution of the matter. *See, e.g., United States v. JS&A Group, Inc.*, 716 F.2d 451 (7th Cir. 1983). However, the choice whether to request such relief rests solely within the Commission's discretion, and the legislative history to the proviso indicates that it is to be invoked where the agency concludes that a case presents no issues warranting detailed administrative consideration. *Id.* at 456-57. Neither in this case, nor in any other suit to date under Section 13(b) to preliminarily enjoin a corporate acquisition, has the Commission asked the district court to render a final decision on the merits. In all such cases, as in this one, the Commission has exercised its express statutory authority under the Clayton and FTC Acts to decide the merits.

²⁴ The obverse is equally correct. Compare *FTC v. Weyerhaeuser Co.*, 665 F.2d at 1075 (finding that Commission demonstrated likelihood of success under Section 7 in five day preliminary injunction hearing), with *Weyerhaeuser Co.*, 106 FTC 172, 265 (1985) (Commission finding lack of Section 7 violation and dismissing complaint after administrative hearing). Plainly, in *Weyerhaeuser*, the

Thus, under the circumstances here, the general rule -- that decisions made in a preliminary injunction hearing do not have preclusive effect on a subsequent trial on the merits -- applies with particular clarity.

B. No Basis for Exception to the General Rule

There is no basis for a departure from the general rule in this case. Donnelley argues that it seeks to create only a narrow exception to the general rule, stating two bases for giving preclusive effect to the decisions of preliminary injunction hearing: (1) where the preliminary injunction proceeding did not afford a "full and fair opportunity to litigate"; and (2) where the preliminary injunction judgment is not vacated.²⁵ In fact, Donnelley's proposed standards for according collateral preclusive effect to a preliminary injunction are no standards at all.

On the first basis, the Supreme Court in *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 481-82 (1982), equates "full and fair opportunity" with "minimum guarantees of due process. Thus, Donnelley appears to suggest that collateral estoppel attaches each time a court denies a preliminary injunction, unless it does not afford the minimum due process. Under this standard, a preliminary injunction hearing would always bar subsequent litigation on the merits since the proper entry of a preliminary injunction decision must meet standards of minimum due process: Section 52(a) of the Federal Rules of Civil Procedure, which applies to all preliminary injunctions hearings in federal courts, requires that "in granting or refusing interlocutory injunctions the court shall . . . set forth the findings of fact and conclusions of law which constitute the grounds of its action." See *FTC v. Beatrice Foods Co.*, 589 F.2d at 1235.²⁶

On the second basis for an exception to the general rule, Donnelley cites *United States v. Munsingwear*, 340 U.S. 36 (1950), for its view that the Commission should have moved the court of appeals to vacate the district court's decision in order to avoid

Commission did not even attempt to argue that the respondent was precluded by collateral estoppel principles from litigating the merits in the administrative proceeding that followed the district court's findings that were favorable to the Commission, even though the "administrative complaint charge[d] the same anticompetitive effects earlier alleged in the Commission's complaint for a preliminary injunction." 665 F.2d at 1075 n.8.

²⁵ RAB at 5-10.

²⁶ If the "full and fair opportunity" is something greater than a "minimum guarantees of due process," Donnelley does not specify what it is.

preclusion. The remedy of vacating a lower court's opinion, however, is available only in the limited class of cases in which the litigated issues become moot before an appeal can be prosecuted. In essence, Donnelley would require every party losing a preliminary injunction to appeal in order to avoid preclusive effect.

This position poses a standard that is contrary to the sound administration of justice. It would force the Commission to pursue an appeal and emergency relief in the court of appeals, even if it believed the district court did not commit any reversible error under the standards applicable to preliminary injunction cases merely to create the circumstances in which the Commission could then ask the court of appeals to vacate the lower court's decision as moot.²⁷ Munsingwear simply recognizes the principle that a party ought not to be burdened with an adverse decision that it has been denied an opportunity to appeal, through no fault of its own. By contrast, to the extent Donnelley's argument is that every preliminary injunction must be either appealed to its conclusion or vacated without an appeal, Donnelley would place an enormous burden on the appellate courts. And to the extent that Donnelley's argument is that the Commission's case was moot (because Donnelley had consummated the transaction and thereby precluded the Commission from obtaining preliminary relief -- the only relief the Commission sought), Donnelley would require the Commission to ask an appellate court either to reverse or to vacate every preliminary merger injunction the Commission loses. This standard also would impose an inordinate burden on the

²⁷ Any appeal requires more than a mere disagreement with the trial court about the result in the case. The critical evaluation of an appeal entails many considerations, including an awareness that appellate courts distinguish among errors of law, errors of fact, and abuses of discretion in reviewing district court decisions. *E.g.*, *Vision Sports, Inc. v. Melville Corp.*, 888 F.2d 609, 612 (9th Cir. 1989); *Baja Contractors, Inc. v. City of Chicago*, 831 F.2d 667 (7th Cir. 1987), *cert. denied*, 485 U.S. 993 (1988) (factual and legal errors constitute an abuse of discretion). The district court's legal analysis fairly correctly articulated the legal standards applicable to an action by the Commission for a preliminary injunction. Assuming the district court erred, its errors concerned questions of fact, not of law. For the Commission to have succeeded in appealing the district court's denial of an injunction, the Commission would have been required to show that the district court's findings of fact were "clearly erroneous." *See* Fed. R. Civ. P. 52(a) ("Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses"). The standard for judicial review of a district court's factual findings is much closer to the "abuse of discretion" standard than it is to the "error of law" standard. An "abuse of discretion" standard is very difficult for an appellant to meet, and courts will rarely overturn a district court for declining to grant equitable relief, especially when that court finds that the equities do not warrant an injunction. Compare *FTC v. Weyerhaeuser Inc.*, 665 F.2d 1072, with *FTC v. PPG Indus. Inc.*, 798 F.2d 1500 (D.C. Cir. 1986).

appellate courts. Neither *Munsingwear* nor any public policy compels such a result.²⁸

The Commission's preliminary injunction action did not seek a resolution of the merits, the court did not decide the case on the merits, and the Commission was never given "clear and unambiguous notice" -- nor indeed any notice at all²⁹ -- that its action for a preliminary injunction was anything more than a preliminary assessment by the district court of the Commission's likelihood of success, given the evidence the Commission presented in that proceeding.³⁰ Indeed, the district court's decision clearly contemplates that the merits of this matter will be adjudicated in an FTC administrative proceeding.³¹ Donnelley's belated attempt to turn that proceeding into something that it was not is rejected.

IV. MARKET DEFINITION

Section 7 of the Clayton Act prohibits acquisitions, the effect of which "may be substantially to lessen competition or tend to create a monopoly" 15 U.S.C. 18.³² The language of Section 7 indicates that a plaintiff need not prove that an anticompetitive effect is a certainty. *California v. American Stores Co.*, 495 U.S. 271, 284 (1990) ("plaintiff need only prove that [the acquisition's] effect may be substantially to lessen competition").³³ But Section 7 requires a prediction of probable anticompetitive effects, not ephemeral

²⁸ The more appropriate practice is for the Commission (i) to confine its requests that district court decisions be vacated to those moot cases that articulate legal principles the Commission believes are erroneous but which it cannot vindicate on appeal, but (ii) not to seek vacation of the adverse preliminary decisions that turn on their unique facts. The efficacy of this approach by the Commission depends on its continued ability to litigate the full merits of a case in the related administrative proceeding when it is denied preliminary relief in the district court.

²⁹ *Pughsley v. 3750 Lake Shore Drive Coop. Bldg.*, 463 F.2d at 1057; see *supra* note 19.

³⁰ Although not dispositive, the relative length and scope of the administrative trial, and the volume and quality of evidence presented therein, is informative. The administrative trial lasted five months, as compared with five days for the preliminary injunction hearing. Moreover, complaint counsel presented live testimony from 40 witnesses and presented 1,450 evidentiary exhibits, as compared with 6 witnesses and 100 exhibits at the preliminary injunction hearing. CAB at 74.

³¹ See *supra* pp. 8-9.

³² Although the complaint challenges the acquisition under both Section 7 of the Clayton Act and Section 5 of the FTC Act, the analytical standards for assessing legality in this context are read coextensively. See *FTC v. PPG Indus., Inc.*, 798 F.2d 1500, 1501 n.2 (D.C. Cir. 1986); *FTC v. Pepsico, Inc.*, 477 F.2d 24, 28 n.6 (2d Cir. 1973); *Grand Union Co.*, 102 FTC 812, 1027 (1983).

³³ Section 7 does not require "a certainty" or "even a high probability" that an acquisition will substantially lessen competition. *United States v. General Dynamics Corp.*, 415 U.S. 486, 505 (1974); *FTC v. Elders Grain, Inc.*, 868 F.2d 901, 906 (7th Cir. 1989). See also *United States v. Western EEC Co.*, 767 F. Supp. 308, 330 (D.D.C. 1991), *aff'd*, 993 F.2d 1572 (D.C. Cir.), *cert. denied*, 114 S. Ct. 487 (1993) ("probability" rather than "certainty" is the applicable standard in antitrust law).

possibilities. *Brown Shoe Co. v. United States*, 370 U.S. 294, 323 (1962); see *Mldcon Corp.*, 112 FTC 93, 169-170 (1989).

The central concern of Section 7 is that acquisitions "should not be permitted to create or enhance market power or to facilitate its exercise." U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines ("Merger Guidelines") Section 0.1.³⁴ Market power is "the ability profitably to maintain prices above competitive levels for a significant period of time." *Id.* Section 0.1. Thus, the ultimate issue under Section 7 is whether the challenged acquisition likely will enable the merging firm, acting unilaterally or collectively with other firms, to increase prices above competitive price levels.³⁵ See, e.g., *Hospital Corp. of America v. FTC*, 807 F.2d 1381, 1386 (7th Cir. 1986) (Posner, J.), *cert. denied*, 481 U.S. 1038 (1987) (Section 7 requires "judgment [as to] whether the challenged acquisition is likely to hurt consumers, as by making it easier for firms in the market to collude, tacitly or explicitly, and thereby force prices above, or farther above, the competitive level"). The ultimate question under Section 7 may be stated more broadly to include a prediction of adverse effects in competitive dimensions other than price -- reductions in output, product quality, or innovation. See Merger Guidelines 0.1, n.6; see, e.g., *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 368-69 (1963); *FTC v. PPG Indus., Inc.*, 628 F. Supp. 881, 885 (D.D.C.), *aff'd in part*, 798 F.2d 1500 (D.C. Cir. 1986).

The prediction that an acquisition likely will have adverse competitive effects requires a series of successive determinations outlined in the Merger Guidelines Section 0.2.³⁶ First, the Commission must find that the acquisition would increase concentration and result in a concentrated relevant market, properly defined and measured. "Determination of a relevant market is a necessary predicate to a finding of a [Section 7] violation." *United States v. E.I. duPont de Nemours & Co.*, 353 U.S. 586, 593 (1957). Section 7 of the Clayton Act prohibits acquisitions "where in any line of commerce . . . in any section of the country, the effect of such acquisition may be substantially to lessen competition." 15 U.S.C. 18

³⁴ 4 Trade Reg. Rep. (CCH) ¶ 13,104 (April 2, 1992).

³⁵ See Merger Guidelines Section 1.11 (the prevailing preacquisition price level is generally used as a proxy for the competitive price level).

³⁶ The Commission uses the framework set out in the Merger Guidelines for determining whether to challenge horizontal acquisitions. Although the Merger Guidelines are not binding on courts, courts of appeal have considered them in determining the impact on competition of proposed acquisitions. See, e.g., *United States v. Baker Hughes*, 908 F.2d 981, 983 n.3 (D.C. Cir. 1990); *PPG*, 798 F.2d at 1503.

(emphasis added). The purpose of market definition identify those sections of the economy that may be exposed by the challenged acquisition to a substantial lessening of competition. *Owens-Illinois, Inc.*, 115 FTC 179 (1992) [FTC Dkt. No. 9212 (Feb. 26, 1992), slip op. at 4].³⁷ As suggested by the language of Section 7, the relevant market must be defined along both a product and a geographic dimension. *United States v. General Dynamics Corp.*, 415 U.S. 486, 510 (1974) ("delineation of proper geographic and product markets is a necessary precondition to assessment of the probabilities of a substantial effect on competition within them"). Complaint counsel bear the burden of proving a relevant market within which anticompetitive effects are likely as a result of the acquisition. *Kaiser Aluminum & Chem. Corp. v. FTC*, 652 F.2d 1324 (7th Cir. 1981). See *United States v. Connecticut Nat'l Bank*, 418 U.S. 656, 669 (1974).

The ALJ found that the relevant product market is "high volume publication gravure printing," as alleged by complaint counsel. ID at 81-85. The ALJ further found that the United States constitutes a relevant geographic market within which to assess the competitive effects of the acquisition, and rejected complaint counsel's proposed Western United States market. ID at 85-86. Respondents appeal the ALJ's product market determination, arguing that competition from offset printing services is sufficient to undermine any attempt by respondents, unilaterally or collectively with other gravure printers, to exercise market power with respect to gravure printing services. RAB at 10-44. Neither complaint counsel nor respondents appeal the ALJ's geographic market findings.³⁸

We find that the ALJ's conclusions as to geographic market are well supported, but we reject the ALJ's conclusions as to product market. We conclude that "high volume publication gravure printing" as proposed by complaint counsel is not a relevant market for the purposes of assessing the competitive effects of the acquisition. Using the price discrimination methodology proposed by complaint counsel, adjusted to reflect actual substitution possibilities, we find that offset printing is used extensively in high volume publication printing. Complaint counsel estimate that, in 1990, offset accounted

³⁷ See *United States v. du Pont*, 353 U.S. at 593 ("substantiality [of any lessening of competition] can be determined only in terms of the market affected").

³⁸ CAB at 51 n.72 (Complaint counsel do not "formally challeng[e]" the ALJ's rejection of the proposed "Western United States" geographic market, but nevertheless contend that the evidence supports such a separate antitrust market).

for 24.1% of print jobs with more than sixteen pages and print runs of more than five million copies.³⁹ In the "core" of complaint counsel's proposed market -- print jobs with more than thirty-two pages and print runs of more than ten million copies -- offset accounted for 13.5%.⁴⁰ These conclusions could be considered dispositive: Complaint counsel made no attempt to prove that the acquisition lessened competition in a broader market that includes offset printing, and it is undisputed that concentration and other characteristics of such a broader market are not conducive to an exercise of market power by the merged firm, unilaterally or in coordination with others. Assuming, however, the existence of a relevant market for high volume publication printing -- contrary to our finding that printers cannot identify customers with inelastic demand according to the alleged parameters of the market -- the analysis of potential anticompetitive effects reinforces our conclusion that the acquisition does not violate Section 7.

A. Product Market: General Standards

A market may be defined as "a product or group of products and a geographic area in which it is produced or sold such that a hypothetical [monopolist] of those products in that area likely would impose at least a 'small but significant and nontransitory' increase in price. A relevant market is a group of products and a geographic area that is no bigger than necessary to satisfy this test." Merger Guidelines Section 1.0.⁴¹ Thus, a relevant product market is the smallest grouping of products whose sellers, if unified by a hypothetical cartel or merger, could profitably increase prices significantly above the competitive level.⁴² See *H.J., Inc. v. International Tel. & Tel. Corp.*, 867 F.2d 1531, 1537 (8th Cir. 1989) (a market is "any grouping of sales whose sellers, if unified by a hypothetical cartel or merger, could raise prices significantly above the competitive level"); *Owens-Illinois, Inc.*, slip op. at 4-5.

Market definition under the Merger Guidelines focuses solely on demand substitution factors -- *i.e.*, possible consumer responses.

³⁹ CX-1167-C-1.

⁴⁰ *Id.* These estimates may understate the proportion of offset printing in the proposed market.

⁴¹ See *id.* (defining the hypothetical monopolist as "a hypothetical profit-maximizing firm, not subject to price regulation, that was the only present and future producer or seller of those products in that area").

⁴² The prevailing pre-acquisition price level is generally used as a proxy for the competitive price level. *Id.* Section 1.11.

Supply substitution factors -- *i.e.*, possible production responses -- are considered in the identification of firms that participate in the relevant market and the analysis of entry. Merger Guidelines Section 1.0.⁴³ See Section V., *infra*. The Commission and the courts use cross-price elasticity of demand as the primary tool for market definition. See *E.I. du Pont*, 351 U.S. at 394; Merger Guidelines Section 1.11.⁴⁴ Under the Merger Guidelines, the Commission evaluates cross-price elasticities of demand through an iterative process that begins with a candidate market of each product of each merging firm and examines the extent to which the price of each such product is constrained by putative substitutes in demand. The Commission asks whether a hypothetical monopolist of that product could profitably impose a "small but significant and nontransitory" price increase in light of successive "next best substitutes." If alternative products are, in the aggregate, sufficiently attractive, an attempt to raise prices would not prove profitable, such that the candidate market would prove too narrow. The candidate market is expanded to encompass those alternative products to which consumers would switch in response to a significant price increase.⁴⁵

⁴³ Respondents argue that this approach is "mistaken" and contrary to long-standing Section 7 precedent. RRB at 46 n.44. Although case law often has treated supply substitutability (or supply elasticity) as part of market definition, the precedent does not compel that approach. See, *e.g.*, *Kaiser Aluminum & Chem. Corp. v. FTC*, 652 F.2d 1324, 1330 (7th Cir. 1981) (explicitly eschewing application of supply substitution to market definition). The Merger Guidelines' approach was designed to eliminate analytical confusion that has often arisen when demand and supply elasticities are considered concurrently. See, *e.g.*, Gregory Werden, Market Delineation Under the Merger Guidelines: A Tenth Anniversary Retrospective, 38 ANTITRUST BULL. 517, 524-27 (1992). In fact, when both demand and supply substitution are examined with the appropriate focus on market power, consideration of supply substitution in the identification of relevant market participants should yield market shares that are identical to those determined by including supply substitution as part of market definition. *Id.* at 525. The Merger Guidelines' separation of these steps merely clarifies the focus on identifying mergers that create or enhance market power. "This methodology matches the grouping of buyers who are exposed by their demand patterns to supracompetitive pricing with the set of sellers who are both readily able and likely to produce the pertinent output." Owens-Illinois, slip op. at 12.

⁴⁴ Cross-price elasticity of demand between the product in question and other products is used as the best indicator of own price elasticity of demand for the product in question, which is the ultimate concern of market definition. "The extent to which a monopolist would increase price is largely a function of own-elasticity of demand for the product . . . Cross-elasticity is relevant only because it is closely related to own-elasticity." Gregory Werden, Market Delineation and the Justice Department's Merger Guidelines, 1983 DUKE L.J. 514, 573 (1983). See ABA Section of Antitrust Law, Monograph No. 12, HORIZONTAL MERGERS: LAW & POLICY 107-08 (1986) (hereinafter, ABA Merger Monograph).

⁴⁵ Direct evidence of cross-price elasticity of demand is often unavailable; "[h]ence, we may apply reasoned judgment in estimating or inferring the relative magnitude of the elasticities in order to assess the degree of market power." *Grand Union*, 102 FTC at 812. In addition to engaging in the direct cross-price elasticity analysis described in the Merger Guidelines, the Commission may consider "practical indicia" such as "industry or public recognition of the [market for the product at issue] as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962). See *United States v. E.I. du Pont de Nemours Co.*, 351 U.S.

As a general matter, the Commission considers significant "a price increase of five percent lasting for the foreseeable future." Merger Guidelines Section 1.11.

B. Market Defined by Non-Discriminatory Price Increase

Donnelley and Meredith/Burda each produce and sell gravure printing services. Thus, absent price discrimination, the initial test is whether a hypothetical monopolist producer of gravure printing services would likely impose a small but significant and nontransitory price increase above prevailing levels. In order to find that gravure printing is a relevant product market under this initial test, the Commission must conclude that substitution by the marginal consumers of gravure printing services -- those who likely would switch to offset printing (or to some other service) in response to a five percent increase from prevailing prices -- would not be sufficient to defeat the price increase.⁴⁶

The evidence demonstrates that, at the time of the acquisition, a hypothetical monopolist of gravure printing services could not profitably impose a significant nontransitory price increase for all current gravure printing services. Complaint counsel and Donnelley do not disagree -- and the ALJ found -- that buyers can and do use either offset or gravure printing services for a wide range of printing jobs. ID at 84.⁴⁷ Customers, demand for printing services varies

377, 395 (1956). As with evidence of cross-price elasticity, evidence of such practical indicia is relevant only to the extent that it is probative of the own-price elasticity of demand for the product at issue. See ABA Merger Monograph, supra note 44, at 108-09 ("The hypothetical monopolist paradigm does not expressly incorporate the submarket indicia identified in Brown Shoe, except to the extent that the indicia may assist the factfinder in inferring whether the hypothetical monopolist could profitably impose a price increase." (notes omitted)). Cf. *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 218-19 (D.C. Cir. 1986), cert. denied 479 U.S. 1033 (1987) (treating submarket indicia as "proxies for cross-elasticities . . . in predicting a firm's ability to restrict output and hence to harm consumers").

⁴⁶ Offset printing is clearly the next best substitute for gravure printing for any relevant job specification. Merger Guidelines Section 1.11 n.9 ("Throughout the Guidelines 'next best substitute' refers to the alternative which, if available in unlimited quantities at constant prices, would account for the greatest value of diversion of demand in response to a 'small but significant and nontransitory' price increase"). More specifically, the next best substitute to gravure in high volume publication printing is heatset offset printing. IDF ¶¶ 27-28; RPF ¶¶ 12-36 (respondents refer only to heatset technology); Hausman Tr. 6422-23 (including only offset as competing with gravure in high volume publication printing). The three other processes used in commercial printing -- coldset offset, letterpress, and flexography -- are not economically reasonable alternatives for high volume publication printing and would likely not significantly constrain the competitive conduct of a hypothetical monopolist of gravure and heatset offset printing services. IDF ¶ 29; CPF ¶¶ 85-86, 115-136. In any event, the exclusion of these processes from the relevant market is not critical to the ultimate determination.

⁴⁷ See generally RAB at 10-44; CAB at 25-26.

across a number of significant dimensions,⁴⁸ and gravure and offset printing are not perfectly substitutable for all differentiated print jobs demanded. But there is a significant margin of overlapping use.⁴⁹ At this margin, gravure and offset printing are relatively cross-price elastic. Even complaint counsel's expert testified that a price increase to all gravure customers could not be sustained because too many purchasers would substitute to offset printing.⁵⁰ This conclusion is not disputed by complaint counsel and is analytically indisputable.⁵¹

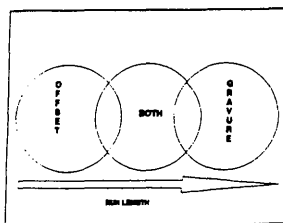
Thus, absent an ability to price discriminate, the hypothetical gravure monopolist could not increase prices profitably and the relevant market would be expanded to include offset.⁵² Indeed, by proposing a relevant market consisting of a subset of all gravure print jobs, the complaint in this matter contemplates a relevant market defined by the ability to price discriminate between relatively elastic and inelastic customers of gravure printing services.

C. Market Defined by Discriminatory Price Increase

The complaint alleges a relevant market for "high volume publication gravure printing," which is approximated by four-color gravure printing jobs with at least five million copies, at least sixteen pages, and fewer than four four-color versions (or the equivalent in one-color versions).⁵³ Thus, complaint counsel have attempted to

⁴⁸ These dimensions include, most significantly: number of versions of each publication, number of copies per version, number of pages per copy, print quality, colors, and, of course, price.

⁴⁹ RX 497 depicts the competition between gravure and offset essentially as follows:



See also CPF-Conclusions of Law at 13 (citing this exhibit as showing "some competition between gravure and offset but also . . . significant areas where the processes do not compete" and as standing for the proposition that there is "limited direct competition between the processes"). The testimony of all of complaint counsel's witnesses corroborates this view. *See, e.g.,* Nytko Tr. 1525 ("offset and gravure compete in certain areas, and there are certain areas that your expectation is that offset would be the predominant process [and] other areas where you would expect gravure to be the predominant process").

⁵⁰ Hilke Tr. 3070-71.

⁵¹ *See* CAB at A-1 (citing Dr. Hilke for the proposition that "a price increase across all gravure printing (broader than high volume gravure printing only) may not be profitable").

⁵² *See* Hilke Tr. 3174-75.

⁵³ CAB at 10; CPF ¶ 657; Hilke Tr. 2997-98, 3419-20, 6149- 50. *See* CX 1167; CX 1351-B.

prove that a hypothetical gravure printing monopolist could profitably impose a discriminatory price increase on customers whose printing demand fits these parameters. Complaint counsel further describe the "core" of this proposed market as gravure print jobs with at least ten million copies, more than thirty-two pages, and fewer than four four-color versions (or the equivalent in one-color versions), but does not plead this as an alternative market.⁵⁴

The Commission and the courts recognize that if a seller or group of sellers can earn substantially different returns from different classes of customers based on their relative demand elasticities for the products of the sellers, the relatively inelastic class of customers may constitute a relevant market.⁵⁵ Under the standards set forth in Section 1.12 of the Merger Guidelines, the Commission will define a relevant market for a group of buyers for which a hypothetical monopolist would separately impose a "small but significant and nontransitory" increase in price.⁵⁶

If a hypothetical monopolist can identify and price differently to those buyers (targeted buyers) who would not defeat the targeted price increase by substituting to other products in response to a "small but significant and nontransitory" price increase for the relevant product, and if other buyers would not purchase the relevant product and resell to targeted buyers, then a hypothetical monopolist would profitably impose a discriminatory price increase on sales to targeted buyers.

Merger Guidelines Section 1. 12.⁵⁷

⁵⁴ See CAB at 10; CPF ¶ 657; Hilke Tr. 2997-98, 3097; CX 1351-B. Complaint counsel define the "core" of the market "as the area in which a hypothetical monopolist has the greatest possibility of success." CAB at 10, citing Hilke Tr. 2997-98, 3417. Complaint counsel do not propose the "core" as a relevant market alternative to the relevant market proposed in the complaint. OA Tr. at 41.

⁵⁵ See, e.g., *Owens-Illinois, Inc.*, 115 FTC 179 (1992) [FTC Dkt. No. 9212 (Feb. 26, 1992), slip op.]; *Midcon Corp.*, 112 FTC 93 (1989). See also *United States v. Grinnell Corp.*, 384 U.S. 563 (1966) (in monopolization case under Section 2 of the Sherman Act, 15 U.S.C. 2, relevant price discrimination product market for class of inelastic buyers); *United States v. Rockford Memorial Corp.*, 898 F.2d 1278 (7th Cir.), cert. denied, 498 U.S. 920 (1990) (affirming injunction against merger under Section 7 of the Clayton Act). In *Rockford Memorial*, Judge Posner explained that each category of customers identified with a specific hospital service (i.e., a specific medical indication) could represent a separate relevant product market if a hypothetical monopolist could discriminate in price (or other terms of competition) between such categories based on identified demand elasticities.

⁵⁶ "This is true regardless of whether a general increase in price would cause such significant substitution that the price increase would not be profitable," Merger Guidelines Section 1.12, as is the case here.

⁵⁷ Price discrimination consists of "differences in price not based on differences in cost." *Midcon*, 112 FTC at 168-69. "Price discrimination consists of obtaining different economic profits from different customers for similar products." Hilke Tr. 3498-99; Hausman Tr. 5474-75. See also F.M. Scherer & David Ross, *INDUSTRIAL MARKET STRUCTURE & ECONOMIC PERFORMANCE* 489 (3d ed. 1990) ("Price discrimination is the sale of different units of a good or service at price differentials not directly corresponding to differences in supply cost"). "Profitability" and "cost" are defined in economic rather than accounting terms. See Merger Guidelines Section 0.1 ("References to profitability of certain actions focus on economic profits rather than accounting profits. Economic profits may be defined as the excess of revenues over costs where costs include the opportunity cost of invested capital.").

In this matter, the Commission may find that a profitable discriminatory price increase is possible, and therefore sufficient to define a relevant market, if three conditions are satisfied: (1) the hypothetical monopolist can identify gravure customers with sufficiently inelastic demand for gravure printing (*i.e.*, those who will not switch to offset printing in response to a five percent price increase); (2) the hypothetical monopolist can selectively and profitably increase prices to those gravure customers;⁵⁸ and (3) arbitrage of gravure printing (resale by favored elastic customers to targeted inelastic customers) would not be sufficient to undermine the price increase.⁵⁹

There appears to be no dispute regarding arbitrage: it is generally not feasible in markets for individualized services,⁶⁰ and publication printing does not appear to be an exception.⁶¹ Assuming that a hypothetical gravure monopolist could impose a discriminatory price increase on a class of buyers whose print jobs fit the proposed market parameters, those buyers would not likely make the price increase unprofitable by purchasing required printing services from elastic buyers who obtained the service at a lower price.⁶² Thus, the focus of the remaining product market inquiry is whether a hypothetical gravure monopolist could accurately identify, and profitably increase price to, a class of current printing customers with inelastic demand for gravure printing.

We do not require proof of actual past or present price discrimination to use the possibility of price discrimination to define a market in a Section 7 case. Section 7 addresses likely future effects on competition, so proof of likely future discrimination could support

⁵⁸ The issue is whether a sufficient number of customers with high volume requirements would not switch to offset in response to a "small but significant and nontransitory" price increase for high volume printing jobs such that the price increase would prove profitable. Complaint counsel need not prove that all current gravure customers have inelastic demand for gravure printing high volume publication printing jobs, only that enough customers are sufficiently inelastic so as to make the price increase profitable.

⁵⁹ CAB at 12-13; Hilke Tr. 3011-3012.

⁶⁰ Hilke Tr. 5876-77; Hausman Tr. 5225-26. *See* Merger Guidelines Section 1.22 n.12 ("arbitrage is inherently impossible for many services"); accord Robert Pitofsky, *New Definitions of the Relevant Market and the Assault on Antitrust*, 90 COLUM. L. REV. 1805, 1848 (1990); Scherer & Ross, *supra* note 57, at 489.

⁶¹ CPF ¶¶ 736-40; Hilke Tr. 3069-70.

⁶² Hilke Tr. 3070 ("[A]rbitrage is a non-starter in [high-volume publication gravure printing]. I simply don't see any reason why J.C. Penney would find any use for old Best catalogs in trying to sell their product. Once the thing is printed, arbitrage is really not something that's in the realm of interest.").

the necessary market definition showing.⁶³ "Thus the possibility of price discrimination might in appropriate circumstances be enough to justify concern about anticompetitive effects. But, possibilities can be a weak foundation for a prediction of 'likely,' 'substantial' competitive effects." *Midcon*, 112 FTC at 169-70.⁶⁴

The Commission must be mindful of the analytical hazards of defining markets by reference to possible price discrimination. It is an economic truism that buyers do not have homogeneous preferences or demand elasticities for a given product within a relevant market, and there may often be some conceptual means of identifying classes of customers that appear to have inelastic demand for the product. The potential for this approach to swallow up the market definition principles established by the federal courts and the Commission is substantial. As the Commission warned in *Midcon Corp.*: "In considering possible markets under [a price discrimination] theory, there is a danger of implicitly assuming the conclusion." 112 FTC at 168.⁶⁵ That risk requires a particular rigor in examining the conceptual basis for distinguishing the allegedly inelastic customers and the factual basis for the prediction that price discrimination with respect to those customers is likely.⁶⁶

The analytical hazards of defining a relevant market by the possibility of price discrimination are manifest in complaint counsel's theory and the ALJ's decision. Although complaint counsel have described, in theory, a methodology for identifying a category of printing customers whose demand for gravure printing should be relatively inelastic, complaint counsel have not carried the burden of proving that the methodology allows an accurate identification of

⁶³ See *Owens-Illinois*, slip op. at 39 (Commissioner Azcuenaga, concurring).

⁶⁴ See *Owens-Illinois*, slip op. at 36 n.41 ("[T]he absence of price discrimination . . . is not determinative of what is likely to occur in the future. Its presence, however, might have conveyed a warning of appreciable danger . . .")

⁶⁵ See Pitofsky, *supra* note 60, at 1816 ("There will almost always be classes of customers with strong preferences for [differentiated] products, but to reason from the existence of such classes to a conclusion that each is entitled to the 'protection' of a separate narrow market definition grossly overstates the market power of the sellers.").

⁶⁶ The Commission will recognize the possibility of price discrimination as a means of defining a relevant market if there is a conceptually sound methodology, supported by the record, by which a hypothetical monopolist can identify the alleged inelastic customers. See *Owens-Illinois*, slip op. at 34; *Midcon*, 112 FTC at 168-69.

inelastic end uses and, thus, that a price increase within the identified category likely would be profitable. First, the identification of the parameters of the proposed market reflects a significant analytical error. In particular, the number of versions is not determined exogenously but is instead an endogenous competitive variable; increasing the number of printed versions ("versioning") is a means by which printing customers can and do substitute from gravure to offset.⁶⁷ Second, even assuming that the described parameters are a reasonable means of distinguishing elastic from inelastic customers, there is substantial historical and existing use of offset printing within the proposed market, even at existing prices and even within the "core" of the market. Third, given this existing substitution at current (presumptively competitive) prices, a significant and nontransitory increase in gravure prices for high volume printing would likely expand use of offset printing. Eliminating (or discounting) the versions parameter significantly increases the amount of observable substitution between offset and gravure. The dynamic analysis of the Merger Guidelines clarifies that substitution at the margin would likely make unprofitable such a supracompetitive price increase. For these and other reasons described below, we find that "high volume publication gravure printing" does not constitute a relevant market for purposes of evaluating the competitive effects of Donnelley's acquisition of Meredith/Burda.

D. Identification of Inelastic Uses

1. "Breakeven Analysis"

Complaint counsel have attempted to describe a methodology for identifying a category of commercial printing customers whose demand for gravure printing should be relatively cross-inelastic with offset: the "breakeven" analysis of gravure and offset printing costs. Complaint counsel argue that above a certain volume level, offset printing becomes an increasingly less viable alternative to gravure as the total number of copies increases. If a hypothetical gravure monopolist can approximate with some degree of confidence the

⁶⁷ The ability to version is an important variable of competition between gravure and offset for high volume printing. Increasing the number of versions is a means of reaching customers more specifically and is an attribute for which printing customers are willing to pay. Thus, a current gravure customer that chooses to print a greater number of versions and therefore shifts to offset has substituted offset for gravure.

volume level at which offset printing becomes an unprofitable substitute for gravure, it likely would increase prices to all customers for jobs above that volume.⁶⁸

The breakeven analysis is based on a fundamental difference between the cost structures of the gravure and offset processes.⁶⁹ The record shows that the cost of a print job can be divided into two basic economic categories: (1) fixed costs, which do not depend upon the number of copies printed, and (2) variable costs, which vary with the number of copies printed.⁷⁰ The cost structure of the gravure process is characterized by relatively high fixed costs and low variable costs for each print run.⁷¹ Relative to the gravure process, the cost structure of the offset process is characterized by lower fixed costs and higher variable costs for each print run.⁷² The primary difference in fixed costs between the processes is that, for a typical print job, the costs of engraving gravure cylinders and installing them to the gravure press are higher than the costs of producing offset printing plates and installing them into an offset press.⁷³ The primary differences in variable costs between the two processes are that gravure presses generally have a higher rate of throughput than offset presses⁷⁴ and that, for a given high volume print job, offset plates are less durable

⁶⁸ Thus, the relevant "identification" in this case concerns the job, not necessarily the customer. If gravure printers know that offset printing is not a reasonable economic alternative to gravure printing for high volume publication jobs, it need not distinguish among customers.

The profit maximizing strategy for the hypothetical monopolist is to approximate perfect price discrimination: setting a separate profit maximizing price for each product and each customer for which it can identify demand elasticity. Hal R. Varian, Price Discrimination, in 1 HANDBOOK OF INDUSTRIAL ORGANIZATION 600 (Richard Schmalensee & Robert D. Willig, eds. 1989).

⁶⁹ Although there is considerable dispute regarding the volume at which the breakeven point occurs, as well as whether trends in technology have or will significantly alter the cost structures that form the basis of the breakeven analysis, the general validity of the breakeven analysis is supported by internal costs studies of the merging firms and by testimony of both gravure and offset printers. *See* IDF ¶¶ 212-15.

⁷⁰ The fixed costs of a print job include the preliminary costs of original artwork and color separations, the costs of making the original set of offset plates or gravure cylinders (including proofs), the costs of the initial "makeready" (including ink and paper used in the makeready), and other costs that do not vary for a print run. Hodgson Tr. 186-96; CX 1164-F-G; CX 1165-G-H. The variable costs of a print job include the operating cost of the press and the materials used in printing the product, such as ink and paper. Hodgson Tr. 204-20; CX 1164-F-G; CX 1165-G-H.

⁷¹ Nytko Tr. 1484, 1514, 1525; Kelly Tr. 1716; Angstrom Tr. 2614; H. Sullivan Tr. 2789; J. Sullivan Tr. 4871-72. *See* Hausman Tr. 6308, 6417.

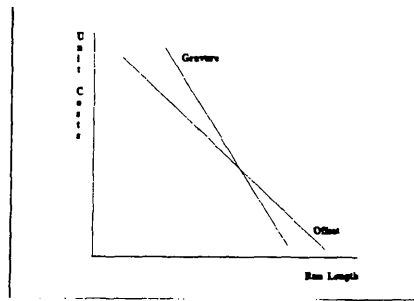
⁷² Kelly Tr. 1716; Glazer Tr. 2155; Angstrom Tr. 2614; J. Sullivan Tr. 4871-72. *See* Hilke Tr. 3090; Hausman Tr. 6308, 6417.

⁷³ IDF ¶ 165. *See, e.g.,* Hodgson Tr. 244-45; Haight Tr. 1328; Engdahl Tr. 2557-58. *See also* Hilke Tr. 3514-16.

⁷⁴ IDF ¶¶ 133-164. *See, e.g.,* Scirocco Tr. 1024-26; Wells Tr. 1916-19; Kaminsky Tr. 2001-02, 2037. Slower input of offset implies, among other things, longer press time per printed page.

and require more frequent replacement than gravure cylinders.⁷⁵ Thus, average unit costs for a particular print job when printed on gravure decrease with volume more rapidly than when printed on offset.

The breakeven point between gravure and offset is defined as the number of copies at which a print job with given page specifications (number and size) is equally costly to print using either the gravure or the offset process. IDF ¶ 212.⁷⁶ In other words, the breakeven point is the intersection of the differing average cost curves, as depicted in the following figure.⁷⁷



Within the framework of the Merger Guidelines, the relevant point for evaluating the usefulness of the breakeven analysis is the volume that would yield a five percent cost differential between gravure and offset.⁷⁸ Of course, printing customers do not make purchases based on the relative costs of their suppliers; their purchases are based on relative prices (and other attributes) of the printing services offered. Assuming that both gravure and offset firms have operated competitively (whether or not they are all in one

⁷⁵ IDF ¶ 165-69. The evidence suggests that, for technology in current use, offset plates for a print run must be replaced at approximately 1-2 million impressions while gravure cylinders for a print run require maintenance ("dechroming and rechroming") at approximately 5-10 million impressions.

The ALJ noted other variable costs that are higher for offset than for gravure, including gravure paper savings resulting from variable cut-off capability (IDF ¶ 172); the ability of gravure presses to stitch and trim on line (IDF ¶ 173-74); less paper waste in the gravure process (IDF ¶ 175-76); and gravure's ability to produce better results than offset on cheaper, lighter weight, uncoated paper (IDF ¶ 180). For purposes of analysis, we can assume that such cost-differences exist. These other factors are relevant to the explanation of any observed cost differences, but specific quantification is not necessary to the evaluation of the breakeven analysis. The ALJ did not attempt such quantification.

⁷⁶ The breakeven analysis appears most reliably defined in terms of run length. The number of versions are then defined as the number of runs. The cost structure of the gravure printing process suggests that run length determines the relative cost advantage vis-a-vis offset. Hodgson Tr. 254-55, 373-74; Hilke Tr. 3093, 3435-36.

⁷⁷ See Hilke Tr. 3152 (describing this relationship).

⁷⁸ Hilke Tr. 3153.

antitrust market), relative average prices for gravure and offset printing should maintain a relationship similar to that depicted in Figure 1.⁷⁹

The record does not indicate clearly the volume at which the breakeven occurs or the volume at which the "breakeven plus five percent" occurs. Although there is some evidence in the record that the breakeven point may occur at a lower point,⁸⁰ the ALJ found that the intersection occurred at the lower bound of complaint counsel's proposed relevant market: approximately five million copies for publications with sixteen pages and fewer than four versions. ID at 82-83. But complaint counsel's economic expert testified -- based on internal studies of relative costs by Donnelley -- that the theoretical gravure-offset breakeven for a sixteen-page catalog may be greater than six million copies.⁸¹ To the extent that these cost-based breakeven estimates do not reflect a five percent differential,⁸² the relevant volume for purposes of market definition is higher. What complaint counsel call the "core" of this market -- more than ten million copies, more than thirty-two pages, and low versioning -- may be viewed as an attempt to approximate the relevant "breakeven plus five percent" point.⁸³

⁷⁹ The record is not "strongly suggestive" that gravure producers are currently engaged in coordinated interaction or that Donnelley is otherwise behaving non-competitively and, therefore, does not provide a basis for postulating a price increase lower than five percent, or for using a threshold other than prevailing prices from which the price increase is postulated. See Merger Guidelines § 1.11. In this case, complaint counsel have argued that the acquisition has resulted in dominant firm conduct by Donnelley and have presented evidence that capacity utilization of gravure has been high at times when there has been substantial excess capacity on offset. See IDF ¶¶ 280-284. Other evidence suggests that prices for both gravure and offset continue to fall in this industry and that it is a "buyer's market." See IDF ¶¶ 358-59. Moreover, the exact specification of the postulated price increase is not critical to our conclusions.

⁸⁰ See IDF ¶¶ 227-35.

⁸¹ Hilke Tr. 3146-51; CX-1164-B, D; CX-1433-B. The economically relevant breakeven analysis must compare the costs of the most efficient technology of each process. It is not clear whether the isolated cost studies upon which CX-1164 is based reflect a state-of-the-art comparison. Nor is it clear that industry witnesses were making the economically relevant comparison. The evidence taken as a whole, however, provides a reasonable approximation of the costs of the marginal technologies.

⁸² Dr. Hilke's estimate explicitly excludes the five percent addition. The ALJ's conclusion appears not to incorporate the five percent differential:

The record supports complaint counsel's claim that, for low version, long run, high page count publications, gravure is less costly than offset. The breakeven point [IDF ¶ 212] at which this usually occurs is in publications with less than 4 four-color versions, more than 32 pages [IDF ¶ 222] and a run length in excess of 5 million copies [IDF ¶ 216] . . . In this case, there was explicit testimony that for run lengths in excess of 5 or 10 million copies, gravure is more economical than offset (see, e.g., F 234).

ID at 82-83.

⁸³ An additional complication in the breakeven analysis arises from considerations of print quality. The ALJ's conclusions reflect the conflicting testimony regarding differences in quality between gravure and offset:

2. Reservations About the Breakeven Analysis

These varying estimates suggest that "breakeven" analysis may be a poor means of distinguishing, with a reasonable degree of confidence, jobs for which gravure is relatively cross-price elastic with offset from those for which it is not. Indeed, one of complaint counsel's witnesses testified that even a "ballpark estimate" would be a "gross generalization."⁸⁴ In particular, he testified that "it's very dangerous to generalize about . . . the specific crossover point at which gravure is more efficient than offset" in large part because changes in technology shift the crossover point.⁸⁵ The continuing trend of increased productivity and efficiency of offset relative to gravure magnifies our doubts about the value of the breakeven analysis as a means of identifying inelastic gravure uses.

Significant trends in process technology between the two putative substitutes should also be considered in the forwardlooking analysis required by Section 7. Over the past decade, offset technology has made significant gains in both quality and productivity relative to gravure technology.⁸⁶ As a result of these relative improvements in offset technology, the margin of competition between gravure and offset has increased in recent years. IDF ¶¶ 194-201.⁸⁷ In general,

Some industry members believe that, for their purposes, gravure and offset offer comparable quality [IDF ¶ 186]; some high quality high volume magazines use offset and gravure for different parts of their publication [IDF ¶ 185]; and, industry members testifying in this proceeding could not distinguish between the two processes with the naked eye [IDF ¶ 187]. Nevertheless, the firm belief of many print buyers that gravure offers higher quality than offset is a real constraint on their choice of printing processes.

ID at 82. Complaint counsel argue that, whatever similarities may be shown in an isolated comparison, print customers generally perceive a reduction in the quality of printed copies as a print run approaches its conclusion, and that the reduction begins earlier in the print run for offset than for gravure. CAB at 22-24. It appears, however, that the breakeven estimates already account for this consideration: differences in quality are incorporated into the relative cost structures through the inclusion of the costs of changing offset plates and the costs of "dechroming and rechroming" gravure. In any event, although the ALJ appears to have felt constrained to hold "quality considerations" aside when discussing the economics of breakeven, IDF ¶ 214, his conclusion regarding the actual estimate of the relevant breakeven did not do so explicitly. See ID at 83.

⁸⁴ Nytko Tr. 1485.

⁸⁵ *Id.*

⁸⁶ RX-161-A, RX-163, RX-164 (pre-acquisition internal Donnelley memoranda describing program to improve gravure productivity to compensate for relative improvements in offset); Doty Tr. 4582-86; Weir Tr. 3778-88; RX-150.

⁸⁷ See Angstrom Tr. 2609 (as offset press technology has improved, "the area of competition between the two processes . . . has definitely gotten broader and . . . there is more work crossing over between the two processes"); CX-1142-Z-43 (industry publication stating that "the latest innovations in web offset . . . [have made] web offset competitive with gravure in long-run printing"). See also RX-153-A (gravure industry group document stating that "with the ever advancing technology in offset, the competitive advantage of gravure is becoming questionable" and that improvements in gravure technology "will be mandatory to protect our market share within the commercial printing community

however, these improvements should already be reflected in the measures of substitution described above and in the estimate of the breakeven point for gravure and offset economics.

Donnelley claims that the recent introduction of the latest generation offset presses will accelerate this trend and may, in fact, eliminate any gravure cost advantage in high volume printing.⁸⁸ The ALJ found that these newer offset presses "come closer to the performance of gravure presses." IDF ¶ 153. These presses are designed for rated speeds and web widths that suggest substantial unit cost improvements over prior generations of offset presses in high volume publication printing.⁸⁹ In particular, the Heidelberg/Harris M-3000 offset press has a rated speed of 3000 feet per minute, which approaches the highest rated speed for any existing gravure press.⁹⁰ Some evidence suggests that the M-3000 offset press compares favorably with late generation gravure presses in terms of unit cost and productivity for high volume printing jobs.⁹¹ As a result, the M-3000 and other new generation offset presses may further reduce whatever cost differential exists between gravure and offset, even for print jobs well within the volume and page parameters of the proposed market.⁹²

vs. offset/flexo"; (emphasis added); CX-1171-B (reflecting view that offset's share of an overall printing "market" is increasing while gravure's share is "steady").

These latter two documents, and many others in the record, refer to a "market" that includes at least gravure and offset. They therefore tend to counter complaint counsel's attempt to bolster their alleged market definition by referring to internal Donnelley documents that mention a "gravure market." The ALJ relied on these documents as evidence of industry recognition of a separate "gravure market." IDF 87 ¶¶ 274-79. These documents generally do not refer to a separate high volume publication gravure market as alleged in the complaint.

⁸⁸ RAB at 36-40.

⁸⁹ Rockwell Graphics recently introduced an offset press named the G-25W, which has a rated speed of 2500 feet per minute. Nytko Tr. 1547; Weir Tr. 3771-73. Mitsubishi and Man-Roland have also introduced offset presses with rated speeds of greater than 2000 feet per minute. Buchanan Tr. 2055-76; Weir Tr. 3771; RPF ¶ 29.

⁹⁰ RPF ¶ 27-28; CPF ¶ 490 (CX 120-Z-30-31, 38).

⁹¹ Dr. Hausman performed an econometric analysis comparing the estimated costs of printing the largest catalog described in the record (J.C. Penney's 1000-1500 page catalog) using an M-3000 with the costs of printing the same catalog using a new three-meter gravure press. RX-666. His analysis purports to show that the state-of-the-art offset press maintains a unit cost advantage of approximately 2-4%, depending on varying assumptions. Hausman Tr. 5320-21, 6384-85, 6388-89. Compare CX-1432; CPF ¶¶ 954-967 (Dr. Hilke's analysis estimating a 11-22% cost advantage for a state-of-the-art gravure press over the M-3000), with Hausman Tr. 6382-89 (Dr. Hausman's analysis of Dr. Hilke's methodology; estimating a 1-3% cost advantage for the M-3000 after replacing some of Dr. Hilke's assumptions with some of his own). See also RX 476; Melton Tr. 2426 (comparison of the M-3000 with a modern gravure press, performed by one of complaint counsel's witnesses, showing M-3000 to be 26% more productive).

⁹² See, e.g., Angstrom Tr. 2608-10, 2622-23 (M-3000 and Man-Roland's "Lithoman V" offset press considered "cross-over presses" because of their ability to do print jobs traditionally thought of as "gravure" work, including high-volume publications).

Complaint counsel admit that these and other technological areas of competition between advances may "create a gravure and offset." CPF ¶ 53.9.⁹³ In fact, evidence presented by complaint counsel shows that the M-3000 was designed to be cost-competitive with gravure in run lengths of up to ten million copies⁹⁴ and that, when commercially diffused, it would increase substitution between gravure and offset in high volume publication printing.⁹⁵ In essence, the commercial success of the M-3000 (and other new generation offset presses) would shift the unit cost breakeven point for gravure and offset to a higher run length and larger volume.

On the other hand, there is no evidence in the record that the M-3000 offset presses have achieved commercial success in high volume publication printing services, as defined by complaint counsel.⁹⁶ Although some evidence suggests that other new generation offset presses are now commercially viable,⁹⁷ there is no evidence in the record that these presses have significantly altered the nature of competition between gravure and offset or that they have produced dramatic increases in the use of offset in high volume publication printing.⁹⁸ Thus, there is no assurance that these presses will have a significant impact on competition in high volume publication printing. See IDF ¶ 202; ID at 84. Nevertheless, the continuing trend of increased productivity and efficiency of offset relative to gravure reinforces our skepticism regarding the value of the breakeven analysis as a means of identifying inelastic gravure uses. A small but significant and nontransitory increase in the price of gravure for high volume publication printing certainly would not

⁹³ Citing Angstrom Tr. 2609; CX 1272-G.

⁹⁴ See IDF ¶ 200; CX-1272 (graphically depicting the "potential market for the M-3000" and showing this offset press as cost-competitive with gravure for volumes as high as ten million copies). Sullivan Tr. at 2806-08.

⁹⁵ See Hilke Tr. 6069-70 ("[T]he M-3000 might be effective in enlarging that area of competition between the two processes, but that doesn't eliminate the portion of gravure that is basically beyond the reach of offset under most circumstances" (citing CX 1272-G; emphasis added); CPF ¶ 541. See also Hodgson Tr. 290-91; Coleman Tr. 1802-03; Angstrom Tr. 2609-10; Sullivan Tr. 2807-08 (testimony to the effect that the commercial success of the M-3000 would simply shift the breakeven point to a higher volume).

⁹⁶ See CAB at 42 ("not one page of high volume printing has been contracted to be printed on an M-3000"; emphasis in original). Complaint counsel attribute the lack of success to two phenomena: (i) performance problems in trials, which suggest that it will not be commercially viable in the near future, and (ii) the revolutionary (as opposed to evolutionary) nature of the technology, which suggests that printers will be reluctant to incur the risks of an unproven technology. See generally CPF ¶¶ 500-535.

⁹⁷ IDF ¶¶ 194-95, 198. See RPF ¶¶ 29-32.

⁹⁸ ID at 84; IDF ¶ 198-200, 202.

reverse this trend, and as discussed above, would shift the breakeven point (wherever it currently lies) to a significantly higher volume.

3. "Versioning" as a Competitive Variable

The ALJ's identification of the parameters of the proposed market reflects a significant analytical error that results in a substantial understatement of competition between gravure and offset printing. Specifically, the ALJ's market definition treats the number of versions of a given print job as somehow pre-determined for each customer. In fact, it appears to be a variable of competition between gravure and offset in high volume publication printing. Increasing the number of versions is a means for publishers to target customers more specifically, IDF ¶ 361, and is an attribute for which printing customers are willing to pay.⁹⁹ As the breakeven analysis makes clear, the costs of versioning are greater in gravure-printing than in offset printing. IDF ¶¶ 38, 224, 225. The record clearly shows that many customers, including some of the largest, have shifted their purchases of high volume publication printing services from gravure to offset. IDF ¶¶ 122-32. Recognizing these facts, offset printers attempt to influence customers to increase the number of versions of high volume publications.¹⁰⁰ Complaint counsel argue that the Commission should ignore the competitive relevance of this switching by, in essence, treating these customers as having exited the relevant market. CAB at 10 n.9.¹⁰¹ The ALJ concurred in this view. ID at 85.¹⁰²

Complaint counsel's analysis presumes implicitly that the number of versions of a particular print job is predetermined. In fact, however, the number of versions ordered for a given print job appears

⁹⁹ "Target marketing" has become increasingly common as retailers and magazine publishers attempt to tailor their publications to the specific preferences of customers or to competitive circumstances. Wyker Tr. 908; Engdahl Tr. 2571; Van Home Tr. 4637; Doty Tr. 4576-77; Higham Tr. 2321; CX-483-X.

¹⁰⁰ RX-19-A; Van Home Tr. 4636-38; Pope Tr. 2843-44.

¹⁰¹ See CPF ¶ 1111 ("In instances where switching between processes occurs, it is usually as a result of a change in the requirements of the printing program. (Bentele Tr. 1441-42; Nytko Tr. 1522-23)").

¹⁰² Donnelley relies too heavily on its analysis of gravure print buyers who have switched to offset (IDF ¶¶ 122-32), for it ignores . . . the reason for some of the switches -- increased versioning." See IDF ¶ 106 ("During 1993, Wal-Mart began shifting its predominantly gravure printed program to offset. Each issue has a run length ranging from 60 to 70 million . . . each with many localized versions"); IDF ¶ 108 (K-Mart shifting weekly 24-36 page insert from gravure to offset after increasing versions); IDF ¶ 122-125.

to be selected by many buyers after comparing the benefits and costs -- that is, the net profit -- associated with varying the attributes of a particular print job. As the relative prices of gravure and offset printing change, so too will the profits associated with each possible variant of a particular job (*e.g.*, low-version/high-run length versus high version/low-run length). The ability of buyers profitably to adjust these attributes provides a means by which printing customers can and do substitute from gravure to offset.¹⁰³

That substitution of this sort occurs is beyond dispute. Print customers with very large print volumes and page counts have substituted from gravure to offset in response to changes in perceived profit considerations related to versioning. Wal-Mart, for example, recently shifted to offset a large portion of its print program (with print issues of 60 to 70 million copies) in order to version more extensively and to target customers geographically. IDF ¶¶ 106, 123-24.¹⁰⁴ K-Mart, one of the world's largest purchasers of high volume publication printing services, also shifted the printing of its weekly national inserts from gravure to offset after deciding to increase versions. IDF ¶¶ 108, 125.¹⁰⁵ The print volumes and page counts in

¹⁰³ To illustrate, consider a retail merchant that intends to mail a sales catalog nationwide. The characteristics of a catalog -- the number of pages, the page size, the type of paper, the number of versions -- seldom will be fixed in advance, but are instead competitive choices made by the retailer. Focusing on versioning (holding other characteristics constant), the retailer will weigh the potential benefits of greater versioning (*i.e.*, greater sales revenue from a more accurately targeted catalog) against potential costs (*i.e.*, higher unit costs from shorter run lengths). Given existing prices for offset and gravure, the retailer will select the set of characteristics that offers the greatest expected profit. Clearly, this profit calculation will change as the relative prices of offset and gravure change. At one set of relative prices, the retailer may find it most profitable to opt for a single version catalog with a high run length, which might dictate the use of gravure. Were gravure prices to increase, however, a multiple-version publication might yield higher profits, which would dictate the use of offset.

Analogously, consider an airline that offers passenger service on a competitive route and is faced with the choice of leasing either one jet that seats 500 passengers or two jets that seat 250 each. Assuming the price of a lease for the larger jet is significantly lower than the price of the lease for the two smaller jets (*i.e.*, a price differential greater than 5%), the airline may choose the larger jet in order to minimize costs and, accordingly, to set a lower passenger ticket price. Alternatively, the airline could choose to lease the two smaller jets at a higher lease price in order to provide additional service to passengers (more departure times) albeit at a higher ticket price. The number of jets selected to provide the service is a competitive variable that is determined by the customer to maximize its profits; it is not an invariable, pre-determined market condition. Thus, it would be incorrect to interpret the airline's choice of the two-jet lease as a departure from the relevant market. The correct interpretation is that the airline selected between two substitutes.

¹⁰⁴ See Baron Tr. 2261, 2275-76, 2307-08.

¹⁰⁵ Specifically, the ALJ found: "Today, K-Mart finds the gravure and offset processes to be interchangeable, receives bids on both processes, and uses both processes for its national inserts. . . . One of the reasons K-Mart has moved more to offset is increased versioning." IDF ¶ 125. See Habeck Tr. 4158-59, 4163, 4234-35; RX-652.

each of these examples are not only within complaint counsel's proposed relevant market, they are well within the "core."¹⁰⁶

Of course, not all volume of a print customer need be shifted to offset to undermine a gravure price increase.¹⁰⁷ As the ALJ found, "some buyers, such as National Geographic, use both processes for their publications because of their unique contribution to specific needs, such as, in the case of offset, its lower cost when a portion of the publication requires a high number of versions." ID at 83; *see* IDF ¶ 121.¹⁰⁸ Customers who currently use both processes would likely shift additional volume to offset as a result of a relative increase in the price of gravure.¹⁰⁹

This evidence shows that the ability to version is an important variable of competition between gravure and offset for high volume printing. In reaching this conclusion, we do not find that all high volume gravure print jobs are currently at this margin of substitution. We need only find that a sufficient number of jobs are at this margin such that a high volume gravure price increase likely would not be profitable. A hypothetical gravure monopolist could profitably raise price only to those customers who could not avail themselves of versioning and other alternatives. As complaint counsel recognize, "the gravure monopolist must take versioning into consideration when targeting price increases. It is inappropriate to ignore versioning when identifying printing likely to be targeted by the hypothetical gravure monopolist." CAB at 9-10 n.8 (emphasis in original). Because a gravure monopolist could not determine *ex ante* whether current purchasers of gravure services will choose to print a greater number of versions in response to a small but significant and

¹⁰⁶ The record reflects other specific examples of customers substituting offset for gravure in order to obtain more versions. *See, e.g.*, RX-355; Gorden Tr. 3954-57 (Levitz Furniture). The record generally reflects that versioning is increasing. *See, e.g.*, Moeller Tr. 4009-10.

¹⁰⁷ *See, e.g.*, IDF ¶ 121 (regarding National Geographic: for each 9.8 million copy run length, more than four versions of up to 25 pages are printed offset and fewer than four versions of up to 88 pages are printed gravure); IDF ¶ 111 (regarding Modern Maturity: for each 22.4 million copy run length, 4-20 versions of up to 12 pages are printed offset and one or two versions of up to 88 pages are printed gravure). Customers who use both processes would likely shift additional volume to offset as a result of a relative increase in the price of gravure.

¹⁰⁸ Each National Geographic issue has a volume of nearly ten million copies and the offset portion is 20-25 pages per issue. IDF ¶ 121. Again, this print job is well within complaint counsel's proposed market and approaches the proposed "core" (absent the versioning restriction). *See* Allen Tr. 1598-99 (AARP plans increased versioning so that certain pages formerly printed gravure will be printed offset, even without a change in relative prices).

¹⁰⁹ Likewise, a publication printing customer faced with a relative increase in the price of offset could alter its print program to reduce the number of versions in order to obtain a better quality-adjusted gravure price. Customers with very high volume print requirements, but who are now using offset for highly-versioned programs, cannot be said to be insulated from gravure competition.

nontransitory price increase, it would likely not be able profitably to target such price increases.

By ignoring this method of substituting between offset and gravure, the data and analysis presented by complaint counsel mask the amount of actual substitution that currently occurs between offset and gravure.¹¹⁰ Eliminating the versioning parameter significantly increases the amount of observable substitution between offset and gravure.¹¹¹ Given this existing substitution, the dynamic analysis of the Merger Guidelines clarifies that substitution at the margin would likely make a high volume gravure price increase unprofitable.

E. Current and Likely Purchasing Patterns

Assuming *arguendo* that versioning is an appropriate market parameter, the evidence suggests that the boundaries at five million copies and sixteen pages have been drawn too low: at both pre-acquisition and post-acquisition prices, a substantial portion of print jobs above this line is done using offset printing.¹¹² Complaint counsel estimate that, in 1990, offset accounted for 12.5% of printing in their proposed relevant market: "low versioned jobs over 16 pages" for print runs of more than five million copies.¹¹³ Moreover, when the versioning parameter is eliminated to reflect more accurately actual substitution (and substitution possibilities), the proposed market boundaries become more porous still. Complaint counsel

¹¹⁰ To a lesser extent, the analysis in this section with respect to versioning also applies to these other listed variables. For example, customers faced with a supracompetitive price increase for gravure could conceivably adjust the number of pages in order to obtain an economical offset bid. However, the extent to which customers likely would make changes in these other variables in response to a gravure price increase is unclear. By comparison, the demand for a greater number of versions is clearly derived from demand for targeted marketing. Thus, unlike changes in other listed variables, an increase in the number of versions has an identified benefit to the print customer that can be considered along with any increase in unit costs assumed by switching to offset.

¹¹¹ Because the versioning parameter is selected somewhat arbitrarily, its elimination also eliminates some anomalous results. See RPF 64-73; RX-28 (showing, for example, one job with a total volume of 35 million copies that is excluded from complaint counsel's proposed market because it had several versions, despite the fact that one of the four-color versions had a run length of 18 million, which would place that version alone in the "core"); Hausman Tr. 5371-81.

¹¹² The finding is also consistent with the testimony of complaint counsel's economic expert that, for a 16-page catalog, the theoretical gravure-offset "breakeven point" may be greater than six million copies. Hilke Tr. 3146-51; CX-1164-D; CX-1433.B.

¹¹³ CX-1167-C-1. See CX-1167-C (showing offset accounted for 11.4% of "low versioned jobs over 32 pages" for print runs of more than five million copies). Dr. Hilke prepared CX-1167 based on subpoena responses from 29 printers with gravure and offset printing capacity. He compiled information regarding run length, page counts, and versions for high volume work that the printers perform. Based on this information, he tabulated proportions of gravure and offset for different permutations of these factors. CX 1167-F-G.

estimate that, in 1990, offset accounted for 24.1% of print jobs with more than sixteen pages and print runs of more than five million copies.¹¹⁴ Even in the "core" of complaint counsel's proposed market -- print jobs with more than thirty-two pages and print runs of more than ten million copies -- offset accounted for 13.4%.¹¹⁵ For purposes of analysis, we will consider these estimates to be representative.¹¹⁶

This substantial existing use of offset printing at current prices would likely increase in response to an attempt by gravure printers to impose a supracompetitive price increase.¹¹⁷ Historical, or existing, purchasing patterns may indicate demand elasticities at competitive prices, but the focus of market definition under Section 7 is demand elasticities at a future, supracompetitive price as a result of the acquisition.¹¹⁸ The principal object of Section 7 market definition analysis is to determine susceptibility to an exercise of market power.¹¹⁹ Therefore, the Commission employs a hypothetical supracompetitive price increase to define the market. Even where historical purchasing patterns suggest that a product is insulated from a putative substitute under existing, competitive prices, relevant purchasers may readily turn to the substitute if faced with any significant price increase. Current preferences in the competitive equilibrium would be altered by an increase in the relative prices of gravure. *Olin Corp.*, 113 FTC 590, 598 "(1990) ("Evidence of what

¹¹⁴ CX-1167-C-1.

¹¹⁵ *Id.*

¹¹⁶ The estimates may understate slightly the proportion of offset printing in the proposed market. Respondents argue that these proportions underrepresent the amount of high volume work done on offset because the entire universe of gravure printers are represented while only 20 offset printers are represented, even though Dr. Hilke testified that there are "thousands and thousands" of offset printers. Hausman Tr. 5365; Hilke Tr. 3106. Dr. Hilke admitted that this may tend to understate the offset proportion, but that he considered the proportions reliable because the 20 offset printers appear to be those most likely to bid on high volume business. Hilke Tr. 3106-07, 3447. Nevertheless, in response, Dr. Hilke adjusted his estimates and arrived at the estimates stated in CX-1167-C-1. Dr. Hausman made his own estimates based on third-party information regarding the same print job parameters and found, *inter alia*, that 27% of work in complaint counsel's core was performed on offset (compared with Dr. Hilke's estimate of 4.5%). RX-668. These estimates have their own problems, none of which needs be resolved here.

¹¹⁷ Similarly, if offset prices increased from prevailing levels, one would expect an increase in the use of gravure, especially at lower volumes: the margin defined by the breakeven analysis would shift to a lower volume and page count.

¹¹⁸ See Robert G. Harris & Thomas J. Jorde, *Antitrust Market Definition: An Integrated Approach*, 72 Cal. L. Rev. 1 (1984) (examination of historical purchasing patterns is an initial step necessary to permit consideration of evidence bearing on purchasers, likely responses to future price increases); Pitofsky, *supra* note 60, at 1836 n.141 ("Examination of historical purchasing patterns is a first step in market definition. While it reflects the sensible concern about using actual rather than hypothetical data, it must be corroborated by further analysis in order to be reliable.")

¹¹⁹ See ABA Merger Monograph, *supra* note 44, at 99-101 (and authorities cited therein).

has happened during a period of equilibrium . . . does not serve as a predictor of what would happen if the price [of the product at issue] . . . rose above the competitive level.").

Current substitution provides the strongest evidence that additional marginal substitution is likely to occur in response to a supracompetitive price increase.¹²⁰ Absent evidence that current offset purchasing within the proposed market is not "competitively relevant," we can conclude that the parameters selected by complaint counsel to define the relevant market have not accurately identified inelastic uses of gravure.¹²¹ There appears to be no basis for concluding that current substitution is not competitively relevant.

Several of the largest print buyers in the United States use the offset process for high volume publication printing falling within the specifications of complaint counsel's proposed market.¹²² Several buyers have switched their high volume printing from gravure to

¹²⁰ Pitofsky, *supra* note 60, at 1836 ("The single most reliable line of evidence in relevant market definition is whether, in response to past price changes, buyers promptly shifted to other products, or competitors promptly adjusted sales efforts. when evidence of this type is available, it should outweigh speculation based on theoretical constructs").

¹²¹ See *Adventist Health System/West*, Docket No. 9234, slip op. (April 1, 1994). In *Adventist*, the Commission rejected a proposed relevant market based on existing purchasing patterns similar to those here, as measured by "Elzinga-Hogarty" ("E-H") statistics. The E-H statistics for a given area are the LOFI ("little out from inside") -- the percentage of production in the area that is consumed in the area -- and the LIFO ("little in from outside") -- the percentage of consumption in the area that is produced in the area. See Kenneth Elzinga & Thomas Hogarty, *The Problem of Geographic Market Delineation Revisited: The Case of Coal*, 23 ANTITRUST BULL. 1, 2 (1978) (proposing a relevant geographic market as an area in which the LIFO and LOFI both exceed 90%); Kenneth Elzinga & Thomas Hogarty, *The Problem of Geographic Market Delineation in Antimerger Suits*, 18 ANTITRUST BULL. 45, 73-76 (1973) (earlier proposal for 75% thresholds; now called the "weak" market test). In an appropriate case, the approach could be extended to product market definition:

[T]he LOFI analogue would ask: what is the smallest group of applications required to account for nearly all shipments of a given product? The LIFO analogue would ask: Of total purchases intended to serve the group of applications identified by the LOFI test, do nearly all consist of the given product? ABA Merger Monograph at 97. In this case, the LIFO value for high volume gravure printing -- *i.e.*, the estimate of current offset use in print jobs above the proposed parameters -- is 75.9%. The LOFI value -- *i.e.*, the percentage of total gravure capacity used in the proposed high volume publication market is less than 31%. See Section V.A.1., *supra*. The LIFO statistic is more probative of substitution opportunities of consumers in a proposed price discrimination market. In *Adventist*, the Commission rejected the proposed geographic market based on a LIFO of 75% and lack of proof that existing substitution was not "competitively relevant." Slip op. at 10-13 (also noting that EH statistics are merely one factor in market definition).

¹²² Competition is also indicated by bidding between offset and gravure printers. Both complaint counsel and respondent submitted economic and econometric analysis based on pricing data from common sets of print jobs for which both gravure and offset bids were received. For example, compare CX-1177; CX-764; CX-1411; CX-1348; with RX-465-R; RX-465-Z. The very existence of this pricing data suggests competition between the processes. The relevance of this competitive bidding can be discounted somewhat because the cost of submitting a bid may be relatively insignificant. Given our conclusions based on the amount of existing substitution, however, it is not necessary to engage in further analysis of this conflicting evidence.

offset in recent years, including -- as the ALJ found -- present buyers who testified in the preliminary injunction hearing that they could only use the gravure process for their high volume printing needs and that they would not switch in response to a significant price increase. IDF ¶ 122. As discussed above, some buyers have substituted to offset in order to take advantage of versioning, including Wal-Mart and K-Mart. IDF ¶¶ 123, 125. Many other buyers, some of whose print jobs occupy complaint counsel's proposed core, recently have shifted purchases to offset (without respect to versioning). IDF ¶¶ 124, 126-132 (*e.g.*, Montgomery Ward, Hanover House, J.C. Penney, Damark, and Compuadd).

The experience of one customer in the proposed "core" is also instructive. Victoria's Secret uses offset for seventeen (low versioned) catalogs, each with an average of 100 pages and a run length of 3.5 million to 30 million copies. IDF ¶ 129. Victoria's Secret, like many others, solicits bids from both gravure and offset printers and continues to purchase the bulk of its printing services from an offset printer. IDF ¶¶ 130, 132. But this customer is "testing" with gravure printing for some catalogs and is comparing the sales results of (consumer responses to) catalogs printed on gravure versus catalogs printed on offset. IDF ¶ 130. Although the first catalog printed on gravure did not meet expectations, Victoria's Secret continues to test, IDF ¶ 131, and may very well shift all or a significant portion of its printing requirements to gravure. The ALJ treats these facts as if they indicate some inevitable trend to gravure for all high volume print jobs. But Victoria's Secret has been purchasing primarily offset for years, despite a print program that is among the largest in the proposed "core." If price alone dictated this customer's printing requirements, it would have been expected to substitute to gravure long ago, particularly in light of the relative decrease in the gravure cost advantage over the last decade. Should this customer substitute gravure for offset in the future, it should not be considered an inevitable and permanent gravure customer any more than Wal-Mart should now be considered an inevitable and permanent offset customer.

Complaint counsel attempt to argue that current substitution is not marginal by arguing that "there is no record evidence that offset has taken a long publication gravure job on the basis of price. . . . there [are] many instances where the program of the retailer changes, and becomes a many version job, and they switch, but none of price

alone." OA Tr. 48.¹²³ In fact, there is testimony in the record of gravure-to-offset substitution on the basis of price.¹²⁴ And, in any event, substitution on the basis of price alone makes little sense in the context of competition between differentiated products. Where putative substitutes are differentiated, "relevant market definition turns on the aggregate decisions of different classes of customers who have different attitudes toward the importance of price and product characteristics in deciding whether to substitute or not."¹²⁵

A publication printing purchaser's choice of characteristics for a particular print job -- and thus the purchaser's choice of printing technology -- does not turn on any single factor. Each purchaser demands the package of printing services attributes that will reach its customers most effectively.¹²⁶ The purchaser will choose the bundle of characteristics that offers the highest profit. This calculation will be determined partly by the prices offered by the two competing printing technologies. Moreover, as the discussion of versioning illustrates, even when substitution is triggered by a change in the relative prices, one would not necessarily expect other characteristics of the job to remain constant -- purchasers would almost surely select a new set of optimum job characteristics (*i.e.*, a new program). It is perhaps plausible that there are few instances where only the print process (but not the print program) changes. The ALJ errs, however, by inferring that this substitution is not economically relevant for the purpose of evaluating the competitive effects of this transaction.¹²⁷

In defining relevant markets under Section 7, the Commission and the courts recognize competition -- and the potential elimination of competition -- in variables other than price. In considering the

¹²³ See CAB at 35 n.50.

¹²⁴ The witness from Wal-Mart testified that price was a primary consideration in shifting a substantial portion of its insert printing from "gravure to offset. Baron Tr. 2307-08, 227576; RX-383. See also RX-84-B (Wal-Mart stating that it is seeking bids from both gravure and offset printers to ensure competitive pricing); Moeller Tr. 4003-04 (Donnelley witness referring to substitution of offset for gravure by Hanover Direct, a retailer, based on more favorable price); IDF ¶ 124.

¹²⁵ Pitofsky, *supra* note 60, at 1835. See Robert D. Willig, Merger Analysis, Industrial Organization Theory, and Merger Guidelines, BROOKINGS PAPERS ON ECONOMIC ACTIVITY (MICROECONOMICS) 281, 299-305 (1991) (economic analysis of merger policy in a differentiated products setting).

¹²⁶ See, e.g., Hilke Tr. 6028-30 (print customer's choice of paper determined by preferences of purchasers of the publication; choice of paper and number of versions suggest offset more economical than gravure for particular print job).

¹²⁷ [Redacted]'s experience demonstrates that demand for print services is multi-dimensional; even though the witness testified that the bid prices she receives from gravure printers are generally lower than bid prices for offset, [redacted] continues to purchase primarily offset printing services. IDF ¶¶ 262-64.

likely reaction of buyers to a price increase for purposes of market definition, the Merger Guidelines state that "the Agency will take into account all relevant evidence, including ... evidence that buyers have shifted or have considered shifting purchases between products in response to relative changes in price or other competitive variables." Section 1.11 (emphasis added). *See United States v. Continental Can Co.*, 378 U.S. 441, 455 (1964) (rejecting argument that different prices for metal and glass containers demonstrate the existence of separate glass and metal container markets because "price is only one factor in a user's choice between one container and another").¹²⁸

No evidence in the record appears to suggest that high volume customers using offset are inframarginal, economically irrational, or otherwise irrelevant to market definition. Complaint counsel offer no explanation for the existing use of offset.¹²⁹ Thus, there is no reason to believe that the high volume print jobs currently using offset do not represent marginal consumers in high volume publication printing, as defined by the complaint.¹³⁰

¹²⁸ Cf. Merger Guidelines Section 0.1 n.6 ("Sellers with market power also may lessen competition on dimensions other than price, such as product quality, service, or innovation.").

¹²⁹ Complaint counsel did not attempt to speculate seriously on existing substitution decisions at oral argument:

COMMISSIONER STAREK: [W]hy is it that the I.D. found that 11.4 percent of all the low versioned jobs over 32 pages for runs of 5 million or more were done in offset? Why did 11 percent of the purchasers choose offset?

MR. DOYLE [for complaint counsel]: I think on the basis of the record evidence on quality and cost, it doesn't make sense. And quite frankly, Commissioner, I don't know. I don't know.

CHAIRMAN STEIGER: Does the record indicate whether there could . . . have been a capacity constraint problem or a time problem for these 11 percent, or is that not in the record?

MR. DOYLE: Well, . . . given the fact that this is 1990 dated, there are instances when particular suppliers could have been capacity constrained, and that very well could explain that. But beyond the capacity constraint situation, I can't address that.

OA Tr. 48-49.

¹³⁰ The ALJ also found that evidence presented by complaint counsel of independent gravure and offset prices is inconsistent with the proposition that the two processes compete. ID at 8384; IDF ¶ 211. Complaint counsel attempt to support the proposed relevant market with evidence purportedly showing a lack of correlation between the prices of offset and gravure. There are serious doubts about the quality of the data on which these correlations were based; but even putting these reservations aside, there are serious conceptual problems with using price correlations to delineate antitrust markets. Although some economists have proposed using price correlations to identify relevant markets, others have noted that price correlations often can be very misleading and, in any case, are static measures of competition that are not designed to predict probable demand responses to an exercise of market power. *See, e.g.*, Jonathan Baker, *Why Price Correlations Do Not Define Antitrust Markets*, FTC Working Paper No. 149 (1987); Luke M. Froeb & Gregory J. Werden, *Correlation, Causality, and All That Jazz: The Inherent Shortcomings of Price Tests of Antitrust Market Definition*, 8 REV. INDUS. ORG. 329 (1993). *Cf. Coca-Cola Bottling Co. of the Southwest*, 118 FTC 452 (1994) [FTC Docket No. 9215 (Aug. 31, 1994), slip op. at 46-471. In particular, even if two goods are very close substitutes (as measured by demand cross-elasticity), the correlation between their prices can be low given sufficiently high supply elasticities. Hence, even assuming that the price correlations presented by complaint counsel are valid, this is not dispositive evidence that high volume gravure printing is a relevant product market. In any event, actual evidence of existing competition between gravure and offset confirms that this and other indicia of separate markets should be given little weight.

The record as a whole shows substantial existing competition between gravure printing services and offset printing services, particularly in publication printing for print jobs with volumes between one million and ten million copies, but the margin (with the versioning parameter appropriately evaluated) appears to extend into even higher volumes. In view of these facts, it appears that gravure printers, if unified by a hypothetical cartel or merger, could not identify inelastic end users effectively and, thus, could not profitably impose a small but significant and nontransitory increase in the price of high volume publication printing.

V. RELEVANT COMPETITORS & CONCENTRATION

Based on the foregoing, we conclude that "high volume publication gravure printing" is not a relevant market for purposes of assessing the competitive effects of the acquisition. At a minimum, the "gravure" qualification to that definition is too restrictive: even if we assume the existence of a distinct market for "high volume publication printing," the relevant competitors in that market would include a significant number of firms that supply both gravure and offset printing services and a significant number of firms that supply only offset printing services.¹³¹ In the remainder of this opinion, we will assume the existence of a "market" for high volume publication printing in order to provide a more comprehensive description of (i) the competitive interaction of firms currently capable of producing high volume publication printing services and (ii) the possibilities of anticompetitive conduct by the merged firm, either unilaterally or in coordination with other firms.

The assumed relevant market must be measured in terms of its participants and concentration. Following the methodology of the Merger Guidelines, the Commission identifies relevant suppliers, assigns to each relevant supplier a market share that reflects its future competitive significance in the relevant market, and then, based on these determinations, calculates market concentration. *See id.*

¹³¹ It is far from clear that this assumption is reasonable. To conclude that high volume publication printing services constitutes a relevant market, the Commission must find that a hypothetical monopolist of printing services could systematically discriminate, on the basis of relative elasticities of demand, between high volume customers -- those satisfying complaint counsel's volume, page count, and color criteria, but not the versioning criterion -- and other printing customers. The evidence suggests that a hypothetical monopolist could not systematically discriminate in this way. Instead, the evidence tends to demonstrate that firms producing gravure and/or offset printing services cannot systematically identify print jobs for which customers have relatively inelastic demand. *See* Section IV.D.-E.

Sections 1.3 - 1.5. Market concentration is a function of the number of firms in the relevant market and their respective shares. *Id.* Section 1.5. The Commission uses the Herfindahl-Hirschmann Index ("HHI") as the most economically relevant measure of concentration. The HHI is calculated by summing the squares of the shares of relevant market participants, and thereby "gives proportionately greater weight to the market shares of the larger firms, in accord with their relative importance in competitive interactions." *Id.*¹³²

A. Relevant Market Participants

For purposes of estimating market shares and concentration in the assumed relevant market, firms to be identified as participants are (i) those currently engaged in high volume publication printing at the time of the acquisition and (ii) any "uncommitted entrants" -- firms not currently engaged in high volume publication printing but whose inclusion would more accurately reflect probable supply responses to a supracompetitive price increase. Merger Guidelines Section 1.3. The ALJ identified as relevant suppliers only the nine printers with gravure capacity at the time of the acquisition. IDF ¶¶ 377-79.¹³³ The ALJ erred in failing to identify as relevant participants at least seventeen offset-only printers that, according to complaint counsel, supplied high volume publication services in the United States at that time.¹³⁴ We find that each offset producer that currently bids on and supplies high volume publication printing is a relevant participant.

The ALJ also erred in failing to address whether any printing firms not currently supplying high volume publication printing are properly considered "uncommitted entrants." In the assumed price discrimination product market, such firms would include any offset printers who currently are not supplying high volume publication printing but who are likely to do so "within one year and without the expenditure of significant sunk costs, in response to a 'small but significant and nontransitory' price increase."¹³⁵ Merger Guidelines

¹³² See *FTC v. PPG Indus., Inc.*, 798 F.2d 1500, 1503 (D.C. Cir. 1986).

¹³³ The ALJ found that, since the acquisition, one firm has exited (Standard Gravure in 1992) and two others have merged (Quebecor acquired Arcata in 1993). IDF ¶ 376.

¹³⁴ See note 113, *supra* (describing CX 1167).

¹³⁵ All existing gravure printers participate in high volume publication printing and have been included as relevant suppliers. Moreover, we conclude that entry into high volume publication printing using gravure capacity would require the expenditure of substantial sunk costs and would entail a lag

Section 1.32. "Sunk costs are the acquisition costs of tangible and intangible assets that cannot be recovered through the redeployment of these assets outside the relevant market." *Id.* Since we find that the relevant market is not limited to gravure printing and have assumed that the relevant market is high volume publication printing, we find that assets used for high volume publication printing represent sunk costs only if the assets cannot be redeployed to lower volume print jobs. Even assets that can be used only in publication printing are not properly considered sunk if they can be used for printing jobs that do not meet the volume and page count criteria that define the assumed relevant market.¹³⁶ Because offset printing assets that are used in high volume publication printing can also be used for lower volume publication printing, the acquisition costs of those assets are not properly considered sunk for purposes of this analysis.¹³⁷ Complaint counsel did not present, and the ALJ did not find, any other significant sunk costs of entry into or exit from the assumed relevant market.¹³⁸

Therefore, a firm not currently bidding on high volume publication printing jobs may be considered an uncommitted entrant and counted among the relevant suppliers if (i) it owns offset printing assets capable of both high volume and lower volume publication printing or (ii) it could acquire such assets and deploy them within one year.¹³⁹ The record does not permit a reliable estimate of the likely supply response by such firms to a supracompetitive price

of more than one year. See IDF ¶¶ 365-75 (finding that *de novo* entry into gravure printing would take more than two years); CPF ¶¶ 1480-90 (entry into gravure printing production entails substantial sunk investment). Therefore, the only potential uncommitted entrants are printers who could deploy offset capacity to supply high volume publication printing.

¹³⁶ Complaint counsel argue that asset acquisition costs are sunk if the assets cannot be redeployed for use other than in gravure printing. CPF ¶¶ 1477-84. This would be correct in a market defined to include only gravure printing.

¹³⁷ This is particularly clear with respect to the more recent generation of offset presses. See Section IV.D.2., *supra*. To the extent that these presses can be used to produce efficiently in both high volume/high page and low volume/low page jobs, their purchase cannot be considered a sunk cost in either putative "market." See RRB at 56.

¹³⁸ In the assumed price discrimination market, in which both gravure and offset technologies participate, the only costs identified by complaint counsel that may properly be considered sunk are the investments in "accumulated know-how and familiarity that both printers and customers gain about each other during an on-going relationship." Complaint counsel argue that this sunk investment "means that customers are reluctant to switch suppliers." CPF ¶ 1462. Of course, such costs (assuming they are significant) affect the potential for switching to any new supplier, whether it is an offset printer or a gravure printer. And in any event, the significance of such costs is belied by the substantial switching between gravure and offset at preacquisition and current prices. See Section IV.E, *supra*; IDF ¶¶ 122-32.

¹³⁹ "Uncommitted supply responses may occur . . . by the switching or extension of existing assets to production or sale in the relevant market; or by the construction or acquisition of assets that enable production or sale in the relevant market." Merger Guidelines Section 1.32.

increase by incumbent high volume publication printers. Nevertheless, given the lack of contrary evidence, we find that some supply response is likely to constrain the conduct of incumbent firms.

B. Pre-Acquisition Market Shares & Concentration

In general, each firm that is identified as a market participant is assigned a market share that reflects its future competitive significance. Normally, this share is "based on the total sales or capacity currently devoted to the relevant market together with that which likely would be devoted to the relevant market in response to a 'small but significant and nontransitory' price increase." Merger Guidelines Section 1.41. More specifically, when the potential for price discrimination defines the relevant market, each firm should be assigned a share reflecting sales likely to be made in, or capacity likely to be used to supply, the price discrimination market in response to such a price increase. Merger Guidelines Section 1.42. In the assumed relevant market, complaint counsel argue that firms are primarily distinguished on the basis of their relative advantages in serving different groups of customers.¹⁴⁰ Under these conditions, unit sales are generally the best indicator of firms, future competitive significance. *Id.*

Using complaint counsel's estimates for unit sales at the time of the acquisition, Table 1 depicts market shares and concentration in high volume publication printing defined to include print jobs of at least five million copies and at least sixteen pages per copy, and Table 2 depicts market shares and concentration in the supply of printing services for print jobs of at least ten million copies and at least sixteen pages per copy.¹⁴¹

¹⁴⁰ See CPF ¶ 1737.

¹⁴¹ Tables 1 and 2 are derived from CX-1167, which summarizes complaint counsel's estimates of relative shares of output of gravure producers (CX-1167-D) and offset printers (CX-1167-E).

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TABLE 1
U.S. UNIT SHARES IN HIGH VOLUME PRINTING (1990)
5 MILLION+ COPIES (16 PAGES/COPY)
Billions of Pages

<u>Printer</u>	<u>Gravure</u>	<u>Offset</u>	<u>Total</u>	<u>Share</u>	<u>HHI</u>
Donnelley	313.4	10.7	324.1	28.6	818
Quebecor	177.4	2.4	179.8	15.9	253
<i>Meredith/Burda</i>	<i>157.6</i>	11.2	168.8	14.9	222
Ringier	75.8	8.8	84.6	7.5	56
Valassis	0.0	69.9	69.9	6.2	38
Arcata	58.5	5.2	63.7	5.6	31
Quad	19.8	43.5	63.3	5.6	31
World Color	34.4	19.7	54.1	4.8	23
Sullivan	0.0	20.0	20.0	1.8	3
American Signature	0.0	18.6	18.6	1.6	3
Perry	0.0	17.9	17.9	1.6	3
Standard	10.3	6.5	16.8	1.5	2
Brown	13.8	1.9	15.7	1.4	2
13 Others	0.0	36.6	36.6	3.2	*
TOTAL	861.0	273.0	1134.0	100.0	1486*

TABLE 2
U.S. UNIT SHARES IN HIGH VOLUME PRINTING (1990)
10 MILLION+ COPIES (16 PAGES/COPY)
Billions of Pages

<u>Printer</u>	<u>Gravure</u>	<u>Offset</u>	<u>Total</u>	<u>Share</u>	<u>HHI</u>
<i>Donnelley</i>	<i>229.3</i>	2.9	232.2	29.3	858
Quebecor	156.3	0.8	157.1	19.8	392
<i>Meredith/Burda</i>	<i>98.1</i>	0.0	98.1	12.4	154
Valassis	0.0	69.9	69.9	8.8	77
Ringier	55.2	8.4	63.6	8.0	64
Quad	14.1	42.9	57.0	7.2	52
Arcata	49.6	5.2	54.8	6.9	48
Perry	0.0	11.5	11.5	1.4	2
Sullivan	0.0	9.2	9.2	1.2	1
Brown	5.5	0.6	6.1	0.8	1
American Signature	0.0	5.8	5.8	0.7	1
Standard	4.9	0.7	5.6	0.7	1
Century Graphics	0.0	3.4	3.4	0.4	*
Graphic Arts	0.0	3.3	3.3	0.4	*
Alden	0.0	3.2	3.2	0.4	*
World Color	0.0	2.1	2.1	0.2	*
6 Others	0.0	9.1	9.1	1.1	*
TOTAL	613.0	179.0	792.0	100.0	1650*

Two important caveats apply to the interpretation of Tables 1 and 2, each tending to suggest that the tables overstate concentration in the assumed relevant market. First, the tables may understate slightly the proportion of historical high volume publication printing sales made by offset printers.¹⁴² Second, neither of these tables reflects any likely supply responses of uncommitted entrants. To the extent that a significant and nontransitory increase in high volume publication printing prices by all or some subset of incumbent sellers would induce a supply response through uncommitted entry, the historical sales share of each incumbent seller would overstate its relative competitive significance. Shares of high volume printing capacity (as an alternative to unit sales) may reflect a more comprehensive measure of the future competitive significance of incumbent firms and uncommitted entrants.¹⁴³ However, we lack a reliable basis for making (i) a quantitative estimate of the full measure of offset capacity likely to be devoted to the high volume publication printing in response to a supracompetitive price increase, or (ii) a quantitative adjustment to the historical sales shares reflected in Tables 1 and 2. In sum, although Tables 1 and 2 may not significantly overstate the appropriate measure of relevant market concentration, they likely represent the upper bound of the range of reasonable concentration estimates.

C. Effect of the Acquisition on Concentration

Based on this (appropriately qualified) concentration information, the Commission next considers whether the acquisition significantly increases concentration and results in a concentrated market. Other things being equal, market concentration affects the likelihood that

¹⁴² See note 116, *supra* (even complaint counsel's expert admitted that his approach to data collection and estimation may tend to understate the use of offset printing, although not significantly; moreover, respondents' economic expert found that, even using complaint counsel's market parameters, offset accounted for a much higher percentage of high volume printing jobs than complaint counsel had estimated).

¹⁴³ In order accurately to portray the relative competitive significance of the identified relevant market participants, all capacity used or likely to be used to supply the price discrimination product market should be included for purposes of calculating market shares and concentration. Merger Guidelines Section 1.42. The evidence suggests that all gravure printing capacity should be included in the relevant market, and that some unspecified, substantial portion of offset printing capacity must also be included.

one firm, or a group of firms, could successfully exercise market power. *Id.* Section 2.0.¹⁴⁴

From Table 1, the maximum effect of the acquisition on market share and concentration in print jobs of at least five million copies and at least sixteen pages per copy can be summarized as follows:¹⁴⁵

Donnelley-Meredith/Burda Share:	43.5%
Increase in HHI:	852
Post-Acquisition Market HHI:	2338

From Table 2, the maximum effect of the acquisition on market share and concentration in print jobs with a volume of at least ten million copies can be summarized as follows:¹⁴⁶

Donnelley-Meredith/Burda Share	41.7%
Increase in HHI	727
Post-Acquisition Market HHI	2377

In general, the Commission presumes that an acquisition producing an increase in the HHI of more than 100 points and yielding a post-acquisition HHI exceeding 1800 is likely to create or enhance market power or facilitate its exercise. Merger Guidelines 1.51.¹⁴⁷ Based on the concentration information described above, this presumption likely applies.¹⁴⁸ This presumption may be overcome by showing that other market conditions make it unlikely that the

¹⁴⁴ See *B.F. Goodrich Co.*, 110 FTC 207, 303 (1988) ("As the number of firms in an industry declines, and industry concentration increases, ceteris paribus, it becomes easier for those firms to coordinate their pricing, and the likelihood of anticompetitive effects from an acquisition consequently increases as well."). Conversely, a merger between market participants is unlikely to create or enhance market power or to facilitate its exercise unless it significantly increases concentration in the market. Merger Guidelines Section 1.0.

¹⁴⁵ Compare IDF ¶ 378, Tables 1 and 2 (based solely on gravure capacity, finding that the acquisition produced an HHI increase in the range of 920-1029 to a post-acquisition HHI in the range of 3070-3093). See CX-501-A-B.

¹⁴⁶ For purposes of the competitive effects analysis that follows, note that both the merged firm's market share is lower in the higher volume segment.

¹⁴⁷ In general, the Commission regards as "highly concentrated" markets with an HHI exceeding 1800 and regards as significant an increase in the HHI exceeding 100 points. *Id.*; see, e.g., *Coca-Cola Co.*, slip op. at 44 (HHI increase of 443 to post-merger HHI of 3572); *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), 807 F.2d 1381 (7th Cir. 1986), *cert. denied* 481 U.S. 1038 (1987) (post-acquisition HHI of 2416 with increase of 395 points).

¹⁴⁸ We assume here that an adjustment to compensate for any understatement of actual and likely offset supplies would not be sufficient to reduce market concentration below the highly concentrated threshold or to reduce the HHI increase below 100.

acquisition will create or enhance market power or facilitate its exercise, in light of market concentration and market shares.

VI. LIKELY COMPETITIVE EFFECTS OF THE ACQUISITION

An acquisition may give rise to anticompetitive effects in two general forms. First, it may facilitate coordinated interaction: a collective exercise of market power among relevant suppliers. Second, it may allow the merged firm to exercise market power unilaterally. *See* Generally Merger Guidelines Section 2. The ALJ found that the acquisition is likely to give rise to both unilateral and coordinated anticompetitive effects. ID at 90-91. In addition, the ALJ found that the merged firms already have exercised market power unilaterally by cancelling or deferring pre-acquisition plans to expand printing capacity. ID at 89-90. We reject these findings and conclude that neither coordinated nor unilateral anticompetitive effects are likely in high volume publication printing.¹⁴⁹

A. Coordinated Interaction Analysis

"Coordinated interaction" is defined broadly 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. This behavior includes tacit or explicit collusion, and may or may not be lawful in and of itself." Merger Guidelines Section 2.1. "Successful coordinated interaction entails reaching terms of coordination that are profitable to the firms involved and an ability to detect and punish deviations that would undermine coordinated interaction." *Id.*; *see Coca-Cola Bottling Co. of the Southwest*, 118 FTC 452 (1994) [FTC Docket No. 9215 (Aug. 31, 1994), slip op. at 74]; *B.F. Goodrich Co.*, 100 FTC at 294. The ALJ made few findings related explicitly to the possibility of coordinated interaction, and concluded that the acquisition increases the likelihood of coordinated interaction because the post-acquisition market is concentrated and because information about competitive activity of suppliers is readily available. ID at 90-91.¹⁵⁰

¹⁴⁹ We reject the ALJ's finding that Donnelley's "deferral or cancellation" of capacity expansion plans constituted an anticompetitive effect because, *inter alia*, we find that the merged firm does not have unilateral market power.

¹⁵⁰ The ALJ found that "Donnelley's acquisition of one of its primary competitors . . . may lead to coordinated interaction, or collusion, among the remaining firms." IDF ¶ 406 He makes five subsidiary findings. First, the acquisition increases concentration in an already concentrated market. IDF ¶ 406. Second, Donnelley is a dominant firm and, as a result, coordination of prices is more likely

We affirm the ALJ's findings that the significant increase in concentration occasioned by the acquisition increased the probability of successful coordination. Nevertheless, based on the totality of market conditions, we conclude that coordinated interaction to discriminate against high volume publication printing customers would be inherently unstable.

The two principal impediments to coordinated interaction are specific to the theory of discriminatory effects alleged. First, relevant suppliers would have strong incentives to deviate from the coordination by diverting capacity from the elastic lower volume into the more profitable high volume publication printing jobs. Second, since the alleged inelastic printing jobs encompass (by definition) only the largest contracts of the largest customers, the incentives to make such diversions are overwhelming. As discussed below, the significance of each problem is inversely related to the breadth of the relevant discrimination market: if the market is defined narrowly in order to minimize the perceived substitutability of offset for gravure, then each problem is magnified. Other market conditions exacerbate these problems.

1. Potential Diversion of Capacity

Coordination directed at some subset of the customers served by a putative collusive group is inherently less likely to succeed than coordination focused on all customers, all other things equal. Owens-Illinois, slip op. at 31. Relative to a nondiscriminatory coordination, a discriminatory coordination creates greater incentives to depart from the terms of the coordination and can be undermined by smaller increases in output into the relevant market by relevant suppliers that either cheat or fail to coordinate altogether. Assuming that relevant

because cheating is easier to detect and punishment is severe. IDF ¶ 407. Third, coordination of gravure prices is possible because of the ready availability of "information about competitive activity of industry members." IDF ¶ 408. Fourth, "[t]he nature of gravure printing may also facilitate coordination: there are only two major manufacturers of gravure presses . . . ; all gravure printers use the same process to produce the finished product, and much of the printers, business is obtained through bidding, which requires an intimate knowledge of industry cost structure and other competitive variables." IDF ¶ 409. Fifth, customers are concerned that switching to new suppliers is difficult. IDF ¶¶ 411-15.

As described below, only the concentration finding appears well-founded. In particular, the record basis for the ALJ's conclusion that competitively-sensitive information is readily available and facilitates coordination is very thin. For example, much of the witness testimony cited in the relevant factual finding, IDF ¶ 408, merely describes speculation about the availability of relevant competitor information. *See, e.g.*, Engdahl Tr. 2547, Hodgson Tr. 333. And the record does not reflect that rival printers can readily obtain competitively sensitive information that would facilitate tacit, or explicit collusion.

publication printers can accurately identify printing jobs by relative elasticities of demand, the potential for diversion of printing capacity from elastic lower volume jobs to inelastic high volume publication printing poses a serious impediment to coordination. Under complaint counsel's theory of coordinated anticompetitive effects, relevant suppliers will earn higher economic returns from high volume publication print jobs than from lower volume print jobs.¹⁵¹ As such, any relevant supplier would have an incentive to divert capacity from the lower volume printing jobs to the higher-return high volume jobs.¹⁵² As output is diverted to the high volume jobs (*i.e.*, as supply to the assumed relevant market is increased), prices will fall toward the competitive level. Despite the obvious application of this analysis to the instant case, and the precedent in Owens-Illinois, the ALJ did not address the possibility of diversion.

In Owens-Illinois, the Commission found that certain end users of glass containers had inelastic demand for glass (based on the characteristics of the end use), that the inelastic end uses comprised a minor portion of total glass container output, and that capacity used to produce glass containers for elastic end uses could also be used to produce glass containers for inelastic end uses. Under these circumstances, the Commission considered whether glass container manufacturers would collusively price discriminate against customers in the inelastic end uses, and concluded that the incentive to divert capacity would be a powerful force subverting collusion:

Any collusive scheme focused on the inelastic end-uses would be threatened not just by the normal incentives to cheat which might in some circumstances undermine even across-the-board collusion; it would face in addition the disruptive force of a pool of readily fungible productive capacity far greater in magnitude than any contemplated output reductions, yet presently devoted to the elastic end-uses and therefore not benefiting from the collusive scheme.

¹⁵¹ This is true regardless of the precise nature of the predicted anticompetitive conduct. As discussed below, whether the coordination takes the form of an agreement (tacit or explicit) on price and other relevant terms or an agreement (tacit or explicit) to allocate customers, the outcome is that suppliers achieve supracompetitive profits with respect to the targeted customers. Therefore, the incentives to obtain supracompetitive profits and the diversion analysis in this section apply to discriminatory coordination generally.

¹⁵² Printers have strong incentives to divert capacity to an inelastic end use even if they currently operate at full capacity utilization. The profit maximizing gravure printer would shift production based on changes in the relative profitability: if prices increased in high volume publication printing, every gravure printer would have an increased incentive to obtain the supracompetitive profits available from shifting sales away from elastic uses.

Id., slip op. at 31. Following this analysis, discriminatory coordination is less likely, other things equal, the smaller is the percentage of total capacity currently devoted to the inelastic end uses and the more cross-price elastic is supply between the elastic and inelastic end uses.

Even in the case most favorable to complaint counsel -- that is, assuming that only gravure printers are necessary to successful coordination and that only gravure capacity could be diverted to the inelastic high volume print jobs -- it appears that a small diversion would undermine any anticompetitive price increase. The parties' estimates of the share of total gravure capacity currently devoted to all high volume publication printing range from approximately 9% to 31%, depending on a variety of disputed assumptions about production and capacity.¹⁵³ Using the formulation from Owens-Illinois, a gravure output diversion from low volume printing into high volume printing of at most approximately 1.5% -- and perhaps as little as 0.5% -- would defeat a supracompetitive price increase of 5% (the benchmark generally used to define a significant and nontransitory price increase).¹⁵⁴ If the hypothetical coordination

¹⁵³ Respondents' expert, Dr. Hausman, estimated that "'low version gravure jobs' with more than 32 pages" and more than 5 million copies accounted for 6.8% to 17.6% of total gravure capacity, depending on the measure of capacity. See RX-397; RX-687; RX-688. Using the same capacity denominators, but changing the numerator to include all jobs with more than 16 pages (to conform with complaint counsel's proposed market), low version gravure jobs above 5 million copies account for 8.7% to 22.5% of total gravure capacity. See CX-1351-F; CX-1167 (reducing the page threshold from 32 to 16 increases the numerator almost by 28%). Complaint counsel's expert, Dr. Hilke, calculated "the gravure capacity share of low version gravure jobs," with more than 16 pages. See CX-1351-I. He estimated that such printing jobs greater than 5 million copies accounted for 30.6% of total gravure capacity.

Dr. Hilke also estimated "the gravure capacity share of low version gravure jobs compared to non-Donnelley capacity." See CX-1351-A and G, and "the gravure capacity share of low version gravure jobs compared to capacity outside the [three or four largest firms including Donnelley]." See CX-1351-C and H. Since Donnelley is part of the hypothetical coordination, excluding its capacity unreasonably understates the amount of divertible capacity in the coordinating firms. Excluding the capacity of the largest three or four firms is an even greater distortion. The principal point of the diversion analysis is not to determine whether some "fringe" has sufficient capacity to perform all of the work in the relevant market; it is to determine the amount of diverted output that would defeat coordination at the margin. Nevertheless, assuming a subset of gravure printers could coordinate, "fringe" firms with little or no sales into the assumed market would have stronger incentives to shift output into the market.

¹⁵⁴ This diversion percentage is derived as follows (from Owens-Illinois, slip op. at 32 n. 36): Elasticity of demand is defined roughly as a ratio of percentage change in output demanded divided by a given percentage change in price; demand for a product is inelastic if this ratio is less than one. In a market with inelastic demand, for example, a 5% price increase would result in less than a 5% decrease in output, and a 5% price increase could be defeated by less than a 5% increase in output. Thus, a 5% price increase targeted at allegedly inelastic customers representing 9% of total printing output would be defeated by an increase in output of less than 5% of 9%, or 0.45% of total gravure capacity. That amount of output represents approximately 0.5% of gravure production available for elastic end uses. See also Merger Guidelines Section 1.11 ("In attempting to determine objectively the effect of a 'small but significant and nontransitory' increase in price, the Agency, in most contexts, will use a price increase of five percent lasting for the foreseeable future").

among gravure printers is limited to imposing supracompetitive prices in the "core" (low-versioned jobs, 32 pages per copy, at least 10 million copies), the output diversion required to upset the coordination is even smaller. The parties' estimates of the share of total gravure capacity currently devoted to the "core" range from approximately 3% to 15%, depending primarily on disputed assumptions about capacity.¹⁵⁵ Thus, a gravure output diversion of less than 1% into the core would defeat a supracompetitive price increase of 5% on core printing jobs.¹⁵⁶

This exercise illustrates that a discriminatory coordination is increasingly less stable the more narrowly defined is the alleged market of inelastic customers. Thus, if the market definition properly takes account of actual and potential substitution to offset, the category of inelastic customers (assuming they can be identified by any objective criteria) appears considerably smaller than either complaint counsel's broad market or its alleged "core." Thus, the gravure output diversion necessary to defeat a price increase to any inelastic customers is likely to be considerably less than one percent. In any event, the percentage of total relevant printing capacity currently used in high volume publication printing is not meant to yield a precise prediction of likely results. Instead, it merely illustrates the relatively strong incentives of suppliers, to deviate from a discriminatory coordination and, thus, the inherently greater instability of such coordination, other things equal.¹⁵⁷

¹⁵⁵ See RX-397-A, B, E (using various measures of capacity, Dr. Hausman estimated that core printing accounted for 2.9% to 10.9% of total gravure capacity); RX-687 and RX-688 (using adjusted capacity and production data from CX-502 and CX-1167, Dr. Hausman estimated that core printing accounted for 3.0% to 10.8% of total gravure capacity). See CX-1351-I (Dr. Hilke adjusted the capacity and production data used to produce RX-397 and estimated that core printing accounted for 14.8% of total gravure capacity).

¹⁵⁶ If core printing accounts for 3% of total gravure capacity, diversion of less than 0.2% from lower volumes would defeat the price increase. If core printing accounts for 15% of total gravure capacity, diversion of less than 0.9% from lower volumes would defeat the price increase.

¹⁵⁷ Complaint counsel also argue that cheating by colluding printers and diversion by a non-colluding fringe would not "reduce the price obtained by the primary printer." CAB at 69. They state: "where, as in printing, all production is customized and done to order," cheating and fringe firms "would have to increase their production massively to enable customers to switch work from colluding printers to cheaters or to the noncolluders." CAB at 69-70. It is not clear that the form of competition, coordination, or diversion this argument contemplates is economically well-founded. For example, under complaint counsel's customer allocation scenario, cheating (diversion) would take the form of soliciting business from customers who have been allocated to other suppliers. By definition, the cheater would offer terms of sale that are more attractive to the customer than the terms offered by the supplier earning supracompetitive profits; if it cannot offer more attractive terms, then the allocation is a natural consequence of cost conditions and does not require coordination. In addition, the necessary diversion does not require any increase in production by any firm; it merely requires a shift in production in order to obtain higher profits.

Having established in theory that a small diversion of output would defeat a discriminatory coordination, even under assumptions most favorable to complaint counsel, we now examine whether such a diversion is practical and economically feasible. Gravure printing capacity appears to be highly cross-price elastic between low volume and high volume publication printing. Each of the incumbent gravure printers is not only capable of supplying high volume publication printing; complaint counsel assert that "all the gravure printers are already doing high volume publication gravure printing." CAB at 70-71. Consequently, substantial capacity now being used to produce into the elastic lower volumes likely would be diverted in response to the prospect of earning higher, supracompetitive returns in high volume printing.¹⁵⁸ Even the gravure printer with the smallest amount of gravure capacity, Brown Printing, alone has more than sufficient divertible capacity to defeat any coordinated price discrimination.¹⁵⁹

Complaint counsel argue that the theoretical diversion calculation understates the actual amount of diversion necessary to defeat a supracompetitive price increase in high volume publication printing. CAB at 69. In particular, complaint counsel assert that diversion of small amounts of high volume publication printing is not economical for customers because printing is characterized by job-specific scale economies and "batch economies" and because customers value color consistency throughout a print job (which, presumably, is best achieved by consolidating one job in a single printer). *Id.* Even assuming, however, that it is more efficient to consolidate all of the work on one job in one printer,¹⁶⁰ this does not significantly affect the incentives or potential for diversion. Diversion (even in relatively small amounts) need not take the form of dividing up a single print job. The high volume printing programs of most publication printing

¹⁵⁸ Although the ALJ found that switching costs between printing customers are significant, IDF ¶ 411-15, this finding proves too little and too much at the same time. The finding necessary to the conclusion that relevant diversion would not undermine coordination is that it is less costly for a buyer to switch to a printer who already supplies high volume publication printing than to switch to a printer who does not. The record does not support such a finding. If the finding is simply that it is costly for a buyer to switch to any printer, it suggests that the acquisition at issue would have very little effect on competition. The finding has greater resonance in the discussion of unilateral effects. See Section VI.B., *infra*.

¹⁵⁹ See RPF ¶ 221. Dr. Hausman testified that, following its acquisition of a three meter gravure press (one of the largest and most efficient in the U.S.), Brown alone has more than six times the capacity needed to defeat the price increase. Hausman Tr. 6369-71.

¹⁶⁰ The record contains numerous references to high volume print jobs that are divided among more than one gravure printer at current prices. See, e.g., Steen Tr. 1110-11, 1132; Doty Tr. 4593. With supracompetitive prices, the incentives to divide jobs would increase, although perhaps not significantly.

customers entail several jobs, and many customers routinely use more than one gravure printer within a program -- using one printer for one job and another printer for another job.¹⁶¹ Thus, a buyer would likely attempt to induce diversion to obtain lower prices by switching entire jobs among gravure printers, and could do so without affecting any job-specific scale economies or color consistency.

Substantial increases in gravure capacity in recent years have increased both the potential and the incentives of gravure printers to divert output to chase the highest available return. Since 1990, gravure printers other than the merged firm have engaged in substantial capacity expansions.¹⁶² In addition, gravure printers could use any excess capacity to undermine the coordinated interaction. The ALJ appears to find that gravure printing capacity has been in shortage, IDF ¶ 282, based largely on evidence that gravure printing capacity at certain locations for certain limited periods was fully utilized.¹⁶³ The totality of the evidence, however, suggests that excess capacity exists. Several industry participants, including witnesses called by complaint counsel, testified "that there is and has been excess gravure capacity." IDF ¶ 358. Moreover, in recent years, "many firms are cutting back or completely cancelling their long-run, high-volume printing programs." IDF ¶ 360. Some buyers have simply eliminated publications -- the most prominent of whom are Sears and Montgomery Ward. *Id.* Other buyers have increased versioning, choosing more targeted marketing, and have substituted offset for gravure accordingly. IDF ¶¶ 361-62. At the same time, several firms have expanded gravure capacity. IDF ¶¶ 280-84. Consistent with this information, gravure prices have been falling since at least 1985 and continue to fall. This evidence is consistent with two market conditions: (i) gravure capacity exceeds gravure demand or (ii) offset capacity constrains the price of gravure printing.

¹⁶¹ Sackett Tr. 570-72; McCoig Tr. 739-40; Gallo Tr. 828-29; Scirocco Tr. 1029-34; Steen Tr. 1079; Joy Tr. 1166; Haight Tr. 1347-48; Baron Tr. 2279-82.

¹⁶² Using complaint counsel's estimates, gravure printers other than the merged firm have increased total gravure printing capacity by more than 7% between 1990 and 1993. *See* CX-502-B-C (indicating expansions by Quebecor, Ringier, Quad, and Brown). The post-acquisition expansion by gravure printers other than the merged firm is equivalent to more than 23% of Meredith/Burda's pre-acquisition capacity. *Id.* In fact, post-acquisition capacity expansions by these other gravure printers may exceed 50% of Meredith/Burda's pre-acquisition capacity, measured by the number of presses. Ringier has acquired two gravure presses and is planning to acquire three additional large (3-meter) presses. Nytko Tr. 1474-75; RX-269-I. Brown has added the first 3-meter press installed in the U.S. IDF ¶ 373; Engdahl Tr. 2525; RX-269-B. Quad Graphics, which entered in the mid-1980s, has acquired three gravure presses, and has ordered two more (as well as four M-3000 (high volume) offset presses). IDF ¶ 372; Melton Tr. 2351-52; RX-269-F.

¹⁶³ *See* CPF ¶¶ 1840-46.

We have found that offset capacity does constrain the price of gravure printing. *See* Section IV, *supra*. In any event, the existence of excess capacity is not necessary to a finding that diversion is likely.¹⁶⁴

The potential for diversion is not dispositive.¹⁶⁵ Relative to nondiscriminatory coordination, however, the existence of readily available supracompetitive returns from shifting sales from one group of customers to another creates relatively stronger incentives to divert production away from customers for whom the return is lower.

2. Characteristics of Buyers and Transactions

Since the allegedly inelastic printing jobs, by definition encompass very large contracts, publication printers would have substantial incentives to divert production from the elastic print jobs to obtain supracompetitive returns. The ALJ found that the probability of coordinated interaction is limited by the size of buyers with an ability, and demonstrated willingness, to switch suppliers. IDF ¶ 410.¹⁶⁶ We affirm this finding and expand on it.

Other things equal, the fewer the number of major buyers and the larger the size of single transactions in a relevant market, the less likely it is that coordination among the sellers will succeed. The larger the payoff from each discrete instance of cheating, the more likely that firms will cheat.

The bigger a buyer is, the more easily and lucratively a member of the cartel can cheat on his fellows; for with a single transaction, he may be able to increase his

¹⁶⁴ "[P]redictions about the size of a firm's probable supply response require an evaluation of both the technical feasibility of making supply adjustments and the economic opportunity cost of doing so." ABA Merger Monograph, *supra* note 44, at 160-61 (citations omitted). For a firm considering increasing its output to inelastic end uses, the opportunity cost of using excess capacity will be lower than the opportunity cost of using capacity currently used to supply the elastic uses. Nevertheless, assuming it is practically feasible, a profit-maximizing firm will shift output to the inelastic end-uses in response to a supra-competitive price increase even if its capacity is fully utilized prior to the price increase.

¹⁶⁵ The import of the percentages can easily be overstated. After all, the Commission's simple diversion calculation would show that a nondiscriminatory collusive price increase would be undermined by a "small" percentage increase in output. For example, a 5% price increase would be generated by something less than a 5% output reduction and defeated by an equal output increase. In fact, any non-trivial output increase by one of the coordinating sellers would tend to destabilize the coordination and lead to output increases by other firms seeking to avoid loss of sales to sellers deviating from the terms of the coordination.

¹⁶⁶ *Id.* ("There have been several post-acquisition instances where print buyers have qualified additional gravure printers besides Donnelley or have switched substantial quantities of their printing to other gravure printers (RPF 268, Table F)").

sales and hence profits dramatically. But with all the members thus vying for the large orders of big buyers, the cartel will erode.

Hospital Corp. of America v. FTC, 807 F.2d 1381, 1391 (7th Cir. 1986), *cert. denied*, 481 U.S. 1038 (1987), citing George Stigler, A Theory of Oligopoly, in *THE ORGANIZATION OF INDUSTRY* 38 (1968); *FTC v. Elders Grain, Inc.*, 868 F.2d 901, 905 (7th Cir. 1989); Owens-Illinois, slip op. at 32 ("As buyer concentration . . . increases, the benefits from cheating to capture a customer's business increase relative to the magnitude of gains from collusion").¹⁶⁷

By its terms, complaint counsel's proposed relevant market includes only the largest print jobs in publication printing. Indeed, according to the theory of anticompetitive effects, the customers with the largest print programs are the "most vulnerable to a price increase." CAB at 67. Many of these printing programs generate revenues for printers in excess of \$10 million annually, and some as high as \$100 million annually.¹⁶⁸ Each high volume printing program represents substantial incremental revenue for any one printer. Thus, large contracts are likely to attract gravure printers to cheat on the terms of any coordination. It follows that coordination in the "core" the category of the largest and ostensibly most vulnerable printing jobs -- appears to be particularly vulnerable to cheating.¹⁶⁹

Large high volume print buyers often use procurement techniques designed to ensure negotiating leverage vis-a-vis printers and to undermine coordination. For example, most large buyers solicit and obtain multiple bids and privately negotiate line items based on the best of the bids.¹⁷⁰ Such techniques increase uncertainty in

¹⁶⁷ See also Richard Posner, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* 53-54 (1976) (noting that large buyers and large transactions also make it more difficult to detect deviations from coordination, since a substantial loss of sales may be attributable to random defections rather than seller conduct that should be punished).

¹⁶⁸ Allen Tr. 1573. See generally IDF ¶¶ 59-121.

¹⁶⁹ At the time of the acquisition, four print buyers accounted for 60 to 80 percent of purchases in the "core." Complaint counsel estimate that this amount is approximately 60%, although the derivation of this figure is not clear. CAB at A-8, citing CX-1374-B. Respondents estimate that the same four buyers account for nearly 80 percent of the "core." RAB at 45, fn. 38 (comparing RX 665 with CX 1167). Buyer concentration in the core appears to have increased since that time, as firms have "exited" the core (through substitution to offset or actual exit). IDF ¶ 363-64. At the time of the acquisition, complaint counsel's broad putative market comprised approximately 100 purchasers with approximately 1,000 print jobs, and the putative "core" comprised 36 purchasers with approximately 200 jobs. CPF ¶ 2011; RX-665. Dr. Hausman found that increased versioning, reduced print programs, and elimination of print programs, among other things, substantially reduced the number of firms in the "core" to as few as nine (including the buyers about whom he lacked information). IDF ¶¶ 364-65. These are precisely the buyers who are best positioned to induce deviations from coordination.

¹⁷⁰ IDF ¶ 43; RPF ¶ 261.

coordinating firms and make detection and punishment of deviations from coordination more difficult. *See B.P. Goodrich Co.*, 100 FTC at 325. More importantly, large purchasers commonly offer long-term contracts to printers. IDF ¶¶ 42, 375.¹⁷¹ Common use of long-term contracts on large transactions increases the potential gains from deviating from coordinated interaction. The longer the term of a printing supply agreement, the greater are the revenues available from a single deviation, and thus the stronger the incentives to deviate, other things equal. *See Merger Guidelines Section 2.12.*¹⁷² The use of long-term contracting and other sophisticated procurement techniques may be expected to increase in response to any anticompetitive conduct by high volume publication printers.¹⁷³

3. Other Impediments to Successful Coordination

Compounding these fundamental weaknesses in complaint counsel's theory of coordinated effects are a variety of other significant obstacles to coordination in high volume publication printing. First, coordinating printers could not likely agree on the identity of inelastic users and, thus, could not tacitly identify the margin. RRB at 73. Although we have assumed to this point in the competitive effects analysis that this problem does not exist, it is, in fact, an imposing problem for the hypothetical coordination among publication printers. *See Section IV, supra.*

Second, printers have varying cost structures and vary in other important ways that undermine the probability of achieving a consensus on the terms of coordination. *See B.F. Goodrich Co.*, 110 FTC 207, 321 (1988). As complaint counsel concede, even if the roster of relevant participants is limited to gravure printers, such firms differ in a variety of ways.¹⁷⁴ *See generally* IDF ¶¶ 340-57.

¹⁷¹ CPF ¶ 2014-15. Many of these contracts provide the buyer with the right to audit price increases. CPF ¶ 2016; RPF ¶ 261-62.

¹⁷² Section 2.12 of the Merger Guidelines states that long-term contracts will induce deviations only "where the duration, volume and profitability of the business covered by such contracts are sufficiently large as to make deviation more profitable in the long term than honoring the terms of coordination, and buyers likely would switch suppliers." This contemplates incentives to cheat in the aggregate. More precisely, a particular seller is more likely to deviate to obtain a particular contract the greater are the revenues from the contract relative to the seller's total revenues.

¹⁷³ In addition, any firms that are under long-term contracts with price and other terms fixed are at least partially protected from post-acquisition anticompetitive effects for the term of the contract.

¹⁷⁴ Complaint counsel state that "gravure printers differ in terms of capacity, utilization, efficiency of operation, press capabilities, service, distribution and sales, reputation and track record, and reputation for quality." CAB at 71. Complaint counsel's industry expert testified to the differences in cost structure. Hodgson Tr. 367-69.

When the hypothetical coordination in the assumed market is expanded to account for the conduct of many offset printers who currently supply the market, the asymmetries among firms are even more pronounced. The different cost structures of gravure and offset printing would further confound any attempt to reach consensus.¹⁷⁵

Third, because high volume printing jobs are performed on a custom basis, relevant suppliers would be required to achieve consensus on a great number of variables and would have multiple opportunities to cheat by shading on hidden variables.¹⁷⁶ Complaint counsel respond by positing a simple customer allocation scheme that ostensibly obviates consensus on multiple variables. CAB at 67-68. It is not clear, however, that all firms would maximize profits by settling on the current allocation -- for example, firms that have recently expanded capacity likely would not.¹⁷⁷ In any event, assuming customer allocation is the most effective form of coordination among printers, it entails the essential incentives to deviate common to any form of coordinated discrimination against high volume publication printing customers, as discussed in Section VI.A.1.2., *supra*.

These market conditions, taken together, indicate that the merger is very unlikely to give rise to coordinated, discriminatory anticompetitive effects in high volume publication printing. At the same time, the differences among relevant suppliers, in conjunction with Donnelley's post-acquisition share, suggest the possibility of unilateral anticompetitive effects.

B. Unilateral Effects Analysis

"A merger may diminish competition even if it does not lead to increased likelihood of coordinated interaction, because merging firms may find it profitable to alter their behavior unilaterally following the acquisition by elevating price and suppressing output." Merger Guidelines Section 2.2. An individual firm has "unilateral" market power if it can raise price above the competitive level without inducing customers to reduce their purchases to a degree that makes

¹⁷⁵ See Section IV.D.1., *supra*.

¹⁷⁶ See CAB at 69; RRB at 73, 78-79.

¹⁷⁷ See note 162, *supra*, and accompanying text (regarding increases in capacity).

the price increase unprofitable.¹⁷⁸ A merger yields unilateral anticompetitive effects if it permits the merged firm to impose a significant and nontransitory price increase without inducing so much substitution to other relevant suppliers that the price increase becomes unprofitable.¹⁷⁹ A merger may facilitate a unilateral exercise of market power in two general market "settings": where firms are "distinguished primarily by differentiated products," Merger Guidelines Section 2.21, and where firms are "distinguished primarily by their capacities." *Id.* Section 2.22.¹⁸⁰ Complaint counsel allege that both settings are applicable to this case and that the acquisition 'likely will permit the merged firm unilaterally to increase prices. Without specifying the prerequisite market setting, the ALJ held that "Donnelley's post-acquisition market share suggests that it can unilaterally raise prices to some high volume publication gravure print customers, restrict output or engage in other anticompetitive conduct." *Id.* at 90.¹⁸¹ We reject the ALJ's conclusions and find that the acquisition is unlikely to give rise to unilateral anticompetitive effects under any theory.

¹⁷⁸ Merger Guidelines Section 0.1. ("Circumstances also may permit a single firm, not a monopolist, to exercise market power through unilateral or non-coordinated conduct -- conduct the success of which does not rely on the concurrence of other firms in the market or on coordinated responses by those firms."); Robert D. Willig, Merger Analysis, Industrial Organization Theory, and Merger Guidelines, BROOKINGS PAPERS ON ECONOMIC ACTIVITY (MICROECONOMICS) 281, 293 (1991) ("A unilateral effect would arise, in contrast, when a merger between sellers of close substitutes impels them to raise prices profitably whether or not rivals in fact follow"). *See also* William Landes and Richard Posner, Market Power in Antitrust Cases, 94 HARV. L. REV. 937 (1981).

¹⁷⁹ *See generally* Roscoe B. Starek III and Stephen Stockum, What Makes Mergers Anticompetitive? "Unilateral Effects" Analysis Under the 1992 Merger Guidelines, 63 ANTITRUST L. J. 801 (1995).

¹⁸⁰ Although Section 2.2 of the Merger Guidelines does not limit itself to a particular theoretical economic model of competitive behavior, the general distinction between market settings appears to be based on the distinction between two general models: the differentiated product Bertrand model and the homogeneous product Cournot model. *See generally* Willig, *supra* note 178, at 292-93. In the differentiated products Bertrand model, a merger between two firms that produce close substitutes in a market of differentiated products will generate an increase in market power. In the Cournot model, a merger will generate market power if nonmerging rivals would not find it profitable to expand output by an amount sufficient to offset the output reductions of the merged firm. *See, e.g.*, Martin K. Perry and Robert H. Porter, Oligopoly and the Incentive for Horizontal Merger, 75 AM. ECON. REV. 219 (1985); Joseph Farrell and Carl Shapiro, Horizontal Mergers: An Equilibrium Analysis, 80 AM. ECON. REV. 107 (1990); *see also* Willig, *supra* note 178, at 295-98.

¹⁸¹ The ALJ based this holding primarily on the basis of Donnelley's post-acquisition market share, "admissions" that Donnelley could increase prices following the acquisition, and testimony from customers stating "concerns" about the effect of the acquisition. *Id.* at 90; IDF ¶¶ 393-405.

1. Potential Reduction in Localized Competition

Where different products within a market differ in the degree of their substitutability for one another, competition can be "localized" so that a seller competes more directly with those firms selling relatively close substitutes. Similarly, competition may be localized in markets where sellers are differentiated by their relative advantages in serving different groups of buyers, and buyers negotiate individually with sellers.¹⁸² In the context of localized competition, unilateral anticompetitive effects may result from (i) a merger between rival sellers that produce relatively close substitutes in a market for differentiated products and (ii) a merger between rival sellers that have similar advantages in serving a particular group of buyers. *See* Merger Guidelines Section 2.21. Such a merger may enable the merged firm unilaterally to increase prices above premerger levels because some of the sales lost by one firm due to the price increase will be diverted to the other firm. "[C]apturing such sales loss through merger may make the price increase profitable even though it would not have been profitable premerger." *Id.* Whether the merger facilitates a unilateral exercise of market power in this setting depends on the "closeness of the products of the merging firms" and the "ability of rival sellers to replace lost competition." *Id.*

Substantial unilateral price elevation in a market for differentiated products requires 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 non-parties' product lines to replace the localized competition lost through the merger be unlikely.

Id. *See Coca-Cola Bottling Co. of the Southwest*, 118 FTC 452 [FTC Dkt. No. 9215 (Aug. 31, 1994), slip op.]; *State of New York v. Kraft General Foods, Inc.*, 1995-1 Trade Cas. (CCH) ¶ 70,911 (S.D.N.Y. 1995). In other words, to show that the acquisition facilitated a unilateral exercise of market power, complaint counsel must demonstrate that (i) customers of the two merging firms have relatively inelastic demand for a particular type or quality of printing services that is currently provided only by the merging firms, and (ii) the supply elasticity of other relevant printers (gravure and offset) is

¹⁸² *See* Merger Guidelines Section 2.21 n. 21.

insufficient to meet the demand of such buyers that would otherwise switch to a repositioned printer.¹⁸³

Economic analysis indicates that the perceived substitutability between two firms' products (*i.e.*, their "closeness") is the primary factor determining the market power that will be created by a merger in a differentiated product setting, and that market concentration plays a lesser role.¹⁸⁴ The closeness of the merging firms' products has a critical effect on the profitability of a post-merger price increase because the more closely substitutable are two products (relative to their substitutability with other products), the greater is the degree to which substitution away from each of the products of the merging firms due to a price increase will be "internalized" by the merged firm. Therefore, information that directly reflects customers' actual preferences is more probative than market concentration data in assessing the relative substitutability of differentiated products.¹⁸⁵ Nevertheless, market concentration can sometimes act to reinforce other evidence bearing on the closeness of the products of the merging firms:

Where market concentration data fall outside of the safeharbor regions of Section 1.5, the merging firms have a combined market share of at least thirty-five percent, and where data on product attributes and relative product appeal show that a significant share of purchasers of one merging firm's product regard the other as their second choice, then market share data may be relied upon to demonstrate that there is a significant share of sales in the market accounted for by consumers who would be adversely affected by the merger.

Merger Guidelines Section 2.211.

Although respondents argue that printing services of the different gravure printers are not differentiated,¹⁸⁶ it appears that printers may be differentiated in their relative advantages in dealing with particular customers.¹⁸⁷ Printers appear to be distinguished in a variety of

¹⁸³ See Landes and Posner, *supra* note 178.

¹⁸⁴ See Willig, *supra* note 178, at 300-01.

¹⁸⁵ *Id.* at 301 (The concentration presumption is "unlikely to be valid in many areas of application where specific information can be developed about product characteristics and about consumer preferences for them. For such applications, merger analysis that focuses exclusively on market shares is likely to go awry.").

¹⁸⁶ RAB at 51-52.

¹⁸⁷ See CPF ¶ 1737 ("Each print job is unique and firms are perceived to have differing capabilities to produce a job to a customer's satisfaction"); CPF ¶ 1738 ("Suppliers of printing services have differing equipment capabilities and differing reputations for quality, service and reliability"); RAB at 56. Printing firms, differing abilities to serve given customers or categories of customers may be based not on any particular aspect of the service, but on the totality of their printing operations -- product

dimensions, and the merging firms had many common characteristics prior to the merger. IDP ¶¶ 338-357. Donnelley certainly perceived Meredith/Burda as one of its most significant competitors.¹⁸⁸ Moreover, many customers testified that they "ranked Donnelley and Meredith/Burda as the highest quality gravure printers, and viewed them as vigorous competitors prior to the acquisition." IDF ¶ 405; *see* IDF ¶ 411.¹⁸⁹ The concerns expressed by large customers of the merging firms may reflect their belief that switching to alternative printers would be difficult. IDF ¶ 415. Where such evidence suggests that market shares may reflect each firm's relative appeal as the first and second choices of their current customers, the merged firm's substantial share of the assumed relevant market may give rise to a presumption that the firms are particularly close substitutes for a significant share of customers. Merger Guidelines Section 2.211.

Here, the structural presumption is very weak. Many customers view the printing services of other printers to be good substitutes for the services of the merging firms and did not consider the merging firms to be the first and second choices for quality and service.¹⁹⁰ And there appear to be no general, objective criteria by which buyers with relatively inelastic demand for the services of the merged firm can be identified.¹⁹¹ The best objective evidence that the level of differentiation between printers is not significant -- and that other printers are reasonable substitutes that constrain the merging firms -- is that each of the other gravure printers, and many offset printers, are

quality, technical expertise, distribution capabilities, bindery capacity, geographic proximity, and other aspects of the relevant service.

¹⁸⁸ *See generally* CPF ¶¶ 1770-1815.

¹⁸⁹ There is some danger in relying on these customer complaints to draw any general conclusions about the likely effects of the acquisition or about the analytical premises for those conclusions. The complaints are consistent with a variety of effects, and many -- including those the ALJ relied upon -- directly contradict complaint counsel's prediction of unilateral price elevation. In fact, some suggested that the effect would be the opposite. *See, e.g.*, Deutsch Tr. 961-62 (predicting that the merged firm would reduce prices following the acquisition "and keep them low enough to drive some of their competition out of business"); Bentele Tr. 1439-40 (concerned that Donnelley would set post-acquisition prices at a level that would not allow other printers "to exist in the marketplace").

¹⁹⁰ Henry Tr. 718; Gallo Tr. 829, 838; Owens Tr. 1284-85; Allen Tr. 1577-78; *see* RX-396. Many customers did not consider Donnelley to provide the kind of quality and service that would make it a closer substitute for Meredith/Burda than were other firms. *See, e.g.*, CPF ¶¶ 1873, 1877-78, 1880. The concerns expressed by these customers may be interpreted as the result of a change in management rather than as a change in the nature or level of competition.

¹⁹¹ As discussed previously, the volume, versions, and page parameters of the assumed relevant market do not yield accurate predictions about demand elasticities for gravure generally. Moreover, they do not provide a basis for estimating demand elasticity for the services of the merging firms -- all gravure printers supply printing services that meet the parameters. Therefore, the criteria by which inelastic customers are identified must be different from the alleged market parameters.

currently selling into the alleged inelastic uses.¹⁹² Among the "core" customers complaint counsel identifies as most susceptible to anticompetitive effects, Quebecor's share was substantially higher than Meredith/Burda's prior to the acquisition, and seven firms had a premerger market share of approximately seven percent or higher.¹⁹³ Each of the gravure printers other than the merged firm is currently supplying printing services to customers who have expressed "concerns" about the acquisitions.¹⁹⁴

Even assuming that printers are sufficiently differentiated in their abilities to perform work for groups of customers, and that customers who regarded the merging firms as their first and second choices prior to the merger comprise a significant share of sales in the market, unilateral effects are not likely. In high volume publication printing, incumbent printers "likely would replace any localized competition lost through the merger by repositioning their product lines." Merger Guidelines Section 2.212.¹⁹⁵ Each of the incumbent gravure printers is currently supplying high volume publication gravure printing,¹⁹⁶ implying that the customers for whom the merging firms were first and second choices represent a minor portion of a proposed relevant market that already represented a minor portion of total gravure capacity. The capacity available for diversion from elastic customers to alleged inelastic customers is similar to that in the coordinated effects scenario.¹⁹⁷ The other printers would have strong incentives to increase sales to the alleged inelastic customers because, by definition, they obtain no benefit from the merged firm's unilateral anticompetitive conduct. Thus, as long as their supply is relatively elastic, these firms should be expected to reposition with alacrity.

"In markets where it is costly to evaluate product quality, buyers who consider purchasing from both merging parties may limit the total number of sellers they consider." Merger Guidelines Section

¹⁹² See Section V.B. (Tables 1 and 2), *supra*.

¹⁹³ See *Id.* (Table 2).

¹⁹⁴ See, e.g., RAB at 53.

¹⁹⁵ Willig, *supra* note 178, at 304 (Absent this important consideration, as Willig notes, the analysis would include an "implicit assumption that the pattern of demand relationships and products' characteristics are not subject to endogenous change. Although this may be an accurate description in many contexts, others firms may be readily and quickly able to reposition their products in response to market incentives.").

¹⁹⁶ CAB at 70-71.

¹⁹⁷ See Section VI.A.I., *supra*. In the unilateral effects calculus, the merged firm's capacity is removed from the denominator, and high volume firms that did not view the merging firms as first and second choices are removed from the numerator. See Hausman Tr. 5450-58; RX-397.

2.212.¹⁹⁸ High volume publication printing meets this description. Contracts are complex, purchase decisions are multidimensional, and buyers often limit the number of potential suppliers through a qualifying process. IDF ¶ 43. Under these circumstances, "[i]f either of the merging firms would be replaced in such buyers' consideration by an equally competitive seller not formerly considered, then the merger is not likely to lead to a unilateral price elevation." Merger Guidelines Section 2.212. Substantial evidence has been presented that many buyers would incur non-trivial costs of qualifying an additional printer to replace one of the merged firms in their bidding consideration. IDF ¶ 411-15. The actions of relevant buyers, however, belie the competitive significance of these "switching costs." Following Donnelley's acquisition of Meredith/Burda, several customers have shifted substantial quantities of business from the merged firm to other gravure printers (as well as to offset printers); and many buyers have replaced one of the merging firms by qualifying other gravure printers to bid on and supply their high volume publication printing services. IDF ¶ 410.¹⁹⁹ The merged firm's competitors have actively sought to expand their sales to high volume publication customers, with observable success.²⁰⁰ Under these circumstances, unilateral anticompetitive effects through the loss of localized competition are unlikely.

2. Unilateral Effects Under Capacity Constraints

Unilateral anticompetitive effects may also result from horizontal mergers in markets in which products are "relatively undifferentiated."²⁰¹ In these markets, where "capacity primarily distinguishes firms and shapes the nature of their competition," merging firms with a high combined market share may find it profitable unilaterally to raise price and suppress output after merger:

¹⁹⁸ In such markets, rivals of the merging firms may need to induce customers to incur whatever costs are necessary to evaluate a repositioned product.

¹⁹⁹ See Section IV.E., *supra*.

²⁰⁰ See, e.g., RX-99-A (Brown's efforts to solicit Meredith/Burda accounts immediately following the merger).

²⁰¹ Because the model of competitive effects in this Section assumes that firms are not differentiated by their ability to serve particular groups of customers, it is mutually exclusive with the model described in Section V.B.I., *supra*. Nevertheless, complaint counsel have essentially argued these models in the alternative.

The merger provides the merged firm a larger base of sales on which to enjoy the resulting price rise and also eliminates a competitor to which customers otherwise would have diverted their sales. . . . [M]erged firms [with a high market share] may find it profitable to raise price and reduce joint output below the sum of their premerger outputs because the lost markups on the foregone sales may be outweighed by the resulting price increase on the merged base of sales.

Merger Guidelines Section 2.22. Under the Merger Guidelines, the Commission recognizes that a combined share of greater than thirty-five percent raises the possibility of such effects. *Id.*²⁰²

Although the merger may have given Donnelley the requisite market share for further analysis, the record establishes that nonmerging firms would be able economically to respond to the merged firm's price increase "with increases in their own outputs sufficient in the aggregate to make the unilateral action of the merged firm unprofitable." *Id.* Assuming that the services of other gravure printers are relatively undifferentiated, anticompetitive effects are unlikely because those other gravure printers are able quickly and easily to expand their output to the category of customers allegedly subject to discrimination by the merged firm.²⁰³ As discussed previously, the merged firm's gravure and offset competitors are under no binding capacity constraint that would keep them from expanding output to high volume publication printing.²⁰⁴ Indeed, each relevant printer has substantial existing capacity that currently is not used to supply the assumed relevant market but could be used in response to unilateral anticompetitive conduct by the merged firm.²⁰⁵ To undermine a discriminatory unilateral price increase by the merged firm, each other supplier needs only to shift output from the elastic to the allegedly inelastic print jobs; it need not have excess

²⁰² The logic of this analysis does not depend on a particular market share. Only if a consumer has limited opportunities to substitute will he be willing to pay an anticompetitive price. If customers have access to suppliers that are able to supply them with a relatively undifferentiated product, then the market share of these firms is of limited significance to the effect of potential substitution on a firm's market power. The importance of market share in this type of industry is only its potential reflection of constraints on firms' productive capacities. See Willig, *supra* note 181, at 295. If a firm has a two percent share of a homogeneous good market largely because it can only produce additional output at substantially higher marginal cost, its economic significance is very different than if it can expand its production at relatively constant marginal cost. See Landes & Posner, *supra* note 178, at 945. See also *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974).

²⁰³ Under the standards of the Merger Guidelines, if the firm can expand output within one year without significantly increasing costs, then its expansion can be presumed to constrain a unilateral price increase by the merged firm. *Id.*; see *id.* Section 1.3 (uncommitted entry).

²⁰⁴ See Sections V.B., VI.A.I., and VI.B.1., *supra*.

²⁰⁵ *Id.*

printing capacity overall, and it need not expand its capacity. Moreover, the merged firm's gravure competitors have actively engaged in capacity expansions under competitive conditions, adding more efficient capacity that could easily be used to supply customers against whom the merged firm attempts to impose a discriminatory price.²⁰⁶

C. Deferral of Capacity Expansion Plans

The ALJ's finding that Donnelley's post-acquisition deferral or cancellation of capacity expansion plans was anticompetitive describes a theory of competitive effects that appears to be, at best, only casually related to the theory of discriminatory anticompetitive effects in high volume publication printing. Prior to the acquisition, Donnelley and Meredith/Burda independently had given various levels of consideration to purchasing and installing gravure presses.²⁰⁷ Following the acquisition, Donnelley deferred these considerations "so that the firms could be integrated and a complete assessment of any operating efficiencies could be made." RAB at 62. For much of the capacity that was considered, the deferrals appear to have become cancellations.²⁰⁸ Respondents state that these cancellations or deferrals were the result of the onset of economic recession immediately following the acquisition and the significant decrease in the demand for gravure printing services. RAB at 62. Complaint counsel allege that the cancellation or deferral of "planned" capacity expansions is, by itself, an anticompetitive effect of the acquisition. CAB at 50-51. The ALJ found that "the cancellation or deferral of these expansion plans had a substantial adverse competitive effect because had they gone forward, significant gravure capacity would have been added to the market at or about the time of the acquisition and this would have resulted in an increase in gravure supply and a reduction in prices." IDF ¶ 381; *see* ID at 89.90.²⁰⁹

The ALJ's finding is based in large part on evidence that Donnelley believed that, by acquiring Meredith/Burda, it could increase its own capacity and could thereby avoid investing in

²⁰⁶ See note 162, *supra*, and accompanying text.

²⁰⁷ See IDF ¶380; RAB 61-62.

²⁰⁸ See, e.g., Moeller Tr. 4124 (Donnelley now appears to have no plans to order a press that it had planned, prior to the acquisition of Meredith/Burda, to install at its Reno facility).

²⁰⁹ See Hilke Tr. 3347-54, 3359 (Donnelley's acquisition of capacity rather than expansion "represents an alternative which involves higher prices and less competition").

internal expansion. *Id.* ¶¶ 381-88. Such evidence likely would exist regarding a vast number of horizontal acquisitions for which no other theory of anticompetitive effects could be articulated.²¹⁰ Capacity expansion deferrals (or cancellations) likely occur in connection with many procompetitive acquisition. It will frequently be the case that a firm that buys existing assets from another firm also considered, as a possible alternative, the creation of new assets, but opted for the former course of action as the least costly alternative. In such cases, the decision to acquire existing assets will frequently (if not usually) cause the acquirer to decide against the contemplated new capital expenditures (*e.g.*, the firm only needs one new factory, not two). Without more, we cannot infer that the cancellation was anticompetitive. A firm's decision to forego internal expansion in favor of acquisition may be anticompetitive only if the merger creates or enhances unilateral market power.²¹¹

Respondents concede that a cognizable anticompetitive effect based on allegations of this type could be found under an analysis similar to an actual potential competition analysis: (i) Would the expansions likely have taken place absent the acquisition? If so, (ii) Would the expansions have increased competition (reduced quality-adjusted prices) in the alleged relevant market relative to what exists today?²¹² First, the Commission would need to find that the capacity expansions were reasonably probable in a timely manner. Here, however, some of the plans appear to have been inchoate.²¹³ It also appears that Donnelley completed some capacity expansions after a deferral following the acquisition.²¹⁴

²¹⁰ See *United States v. Amax, Inc.*, 402 F. Supp. 956, 959 (D. Conn. 1975) (the argument that defendant's acquisition is anticompetitive because it could have expanded internally rather than through acquisition is an argument that "can be made, at least in theory against any horizontal merger, and Section 7 of the Clayton Act has not been interpreted to outlaw all such mergers.").

²¹¹ Cf. Robert H. Bork, *THE ANTITRUST PARADOX* 206-08 (1978) (internal expansion is preferable to merger only where the merger would create unilateral market power in the merged firm; otherwise, "we must assume that the firm makes the choice between internal expansion and merger on the basis of the relative costs of the two routes to larger size"). See RAB at 62; CAB at 50 n. 70 (conceding standard and arguing that Donnelley gained unilateral market power through the acquisition).

²¹² See, *e.g.*, *B.A.T. Indus., Ltd.*, 104 FTC 852, 930 (1984).

²¹³ For example, the record describes Meredith/Burda as "considering" and "contemplating" an expansion at its Lynchburg facility, and taking only preliminary steps toward such an expansion. See CPF ¶¶ 1597-1627. There appears to be no evidence that Meredith/Burda's board or general management ever approved these expansion plans. See, *e.g.*, RX-280 (Meredith/Burda's capital budgets prior to the acquisition did not reflect plans for expansion at Lynchburg).

²¹⁴ For example, Donnelley appears to have proceeded with expansion at its Warsaw facility after deferring the projected date of completion from the fall of 1991 to the fall of 1994. CPF ¶ 1565.

Second, assuming Donnelley cancelled certain planned expansions, it appears unlikely that the cancellations were the result of a unilateral exercise of market power.²¹⁵ To prove that the actions constituted a unilateral exercise of market power resulting from the acquisition, we would be required to conclude that the merging firms are uniquely able to expand capacity to the extent allegedly cancelled. If other firms are equally well-positioned to expand capacity, or could quickly and economically expand capacity in response to a supracompetitive price increase, Donnelley's actions would not result in a reduction in capacity relative to the hypothetical world that would have existed "but for" the acquisition. Clearly, other firms have expanded gravure capacity since the acquisition.²¹⁶ And the record does not indicate the extent to which these other firms would have expanded capacity if Donnelley had completed the expansions allegedly considered.²¹⁷

More importantly, the relevant capacity expansion involves not capacity to produce gravure printing but rather capacity to produce high volume publication printing. As discussed throughout this opinion, the only relevant market alleged by complaint counsel comprises a small share of total printing capacity. Thus, the relevant measure of available capacity under this theory is the capacity to produce for the high volume customers whose demand is allegedly inelastic. Most of the "cancelled" capacity would have been used in printing jobs for which there was no threat of post-acquisition anticompetitive conduct. The assumed relevant market consumes substantially less than one-third of total gravure capacity, and an even lesser share of gravure-plus-offset capacity. Hence, complaint counsel's theory requires that Donnelley would forego the returns it would have earned on the capacity's competitive uses (*e.g.*, in lower volume publications) -- returns which constitute the major share of the total returns on the assets -- in order to earn supracompetitive returns on activities which constitute a minor portion of the assets' total uses. Even if the supracompetitive returns in the relevant market were assured to the merged firm, the conditions necessary for

²¹⁵ The cancellation would also be anticompetitive if it had been coordinated with the other gravure printers. Complaint counsel do not allege such a coordinated action.

²¹⁶ See note 162 *supra*, and accompanying text.

²¹⁷ Other firms may not have proceeded with their expansion plans if Donnelley had completed all of the expansions allegedly planned. There is no evidence in the record allowing the Commission to predict the extent to which the acquisition affected other firms, plans for expansion. Therefore, we cannot assess the likely effect of the acquisition on total industry capacity or output.

this tradeoff to make economic sense seem implausible. The monopoly profits in the putative relevant market would have to be substantial.

In any event, we have concluded that the merger did not create or enhance unilateral market power in Donnelley even in the narrow price discrimination market. Given the conclusions of the relevant market analysis and the competitive effects analysis above, the record does not reveal that the cancellation of the premerger plans for expansion was anticompetitive.²¹⁸

VII. CONCLUSION

The complaint's proposed market definition does not sufficiently account for actual and potential substitution and is therefore too narrowly drawn. Even assuming the relevance of a high volume publication printing market, there is no theory of anticompetitive effects that withstands scrutiny. The complaint is dismissed for failure to prove that the acquisition is likely substantially to reduce competition in a relevant market.

CONCURRING OPINION OF COMMISSIONER MARY L. AZCUENAGA

I concur in the decision of the Commission to dismiss the complaint. To support the product market alleged in the complaint, "high volume publication gravure printing," complaint counsel attempted to show that a discriminatory price increase could be imposed on customers who purchase high volume gravure printing services. Many such customers do not regard offset printing as a substitute for gravure printing. In defining the product market using the analytical approach set forth in the 1992 Horizontal Merger Guidelines, the question is whether enough customers would switch from high volume gravure printing to offset printing to defeat a price increase. In my view, the opinion of the Commission understates the strength of complaint counsel's case in support of the product market. Nevertheless, the evidence of actual switching from high volume gravure to offset printing is sufficient that I am unable to conclude that the weight of the evidence supports the proposed product market. Not having found a relevant market in which to assess competitive

²¹⁸ A similar theory was proposed and rejected in Owens-Illinois [IDF ¶ 10], slip op.

effects, I would dismiss the complaint, and I do not reach the other issues discussed in the opinion of the Commission.

FINAL ORDER

The Commission has heard this matter on the appeal of respondents R.R. Donnelley & Sons Company and Pan Associates, L.P. 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 accompanying Opinion, the Commission has determined to grant the appeal.

Accordingly, *It is ordered*, That the complaint is dismissed.

Complaint

120 F.T.C.

IN THE MATTER OF

NATURE'S BOUNTY, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3593. Complaint, July 21, 1995--Decision, July 21, 1995*

This consent order requires, among other things, the New York-based company and two of its wholly-owned subsidiaries to pay \$250,000 to the Commission for possible use for consumer redress, and requires them to have substantiation for specific health-related representations they make in advertising and promoting any product in the future.

Appearances

For the Commission: *Justin Dingfelder, Peter Metrinko, Rose Toufexis and Jonathan Cowen.*

For the respondents: *Michael F. Brockmeyer, Piper & Marbury, Baltimore, MD.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Nature's Bounty, Inc., a corporation, Puritan's Pride, Inc., a corporation, and Vitamin World, Inc., a corporation, ("respondents"), have violated Sections 5(a) and 12 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. 45(a) 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. A. Respondent Nature's Bounty, Inc. ("Nature's Bounty"), is a Delaware corporation, with its office and principal place of business at 90 Orville Dr., Bohemia, NY.

B. Respondent Puritan's Pride, Inc. ("Puritan's Pride"), is a Delaware corporation with its office and principal place of business at 90 Orville Dr., Bohemia, NY. Puritan's Pride is a wholly-owned subsidiary of Nature's Bounty.

C. Respondent Vitamin World, Inc. ("Vitamin World"), is a Delaware corporation with its office and principal place of business

at 90 Orville Dr., Bohemia, NY. Vitamin World is a wholly-owned subsidiary of Nature's Bounty.

D. Nature's Bounty directs or controls its subsidiaries Puritan's Pride and Vitamin World in carrying out the acts and practices alleged in this complaint.

PAR. 2. Respondents have manufactured, advertised, offered for sale, sold or distributed a variety of products, including "Sleeper's Diet," "L-Arginine 500 mg. tablets," "L-Ornithine 500 mg. tablets," "Prostex," "L-Cysteine," "L-Lysine," "L-Methionine," "Octacosanol," "New Zealand Green Lipped Mussel Extract," "KLB6," "Glucomannan," "Sugar Blocker," "Spirulina 500 mg. tablets," "Eye-Vites" (also sold as CATA-RX), "KLB6 Grapefruit Diet," "Herbal Cellulex Formula," "Memory Booster," "Ginsana," "Fatbuster Diet Tea," "Shake-A-Weigh," "Dark Circle Eye Treatment," "Natural Sterol Complex," "Super Fat Burners," "Super Cut," "Papaya Enzyme Tablets," and "Calmtabs." Each of these products is a "food" and/or "drug" within the meaning of Sections 12 and 15 of the FTC 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 FTC Act.

PAR. 4. Respondents have disseminated or have caused to be disseminated advertisements and promotional materials for the products referred to in paragraph two, including, but not necessarily limited to, the attached Exhibits ("Ex.") A-R. These advertisements contain the following statements:

A. In regard to Sleeper's Diet: "SLEEPER'S DIET . . . Based on a popular weight loss program. Dieters will be interested in this special combination of amino acids." (Ex. A)

B. In regard to L-Arginine: (1) "L-Arginine stimulates the release of HGH (human growth hormone). HGH . . . promotes the formation of DNA and RNA needed to increase muscle mass and decrease body fat." (Ex. B) (2) "L-ARGININE . . . stimulates the release of growth hormone . . . [I]ncreases muscle mass while decreasing the amount of body fat." (Ex. C)

C. In regard to L-Ornithine: (1) "L-ORNITHINE . . . As with L-Arginine this amino acid releases HGH. However, L-Ornithine is said to be twice as effective." (Ex. B) (2) "L-ORNITHINE stimulates the release of growth hormone which increases muscle mass while decreasing the amount of body fat." (Ex. C)

D. In regard to Prostex: "PROSTEX Can Help You! If you are over 50 years of age and Benign Prostatic Hypertrophy is causing these discomforts: Frequent urination. Painful Urination. Urgency to urinate. Dribbling. Distended bladder due

to incomplete emptying. Sleepless nights caused by night time urination. Developed by a doctor - Prostex is a scientific combination of 3 pure amino acids in capsule form. It is safe, natural and effective . . . to relieve the symptoms of Benign Prostatic Hypertrophy." (Ex. D)

E. In regard to L-Cysteine: (1) "L-CYSTEINE found to increase hair growth by as much as 100%." (Ex. C)(2) "[E]ffective in preventing not only hangovers but brain and liver damage from alcohol." (Ex. C) (3)[H]elps prevent damages from the ill effects of cigarette smoke." (Ex. C)

F. In regard to L-Lysine: "L-LYSINE . . . produces L-Carnitine which improves stress tolerance . . . and has an anti-fatigue effect." (Ex. C)

G. In regard to L-Methionine: "L-METHIONINE . . . helps prevent premature hair loss." (Ex. C)

H. In regard to Octacosanol: "Increase Stamina, Vigor and Endurance. OCTACOSANOL . . . In fact, a recent study at the University of Illinois has shown that Octacosanol may speed reaction time, lower cholesterol levels and strengthen muscles (including the heart)." (Ex. D)

I. In regard to New Zealand Green Lipped Mussel Extract: "NEW ZEALAND GREEN LIPPED MUSSEL EXTRACT. It has been shown in recent studies that Green Lipped Mussel not only relieves the symptoms of arthritis, but works on the cause. For relief of one of the most painful and discomforting ailments, try Puritan's Pride Green Lipped Mussel today!" (Ex. E)

J. In regard to KLB6: "Losing weight is easy the KLB6 way. The original natural fat fighting plan that helps put you in shape. KLB6 Kelp, Lecithin, Vitamin B-6 and Cider Vinegar, all-in-one capsule. KELP - a natural food rich in iodine. It works to maintain a healthy thyroid. And, of course, a sluggish metabolism is an enemy to anyone wishing to shed a few pounds. LECITHIN . . . is of special interest if you're concerned about weight reduction. It is a lipotropic agent that disperses fat globules in the body and also appears to be involved in keeping down the cholesterol level." (Ex. F)

K. In regard to Glucomannan: "GLUCOMANNAN . . . Feel Full, Satisfied and Eat Less . . . Glucomannan helps your body to process your food easier and faster. Therefore many of the calories you do take in pass through your digestive tract undigested without adding inches to your waistline. Helps you lose weight without harmful drugs, chemicals or stimulants." (Ex. G)

L. In regard to Sugar Blocker: "Stop Sugar Calories before they make it to your waistline. SUGAR BLOCKER. New Sugar Blocker contains the herb Gymnema Sylvestre which helps to impede the absorption of some of the sugar you eat . . . When taken before a meal, Sugar Blocker occupies the same sites in the small intestine where sugar is absorbed. With these sites blocked, the sugar passes through your system, greatly reducing assimilation by the body." (Ex. H)

M. In regard to Spirulina 500 mg. tablets: "Diet without hunger . . . the natural way. SPIRULINA . . . People are reporting fast weight loss of 20 pounds and more . . . without hunger! . . . Taken before meals it helps turn off your brain's hunger center. It cuts your drive to eat, so you stick to your diet." (Ex. I)

N. In regard to Eye-Vites, also sold as CATA-RX: "EYE-VITES Tablet. A Nutritional Breakthrough in Cataracts Prevention . . . [N]ow, thanks to the efforts of a group of dedicated vision scientists, there's Eye-Vites . . . the nutritional approach to the prevention of age related cataracts. The potent anti-oxidants and

micronutrients in Eye-Vites combine to help prevent the formation of cataracts. Research has proven that patients undergoing anti-oxidant therapy were 70% less likely to develop cataracts." (Ex. J)

O. In regard to KLB6 Grapefruit Diet: "KLB6 GRAPEFRUIT DIET . . . Puritan's Pride brings you the ultimate grapefruit diet formula to help you lose weight. You get the famous KLB6 combination that helps keep your body active so you can burn calories. Grapefruit extract works as a 'fat melter' to stimulate your metabolism and suppress the appetite." (Ex. K)

P. In regard to Herbal Cellulex Formula: "HERBAL CELLULEX FORMULA . . . Millions of dieters have used this unique herbal-vitamin formula as part of their herbal diet weight loss plan . . . You also get the famous Kelp, Lecithin and Cider Vinegar 'fat fighters' plus 6 herbal extracts." (Ex. F)

Q. In regard to Memory Booster: "An Exciting Blend of Nutrients to Help Sharpen Your Mind. MEMORY BOOSTER. Memory Booster from Puritan's Pride combines these special natural ingredients to work together as an aid to memory retention and mental alertness." (Ex. J)

R. In regard to Ginsana: "GINSANA. Concentrated Herbal Extract Helps Build Physical Endurance and Mental Alertness. Years of research studies have shown that endurance [and] mental alertness . . . were improved among Ginsana users." (Ex. L)

S. In regard to Fatbuster Diet Tea: "Lose weight naturally with . . . FATBUSTER DIET TEA . . . The result is a flavorful beverage that actually helps you shed unwanted pounds! When taken after every meal, the special combination of herbs filters through fatty substances, aiding your body in eliminating them . . ." (Ex. F)

T. In regard to Shake-A-Weigh: "SHAKE-A-WEIGH . . . This great tasting seasoning contains . . . Pantothenic Acid (B5) which helps food to pass rapidly through your digestive tract allowing less time to absorb calories." (Ex. G)

U. In regard to Dark Circle Eye Treatment: "This photo shows how there is no longer any evidence of dark circles after only one application on her left eye. DARK CIRCLE EYE TREATMENT. Makes Your Dark Circles Disappear . . . Dark Circle Eye Treatment is a new beauty discovery that therapeutically removes dark circles from the delicate area under your eyes in 2 easy steps." (Ex. M)

V. In regard to Natural Sterol Complex: "ADVANCED MUSCLE BUILDING FORMULA. NATURAL STEROL COMPLEX. MASS AND DENSITY ENHANCER . . . To maximize gains in muscle mass and strength, world-class bodybuilders train with Natural Sterol Complex . . . For serious growth in mass and strength, you need real power. And nothing powerizes you like Natural Sterol Complex by Universal. It's the most advanced, anabolic-strength formula available today for anyone looking to build a huge, massive and awe-inspiring body . . . Massive arms. Rock-hard shoulders. Awesome legs. Chiseled abs. For building your body, nothing even comes close to the power of Natural Sterol Complex." (Ex. N)

W. In regard to Super Fat Burners: "SUPER FAT BURNERS. Super Fat Burners contains a special combination of vitamins, minerals and amino acids needed for the reduction of fat cells. The ingredients in this formula help the body's ability to burn fat, thereby promoting visible muscle definition." (Ex. O)

X. In regard to Super Cut: "SUPER CUT . . . The ingredients in this formula help the body's ability to burn fat, thereby promoting visible muscle definition." (Ex. P)

Y. In regard to Papaya Enzyme Tablets: "PAPAYA ENZYME Tablets. An aid to better digestion from papaya . . . [C]ontains the enzyme Papain which helps you digest protein and helps release the nutritional potency of your foods and also promotes comfortable natural digestive processes." (Ex. Q)

Z. In regard to Calmtabs: "CALMTABS. All Natural Non-Habit Forming Herbal Relaxant. Puritan's Pride Calmtabs offers you a gentle and safe way to relax especially when everyday stress winds you up. This special formulation gives you six different herbs known for their calmative properties . . . You can enjoy Calmtabs' soothing, calm effect anytime during the day or before bedtime." (Ex. R)

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 attached Exhibits A-R, respondents have represented, directly or by implication, that:

A. Sleeper's Diet promotes weight loss during sleep.

B. L-Arginine stimulates the release of human growth hormone which increases muscle mass while decreasing body fat.

C. L-Ornithine stimulates the release of human growth hormone which increases muscle mass while decreasing body fat.

D. Prostex relieves the symptoms of benign prostatic hypertrophy.

E. L-Cysteine (1) increases hair growth, (2) prevents hangovers and brain and liver damage from alcohol, and (3) helps prevent harm caused by cigarette smoke.

F. L-Lysine improves stress tolerance and reduces fatigue.

G. L-Methionine prevents premature hair loss.

H. Octacosanol increases stamina, vigor, and endurance, improves reaction time, lowers cholesterol levels and strengthens muscles.

I. New Zealand Green Lipped Mussel Extract prevents arthritis and relieves its symptoms.

J. KLB6 causes weight loss and reduces cholesterol levels.

K. Glucomannan causes weight loss by suppressing appetite and allowing calories to pass through the body undigested.

L. Sugar Blocker prevents weight gain by impeding the body's absorption of sugar.

M. Spirulina 500 mg. tablets suppress the appetite, enabling adherence to a diet.

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N. KLB6 Grapefruit Diet causes weight loss by stimulating metabolism and suppressing appetite.

O. Herbal Cellulex Formula causes weight loss by eliminating body fat.

P. Memory Booster improves memory retention and mental alertness.

Q. Ginsana helps build physical endurance and mental alertness.

R. Fatbuster Diet Tea causes weight loss by eliminating fatty substances from the body.

S. Shake-A-Weigh reduces the body's absorption of calories from food.

T. Dark Circle Eye Treatment removes dark circles from under the eyes.

U. Natural Sterol Complex promotes growth in muscle mass and improves strength.

V. Super Fat Burners reduces body fat, thereby promoting muscle definition.

W. Super Cut reduces body fat, thereby promoting muscle definition.

X. Papaya Enzyme Tablets aid digestion and promote greater absorption of nutrients from food.

Y. Calmtabs relieves stress and promotes relaxation.

PAR. 6. In truth and in fact:

A. Sleeper's Diet does not promote weight loss.

B. L-Arginine does not stimulate the release of human growth hormone so as to increase muscle mass while decreasing body fat.

C. L-Ornithine does not stimulate the release of human growth hormone so as to increase muscle mass while decreasing body fat.

D. L-Cysteine does not promote hair growth.

E. L-Methionine does not prevent premature hair loss.

Therefore the representations set forth in paragraph five A, B, C, G, and E(1) were, and are, false and misleading.

PAR. 7. 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 attached Exhibits A-R, respondents have represented, directly or by implication, that at the time they made the representations set forth in paragraph five A-

Y, 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 A-Y, 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 contained in certain advertisements and promotional materials set forth in paragraph four, including but not necessarily limited to the advertisements and promotional materials attached as Exhibits D, E, J, and L, respondents have represented, directly or by implication, that scientific research, including scientific papers and/or studies, prove that:

1. Octacosanol may improve reaction time, lower cholesterol levels and strengthen muscles.
2. New Zealand Green Lipped Mussel Extract prevents arthritis and relieves its symptoms.
3. As to Eye-Vites, also sold as CATA-RX, patients undergoing anti-oxidant therapy such as that provided by Eye-Vites and CATA-RX are 70% less likely to develop cataracts.
4. Ginsana improves physical endurance and mental alertness.

PAR. 10. In truth and in fact, at the time respondents made the representations set forth in paragraph nine, scientific research, including scientific papers and/or studies, did not prove that (1) Octacosanol may improve reaction time, lower cholesterol levels and strengthen muscles, (2) New Zealand Green Lipped Mussel Extract prevents arthritis and relieves its symptoms, (3) patients undergoing anti-oxidant therapy such as that provided by Eye-Vites and CATA-RX are 70% less likely to develop cataracts, and (4) Ginsana improves physical endurance and mental alertness. Therefore, the representations set forth in paragraph nine were, and are, false and misleading.

PAR. 11. Through the use of the trade names set forth in this paragraph, including but not necessarily limited to their uses in the advertisements and promotional materials attached as Exhibits A, J, M, and O referred to in paragraph four, respondents have represented, directly or by implication, that:

1. "Sleeper's Diet" promotes weight loss during sleep.
2. "Memory Booster" improves memory retention.
3. "Dark Circle Eye Treatment" removes dark circles from under the eyes.
4. "Super Fat Burners" reduces body fat.

PAR. 12. In making the representations referred to in paragraph eleven, respondents have represented, directly or by implication, that at the time they made these representations they possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 13. In truth and in fact, at the time respondents made the representations set forth in paragraph eleven, they 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 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 FTC Act.

EXHIBIT A

Is it really possible to lose weight while you still eat most of your favorite foods?

Yes! FIBER DIET lets you do it!**

Fiber Diet is an all natural food supplement that helps you lose weight while improving your diet. It helps you look and feel great. Here's how it works . . . Fiber Diet is a special combination of grain and fruit fiber. Recent medical research confirms that a high fiber diet is healthier and an effective, natural way to lose weight and keep it OFF! You simply take Fiber Diet tablets with water 15-30 minutes before you eat. You can eat what you want, but it is always sensible to avoid highly processed food, sugar or fat. Fiber Diet absorbs water to give you a full feeling and cut your hunger so you naturally eat less, and so, you lose weight. Fiber Diet is completely free of drugs! It has no sugar, starch, preservatives or artificial colors. There is no caffeine or sodium (salt). So you can use Fiber Diet with confidence for as long as you need.



Sugar, Starch and Preservative Free

QTY.	PROD. NO.	PRICE*
120	4122	6.95
250	4123	13.20
500	4125	21.95



For Dieters and Cholesterol Watchers!

Low Fat Cooking with Diet Brush**

This amazing brush has high technology polymer fibers that attract grease like a magnet, but repel other liquids. Brush it across the top of soups, stews and roasts to skim off the floating fat. Stir with it, and it removes from deep down. Wipe bacon, french fries and hamburgers to reduce fat and calories. Works better and cheaper than paper towels. Brush washes clean in sink or dishwasher.

QTY.	PROD. NO.	PRICE*
1 Brush	5679	4.95

*Our special sale does not apply.

SLEEPER'S DIET**

GHF (Growth Hormone Factor)

Sugar & Starch Free

Formerly Tri-Amino Diet Supplement

Based on a popular weight loss program. Dieters will be interested in this special combination of amino acids.

4 Sleeper's Diet Tablets
Provides:

L-Lysine	1200 mg.
L-Ornithine	900 mg.
L-Arginine	1200 mg.

QTY.	PROD. NO.	PRICE
60	3940	8.70
120	3941	15.95

Get That Full Feeling Naturally...

GUAR GUM Capsules**

It's Natural, Safe and Works Fast!

Guar Gum is the natural gel-forming fiber that many medical experts are recommending as a new, effective diet aid. It is a natural soluble fiber that comes from the guar plant, found in India and Sri Lanka. Guar Gum works because it helps to make your stomach feel full, reducing your appetite naturally. Even if you've tried other appetite suppressants before, you owe it to yourself to try Guar Gum, the one that really works.

QTY.	PROD. NO.	PRICE
100 Caps	4670	5.95

**The amount of weight you lose will depend on your body size, calorie intake and level of activity. As with starting any diet, you should first consult your physician.

84 Buy 1 Bottle GET 1 FREE (Total 2) (same item, same size)

EXHIBIT B

**NATURAL (FREE FORM)
AMINO ACID TABLETS**
Sugar, Starch and Preservative Free

L-TRYPTOPHAN Tablets "NATURE'S TRANQUILIZER"
In addition to being necessary to build high quality protein, L-Tryptophan has come to be known as Nature's Tranquilizer. It is the precursor of serotonin, a chemical messenger of the brain. Serotonin has been found to be useful as an aid for relieving depression and inducing sleep.

200 mg.			500 mg.			667 mg.		
QTY.	PROD. NO.	3 FOR	QTY.	PROD. NO.	3 FOR	QTY.	PROD. NO.	3 FOR
30	2110	4.80	30	3890	9.85	30	2170	11.20
100	2112	14.40	100	3892	28.35	100	2172	32.55
250	2113	33.70						

Puritan's Pride now offers you the benefit of 15 individual amino acid supplements. Each is supplied in the natural "L" form, the form utilized by your body.

	QTY.	PROD. NO.	3 FOR
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L-ARGININE 500 mg. Tablets
L-Arginine stimulates the release of HGH (human growth hormone). HGH improves the body's immune systems, aids the healing process, and promotes the formation of DNA & RNA needed to increase muscle mass and decrease body fat.

	50	90	3.90
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L-ORNITHINE 500 mg. Tablets
As with L-Arginine this amino acid releases HGH. However, L-Ornithine is said to be twice as effective.

	50	80	9.60
--	----	----	------

L-PHENYLALANINE 500 mg. Tablets
Your body uses this essential amino acid to produce the neurotransmitters responsible for your positive mood, alertness and drive.

	50	150	9.60
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L-GLUTAMINE 500 mg. Tablets
This important amino acid is one of the few nutrients that can pass through the selective blood barrier in the brain. Once in the brain, it is broken down into glutamic acid, a potent energy source for high level brain activity.

	50	3040	6.40
	100	3042	11.60

L-CYSTEINE 500 mg. Tablets
Research is concentrating on this amino acid's ability to act as a detoxicant in the body. Heavy drinking and smoking produces harmful chemicals in the body which L-Cysteine can help to destroy.

	50	100	10.45
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L-LYSINE 500 mg. & 312 mg. Tablets
New easy-to-swallow protein-coated tablet

	100	3061	4.85
	250	3063	10.95
	500	3065	19.70

Many doctors today are recommending L-Lysine as a dietary supplement to patients who suffer from herpes.

	60	8148	2.35
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48 Buy 1 Bottle GET 2 FREE (TOTAL 3) (same item, same size)

EXHIBIT B

EXHIBIT C

AMINO ACID GUIDE

L-ALANINE

- used as body fuel by tissues of the brain, nervous system and muscle
- important in converting energy to stored energy in the body's Krebs energy cycle
- glycogenic (energy storage source of glucose by the liver and muscles)
- important nitrogen source for post-injury states
- builds up the immune system, producing immunoglobulins and antibodies
- metabolizes sugars and organic acids

L-ARGININE

- necessary for optimum growth
- stimulates the release of growth hormone
- important to muscle metabolism; acts as a vehicle for transport, storage and excretion of nitrogen
- increases muscle mass while decreasing the amount of body fat
- plays an important role in post-injury problems such as weight changes, nitrogen balance and bone healing
- increases collagen, the main supportive fibrous protein found in bone, cartilage and other connective tissue
- stimulates the immune system
- combats physical and mental fatigue
- increases spermatogenesis
- used in the treatment of hepatic (liver) disorders
- transforms to L-Ornithine and urea
- promotes the detoxification of ammonia which is poisonous to living cells.

L-ASPARTIC ACID

- increases resistance to fatigue
- involved in the formation of RNA and DNA, the chemical bases of heredity and carriers of genetic information
- salts of aspartic acid increase stamina and endurance
- protects the liver and promotes normal cell function
- builds up the immune system, producing immunoglobulins and antibodies

L-CITRULLINE

- helps recovery from fatigue
- stimulates the immune system; therefore, beneficial in the presence of any illness, disease, traumatic injury or wound
- metabolizes to L-Arginine
- detoxifies ammonia which is poisonous to living cells

L-CYSTEINE

- found to increase hair growth by as much as 100%
- effective in preventing not only hangovers but brain and liver damage from alcohol
- helps prevent damage from the 4 effects of cigarette smoke
- detoxifies many harmful chemicals
- helpful in the treatment of rheumatoid arthritis
- promotes healing and the immune system

L-CYSTEINE

- essential for the formation of skin and hair
- promotes recovery from surgical operations and burns
- used in the treatment of respiratory disorders such as chronic bronchitis
- stimulates white blood cell activity in the immune system necessary for the resistance to disease

L-GLUTAMIC ACID

- especially important in brain metabolism
- functions as a brain fuel serving as an excitatory neurotransmitter
- transports potassium across the blood brain barrier
- combines to form L-Glutamine and in the process picks up ammonia radicals. This is the only method the brain has of detoxifying ammonia.
- instrumental in the metabolism of other amino acids
- metabolizes sugars and fats
- increases the blood sugar level; used in the treatment of hypoglycemia

L-GLUTAMINE

- sustains mental ability
- involved with brain metabolism
- along with L-Glutamic Acid is used as a brain fuel
- used in the treatment of alcoholism; can protect against alcohol poisoning
- has been used in the treatment of schizophrenia and senility

GLYCINE

- of special value as a source of creatine which is essential for muscle function, breaking down glycogen and freeing energy
- produces gluconic acid which mobilizes glycogen (a stored energy source of glucose) from the liver
- builds up the immune system, producing immunoglobulins and antibodies
- acts as a nitrogen pool for the synthesis of non-essential amino acids
- effective for hyperacidity (used in many gastric antacid agents)

L-MISTIDINE

- used in the treatment of allergic diseases
- used in the treatment of rheumatoid arthritis
- effective in the treatment of ulcers of the digestive organs
- important in the production of red and white blood cells; used in the treatment of anemia

L-ISOLEUCINE

- primarily metabolized in muscle tissue
- essential to the formation of hemoglobin
- should always be in well-balanced proportion with L-Leucine and L-Valine

For educational purposes only. Not to be construed or used as labeling for any product.

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Complaint

EXHIBIT C

AMINO ACID GUIDE

L-LEUCINE*

- metabolized in muscle tissue
- promotes healing of skin and broken bones
- lowers elevated blood sugar levels
- should always be in well balanced proportion with L-Valine and L-Isoleucine

L-LYSINE*

- inhibits the growth of viruses
- used in the treatment of herpes simplex virus
- produces L-Carnitine which improves stress tolerance and fat metabolism and has an anti-fatigue effect
- promotes bone growth by helping to form collagen, the fibrous protein which makes up bone, cartilage and other connective tissue
- aids in the absorption of calcium

L-METHIONINE*

- is lipotropic, preventing excessive fat buildup in the liver
- helps prevent premature hair loss
- interacts with other body substances to detoxify harmful compounds
- is included in nutritional supplementation as an anti-fatigue agent

L-ORNITHINE

- stimulates the release of growth hormone which increases muscle mass while decreasing the amount of body fat
- helps build up the immune system
- promotes liver function and regeneration
- important in the formation of urea, detoxifying ammonia which is poisonous to living cells
- promotes healing

L-PROLINE

- extremely important for the proper function of joints and tendons, as well as good heart muscles
- glycogenic (energy storage source of glucose by the liver and muscles)
- a major constituent of collagen, the main fibrous protein found in bone, cartilage and other connective tissue

L-PHENYLALANINE*

- produces and maintains an elevated and positive mood, alertness and ambition
- enhances learning and memory
- produces neurotransmitters which control impulse transmission between nerve cells
- is involved in dopamine transmission
- used in the treatment of certain types of depression
- suppresses appetite

L-SERINE

- glycogenic (energy storage source of glucose by the liver and muscles)
- builds up the immune system, producing immunoglobulins and antibodies

TAURINE

- found in high concentrations in the tissues of the heart, skeletal muscles and central nervous system
- used to treat some forms of epilepsy by controlling seizures

L-THREONINE*

- is lipotropic, preventing fatty buildup in the liver
- glycogenic (energy storage source of glucose by the liver and muscles)
- essential to normal growth
- generally low in vegetarian diets
- builds up the immune system, producing immunoglobulins and antibodies
- is an important constituent of collagen and elastin proteins

L-TRYPTOPHAN*

- used by the brain to produce the neurotransmitter serotonin which results in a calming effect
- used in the treatment of insomnia, stress, anxiety and depression
- stimulates the release of growth hormone which burns body fat and acts as a natural weight control
- used in the treatment of migraines

L-TYROSINE

- plays an important role in the function of the adrenal, pituitary and thyroid glands
- generates red and white blood cells
- elevates mood
- is used in the treatment of anxiety, depression and insomnia
- produces Melanin, the skin and hair pigment
- produces norepinephrine, an appetite inhibitory neurotransmitter that suppresses appetite
- stimulates the release of growth hormone which causes muscle growth and reduces body fat

L-VALINE*

- glycogenic (energy storage source of glucose by the liver and the muscles)
- metabolized in muscle
- should always be in well balanced proportion with L-Leucine and L-Isoleucine
- used in the treatment of severe amino acid deficiencies caused by addictions

* Essential Amino Acid © Roger Prince 1984
Prince Enterprises, Santa Cruz, CA Used with permission

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EXHIBIT D

ATTENTION MEN!

**PROSTEX
Can Help You!**

If you are over 50 years of age and Benign Prostatic Hypertrophy is causing these discomforts:

- Frequent urination • Painful urination
- Urgency to urinate • Dribbling
- Distended bladder due to incomplete emptying
- Sleepless nights caused by night time urination

Developed by a doctor — Prostex is a scientific combination of 3 pure amino acids in capsule form. It is safe, natural and effective when taken as directed (6 tablets daily) to relieve the symptoms of Benign Prostatic Hypertrophy. If you suffer from urinary distress, see your doctor. Then, if he diagnoses Benign Prostatic Hypertrophy, use Prostex for safe, natural relief.

QTY.	PROD. NO.	PRICE*
100	4030	9.95

*Our Special Sale does not apply.

**Increase Stamina,
Vigor and Endurance
OCTACOSANOL**

The secret of Wheat Germ Revealed
Sugar, Starch and Preservative Free

Octacosanol has been isolated as one of the most important ingredients found in wheat germ oil. In fact, a recent study at the University of Illinois has shown that Octacosanol may speed reaction time, lower cholesterol levels and strengthen muscles (including the heart).

1000 mcg. Capsules

QTY.	PROD. NO.	3 FOR
50	3820	9.85
100	3822	18.15
250	3823	42.40

5000 mcg. Tablets

Five times the potency in one convenient tablet.

QTY.	PROD. NO.	3 FOR
50	4270	12.95
100	4271	22.75



**MAN-VITES™
VITAMIN FORMULA
SPECIFICALLY FOR MEN**

These chewable tablets have a pleasing honey-nut flavor and contain 100 I.U. of Vitamin E, 100 mg. of all natural Bee Pollen, rich in protein and free amino acids, and 100 mcg. of Vitamin B-12. This combination may be what your body needs to meet your unique requirements.

QUANTITY	PROD. NO.	3 FOR
100	841	8.55

Sugar, Starch and Preservative Free

**INTERNATIONAL
TREASURES
GINSENG**

Ginseng is one of the oldest and most highly regarded herbs known to man. It has been referred to as the "root of life, the queen of herbs" and the "herb of eternal life." Ancient Asians prized it more than gold and royal families gave it as gifts.

Modern research in the Soviet Union resulted in its use by Russia's olympic athletes and her cosmonauts. It is also part of the diet of Japan's professional baseball players.

If you're looking for results, Puritan's Pride Ginseng is the finest high quality product you can buy. It is cultivated in the Asian Area which yields the greatest potency, high quality roots.

**MANCHURIAN GINSENG
250 mg. Capsules**

QTY.	PROD. NO.	3 FOR
50	1270	6.25
100	1271	11.60



**Higher Potency
500 mg. Tablets**

QTY.	PROD. NO.	3 FOR
50	3110	9.40
100	3111	17.25
250	3113	40.10

**KOREAN GINSENG
500 mg. Capsules**

QTY.	PROD. NO.	3 FOR
100	5021	16.90

NEW

Buy 1 Bottle GET 2 FREE (TOTAL 3) (same item, same size)

EXHIBIT E

Natural Pain Relief

M-KYA® (LEG-EZE)

Relieves Leg Cramp Pain.

Enjoy a full night's sleep without painful leg cramps. A non-prescription formula, M-KYA actually relaxes the knotted, tight muscles that cause painful leg cramps. Conventional pain relievers simply dull pain. M-KYA works directly on the muscles, relaxing them to relieve pain.

QTY.	PROD. NO.	3 FOR	Each capsule contains
50	3961	11.95	37 mg. 8 mg. Vitamin B ₆ and Vitamin E in a vegetable case
100	3962	22.20	

Compare to Q-Vel***

*Q-Vel is a registered trademark of 90-Products

Long Lasting Arthritis Pain Relief

MYKON PLUS Tablets

Do all those things you used to enjoy before the pain of arthritis, bursitis and rheumatism stopped you. You'll even be able to sleep the whole night through.

Take doctor-recommended MYKON PLUS Tablets for natural pain relief. MYKON PLUS is powerful yet so safe it is available without prescription. The special ingredients in MYKON PLUS work quickly to ease aches and pains giving fast, temporary relief.

QTY.	PROD. NO.	PRICE*	*Our Special Sale does not apply.
100	4090	9.85	

For Complete Formula see Page 86.

DL-PHENYLALANINE

An aid for offsetting depression and relieving pain.

Research suggests that this pure form of DL-Phenylalanine will perform a superior function as a nutritional supplement. It has been reported to aid in offsetting depression and in relief of pain.

QTY.	PROD. NO.	3 FOR
50	4050	10.95
100	4052	20.30

Each tablet contains 500 mg.

BACK-EZE NEW

Back-Eze is a brand new supplement that combines the specific nutritional elements found in healthy spines and discs. Each tablet provides essential vitamins and minerals including calcium, magnesium, zinc, potassium, vitamin C and vitamin B-6 to help fight the aching-back syndrome. Try some Back-Eze today.

*Our special sale does not apply.

QTY.	PROD. NO.	PRICE*
120	8066	9.95



until 10 pm
Eastern Time • Mon.-Fri.
Sat.-6 pm



NEW ZEALAND GREEN LIPPED MUSSEL EXTRACT NEW

It has been shown in recent studies that Green Lipped Mussel not only relieves the symptoms of arthritis, but works on the cause. For relief of one of the most painful and discomfiting ailments, try Puritan's Pride Green Lipped Mussel today!

250 mg.

Sugar & Starch Free

QUANTITY	PROD. NO.	3 FOR
100	4950	15.95

Soothe Pain Away EXTRA-ACTIVE FORMULA

COOL HOT GEL

Compare to the active ingredient of "Mineral Ice".

Apply Puritan's Pride Cool Hot Gel to get soothing relief. This remarkable creamy balm gives overnight temporary relief from the pain of arthritis, bursitis, rheumatism, soreness, stiffness and annoying aches and pains of the common cold. Experience the tingly-cool of an ice-pack then toasty heat to bring deep soothing relief. Begin to sleep peacefully again. You will actually feel the lessening of pain within 24 hours.

QUANTITY	PROD. NO.	3 FOR
8 oz.	2090	8.95

EXHIBIT F

Losing weight is easy the KLB6® way

The original natural fat fighting plan that helps put you in shape.

KLB6® Kelp, Lecithin, Vitamin B-6 and Cider Vinegar, all-in-one capsule.**

KELP — a natural food rich in iodine. It works to maintain a healthy thyroid. And of course, a sluggish metabolism is an enemy to anyone wishing to shed a few pounds.

LECITHIN — an excellent natural source of choline and inositol—two members of the B-Complex of vitamins. Lecithin is essential to health and is of special interest if you're concerned about weight reduction. It is a lipotropic agent that disperses fat globules in the body and also appears to be involved in keeping down the cholesterol level.

B-6 — functions as a coenzyme involved in protein and fat metabolism when used in conjunction with kelp, lecithin and cider vinegar.

CIDER VINEGAR — a natural and rich source of potassium and other associated minerals.

6 KLB6 capsules daily contain	QTY.	PROD. NO.	3 FOR
Vitamin B-6 (Pyridoxine HCl)	21 mg	100	1210 5.95
Soya Lecithin	600 mg	250	1213 13.25
Kelp	150 mg		
Cider vinegar	240 mg		

For those who prefer a higher potency tablet

ULTRA KLB6®**

Sugar, Starch and Preservative Free

This formulation offers what we believe to be the highest potency of this ideal combination in a tablet. ULTRA KLB6 tablets provide an ideal supplement to the now-famous 1000 calories per day diet that is being followed successfully by many thousands throughout the country.

QTY.	PROD. NO.	3 FOR	U.S. RDA
Three Ultra KLB6 tablets contain			
Lecithin			200 mg
Vitamin B-6 (Pyridoxine HCl)			50 mg 2500
Kelp			100 mg
Cider vinegar			240 mg

QTY.	PROD. NO.	3 FOR
100	1240	6.95
250	1243	15.80
500	1245	29.25



until 10 pm Eastern Time - Mon.-Fri. Sat.-6 pm

Lose weight naturally with... FATBUSTER™ DIET TEA..

- NO caffeine
- NO side-effects
- aids in digestion
- calms tense nerves

Share in the ancient Chinese secret for weight loss! This exclusive tea contains Chinese herbs such as ginseng, comfrey and other herbs, carefully blended according to a thousand-year old oriental formula. The result is a flavorful beverage that actually helps you shed unwanted pounds! When taken after every meal, the special combination of herbs filters through fatty substances, aiding your body in eliminating them, and as a bonus, the delicious taste and aroma have a calming effect on your nerves, making you feel refreshed and rejuvenated.

QTY.	PROD. NO.	PRICE*
30 Tea Bags	5686	8.95

*Our special rate does not apply.

HERBAL CELLULEX FORMULA

Compare to Herbalife's® Cell-U-Loss

Millions of dieters have used this unique herbal-vitamin formula as part of their herbal diet weight loss plan. Herbal Cellulex is a special herbal formula fortified with natural Vitamin C, Potassium and Iron. You also get the famous Kelp, Lecithin and Cider Vinegar "fat fighters" plus 6 herbal extracts.

U.S. RDA*	QUANTITY	PRODUCT NO.	3 FOR
Three Herbal Cellulex tablets contain			
Vitamin C (with Ascorbic Acid)	250 mg	417	
Potassium	20 mg	90	4002 12.95
Iron	21 mg	50	

plus 1000 mg. of a special combination of the following powdered extracts: Kelp, Lecithin, Cider Vinegar, Ginseng, Comfrey and Iron. In a dose of 100 mg. of Kelp, 30 mg. Lecithin and 100 mg. Cider Vinegar.

**The amount of weight you lose will depend on your body size, calorie intake and level of activity at each eating and diet. You should first consult your physician.

Buy 1 Bottle GET 2 FREE (TOTAL 3) (same item, same size)

Complaint

EXHIBIT G



For Dieters and Cholesterol Watchers!

Low Fat Cooking with Diet Brush

This amazing brush has high technology polymer fibers that attract grease like a magnet, but repel other liquids. Brush it across the top of soups, stews and roasts to skim off the floating fat. Stir with it, and it removes from deep down. Wipe bacon, french fries and hamburgers to reduce fat and calories. Works better and cheaper than paper towels. Brush washes clean in sink or dishwasher.

QTY.	PROD. NO.	PRICE*
1	5679	4.95

*Our special sale does not apply.

SHAKE-A-WEIGH
Adds flavor to your diet while suppressing your appetite



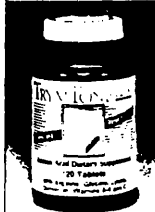
This great tasting seasoning contains an appetite suppressant, a diuretic to reduce water retention, enzymes to break down food and Pantothenic Acid (B5) which helps food to pass rapidly through your digestive tract allowing less time to absorb calories.

Shake-A-Weigh is a natural assortment of herbs and spices you can sprinkle on salads, soups, meats, etc., to enhance the flavor of food. Use it like any flavoring or spice.

QTY.	PROD. NO.	PRICE*
1	5675	7.95

*Our Special Sale does not apply.

TRYMTONE 1200
All-Natural Amino Acid Dietary Supplement



A natural weight loss helper derived from vegetarian sources specially formulated for those concerned with their nutritional well-being. This safe, drug-free amino acid dietary supplement gives you the power of three essential amino acids L-Arginine, L-Glycine & L-Lysine along with 15 mg. Pyridoxine HCl, which acts as a co-enzyme in carbohydrate, protein and fat utilization.

QTY.	PROD. NO.	1 BOTTLE FOR*
120	5687	15.95

*Our special sale does not apply.

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Buy 1 Bottle GET 2 FREE (TOTAL 3) (same item, same size)

GLUCOMANNAN**
500 mg. Capsules

Feel Full, Satisfied and Eat Less

When taken with 8 ounces of water, the Glucomannan Capsules instantly start to form a high fiber gel in your stomach. This gel provides you with the bulk you need to curb your appetite before you take in unnecessary calories. In addition, Glucomannan helps your body to process your food easier and faster. Therefore many of the calories you do take in pass through your digestive tract undigested without adding inches to your waistline. Helps you lose weight without harmful drugs, chemicals or stimulants.

QTY.	PROD. NO.	3 FOR
90	1891	14.90
250	1893	37.25

Get That Full Feeling Naturally...

GUAR GUM Capsules**

It's Natural, Safe and Works Fast!

Guar Gum is the natural gel-forming fiber that many medical experts are recommending as a new, effective diet aid. It is a natural soluble fiber that comes from the guar plant, found in India and Sri Lanka.

Guar Gum works because it helps to make your stomach feel full, reducing your appetite naturally. Even if you've tried other appetite suppressants before, you owe it to yourself to try Guar Gum; the one that really works.

QTY.	PROD. NO.	3 FOR
100	4670	5.95

Caps

**The amount of weight you lose will depend on your body size, calorie intake and level of activity. As with starting any diet, you should first consult your physician.

EXHIBIT H

Reduce Excess Body Water
Natural Herbal Diuretics

Yeast, Sugar, Salt & Preservative Free
WATER PILL™ TABLET
with POTASSIUM

This totally protein coated Water Pill Tablet (diuretic) is fortified with Potassium.

Each Water Pill with Potassium Tablet Contains:

Bucho Leaves Powder	50 mg.
Uva Ursi Leaves Powder	50 mg.
Parley Leaves Powder	50 mg.
Juniper Berries Powder	10 mg.
Potassium from Gluconate	20 mg.

QTY.	PROD. NO.	PRICE
50	2210	3.75
100	2212	6.85
250	2213	15.95

WATER PILL™ TABLET
with IRON & POTASSIUM

Yeast, Sugar, Salt & Preservative Free
Helps reduce excess body water, and replace lost iron and potassium.

Each Water Pill with Iron & Potassium Tablet Contains:

Bucho Leaves Powder	50 mg.
Uva Ursi Leaves Powder	50 mg.
Parley Leaves Powder	50 mg.
Juniper Berries Powder	10 mg.
Potassium from Gluconate	20 mg.
Iron (Ferrous Gluconate)	5 mg.

*Three (3) tablets daily provide 100% of the Recommended Daily Allowance of iron for adults and children over 12.

QTY.	PROD. NO.	PRICE
50	2380	4.70
100	2382	8.70
250	2383	19.95

Lose weight fast while you spoil yourself with either a luscious chocolate, creamy vanilla, or delicious strawberry taste.

NATURE'S BOUNTY®

SLIM® QUICK™

Imagine the richest, thickest and most luscious shake ever and you'll know just how satisfying Slim Quick really is. The best part about indulging yourself with this rich diet shake is that with every passing day on this meal replacement plan you'll be closer to your goal of a new slimmer you.

Fortified with FIBER, CALCIUM and 20 Vitamins & Minerals

Chocolate	QTY.	PROD. NO.	PRICE
	14 oz.	5581	10.95

Vanilla	QTY.	PROD. NO.	PRICE
	14 oz.	5565	10.95

Strawberry	QTY.	PROD. NO.	PRICE
	14 oz.	5567	10.95

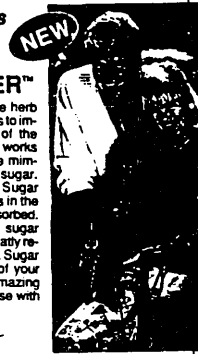


Stop Sugar Calories before they make it to your waistline.

SUGAR BLOCKER™

New Sugar Blocker contains the herb Gymnema Sylvestre which helps to impede the absorption of some of the sugar you eat. Sugar Blocker works because it's molecular structure mimics the molecular structure of sugar. When taken before a meal, Sugar Blocker occupies the same sites in the small intestine where sugar is absorbed. With these sites blocked, the sugar passes through your system greatly reducing assimilation by the body. Sugar Blocker itself also passes out of your body eventually, making this amazing new food supplement safe to use with no side effects.

QTY.	PROD. NO.	PRICE
90	5696	14.95



Buy 1 Bottle GET 1 FREE (Total 2) * Buy 2 Bottles GET 3 FREE (Total 5) 83

EXHIBIT I

Is it really possible to lose weight while you still eat most of your favorite foods?

Yes! FIBER DIET lets you do it!

Sugar, Starch & Preservative Free

Fiber Diet is an all natural food supplement that helps you lose weight while improving your diet. It helps you look and feel great. Here's how it works... Fiber Diet is a special combination of grain and fruit fiber. Recent medical research confirms that a high fiber diet is healthier and an effective, natural way to lose weight and keep it OFF! You simply take Fiber Diet tablets with water 15-30 minutes before you eat. You can eat what you want, but it is always sensible to avoid highly processed food, sugar or fat. Fiber Diet absorbs water to give you a full feeling and cut your hunger so you naturally eat less, and so, you lose weight. Fiber Diet is completely free of drugs! It has no artificial colors. There is no caffeine or sodium (salt). So you can use Fiber Diet with confidence for as long as you need.



QTY.	PROD. NO.	3 FOR
120	4122	6.95
250	4123	13.20
500	4125	21.95

Diet without hunger . . . the natural way

SPIRULINA 500 mg. Tablets

Sugar, Starch and Preservative Free

People are reporting fast weight loss of 20 pounds and more . . . without hunger! The best thing about Spirulina is that it is totally natural. It is a unique type of vegetable plankton that grows in the pure lake waters of Central America and Africa. Spirulina contains up to 65% protein plus an incredible amount of vitamins and minerals.

Taken before meals it helps turn off your brain's hunger center. It cuts your drive to eat, so you stick to your diet.

QUANTITY	PROD. NO.	3 FOR
60	3281	6.80
500	3285	46.50

Makes a delicious drink to help you lose weight fast

PURITAN'S PRIDE SLIM™

Nutritionally Balanced Diet Meal Replacement with Fiber and NutraSweet!

Our most delicious formula ever! Mixed with skim milk Puritan's Pride Slim tastes like a rich chocolate candy bar. The flavor comes from real chocolate, natural carbohydrate sweetener and NUTRA-SWEET which adds sweetness with almost no calories. PLUS it's loaded with healthful fiber to fill

you up. Try Puritan's Pride Slim today and start losing weight. It's nutritious, inexpensive and delicious!

QTY.	PROD. NO.	1 FOR
16 oz. (1 lb.)	2280	16.65

Serving Size 1 oz.		Serving with		
Serving per 16 oz. container 16		8 Fl. Oz. Skim Milk**		
Each Serving Provides:	90	17 gms.	30 gms.	1 gm.
Calories	17 gms.	30 gms.	1 gm.	2500 mg.
Protein	30 gms.	1 gm.	2500 mg.	
Carbohydrate	1 gm.	2500 mg.		
Fat	2500 mg.			
Fiber (Dietary)				
PERCENTAGE OF U.S. RECOMMENDED DAILY ALLOWANCE (U.S. RDA)				
Protein	40%	Iron	35%	
Vitamin A	35%	Vitamin D	35%	
Vitamin C (Ascorbic Acid)	35%	Vitamin E	35%	
Vitamin B-1 (Thiamine)	35%	Vitamin B-6	35%	
Vitamin B-2 (Riboflavin)	35%	Folic Acid	25%	
Niacinamide	35%	Vitamin B-12	35%	
Calcium	50%	Phosphorus	40%	
		Iodine	35%	
		Magnesium	35%	
		Zinc	35%	
		Copper	35%	
		Selenium	35%	
		Pantothenic Acid	35%	
		Manganese	1 mg.	
		Potassium	640 mg.	
		**No U.S. RDA established		
		***Vitamin A & D, Protein Fortified		
		Phenylethylamine, carnitine, Phenylethylamine		
		As with starting any diet, you should consult your physician.		

Double Rich Chocolate Flavor

NutraSweet is a registered trademark of G.D. Searle & Co.

42 Buy 1 Bottle GET 2 FREE (TOTAL 3) (same item, same size)

EXHIBIT J

A Perfect Combination for Healthy Blood **CHOLESTEROL FREE**

Natural EPA Softgel Capsules with Odorless Garlic

Sugar, Starch and Preservative Free

Medical evidence continues to indicate that fish oils can substantially reduce cholesterol and blood pressure. New EPA with Garlic from Puritan's Pride is a unique combination of fish oils combined with odorless garlic to maximize your nutritional benefits. Now you can have the combined benefit of both EPA (marine lipid concentrate) and natural garlic all in one easy to swallow softgel capsule.

Each EPA with Garlic Capsule contains:

Marine Lipid Concentrate	1000 mg
EPA (Eicosapentaenoic Acid)	180 mg
DHA (Docosahexaenoic Acid)	120 mg
Garlic Powder	50 mg
Vitamin E (D-Alpha Tocopherol)	7.0 mg
Ascorbyl Palmitate	7.0 mg
Lemon Oil	1.5 mg

QTY.	PROD. NO.	PRICE	SALE
50	6330	8.95	5.25
100	6332	17.90	9.45
250	6335	27.40	21.95

Don't Let Cataracts Dim Your Vision **NEW**

EYE-VITES® Tablet

A Nutritional Breakthrough in Cataracts Prevention

An alarming 2 out of 3 Americans over age 60 develop cataracts, a condition that clouds the lens of the eye and blurs the vision. For most cataracts sufferers, the usual surgical solution is an unpleasant alternative to the problem. But now, thanks to the efforts of a group of dedicated vision scientists, there's Eye-Vites — the nutritional approach to the prevention of age related cataracts. The potent anti-oxidants and micro-nutrients in Eye-Vites combine to help prevent the formation of cataracts. Research has proven that patients undergoing anti-oxidant therapy were 70% less likely to develop cataracts. Even if you already have cataracts you owe it to yourself and your sight to try Eye-Vites to help stabilize your problem. It's safe, natural and available to you without a prescription.

QTY.	PROD. NO.	PRICE
60	5626	16.95

*Our special sale does not apply.

86 Buy 1 Bottle GET 1 FREE (Total 2)

Natural EPA Marine Lipid Concentrate 1000 mg. Capsules **CHOLESTEROL FREE**

Sugar, Starch and Preservative Free

Now you can increase your intake of EPA and DHA, the two essential Omega-3 fatty acids without having to eat large amounts of oily fish. Just one capsule of Puritan's Pride EPA Marine Lipid Concentrate provides 180 mg. of EPA (Eicosapentaenoic acid) and 120 mg. of DHA (Docosahexaenoic acid) plus 1 I.U. of natural Vitamin E as an antioxidant. Puritan's Pride is proud to offer you such a beneficial natural supplement. Order your supply today!

QTY.	PROD. NO.	PRICE
50	3430	5.50
100	3832	9.95
250	3835	22.95

An Exciting Blend of Nutrients to Help Sharpen Your Mind

MEMORY BOOSTER™

Memory Booster from Puritan's Pride combines these special natural ingredients to work together as an aid to memory retention and mental alertness.

Two Memory Booster tablets provide:

- L-Glutamine 250 mg. — An important amino acid used by the brain as an energy source for high level brain activity.
- Ribonucleic Acid (RNA) 250 mg. — A key factor for cell reproduction vitally important to living cells and believed to be a memory and learning component that assists the brain.
- L-Phenylethylamine 250 mg. — An amino acid capable of producing Epinephrine, a vital element of healthy neuroactivity.
- Choline Bitartrate 250 mg. — Part of the Vitamin B-Complex group and component of acetylcholine, important for nerve impulse transmission.
- Gotu Kola 250 mg. — A widely used herb believed to avoid mental fatigue and improve mental acuity.
- Lecithin 1000 mg. — A rich source of choline which has been shown to aid the memory and learning processes of the brain.

QTY.	PROD. NO.	PRICE	SALE
60	2070	8.95	
100	2072	16.45	
500	2073	73.95	

* Buy 2 Bottles GET 3 FREE (Total 5)

EXHIBIT K

KLB6 DIET MIX[®]

Many people who have tried other diet drinks find them difficult to tolerate and not nearly as satisfying. A few years ago we introduced KLB6 Diet Mix, a much better diet plan. Used by millions of successful dieters, KLB6 Diet Mix is the exclusive formula fortified with kelp, lecithin, and Vitamin B-6. Its vanilla flavor and luscious chocolate flavor makes it the most delicious, easy to take, effective weight loss plan that can work for you.

Taken as directed, twice a day, KLB6 Diet Mix provides 100% of the U.S. RDA of all the most important vitamins and minerals plus 80% of your protein requirement. There is no easier way to lose weight while maintaining sound nutrition.

Chocolate

(tastes like a rich chocolate shake)

QUANTITY	PROD. NO.	3 FOR
14 oz.	2600	11.95

Vanilla Flavor

(tastes like a creamy vanilla shake)

QUANTITY	PROD. NO.	3 FOR
14 oz.	2590	11.95

KLB6 GRAPEFRUIT DIET[®]

The Ultimate Grapefruit Diet

3 Powerful Diet Aids in 1 Formula

- KLB6[®] • Grapefruit Extract
- Glucomannan

Puritan's Pride brings you the ultimate grapefruit diet formula to help you lose weight. You get the famous KLB6 combination that helps keep your body active so you can burn calories. Grapefruit extract works as a "fat melter" to stimulate your metabolism and suppress the appetite. The Glucomannan in KLB6 Grapefruit Diet forms a natural high fiber gel in your stomach to give that feeling of fullness. Dieting is so much easier without those nagging hunger pains. Follow the diet plan provided and start losing weight quickly and safely.

FOUR (4) TABLETS PROVIDE:

Grapefruit Extract	800 mg	Kelp	75 mg
Glucomannan	800 mg	Cider Vinegar	100 mg
Vitamin B-6	20 mg	Live Lignin	25 mg
Lecithin	200 mg	L-Phenylalanine	25 mg

*100% of the U.S. Recommended Daily Allowance for adults and children 12 or more years of age for Vitamin B-6.

KLB6[®] is a licensed registered trademark.

QTY.	PROD. NO.	3 FOR
100	3970	8.95
250	3973	20.90
500	3975	38.60

CO ENZYME Q-10

10 mg. Tablets and 75 mg. Capsules

Co Enzyme Q-10 has been the subject of important research for the past 30 years. This nutrient reportedly plays a role in the body's production of adenosine tri-phosphate, the basic energy component of the cell. Popular as a cardiovascular supplement in Japan, Co Enzyme Q-10 is now available to you from Puritan's Pride.

10 mg. Tablets

QTY.	PROD. NO.	3 FOR
50	4710	15.95

75 mg. Capsules

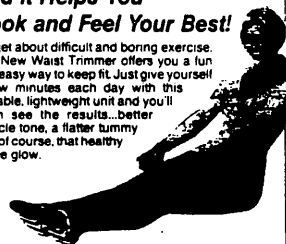
QTY.	PROD. NO.	3 FOR
30	5810	39.95

WAIST TRIMMER

It's Fun... It's Easy and It Helps You

Look and Feel Your Best!

Forget about difficult and boring exercise. The New Waist Trimmer offers you a fun and easy way to keep fit. Just give yourself a few minutes each day with this portable, lightweight unit and you'll soon see the results...better muscle tone, a flatter tummy and of course, that healthy active glow.



QUANTITY	PROD. NO.	PRICE	SALE
1	5644	6.99	2.99*

*Our special sale does not apply.

ORIENTAL HERBAL DIET

Thousands of people have discovered the Oriental Herbal Diet. It's a blend of Ephedra and Glucomannan from the Orient. Also contains vitamins B-6, lecithin, kelp and cider vinegar!

QTY.	PROD. NO.	3 FOR
84	4770	14.95



Buy 1 Bottle GET 2 FREE (TOTAL 3) (same item, same size)

EXHIBIT L

FOOD SUPPLEMENTS



GINSANA

NEW

Concentrated Herbal Extract Helps Build Physical Endurance and Mental Alertness

Years of research studies have shown that endurance, mental alertness, cardiovascular performance and oxygen intake, were improved among Ginsana users. Developed in Switzerland, Ginsana is made of the finest standardized Ginseng extract G115. This all natural, non-habit forming non-allergenic herbal food supplement is available to you in easy-to-take softgel capsules. Order some today!

QTY.	PROD. NO.	PRICE*
30	8067	14.95

*Our special sale does not apply.

INTERNATIONAL TREASURES

GINSENG

Sugar, Starch & Preservative Free



Ginseng is one of the oldest and most highly regarded herbs known to man. It has been referred to as the "root of life, the queen of herbs" and the "herb of eternal life." Ancient Asians prized it more than gold and royal families gave it as gifts.

Modern research in the Soviet Union resulted in its use by Russia's Olympic athletes and her cosmonauts. It is also part of the diet of Japan's professional baseball players.

If you're looking for results, Puritan's Pride Ginseng is the finest high quality product you can buy. It is cultivated in the Asian Area which yields the greatest potency, high quality roots.

**MANCHURIAN GINSENG™
250 mg. Capsules**

QUANTITY	PROD. NO.	3 FOR
50	1270	6.25
100	1271	11.60

**Higher potency
500 mg. Tablets**

QUANTITY	PROD. NO.	3 FOR
50	3110	9.40
100	3111	17.25
250	3113	40.10

**KOREAN GINSENG
500 mg. Capsules**

QUANTITY	PROD. NO.	3 FOR
100	5021	16.90



Maintain Your Natural Energy, Vitality and Good Health!

Recent articles in a leading magazine and numerous requests led our Research and Development team to offer this Nucleic Acid supplement which nutritionists are excited about!

**RNA/DNA
Ribonucleic Acid & Deoxyribonucleic Acid**

Each RNA/DNA tablet contains:
RNA (Ribonucleic Acid) 100 mg
DNA (Deoxyribonucleic Acid) 100 mg
In a base containing 400 mg of Dried Deionized Brewer's Yeast.

QTY.	PROD. NO.	3 FOR
100	2150	7.65
250	2153	17.80
500	2155	33.20

Sugar & Starch Free

ORGANIC GERMANIUM

NEW

This fantastic nutrient has become one of the most talked about minerals. Recent studies show a wide variety of nutritional value and health benefits.

QTY.	PROD. NO.	3 FOR
60	5451	11.95

Buy 1 Bottle GET 2 FREE (TOTAL 3) (same item, same size)

Eye Care Products


A Nutritional Supplement for Healthy Eyes and Vision

EYE-VITES® Tablets

NEW

Eye-Vites is a nutritional formula created to supplement your diet with the nutrients you need to help maintain healthy eyes and vision. Eye-Vites contain zinc, the mineral many researchers believe is essential for ocular nutrition, plus vitamins A, C, and E, the antioxidants involved in important metabolic processes in the eye. Taken daily, Eye-Vites are a safe, natural way to supplement your diet with the nutrients you need for healthy, clear vision.

QTY.	PROD. NO.	PRICE
60	5626	16.95



NEW

This photo shows how there is no longer any evidence of dark circles after only one application on her left eye.

DARK CIRCLE EYE TREATMENT

Makes Your Dark Circles Disappear

Eliminate that fatigued look by making the unattractive dark circles under your eyes disappear. Dark Circle Eye Treatment is a new beauty discovery that therapeutically removes dark circles from the delicate area under your eyes in 2 easy steps. The Day Treatment actually makes circles go away while preventing eye makeup from creasing. The Night Treatment rejuvenates and moisturizes the dry area under your eyes where dark circles occur.

QTY.	PROD. NO.	PRICE*
2	8229	9.95

*Our special sale does not apply.



Finally... Fog Free Vision with

OPTI-SHINE PEN

Have you ever walked in from outside only to have your glasses fog up on you? One application from the easy to use Opti-Shine Pen and your glasses are fog free. The applicator pen lasts for over 200 applications. Try it today. It really works.

QTY.	PROD. NO.	PRICE
4	8091	5.00

*Our special sale does not apply.

Keep your eyeglasses from slipping off.

OPTI-GRIP PEN

Just brush Opti-Grip on frame nosepieces and keep your eyeglasses or sunglasses exactly where you want them, all day long.

QTY.	PROD. NO.	PRICE
4	8088	5.00

*Our special sale does not apply.

NEW

EYE PUFFINESS MINIMIZER

Help Reduce Undereye Puffiness and Swelling

Help reduce the early morning puffiness and swelling that can occur under the eyes with this soothing, cool gel. Use it in the morning before applying make up. It's a great way to begin your daily beauty regimen.

QTY.	PROD. NO.	PRICE*
.5 oz.	8239	5.95

*Our special sale does not apply.

Condition dry, brittle eyelashes!

EYE-LASH OIL

Used nightly this unique blend of oils helps to build stronger healthier eyelashes. In just days you'll see the difference. Try some today!

QTY.	PROD. NO.	PRICE
1/3 oz.	8141	4.45

PERMA-TWEEZ

Removes Unwanted Hair...PERMANENTLY!!

Now you can save hundreds of dollars in professional electrolysis treatments with the Perma-Tweez permanent hair remover! Perma-Tweez has been clinically tested for safety and effectiveness in removing hair from face, eyebrows, arms, legs or any part of your body...in the privacy of your own home! Easy to use. No-skin-puncture safety feature. Order now and get rid of that unwanted hair...forever!!

QTY.	PROD. NO.	PRICE
1	5690	19.95

*Our special sale does not apply.

68 Buy 1 GET 1 FREE (TOTAL 2) • Buy 2 GET 3 FREE (TOTAL 5)

Complaint

120 F.T.C.

EXHIBIT N



NATURAL STEROL COMPLEX

MASS AND DENSITY ENHANCER

Each Six Tablets Contains:

GLANDULAR BALANCE AGENTS:

Mexican Wild Yam Root	1000 mg
Smitax Officialis Extract	1000 mg
Mura Pusama	1000 mg
Gota Kola	500 mg
Smitagenin	25 mg
Diosgenin	25 mg
Hecogenin	25 mg
Boron	3 mg

ANABOLIC STEROLS:

Gamma Oryzanol	500 mg
Fucoesterol	7850 mcg
Beta-Sitosterol	5963 mcg
Campesterol	3378 mcg
Sitosterol	1924 mcg
Other Naturally Occurring Sterols	10,0981 mcg

AMINO ACIDS:

Arginine	1200 mg
Ornithine	600 mg
Lysine	634 mg
Leucine	40 mg
Valine	38 mg
Isoleucine	30 mg
Phenylalanine	30 mg
Threonine	24 mg
Methionine	20 mg
Histidine	20 mg

LIPOTROPICS (FAT BURNERS):

Lipoic Acid	1040 mg
Oleic Acid	698 mg
Palmitic Acid	263 mg
Linolenic Acid	109 mg
Stearic Acid	58 mg
Lignoceric Acid	14 mg

Arachidonic Acid	13 mg
Eicosanoic Acid	11 mg
Behenic Acid	6 mg
Myristic Acid	5 mg

ENERGY STIMULANTS:

Bee Pollen	1000 mg
Guarana	500 mg
Korean Ginseng	100 mg
Cytochrome C	100 mg
Inosine	100 mg
Dimethylglycine	100 mg
Royal Jelly	30 mg

ELECTROLYTES:

Calcium	200 mg
Magnesium	100 mg
Potassium	98 mg

GROWTH AGENTS:

Octacosanol	1650 mg
RNA	60 mg
DNA	30 mg

PERFORMANCE BOTANICALS:

Capsaicin	100 mg
Alfalfa	100 mg
Dandelion Root	100 mg
Garlic	100 mg
Yellow Dock	100 mg
Licorice Root	100 mg
Hops	100 mg

POTENTIATING FACTORS AND TRACE MINERALS:

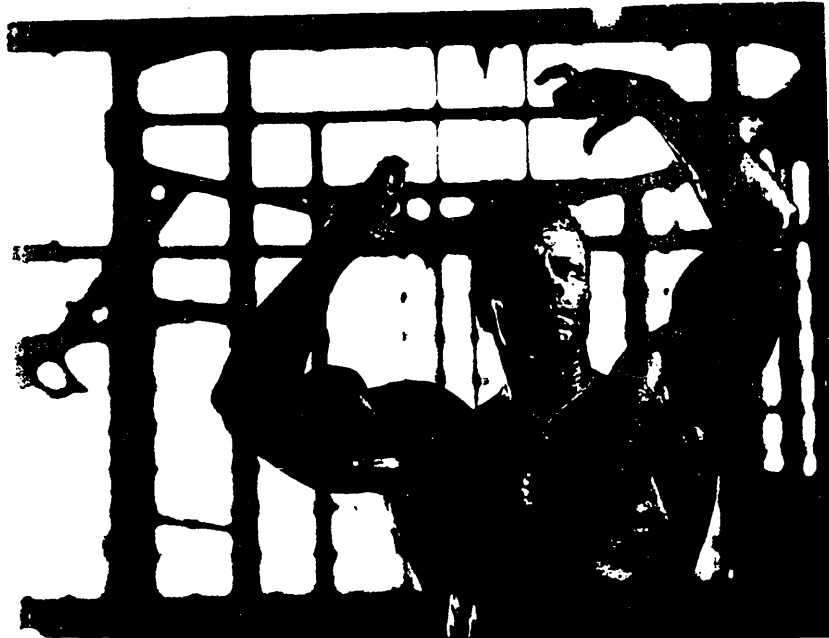
Chromium, Silicon, Silver, Lithium, Strontium, Chlorine, Cobalt, Sulfur, Nickel, Thallium, Barium, Sodium, Aluminum, Vanadium	
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UNIVERSAL
NUTRITIONAL SYSTEMS

3 Terminal Rd., New Brunswick, NJ 08901 • 1-800-872-0101 (In NJ 1-908-545-3130)

EXHIBIT N

EXHIBIT N



To maximize gains in muscle mass and strength, combine your workouts with Natural Steral Complex.

Experience the Power.

For serious growth in mass and strength, you need real power. And nothing powizes you like Natural Steral Complex by Universal. It's the most advanced, anabolic-strength formula available today for anyone looking to build a huge, massive and awe-inspiring body.

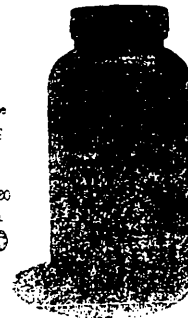
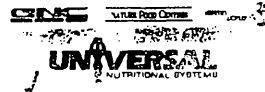
That's why serious bodybuilders and hardcore lifters swear by Natural Steral Complex as the most powerful, safest training supplement available. There's no other product nearly as potent or effective.

With an exclusive 9-way formula, Natural Steral Complex gives you more than ever before. Each time-released tablet is loaded with Anabolic Steroids, Glucocorticoid Balance Agents, and Essential Amino

Acids, Plus Electrolytes, Energizers, Lipo-proteins, Growth Agents and Performance Nutrients... synergized for maximum anabolic gains and optimum performance.

Massive arms. Rock-hard shoulders. Awesome legs. Chiseled abs. For building your body, nothing even comes close to the power of Natural Steral Complex. Experience it.

Natural Steral Complex is available in 90 and 180 tablet sizes at health food stores and gyms everywhere.



UNIVERSAL
NUTRITIONAL SYSTEMS

Complaint

120 F.T.C.

EXHIBIT O

Sports Nutrition

MUSCLE & WEIGHT GAINER

Chocolate & Vanilla Flavors

Muscle and Weight Gainer is a combination of free-form and branched chain amino acids to help build muscle mass and gain pounds. It is formulated with high quality milk and egg protein, 10 essential vitamins, 5 essential minerals, and 17 amino acids. Body Fortress Muscle & Weight Gainer gives you more body building protein, vitamins, minerals and amino acids than most other weight gain powders. For you that adds up to maximum nutritional power and weight gain potential, as much as 3 lbs. or more per week depending on how many shakes you drink. Natural energy packed carbohydrates are also included in Body Fortress Muscle and Weight Gainer to provide great taste and to help you recover quickly from your workouts.

Amino Acids Per 85 Gram Serving	With 2 Cups Whole Milk
Alanine	981 mg / 1440 mg
Arginine	970 mg / 1550 mg
Aspartic Acid	1740 mg / 2960 mg
Cysteine	225 mg / 370 mg
Glutamic Acid	4675 mg / 8035 mg
Glycine	384 mg / 640 mg
Histidine	680 mg / 1115 mg
Isoleucine	1495 mg / 2275 mg
Leucine	2235 mg / 3695 mg
Lysine	1765 mg / 3040 mg
Methionine	675 mg / 1090 mg
Phenylalanine	1230 mg / 2035 mg
Proline	2025 mg / 3360 mg
Serine	1345 mg / 2220 mg
Threonine	1010 mg / 1715 mg
Tyrosine	1140 mg / 1965 mg
Valine	1830 mg / 3075 mg

Chocolate Flavor
 PROD. NO. 5463 QTY. 24 oz.

Vanilla Flavor
 PROD. NO. 5461 QTY. 24 oz.

YOHIMBE BARK

760 mg. Tablets

History heralds the natural herb, yohimbe. Each tablet provides 760 mg. of yohimbe bark.

PROD. NO. 6351 QTY. 50 Tablets

SUPER FAT BURNERS

Super Fat Burners contains a special combination of vitamins, minerals and amino acids needed for the reduction of fat cells. The ingredients in this formula help the body's ability to burn fat, thereby promoting visible muscle definition.

Each Tablet Provides	RDA*
Choline Bitartrate	1000 mg
Inositol	500 mg
DL-Methionine	200 mg
Sea	50 mg
Retaine HCL	200 mc

In a natural base of liver and leaf.
 *U.S. Recommended Daily Allowance for adults and children 12 or more years of age.

PROD. NO. 6361 QTY. 40 Tablets

SMILAX

Smilax is a 100% pure cold processed Bio-Chelated Liquid Sarsaparilla Root Extract derived from the Smilax officinalis root. It is a highly concentrated liquid used by bodybuilders for added nutrition.

PROD. NO. 5740 QTY. 1 Fl. Oz.

Orange Flavor

CARBO-BOOSTER

Carbo-Booster Energy Drink is a combination of complex carbohydrates to help meet your energy needs during sustained sport activity or heavy training. This complex grouping of carbohydrates metabolizes at different rates and is digested slowly to provide maximum glycogen storage for prolonged energy demands.

Ingredients	Each Serving Contains:
Granulated complex carbohydrates	900 IU Vitamin A (from Beta Carotene)
Fructose, Vitamin and Mineral Mix containing:	Vitamin C 300 mg
Ascorbic Acid, Potassium	Vitamin B-1 3 mg
Citrate, Calcium Citrate, Magnesium Oxide,	Vitamin B-2 14 mg
Nucliamide, Beta Carotene,	Nucliamide 5 mg
Pyridoxine HCl, Riboflavin, Thiamine HCl and	Vitamin B-6 4 mg
Cobalamin, Citric Acid and Natural Flavors	Vitamin B-12 4 mcg
	Calcium 40 mg
	(from Calcium Citrate)
	Magnesium 110 mg
	(from Magnesium Oxide)
	Potassium 115 mg

PROD. NO. 5490 QTY. 16 oz.

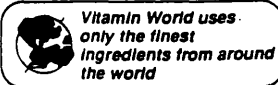


EXHIBIT P

NATURAL AMINO 1500
FREE FORM & PEPTIDE BOND

Body Fortress Amino Acids are specially formulated and scientifically balanced for body builders, power lifters and professional athletes. This formula contains a balanced blend of free form and peptide bond Amino Acids to give you optimum utilization.

Ingredients: Pharmaceutical grade Amino Acids derived from Lactalbumin hydrolysate and L-Cysteine HCL.

Typical Amino Acid Profile Per 6 Tablets	
L-Ornithine HCL	141.3
L-Lysine	434.2
L-Isovaline	198.6
L-Arginine	229.2
L-Aspartic Acid	481.3
L-Threonine	374.3
L-Serine	629.2
L-Glutamic Acid	1297.7
L-Proline	625.6
L-Cysteine	162.8
L-Alanine	388.8
L-Cysteine	250.9
L-Valine	445.3
L-Methionine	203.8
L-Isoleucine	542.3
L-Leucine	972.4
L-Tyrosine	139.7
L-Phenylalanine	374.3

Essential Amino Acids	
PROD. NO.	QTY.
5091	150 Tablets
5097	400 Tablets

ARGININE-ORNITHINE 1500

FREE FORM AMINO ACIDS

Body Fortress Arginine/Omithine 1500 combines two of the body's most important building blocks into one potent supplement. Each ingredient comes to you in its natural "L" free form state for maximum metabolic absorption and assimilation.

Each two tablets provide:	
L-Arginine (pharmaceutical grade)	1000 mg.
L-Ornithine (pharmaceutical grade)	500 mg.

PROD. NO.	QTY.
5411	60 Tablets



SUPER CUT

Super Cut is a special formulation of vitamins, minerals and amino acids needed for lean muscle development. The ingredients in this formula help the body's ability to burn fat, thereby promoting visible muscle definition.

Each two tablets contain:	
Choline	3000 mg.
Inositol	1000 mg.
dl-Methionine	400 mg.
B6	100 mg.
Betaan HCl	400 mg.
In a natural base of liver and kelp	
PROD. NO.	QTY.
5730	90 Tablets

Yeast Free CHROMAX II CHROMIUM PICOLINATE 200 mcg.

Chromium Picolinate is an organic chromium supplement. It is yeast free and highly assimilable, providing optimum effectiveness as a dietary supplement for the essential trace nutrient-chromium.

Each tablet contains:	
Chromium (Picolinate)	200 mcg.

PROD. NO.	QTY.
6390	100 Tablets

ANABOLIC BOOSTER

Branch Chain & Free Form Amino Acids

PROD. NO.	QTY.
5402	30 Tablets

DIBENCOZIDE 10 mg.

PROD. NO.	QTY.
5860	60 Tablets

GAMMA ORYZANOL 60 mg.

PROD. NO.	QTY.
5420	100 Tablets

Crystalline Pure INOSINE 500 mg.

PROD. NO.	QTY.
4570	30 Tablets



LIQUID AMINO

PROD. NO.	QTY.
837	16 Fl. Oz.

EXHIBIT Q

DIGESTIVE AIDS



Natural CHEWABLE ANTACID with Calcium

Supplies 200 mg. of Elemental Calcium
Salt, Starch and Preservative Free

A delicious fructose sweetened chewable tablet to help make life more comfortable for thousands of fuzzy stomachs. Each tablet contains 500 mg. of the active ingredient Calcium Carbonate to provide symptomatic relief and neutralize gastric acidity. Obtain relief from acid indigestion, heartburn and sour stomach with Puritan's Pride Natural Antacid.

QUANTITY	PROD. NO.	3 FOR
100	2220	4.95
250	2223	11.55
500	2225	21.45

BETAINE HYDROCHLORIDE 400 mg. Tablets

Sugar and Starch Free
As we get older, some of us may have trouble digesting the foods we eat. Puritan's Pride Betaine Hydrochloride provides acids that can naturally assist in the digestion of fats, proteins and starches. One tablet taken before meals supplies the powerful digestive aid of 400 mg. of Betaine Hydrochloride.

QUANTITY	PROD. NO.	3 FOR
100	3850	4.30
250	3853	9.90

HERBAL LAXATIVE Tablets

Safely Encourages Natural Elimination

Sugar and Starch Free
Now a natural way to obtain relief from the uncomfortable feeling of constipation. Puritan's Pride combines a mixture of natural active laxative ingredients, which include Senna Leaves, Cas-cara Sagrada and Frangula. This is a gentle all-vegetable and herb tablet.



QUANTITY	PROD. NO.	3 FOR
100	2180	4.45
500	2185	19.80

Chewable PAPAYA ENZYME Tablets

An aid to better digestion from papaya, "the Melon of the Tropics"

Preservative Free New Fruit Flavored Chewable Tablets

Puritan's Pride manufactures this natural digestive aid in pleasantly small tablets. Each Papaya tablet contains the enzyme Papain which helps you digest protein and helps release the nutritional potency of your foods and also promotes comfortable natural digestive processes.

QUANTITY	PROD. NO.	3 FOR
100	1130	3.45
250	1133	7.95
500	1135	14.95



until 10 pm
Eastern Time • Mon.-Fri.
Sat.-8 pm

66

Buy 1 Bottle GET 2 FREE (TOTAL 3) (same item, same size)

Complaint

EXHIBIT R



CALMTABS™

All Natural
Non-Habit Forming
Herbal Relaxant

Pun-tan's Pride Calmtabs offers you a gentle and safe way to relax especially when every-day stress winds you up. This special formulation gives you 6 different herbs known for their calmative properties since the days of ancient Egypt. You can enjoy Calmtabs' soothing, calm effect anytime during the day or before bedtime.

**NEW EASY-TO-SWALLOW
PROTEIN-COATED TABLET**

Each Calmtabs tablet contains:
 Ext. Valerian 1 grain
 Passiflora 1 grain
 Celery Seed 1 grain
 Calina 1 grain
 Hops 1/2 grain
 Dried Orange Peel 1/2 grain

Sugar & Preservative Free

QTY.	PROD. NO.	3 FOR
90	3261	4.95
250	3263	12.65
500	3265	23.50

NEW
Time Release
NIACIN 250 mg.

Don't miss out on the benefits of Niacin. Pun-tan's Pride now offers you a Time Release 250 mg. size capsule. This new size has been micro-coated for easy swallowing, and has been specially processed to release its activity over 8 hours. Try some today!

QTY.	PROD. NO.	3 FOR
90	5800	7.99

Natural
**EVENING
PRIMROSE
OIL**

**500 mg. Capsules
with
Natural Vitamin E
13 I.U.**



Evening Primrose Oil is especially high in the essential polyunsaturated fatty acids - cis-linoleic and gamma-linolenic acid (GLA). Both are involved in the body's synthesis of prostaglandin, the chemical regulator of many body functions. Although both are involved, it is GLA which is directly converted to prostaglandin.

Evening Primrose Oil is not refined or hydrogenated. It is virtually the only natural source, other than mother's milk, which supplies GLA directly to the diet.

Sugar, Starch and Preservative Free

QTY.	PROD. NO.	3 FOR
30	3630	10.95
100	3632	32.95
250	3633	75.98

**POTASSIUM
99 mg.**

From
potassium gluconate.

Potassium helps in sending messages through the nervous system, keeps the body fluids properly balanced and helps attract nutrients from the blood stream into the cells. Without it sugar cannot be converted into energy nor can body starch be stored for future energy demands. This nutrient is excreted daily and therefore must be replaced each day.

Sugar and Preservative Free

**YOU NEED IT
EVERY DAY!**

QTY.	PROD. NO.	3 FOR
100	1111	2.95
250	1113	6.05
500	1115	11.10
1000	1118	20.40

NEW
**BLACK CURRANT
OIL**
**460 mg. Capsules
from Black Currants**

Black Currants have been found to be a rich, natural source of GLA. GLA is essential to good health because it is involved in the body's synthesis of Prostaglandin, the chemical regulator of many body functions. Now Pun-tan's Pride is proud to offer you this new rich source of GLA.

QTY.	PROD. NO.	3 FOR
50	5600	16.50

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 Nature's Bounty, 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 90 Orville Dr., in the City of Bohemia, State of New York.

2. Respondent Puritan's Pride, 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 90 Orville Dr., in the City of Bohemia, State of New York. Puritan's Pride, Inc., is a wholly-owned subsidiary of Nature's Bounty, Inc.

3. Vitamin World, 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 90 Orville Dr., in the City of Bohemia, State of New York. Vitamin World, Inc., is a wholly-owned subsidiary of Nature's Bounty, Inc.

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

ORDER

DEFINITIONS

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

1. "*Product*" means any good 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, or under the brand name of any third party. "Product" also means any product sold or distributed to the public by third parties under any brand name of respondents, or under private labeling agreements with respondents, their successors and assigns.

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

I.

It is ordered, That respondents Nature's Bounty, Inc., Puritan's Pride, Inc., and Vitamin World, Inc., their successors and assigns, and their officers, agents, representatives, and employees, directly or through any partnership, corporation, subsidiary, division or other device, in connection with the manufacture, advertising, packaging, labeling, 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, study, research article, or any other scientific opinion or data.

II.

It is further ordered, That respondents, their successors and assigns, and their officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, advertising, labeling, packaging, offering for sale, sale, or distribution of "Sleeper's Diet," "L-Arginine," or "L-Ornithine," or any other substantially similar amino acid 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. Any such product stimulates greater production or release of human growth hormone in a user than a non-user of such product;
- B. Any such product promotes muscular development; or
- C. Any such product burns fat or otherwise alters human metabolism to use up or burn stored fat, or promotes weight loss.

For purposes of this order paragraph, "substantially similar amino acid product" shall mean any product which is of substantially similar composition or possesses substantially similar properties to Sleeper's Diet, L-Arginine or L-Ornithine.

III.

It is further ordered, That respondents, their successors and assigns, and their officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, advertising, labeling, packaging, offering for sale, sale, or distribution of L-Cysteine, L-Methionine, or any other substantially similar hair care 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 any such product will prevent or retard hair loss or promote hair growth where hair has already been lost. For purposes of this order paragraph, "substantially similar hair care product" shall mean any product that is advertised or intended for

sale over-the-counter to treat, cure or curtail hair loss or to promote hair growth where hair has already been lost, and which is of substantially similar composition or possesses substantially similar properties to L-Cysteine or L-Methionine.

IV.

It is further ordered, That respondents, their successors and assigns, and their officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, advertising, labeling, packaging, offering for sale, sale, or distribution of any hair care product or service, 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

- (1) The use of the product or service will prevent, cure, relieve, reverse, or reduce hair loss; or
- (2) The use of the product or service will promote the growth of hair where hair already has been lost,

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

B. Manufacturing, advertising, labeling, packaging, promoting, offering for sale, selling, or distributing any product that is represented as promoting hair growth or preventing hair loss, unless the product is the subject of an approved new drug application for such purpose under the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. 301 *et seq.*, provided that, this requirement shall not limit the requirements of order paragraphs III or IV.A. herein.

V.

It is further ordered, That respondents, their successors and assigns, and their officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, advertising, labeling,

packaging, 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 making any representation, directly or by implication, that any such product:

A. Cures, treats, prevents, or reduces the risk of developing any disease, disorder or condition in humans or relieves symptoms thereof;

B. Provides any weight loss or weight control benefit or otherwise provides an effective treatment for obesity;

C. Suppresses appetite, reduces the body's absorption of calories, stimulates metabolism, or reduces serum cholesterol;

D. Cures, treats, prevents, or reduces the risk of benign prostatic hypertrophy;

E. Promotes greater muscular development, endurance, strength, power, definition, or stamina, or shorter exercise recovery or recuperation time in a user than a non-user of such product;

F. Removes or diminishes dark circles under the eyes;

G. Improves mental clarity, mental concentration, mental comprehension, mental retention or mental alertness;

H. Aids digestion or promotes increased absorption of nutrients from ingested foods;

I. Relieves stress or promotes relaxation; or

J. Prevents, relieves or treats fatigue or boosts energy;

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

Provided, however, that respondents shall not be liable under this paragraph for any representation contained on a package label or package insert for a product that meets all of the following conditions:

1. The product is manufactured and distributed by a third party and is not manufactured or distributed exclusively for respondents;

2. The product is generally available at competing retail outlets;

3. The product is not identified with respondents and does not contain respondents' names or logos;

4. The product was not developed or manufactured at the instigation or with the assistance of respondents; and,

5. The product representation is not otherwise advertised or promoted by respondents.

Provided further, that the proviso in the preceding paragraph is currently identical to the "safe harbor" proviso contained in paragraph V. of the order in General Nutrition, Inc., Docket No. 9175, entered February 2, 1989. It is the intention of the parties to the order herein that the provisos shall remain identical. Therefore, except upon respondents filing a petition to reopen the proceeding herein and making a satisfactory showing that changed conditions of law or fact or the public interest warrants modification of the order herein by the Commission, respondents agree to be bound by any subsequent modifications (including vacation) of the safe harbor proviso in Docket No. 9175, without any further formal modification of the instant order.

VI.

It is further ordered, That nothing in this order shall prohibit respondents, their successors and assigns, and their officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, from making any representation that is specifically permitted in labeling for any product by regulations promulgated by the Food and Drug Administration (FDA) pursuant to the Nutrition Labeling and Education Act of 1990; moreover, nothing in this order shall prohibit respondents, their successors and assigns, and their officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, from making any representation for any drug that is permitted in labeling for any 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.

VII.

It is further ordered, That respondents, their successors and assigns, and their officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, advertising, labeling,

packaging, 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:

1. Using the name "Sleeper's Diet" or any other brand name that represents, directly or by implication, that such product has the ability to promote weight loss during sleep;
2. Using the name "Memory Booster" or any other brand name that represents, directly or by implication, that such product improves memory retention;
3. Using the name "Dark Circle Eye Treatment" or any other brand name that represents, directly or by implication, that such product removes dark circles from under the eyes; or
4. Using the name "Super Fat Burners" or any other brand name that represents, directly or by implication, that such product reduces body fat

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

VIII.

It is further ordered, That respondents, their successors and assigns, shall pay to the Federal Trade Commission, by cashier's check or certified check made payable to the Federal Trade Commission and delivered to the Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 6th and Pennsylvania Ave., NW, Washington, DC, the sum of two hundred and fifty thousand dollars (\$250,000). Respondents shall make this payment on or before the tenth day following the date of issuance of this order. In the event of any default on any obligation to make payment under this section, interest, computed pursuant to 28 U.S.C. 1961(a), shall accrue from the date of default to the date of payment. The funds paid by respondents shall, in the discretion of the Federal Trade Commission, be used to provide direct redress to consumers allegedly injured by respondents in connection with the acts or practices alleged in the complaint, and to pay any attendant costs of administration. If the Federal Trade Commission determines, in its sole discretion, that redress to consumers is impracticable or

unwarranted, any funds not used for redress shall be paid to the United States Treasury. Respondents shall be notified as to how the funds are distributed, but shall have no right to contest the manner of distribution chosen by the Commission.

IX.

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

1. All labeling, packaging, advertisements and promotional materials setting forth any representation covered by this order;
2. All materials that were relied upon by respondents to substantiate any representation covered by this order; and
3. 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 upon which respondents relied for such representation, including complaints from consumers.

X.

It is further ordered, That for a period of ten (10) years after service upon them of this order, respondents, their successors and assigns, shall notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in the respondents 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 corporations that may affect compliance obligations arising under this order.

XI.

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

to all distributors of products manufactured or marketed by respondents.

XII.

It is further ordered, That respondents shall, within sixty (60) days after 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 or intend to comply with this order.

Commissioner Azcuenaga dissenting.

STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

I dissent from the Commission's decision to issue a final decision and order against Nature's Bounty and its subsidiaries, Puritan's Pride, Inc., and Vitamin World, Inc., because the order leaves the respondents free to sell products they know, or should know, are deceptively labeled.

The proviso in paragraph V of the order states that the respondents would not necessarily be liable for false or unsubstantiated claims appearing on the labels or in the packaging of the products sold at its stores, even if it were clear that the companies had actual knowledge that those claims were unsubstantiated or untrue. I believe that the order should have provided that the respondents would be liable if they know, or should know, that the labels or packaging of any such product contains false or unsubstantiated claims.

IN THE MATTER OF

ELI LILLY AND COMPANY, 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-3594, Complaint, July 28, 1995--Decision, July 28, 1995

This consent order requires, among other things, an Indiana producer of pharmaceutical products to: ensure that the acquired company, PCS Health Systems (PCS), maintains an open formulary; appoint an independent Pharmacy and Therapeutics (P&T) Committee of health care professionals to objectively evaluate drugs for inclusion in the PCS open formulary; and, ensure that PCS accepts all discounts, rebates or other concessions offered by Eli Lilly's competitors for drugs that are accepted for listing on the open formulary, and to accurately reflect such discounts in ranking the drugs on the formulary. Pursuant to the modification of the proposed consent agreement, Eli Lilly would only need to obtain prior approval for an exclusive distribution agreement with McKesson Corporation. In addition, the consent order prohibits PCS and Eli Lilly from sharing proprietary or other non-public information, such as price data, obtained from Eli Lilly competitors whose drugs may be placed on a PCS formulary.

Appearances

For the Commission: *Michael D. McNeely* and *Kenneth A. Libby*.

For the respondent: *Jack Kaufman*, *Dewey Ballantine*, New York, N.Y.

COMPLAINT

The Federal Trade Commission, having reason to believe that respondent Eli Lilly and Company ("Lilly"), a corporation subject to the jurisdiction of the Commission, has entered into agreements with McKesson Corporation ("McKesson") that violate Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, that pursuant to these agreements, Lilly has commenced a cash tender offer to acquire all outstanding common shares of McKesson and intends to merge McKesson into a subsidiary of Lilly following the cash tender offer, which cash tender offer, acquisition and merger would, if consummated, 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 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, 15 U.S.C. 21, and Section 5(b) of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, stating its charges as follows:

PARAGRAPH 1. Respondent Eli Lilly and Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Indiana, with its principal office located at Lilly Corporate Center, Indianapolis, Indiana.

PAR. 2. Lilly is engaged in the development, production and sale of pharmaceutical products, including Prozac, an antidepressant (specifically, a selective serotonin reuptake inhibitor); Humulin, an injectable insulin; Ceclor, an oral antibiotic; and Axid, an anti-ulcer product (specifically, an H₂ antagonist).

PAR. 3. McKesson Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office located at One Post Street, San Francisco, California.

PAR. 4. Through its subsidiary PCS Health Systems, Inc. ("PCS"), McKesson is engaged in the business of providing pharmacy benefit management services to insurance companies, third party payors, and other members of the healthcare industry.

PAR. 5. At all times relevant herein, respondent Lilly has been, and is now, 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 Federal Trade Commission Act, as amended, 15 U.S.C. 44.

PAR. 6. Lilly and McKesson entered into an Agreement and Plan of Merger on July 10, 1994, pursuant to which Lilly commenced a cash tender offer for all outstanding shares of McKesson's common stock for \$76 per share. Following the cash tender offer, Lilly intends to merge McKesson into a subsidiary of Lilly. The total value of the cash tender offer is approximately \$3.4 billion.

PAR. 7. A relevant line of commerce within which to analyze the effects of this acquisition is the provision of pharmacy benefit management ("PBM") services by national full-service PBM firms, and any narrower markets contained therein. Other relevant lines of

commerce within which to analyze the effects of this acquisition are the development, manufacture and sale of pharmaceutical products in specific therapeutic categories, and narrower markets contained therein (including, but not limited to, the markets for injectable insulin, selective serotonin reuptake inhibitors, antidepressants, H2 antagonists, and anti-ulcer drugs).

PAR. 8. A relevant section of the country within which to analyze the effects of this acquisition is the United States.

PAR. 9. The relevant market for PBM services by national full-service PBM firms, as well as the relevant markets for pharmaceutical products in specific therapeutic categories, are highly concentrated.

PAR. 10. There are substantial entry barriers into the relevant markets. Even if new entry were to occur, it would take a long time, during which time substantial harm to competition could occur.

PAR. 11. As part of its PBM services, PCS maintains a drug formulary, which is a listing, by therapeutic category, of ambulatory drug products that are approved for use by the U.S. Food & Drug Administration, and which is made available to pharmacies, physicians, third-party payors, and other persons, to guide in the prescribing and dispensing of pharmaceuticals. Lilly pharmaceutical products are included on the PCS formulary. PCS provides a variety of other PBM services, including claims processing, drug utilization review, pharmacy network administration, and related services. PCS negotiates with pharmaceutical manufacturers, including Lilly, concerning placement on the PCS formulary, rebates, discounts, prices to be paid for pharmaceutical products purchased pursuant to pharmacy benefit plans managed by PCS, and other issues. PCS thereby influences the prices of pharmaceutical products and the availability of such products under the PCS pharmacy benefit plans.

PAR. 12. The Agreement and Plan of Merger contain a Memorandum of Understanding ("MOU") in which Lilly and McKesson agreed to investigate closing Lilly's distribution centers and having McKesson handle physical distribution of Lilly products to wholesalers and possibly be the sole distributor of Lilly products. Implementation of this MOU would force wholesalers to deal with McKesson to obtain Lilly products or deny them access to Lilly products.

PAR. 13. The effects of the proposed acquisition of McKesson by Lilly may be substantially to lessen competition 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 Federal Trade Commission Act, as amended, 15 U.S.C. 45, in the following ways, among others:

(a) Products of manufacturers other than Lilly are likely to be foreclosed from the PCS formulary;

(b) Reciprocal dealing, coordinated interaction, interdependent conduct, and tacit collusion among Lilly and other vertically integrated pharmaceutical companies will be enhanced;

(c) PCS will be eliminated as an independent negotiator of pharmaceutical prices with manufacturers;

(d) Incentives of other manufacturers to develop innovative pharmaceuticals will be diminished;

(e) Entry into the relevant markets may be more difficult because it will require entry at more than one level;

(f) Competition among drug wholesalers may be reduced because of the competitive advantage that control over Lilly drugs will provide McKesson; and,

(g) The price of pharmaceuticals is likely to increase and the quality of the pharmaceuticals available to consumers is likely to diminish.

PAR. 14. The proposed acquisition of McKesson by Lilly would, if consummated, 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.

PAR. 15. The Agreement and Plan of Merger between Lilly and McKesson violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

Commissioner Azcuenaga dissenting and Commissioner Starek recused.

DECISION AND ORDER

The Federal Trade Commission ("Commission") having initiated an investigation of the proposed acquisition by respondent Eli Lilly and Company of the stock of McKesson 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 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 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, 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 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 Eli Lilly and Company ("Lilly") is a corporation organized, existing and doing business under and by virtue of the laws of the State of Indiana, with its office and principal place of business located at Lilly Corporate Center, in the City of Indianapolis, State of Indiana.

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 the following definitions shall apply herein:

A. "*Respondent*" or "*Lilly*" means Eli Lilly and Company, its predecessors, divisions, subsidiaries, affiliates, partnerships, joint ventures, successors and assigns, and all directors, officers, employees, agents and representatives of the foregoing.

B. "*McKesson*" means McKesson Corporation, its predecessors, divisions, subsidiaries, affiliates, partnerships, joint ventures, successors and assigns, and all directors, officers, employees, agents and representatives of the foregoing.

C. "*PCS*" means PCS Health Systems, Inc., its predecessors, divisions, subsidiaries, affiliates, partnerships, joint ventures, successors and assigns, and all directors, officers, employees, agents and representatives of the foregoing.

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

E. "*Formulary*" means a listing, by therapeutic category, of branded and generic ambulatory drug products that are approved for use by the U.S. Food & Drug Administration ("FDA"), and which is made available to pharmacies, physicians, third-party payors, or other persons involved in the healthcare industry, to guide in the prescribing or dispensing of pharmaceuticals. An "Open Formulary" is a formulary that allows the inclusion of any ambulatory prescription drug product approved by the FDA for use in the United States, which the P&T Committee (defined below) determines is appropriate for inclusion in such formulary. For purposes of this order, an Open Formulary may provide truthful information stating or indicating the relative costs or benefits of drugs on the formulary.

F. "*Pharmacy Benefit Management Services*" or "*PBM Services*" means services provided by a pharmacy benefits manager, such as formulary services, negotiation of rebates or discounts from pharmaceutical manufacturers, prescription claims processing, and drug utilization review.

G. "*Formulary Services*" means the provision, development, establishment, management or maintenance of a formulary by a pharmacy benefits manager. For purposes of this order, "management" of a formulary includes the negotiation and administration of rebate or discount agreements with pharmaceutical manufacturers for drugs included on a formulary.

H. "*Lilly Non-Public Information*" means information not in the public domain that is provided to Lilly in its capacity as a pharmaceutical manufacturer by a supplier of PBM Services and that

concerns bids, proposals, contracts, prices, rebates, discounts, or other terms or conditions of sale of any person other than PCS.

I. "*PCS Non-Public Information*" means information not in the public domain that is provided to PCS in its capacity as a supplier of PBM Services by a manufacturer or seller of prescription drug products and that concerns bids, proposals, contracts, prices, rebates, discounts, or other terms or conditions of sale of any person other than Lilly.

J. "*Pharmacy and Therapeutics Committee*" or "*P&T Committee*" means a group of healthcare professionals, such as doctors, pharmacists, and pharmacologists, appointed for the purpose of evaluating prescription drug products for inclusion on a formulary.

II.

It is ordered, That respondent:

A. Within thirty (30) days from the date this order becomes final, Lilly shall cause PCS to maintain an Open Formulary. As of the date this order becomes final, the PCS "Clinical Formulary and Prescribing Guidelines 1994-1995," shall be deemed an Open Formulary that complies with this paragraph II.A.

B. Within thirty (30) days from the date this order becomes final, Lilly shall cause PCS to appoint an independent P&T Committee with the authority and responsibility to maintain the Open Formulary required by paragraph II.A above. Such P&T Committee shall make all decisions concerning the inclusion of drugs on such Open Formulary, the exclusion of drugs from such Open Formulary, and the clinical and therapeutic advice and evaluation concerning drugs on such Open Formulary, and shall operate according to the following provisions:

1. Such P&T Committee shall consist of at least nine (9) members, all of whom shall be physicians, pharmacists, pharmacologists, or other healthcare professionals.

2. A majority of the P&T Committee shall consist of persons who are not employees, officers, directors, or agents of, and who have no financial interest in: (a) Lilly, (b) PCS, or (c) any other person who has an ownership interest in Lilly or PCS. Such persons shall be referred to herein as "independent" members of the P&T Committee.

3. Each independent member of the P&T Committee shall have one vote on all decisions of the P&T Committee.

4. All members of the P&T Committee who are employees, officers, directors, or agents of, or who have a financial interest in, Lilly, PCS, or any other person who has an ownership interest in Lilly or PCS, shall not be entitled to vote on decisions of the P&T Committee.

5. All independent members of the P&T Committee shall be appointed for three-year terms, except that for the initial board, one-third of the independent members shall be appointed for one-year terms, one-third shall be appointed for two-year terms, and the remaining independent members shall be appointed for three-year terms. At the expiration of their terms, or upon the occurrence of a vacancy, members may be reappointed, or new members may be appointed, by a majority of the then-appointed independent members of the P&T Committee.

6. No independent member of the P&T Committee may be removed except for cause by vote of a majority of the independent members of the P&T Committee.

7. In performing its responsibilities in maintaining the Open Formulary, the P&T Committee shall utilize only criteria relating to safety, efficacy, FDA approved indications, side effects, contraindications, pharmacokinetics, patient compliance, physician follow-up requirements, effect on emergency room visits and hospitalizations, laboratory tests, cost, and similar objective factors. Such P&T Committee shall give no preference to the products of Lilly, or of any other person with an ownership interest in PCS, except on the basis of such objective criteria.

8. Lilly shall cause PCS to cover the costs and expenses of the P&T Committee, and Lilly shall cause PCS to indemnify the P&T Committee against any losses or claims of any kind that might arise out of its performance of functions under this order, except to the extent that such losses or claims result from misfeasance, gross negligence, willful or wanton acts, or bad faith.

9. Such P&T Committee shall maintain written records, for five (5) years from the date thereof, explaining the basis and rationale for all P&T Committee decisions relating to the exclusion of any products from, or the ranking of products on, the Open Formulary required by paragraph II.A.

C. Lilly shall cause PCS to accept all discounts, rebates or other concessions offered by any manufacturer, seller or distributor of pharmaceutical products included by the P&T Committee on the Open Formulary, and Lilly shall cause PCS to ensure that all such discounts, rebates, or concessions are truthfully and accurately reflected in determining relative rankings of products on the Open Formulary.

D. Nothing in this order shall preclude PCS from offering any formulary other than the Open Formulary to any customer.

E. Lilly shall cause PCS to provide a copy of this order to each member of the P&T Committee on or before the date of each such person's appointment to such P&T Committee.

III.

It is further ordered, That:

A. Lilly shall not provide, disclose, or otherwise make available to PCS any Lilly Non-Public Information; and

B. PCS shall not provide, disclose, or otherwise make available to Lilly any PCS Non-Public Information.

IV.

It is further ordered, That Lilly shall retain all documents, and shall cause PCS to separately retain all documents, that relate to (A) the exclusion of any prescription drug products from the Open Formulary required by paragraph II.A above, (B) any preference or ranking accorded to any prescription drug product on the Open Formulary required by paragraph II.A above, or (C) statements or indications of discounts, rebates, or other concessions, as described in paragraph II.C above, for a period of five (5) years from the date such document is created or received.

V.

It is further ordered, That Lilly shall disclose the availability of the Open Formulary as follows:

A. Lilly shall cause PCS to disclose the availability of the Open Formulary to all persons who currently have an agreement with PCS concerning PBM services or concerning the inclusion of pharmaceuticals on a formulary, by providing to each such person a letter containing the following statement within ten (10) days after initiation of contact between PCS and such person regarding renewal or extension of such person's existing agreement with PCS:

PCS maintains an Open Formulary that allows, subject to the determination of an independent Pharmacy and Therapeutics Committee, the inclusion of any ambulatory prescription drug product approved by the FDA for use in the United States. This Open Formulary will be provided to you upon request.

B. For a period of five (5) years from the date this order becomes final, Lilly shall cause PCS to provide in writing the statement set forth in paragraph V.A above to each prospective customer of PCS at the time of PCS's response to such prospective customer's request for proposal, or at the time of PCS's initial written proposal to such prospective customer, whichever occurs first.

VI.

It is further ordered, That, for a period of five (5) 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, enter into any agreement, understanding, or condition with McKesson that Lilly will sell or distribute pharmaceutical products bearing any brand or trade name used by Lilly, in the United States or any part of the United States, exclusively through McKesson.

VII.

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.

VIII.

It is further ordered, That:

A. Within sixty (60) days after the date this order becomes final, 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 this order.

B. One year (1) 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 is complying with this order.

C. Respondent shall include in its compliance reports a copy of the Open Formulary required by paragraph II.A above, and all written communications, internal memoranda, and reports and recommendations concerning compliance with the order.

IX.

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 order; and

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

X.

It is further ordered, That this order shall terminate ten (10) years from the date this order becomes final.

Commissioner Azcuenaga dissenting and Commissioner Starek recused.

STATEMENT OF THE COMMISSION

The Commission has determined to approve and issue as final, with two modifications, the consent order ("order") agreed to with Eli Lilly and Company ("Lilly") in connection with its acquisition of PCS Health Systems, Inc. from McKesson Corporation. We reached this decision after careful and thorough consideration of the public comments received and discussions with consumer and industry representatives.

The Commission believes that, based on the evidence currently before it, this order provides the most appropriate relief available. Nevertheless, in light of the rapidly evolving nature of the markets for pharmaceutical products and pharmacy benefits management ("PBM"), the Commission remains concerned that this acquisition, together with other vertical integration in these markets, could lead to anticompetitive consequences that require additional relief. Thus, the Commission will continue to monitor this industry carefully, both through ongoing investigations and Lilly's compliance obligations under the order. More specifically, the Commission will assess, among other things:

(1) The extent and effects of foreclosure of the products of other pharmaceutical manufacturers, especially those not vertically integrated with a PBM;

(2) Whether, and to what extent, vertical integration in this industry fosters anticompetitive reciprocal dealing, coordinated interaction, or interdependent conduct among the vertically integrated firms; and

(3) Whether vertical integration among pharmaceutical manufacturers and PBMs increases the prices or diminishes the availability of pharmaceuticals to consumers.

If the Commission concludes that competition is being reduced as a result of these vertical arrangements, it will seek appropriate relief against any firms engaged in anticompetitive conduct, including if necessary post-acquisition divestitures. The Commission may, of course, subsequently reopen a judgment in this or any matter

"whenever in the opinion of the Commission conditions of fact or law have so changed as to require such action or if the public interest shall so require." 15 U.S.C. 45(b); *see* 15 U.S.C. 21(b). The Commission believes that this course of action is both prudent and appropriate, given the significant and ongoing changes occurring in this segment of the health care industry.

Because the Commission has recently adopted a policy limiting the imposition of prior approvals, paragraphs VI(a) and VI(b) of the proposed order, which required Lilly to obtain prior approval before acquiring another PBM, have been eliminated. The acquisition of another PBM in the relevant market by Lilly would likely require premerger notification under the Hart-Scott-Rodino Act. 15 U.S.C. 18a. The Commission has modified paragraph VI of the order to require Lilly to obtain prior approval before distributing pharmaceuticals through an exclusive arrangement with McKesson, rather than through any exclusive arrangement with a wholesaler.

DISSENTING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

Today, the Commission accepts a consent order that is simultaneously inadequate to remedy the potential competitive harm from Eli Lilly and Company, Inc.'s acquisition of PCS Health Systems, Inc. ("PCS") from McKesson Corporation and overreaching in that it imposes restrictions on Lilly without a coherent theory of competitive harm. I dissent because the order does not resolve the competitive concern raised by the acquisition and because it encumbers the company with pointless and unnecessary restrictions. The Statement of the Commission, which holds out the possibility of further investigations and monitoring, implicitly reflects a lack of confidence in the remedial value of the order.¹

Paragraph thirteen of the complaint identifies several ways in which the proposed acquisition may substantially lessen competition. The most specific and plausible theory of violation is described in paragraph thirteen C of the complaint, which alleges that the acquisition eliminates PCS as "an independent negotiator of pharmaceutical prices with manufacturers." PCS is a pharmacy benefits manager (PBM) and provides administrative services for

¹ *See* Dissenting Statement of Commissioner Mary L. Azcuenaga (on the occasion of accepting the consent order for public comment), Eli Lilly and Company, Inc., File No. 941-0102 (Nov. 4, 1994) (attached and incorporated by reference).

pharmacy benefits plans to insurers, third party payers, and others. As alleged in paragraph eleven of the complaint, one service provided by a PBM is to negotiate, on behalf of the benefit plans, with pharmaceutical manufacturers regarding the price paid for drugs purchased through the plans.

The price negotiation function of a PBM, such as PCS, has competitive significance because PBMs, acting on behalf of many pharmacy benefits plans covering millions of covered patients, apparently have been successful in negotiating low prices for pharmaceuticals. Since the consent order is being entered without an administrative trial, we do not have a record sufficient to assess the role of PCS (and that of other PBMs) in bargaining for low drug prices. Based on the limited information presently available, it seems possible that PBMs may have been able to act as power buyers by aggregating the purchasing power of millions of covered patients and using this leverage to negotiate competitive prices. After the merger, PCS will continue to negotiate on behalf of its millions of covered patients. The merger, however, may alter the incentives of a Lilly-owned PCS. Lilly's role as a major drug producer may temper PCS's enthusiasm for bargaining down pharmaceutical prices. Lilly may be unwilling to lower prices and forgo profits on its own drugs sold through PCS, and a Lilly-owned PCS may hesitate to give any preference to a Lilly competitor in reward for low prices.

Assuming that the Commission has reason to believe that the merger violates Section 7 on the basis of this theory, the consent order provides no remedy. The order does nothing to preserve the role of PCS as an independent bargaining agent on behalf of pharmaceutical consumers. Section II of the order requires Lilly to offer an open formulary and to accept whatever discounts sellers may choose to offer, but passive acceptance of proffered discounts is hardly the same thing as aggressively pursuing price reductions. To the extent that the theory of competitive harm alleged in paragraph thirteen C of the complaint has merit, the order does not remedy the harm to competition.

A second theory of violation is contained in paragraph thirteen A of the complaint, which alleges that "[p]roducts of manufacturers other than Lilly are likely to be foreclosed from the PCS formulary." Although cases such as *United States Steel v. FTC*, 426 F.2d (6th Cir. 1970) (vertical market foreclosure resulting from a vertical merger deemed to be anticompetitive), support the theory of violation in

paragraph thirteen A, reliance on such cases ignores subsequent scholarly and judicial repudiation of the vertical foreclosure theory.

The Commission's apparent resuscitation of this theory calls for an explanation. Although the Commission used the foreclosure theory to challenge vertical mergers in the 1970's,² the Court of Appeals for the Second Circuit decisively rejected it in 1979. *Freuhauf Corp. v. FTC*, 603 F.2d 345 (2d Cir. 1979). The court was unwilling to rely on vertical foreclosure alone as a basis for liability. 603 F.2d at 352 and 352 n.9. It observed that "[a] showing of some probable anticompetitive impact is still essential" 603 F.2d at 353. Antitrust commentators also have criticized the foreclosure approach.³ The Court of Appeals for the Third Circuit agreed with the scholarly criticism and rejected the vertical foreclosure theory. *Alberta Gas Chemicals v. E.I. du Pont de Nemours and Co.*, 826 F.2d 1235 (3d Cir. 1987), *cert. denied*, 486 U.S. 1059 (1988).⁴

A truly effective prohibition on foreclosure of Lilly's competitors may preclude a closed formulary from achieving efficiencies. Closing a formulary may be essential to achieve certain efficiencies. By steering all patients to one of several equivalent drugs, the PBM may be able to negotiate a highly favorable, low price with a manufacturer by offering a large number of purchasers of that drug. Absent the ability to steer patients to one of several equivalent products, the PBM would lack negotiating leverage. In an analogous situation, the Commission's staff has opposed state legislation to require medical plans to deal with "any willing provider."⁵ The staff's argument has been that requiring a plan to deal with any pharmacy (or other provider) willing to provide the services diminishes the incentives of pharmacies to compete to secure places in the provider network and thereby drives up consumer prices. At this point, we lack empirical evidence establishing that closed formularies are able to realize similar efficiencies, but the

² See, e.g., *Ash Grove Cement v. FTC*, 577 F.2d 1368 (9th Cir. 1975), *cert. denied*, 439 U.S. 982 (1978).

³ See, e.g., 4 P. Areeda & D. Turner, *Antitrust law* ¶ 1004 at 211 (1980); R. Bork, *The Antitrust Paradox* 226, 237 (1978); Page, *Antitrust Damages and Economic Efficiency*, 47 U. Chi. L. Rev. 467, 495 (1980).

⁴ But see generally *United States v. American Cyanamid Co.*, 719 F.2d 558 (2d Cir. 1983), *cert. denied*, 465 U.S. 1101 (1984).

⁵ Letter to The Honorable Roger Madigan, The Senate of Pennsylvania, from the staff of the Federal Trade Commission, April 19, 1993; Letter to The Honorable E. Scott Garrett, Chairman, Assembly Insurance Committee of the New Jersey State Assembly from the staff of the Federal Trade Commission, March 29, 1993.

Commission staff's analysis of any willing provider provisions suggests that closed formularies may realize efficiencies.

Reliance on the theory of vertical foreclosure, given its history, seems to cry out for an explanation why the Commission is reviving it. Recent economic literature has suggested that under certain narrow conditions vertical arrangements may have harmful horizontal competitive effects.⁶ The complaint alleges the foreclosure "from the PCS formulary" as an anticompetitive effect, standing alone, which allegation does not appear to reflect the potential issue addressed in the economics literature. The complaint does not allege that the "PCS formulary" is a relevant antitrust market, and it does not (and insofar as I can tell, could not) allege that any relevant antitrust market, such as the markets for antidepressants, injectable insulin, H2 antagonists, or antiulcer drugs, will be totally (or even significantly) foreclosed to any competitor. Sales of these drugs through PCS account for only a portion of sales through PBM companies, and sales of these drugs through all PBMs are only a fraction of all drugs sold through the various channels of distribution. In short, PCS accounts for only a fraction of total United States drug sales, and it is not self evident what impact, if any, the merger has on the relevant markets for drugs alleged in paragraph seven of the complaint, including the markets for antidepressants, injectable insulin, H2 antagonists, or antiulcer drugs (or any other relevant markets).

Even assuming that the vertical foreclosure theory is sound, the remedy, which is to require Lilly to offer an open formulary, is singularly ineffective. A PBM's formulary is a list of drugs approved or recommended for particular therapeutic purposes. The formulary is made available to physicians, pharmacists, and others who treat patients covered by health plans using the PBM's services. A formulary is open if it includes all drugs recommended for treatment of a condition covered by the benefit plan. A closed or restricted formulary may limit reimbursement under the benefit plan to certain approved drugs, or may employ other incentives to encourage the use of a particular product in the treatment of a medical condition.

Although the Commission's order requires Lilly/PCS to offer an open formulary, it does nothing to ensure that PCS's open formulary remains an economically attractive or even viable option for benefit

⁶ See e.g., Riordan and Salop, "Evaluating Vertical Mergers: A Post-Chicago Approach," 63 Antitrust Law J. 513 (1995); Janusz Ordover, Garth Saloner & Steven Salop, "Equilibrium Vertical Foreclosure," 80 Am. Econ. Rev. 127 (1990); Steven Salop & David Scheffman, "Cost-Raising Strategies," 36 J. Indus. Econ. 19 (1987).

plans to select. Under the order, PCS is free to offer a high priced open formulary and a closed formulary with lower prices. Simply by adjusting the relative prices of the open and closed formularies, Lilly/PCS should be able to shift sales from one formulary to another. Even if Lilly concludes that it is commercially advantageous for PCS to offer an open formulary at an attractive price, PCS is free to shift patients away from other drugs to Lilly products. For example, PCS might waive copayments by end users for Lilly drugs, while requiring copayments on competing drugs, or it might promote Lilly products directly to physicians and pharmacists. To the extent that the Commission finds reason to believe that foreclosure from "the PCS formulary" is anticompetitive, the Commission's order does not solve the problem.

Third, paragraph thirteen E of the complaint alleges that "[e]ntry into the relevant markets may be more difficult because it will require entry at more than one level." This is a theoretically plausible competitive effect from a vertical merger that I would support in an appropriate case. Here, however, the alleged foreclosure resulting from this acquisition is not remotely related to the established standards for proving this competitive effect. Section 4.2 of the Department of Justice 1984 Merger Guidelines, which the Commission adopted by reference in joining the Statement Accompanying the Release of Revised Merger Guidelines in April 1992, sets forth the standard for evaluating this competitive effect. Section 4.2 states, as one "necessary" condition for this anticompetitive effect, that "the degree of vertical integration between the two markets must be so extensive that" entrants to one market must also enter the second market simultaneously. A second prerequisite is that the need for entry at the secondary level must make primary level entry "significantly more difficult and less likely to occur." In addition, competitive conditions in the primary market must be sufficiently conducive to noncompetitive performance that the increased difficulty of entry is a matter of concern. Even if these conditions are satisfied, the Merger Guidelines indicate that an antitrust challenge is unlikely if sales by unintegrated firms in the secondary market are sufficient to service two minimum-efficient-scale plants in the primary market.

The conclusory allegations of the complaint do not set forth a plausible claim under the standards in the 1984 Merger Guidelines. For example, the Guidelines adopt the standard of two minimum-

efficient-scale plants as a threshold level for an antitrust challenge. Although the complaint does not allege the size of efficient scale operations to produce the products identified in paragraph seven (injectable insulin, selective serotonin reuptake inhibitors, antidepressants, H2 antagonists and antiulcer drugs), the fact that a substantial proportion of total drug sales is made through non-PBM channels tends to mitigate any concern regarding the need for two level entry under the Guidelines. Furthermore, even assuming that a competing manufacturer of one primary product, say injectable insulin, would be foreclosed from sales through PCS, it does not follow that it would be foreclosed from sales through other PBMs, whether or not they are owned by a drug producer. Other vertically integrated PBMs would not necessarily be foreclosed to an unintegrated insulin supplier unless the PBM/drug manufacturer also produced insulin. In short, the complaint does not allege a *prima facie* case under the Guidelines.

Fourth, paragraph thirteen B of the complaint alleges that "[r]eciprocal dealing, coordinated interaction, interdependent conduct, and tacit collusion among Lilly and other vertically integrated pharmaceutical companies will be enhanced." These allegations evoke a sinister image without providing any explanation of what anticompetitive harms are likely and why this merger is likely substantially to lessen competition. Although under notice pleading little specificity is required in articulating a theory of harm to competition, and this is especially so in a complaint accompanying a consent order, I seriously question whether this allegation has any substance at all. In horizontal merger cases, when the Commission alleges that a merger lessens competition by enabling the firms in the relevant market to engage in coordinated interaction, that allegation reflects a carefully considered judgment based on established standards. Several substantial hurdles must be crossed before a judgment of anticompetitive effects will be reached. After markets are identified, the structure of the industry is examined, as are the likelihood of entry and efficiencies. Under Section 2.1 of the 1992 Horizontal Merger Guidelines, the Commission considers various conditions conducive to coordination. Careful allegations, well supported in fact, law and economic analysis, have served the Commission well in challenging horizontal mergers. Given that this vertical merger does not fit within a familiar template, it is particularly inappropriate to abandon careful consideration of

competitive conditions in the relevant markets in favor of casual conclusions about competitive effects.

The allegations in paragraph thirteen B are so conclusory that it is difficult to pinpoint any coherent antitrust theory of liability. One antitrust concern relating to the pharmaceutical industry in general appears to be that Lilly/PCS may reach agreements with other vertically integrated drug manufacturer/PBM companies regarding inclusion on each other's formularies. That is, Lilly might agree, for example, to include Merck drugs on the PCS formularies in exchange for Merck's inclusion of Lilly drugs on the Medco formularies. If enough vertically integrated firms engaged in such reciprocal agreements and if they excluded drugs made by other firms from their formularies, then drug manufacturers that did not own a PBM (and thus were not part of a series of reciprocal deals) might be foreclosed from sales through many PBM firms. I agree that horizontal reciprocal deals that created a noncompetitive market might well raise serious antitrust concerns. If reciprocal agreements among integrated drug producers do produce anticompetitive results, an antitrust action under Section 5 of the Federal Trade Commission Act would lie. I seriously question, however, whether on the present record, there is reason to believe that the anticompetitive practices are occurring or are likely to occur or that Lilly's acquisition of PCS would make them more likely. Even assuming that such a cartel of drug manufacturers is likely to be formed, the remedy in this order, which merely prohibits some limited information sharing between Lilly and PCS, is totally inadequate. If at some time in the future the Commission has reason to believe that this anticompetitive practice is occurring, I would suggest consideration of a much stronger remedy that is more related to the competitive harm. The other theories of violation alleged in paragraph thirteen of the complaint are even less compelling than those I have discussed.

Fifth, paragraph twelve of the complaint alleges that Lilly and McKesson have signed a memorandum of understanding "to investigate closing Lilly's distribution centers and having McKesson handle physical distribution of Lilly products to wholesalers and possibly be the sole distributor of Lilly products." Paragraph thirteen F of the complaint alleges that competition among drug wholesalers may be reduced "because of the competitive advantage that control over Lilly drugs will provide McKesson."

The memorandum of understanding is not an exclusive distribution agreement. It is not even an agreement to agree on an exclusive distribution arrangement. It is an agreement "to investigate" possible distribution arrangements in the future. In my view, there is no colorable factual basis to allege that competition in drug wholesale distribution is threatened because McKesson will control Lilly drugs. Indeed, the allegation that a major pharmaceutical manufacturer such as Lilly would hand over "control" of its products to McKesson seems so implausible that it begs for an explanation.

The Commission's hasty allegation of a Section 7 violation from the mere consideration of innovative, new distribution arrangements could chill consideration of efficient, procompetitive channels of delivering products to consumers. At this point, all we know is that McKesson and Lilly proposed to investigate a novel concept in distribution. Perhaps nothing would have come of the investigation, but perhaps the two firms could have found ways to save costs and improve efficiency. Because the Commission acted peremptorily and without the benefit of a specific proposal, the order could well chill consideration of innovative approaches to distribution.

The consent order imposes a five-year prior approval requirement on any exclusive distribution agreement between Lilly and McKesson. It is at least somewhat amusing that having recently abandoned its prior approval requirement in cases enjoining unlawful mergers (citing as one reason the cost of compliance),⁷ the Commission chooses here to impose a prior approval requirement in the context of an acquisition that is being allowed to proceed and on the basis of a separate alleged violation that is only a gleam in the Commission's eye.

Lilly's acquisition of PCS followed several other acquisitions of PBMs by drug manufacturers that the Commission did not challenge. Although the elimination of PBMs as an independent force in the pharmaceutical marketplace would be a source of legitimate antitrust concern, the evidence does not come close to showing that this transaction would likely lead to such a result, and even assuming that it did, requiring PCS to maintain an open formulary would be no

⁷ Statement of Federal Trade Commission Policy Concerning Prior Approval and Prior Notice Provisions (June 21, 1995), Commissioner Azcuenaga dissenting in a separate statement. According to the Commission's Statement, "as a general matter, Commission orders will not include . . . prior approval . . . requirements . . . [except possibly] where there is a credible risk that a company . . . would, but for the provision, attempt the same or approximately the same merger." *Id.* at 2-3.

solution. This order is no more than a fig leaf to conceal apparent indecision about the extent and nature of the competitive problem. Implementation of the bureaucratic provisions of the order will waste private resources and may provide a false sense of security that will lull us into complacency. Although I support the Commission's promise to continue monitoring the industry, the murky allegations in the complaint and the ineffective order are not an auspicious beginning. The allegation that the Lilly/McKesson agreement to investigate new distribution concepts is unlawful already has done its harm. That peremptory action, which is entirely unnecessary at this time, may cost consumers by blocking the exploration of innovative ideas for distribution.

I dissent.

DISSENTING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

Today, the Commission accepts a consent order for public comment that exudes a lack of conviction in the underlying theory of competitive harm on which the order is based. The order does not cure the competitive problems alleged in the complaint. Three of the four primary provisions in the order are inadequate, and the fourth, which addresses a memorandum of understanding between Lilly and McKesson, is based on no colorable factual showing of a violation of law. In addition, there is no justification for making the duration of the order half that of other Commission orders. Finally, imposing this order without addressing similar acquisitions raises a question of evenhandedness and leaves unanswered the broader question of the competitive effect of vertical integration in this industry.

I dissent.

Complaint

120 F.T.C.

IN THE MATTER OF

IHI CLINICS, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3595, Complaint, Aug. 1, 1995--Decision, Aug. 1, 1995*

This consent order prohibits, among other things, a Georgia corporation and its officers from misrepresenting the performance, success or efficacy of their smoking cessation, weight loss and maintenance seminars, or any such program, and from representing that the U.S. Government has rated their group hypnosis method as the best way to stop smoking. The consent order requires the respondents to possess and rely upon competent and reliable scientific evidence to substantiate any representation about the performance or efficacy of any smoking cessation or weight loss program, before they make such a claim.

*Appearances*For the Commission: *Matthew Daynard.*For the respondents: *Pro se.*

COMPLAINT

The Federal Trade Commission, having reason to believe that IHI Clinics, Inc. ("IHIC"), a corporation, Gordon Brick, individually and as an officer of said corporation, and Larry Brick, individually and as a former 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 IHIC is a Georgia corporation, with its principal office and place of business at 1962 Carthage Road, Tucker, Georgia.

Respondent Gordon Brick is the sole officer, director and shareholder of the corporate respondent. Larry Brick is the former President of the corporate respondent. Together, they formulated, directed, and controlled the acts and practices of the corporate respondent, including the acts and practices alleged in this complaint.

Their 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 seminars for smoking cessation and weight loss known as "The IHI Clinic Method of Hypnosis," and other stop-smoking and weight-loss seminars, to consumers. The IHI Clinic Method seminar consists of a single, group hypnosis session, approximately three hours in length, provided to consumers by Larry Brick at various sites throughout the United States.

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 IHI Clinic Method seminar, including but not necessarily limited to the attached Exhibit A. This advertisement contains the following statements:

SAVE HUNDREDS OF DOLLARS and RESTORE YOUR HEALTH
STOP SMOKING IN JUST ONE EVENING! NO CRAVING NO STRESS
. . . . NO WEIGHT GAIN The IHI Clinic Method of Hypnosis has helped
thousands of smokers kick the habit. Of the smokers attending the seminar, over
95% will discard their cigarettes and Stop Smoking YOUR CRAVING FOR
CIGARETTES IS GONE! Graduates of this seminar do everything they've
done before, but they do it without smoking THIS PROGRAM ELIMINATES
THE NEED, THE DESIRE, THE CRAVING AND THE URGE TO SMOKE.
. . . . Even if you are currently using the patch, you should attend my program. I
explain why the gum and patch don't work for most people. You'll find my
program educational, informative, and most important - 95% effective. . . . You will
be amazed at how easy and pleasant it is to overcome your desire for cigarettes
ONCE AND FOR ALL You've tried to quit smoking many times before --
you've tried everything. The gum, the patches, cold turkey, and EVEN WILL
POWER - Nothing else has worked. My program will end your smoking habit
forever! NO UNWANTED WEIGHT GAIN! This program helps you
attain your goal weight and be a health conscious eater LOSE WEIGHT FREE
. . . . THOUSANDS BECOME NON-SMOKERS! Thousands of people just like
you, with the same doubts, have gone before you and successfully stopped smoking
with this guaranteed program THE U.S. GOVERNMENT RATES THESE
PROGRAMS AS THE BEST WAY TO STOP SMOKING

PAR. 5. Through the use of 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. Ninety-five percent or more of the participants who attend respondents' smoking cessation seminars permanently abstain from smoking after attending those seminars.

B. The United States Government has rated the single-session, group hypnosis seminar used by respondents as the best way to stop smoking.

PAR. 6. In truth and in fact:

A. Ninety-five percent or more of the participants who attend respondents' smoking cessation seminars do not permanently abstain from smoking after those seminars.

B. The United States Government has not rated the single-session, group hypnosis seminar used by respondents as the best way to stop smoking.

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

PAR. 7. Through the use of 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. Participants who attend respondents' single-session group hypnosis seminar are cured of smoking addiction and permanently abstain from smoking cigarettes.

B. Participants who attend respondents, single-session group hypnosis seminar are cured of smoking addiction without experiencing craving, stress or weight gain.

C. Thousands of consumers have permanently quit smoking as a result of attending respondents' single-session, group hypnosis seminar.

D. Respondents' single-session group hypnosis seminar is more efficacious for smoking cessation than other stop-smoking methods.

PAR. 8. Through the use of the statements 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 paragraph 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 paragraph 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. Respondents have disseminated or have caused to be disseminated advertisements for The IHI Clinic Method seminar, including but not necessarily limited to the attached Exhibit B. This advertisement contains the following statements:

LOSE WEIGHT THRU HYPNOSIS . . . SAVE . . . FAST . . . WITHOUT DIETING . . . THE RESULTS ARE INCREDIBLE . . . Expect results ranging from 20 to 60 lbs. in as little as 3 months, to over 110 lbs. in one year . . . You will lose the weight you wish to lose and keep it off permanently. The program works if you want to lose a little or a lot of weight. LOSE WEIGHT THE EASY WAY . . . DIETS DON'T WORK . . . Say goodbye to diets forever. Remember, you diet, lose weight and 6 months later its all gained back. The true solution is real behavior modification brought about by using the power of the subconscious mind. GAIN CONTROL OF YOUR EATING HABITS . . . This program eliminates the need, the desire, the craving, and the urge to overeat. You will be free of impulsive or compulsive overeating. You will be able to pass up the non-healthy foods with little or no conscious effort. THIS PROGRAM WILL WORK FOR YOU! GUARANTEED . . . OUR WRITTEN GUARANTEE . . . You will lose the weight you wish to lose. If you don't, or if you ever need reinforcement, you'll be admitted to any IHI Clinics Weight Loss Session free of charge.

PAR. 11. Through the use of 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. Participants who attend respondents' single-session group hypnosis seminar achieve and maintain weight loss.

B. Participants who attend respondents' single-session group hypnosis seminar achieve weight loss quickly.

C. Respondents' single-session group hypnosis seminar is more efficacious for weight loss and weight-loss maintenance than other weight-loss methods.

PAR. 12. Through the use of the statements 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 paragraph eleven, respondents possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 13. In truth and in fact, at the time that they made the representations set forth in paragraph eleven, 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. Respondents have disseminated or have caused to be disseminated advertisements for The IHI Clinic Method seminar, including but not necessarily limited to the attached Exhibit A. This advertisement contains the following statements:

You too will have a bright Future as a NON-SMOKER!

ENDORSEMENTS

"My wife and I attended your seminar. I wanted to stop smoking and we both wanted to lose weight. Well I haven't smoked since then and we've both reached our weight goal . . ."

Bill and Kathy Woodfin, Lookout Mountain, TN

"I am a cocktail waitress and work around smokers constantly. I didn't think I could stop; but I did and their smoking doesn't bother me one bit. Also since your seminar, I've lost 12 pounds."

Jenny Thigpen, Macon, GA

"Before I attended your seminar, I was obsessed with cigarettes. I smoked 3 packs a day. I haven't had the slightest urge since then -- I am truly a non-smoker today. Many thanks for a better life."

Louise Ross, Tampa, FL

"I lost 38 pounds in seven weeks and it was really easy. I really feel great about myself."

Joe Casbarro, Tucker, GA

"I'd smoked for 36 years, two packs per day. Your seminar was a miracle for me -- I had no withdrawal at all."

George Myers, Tampa, FL

"Four of my fraternity brothers attended with me -- we all quit and we're even losing weight . . ."

Dick Middleton, Thomasville, GA

"It works. I have not smoked since the seminar. It was so easy."

Robert J. Adkins, Stockbridge, GA

PAR. 15. Through the use of 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 testimonials from consumers appearing in advertisements for the IHI Clinic Method seminar reflect the typical or ordinary experience of members of the public who have attended the seminar.

PAR. 16. Through the use of the statements 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 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 that they made the representation set forth in paragraph fifteen, respondents did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation set forth in paragraph sixteen was, and is, false and misleading.

PAR. 18. 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


PRINTED & MAILED BY IHI INC. ADVERTISING CONSULTANTS, INC. 170 ADVERTISING CALL 411-944-8888 MON-FRI 9:00 AM TO 5:00 PM

SAVE HUNDREDS OF DOLLARS and RESTORE YOUR HEALTH

STOP SMOKING

IN JUST ONE EVENING!

NO CRAVING \$39.99
NO STRESS COMPLETE!
NO WEIGHT GAIN
WRITTEN LIFETIME GUARANTEE Cash & Checks are also Welcomed



The IHI Clinic Method of Hypnosis has helped thousands of smokers quit the habit. Of the smokers attending the seminar, over 95% quit smoking their cigarettes and stop craving.

Larry Smith is a Certified and Registered Clinical Hypnotist with the American Society of Hypnotists, Inc. a President of IHI Clinics, Inc. & Director of the program, and received his B.S. degree from the University of Georgia.

Larry Smith, C.J.H.
Senior Counselor

SMOKERS, Bring this AD for FREE AUDIO TAPE

KNOXVILLE

MONDAY DECEMBER 13
KNOXVILLE HOLIDAY INN WEST
1315 Kirby Road
(Papermill Rd. Exit 363 off I-75 & I-40)

TWO SEMINARS
2:00 PM till 4:30 PM
OR
7:00 PM till 9:30 PM
REGISTRATION BEGINS AT
THE DOOR 1 HOUR BEFORE

YOUR CRAVING FOR CIGARETTES IS GONE! See, hear, and experience the joyful feeling of becoming a Non-Smoker without all the pain and stresses. Cravings of the moment are overwhelming but in some hours, but they do a sudden disappearing act. Enjoying your favorite activities, watching TV, or any other activity. You'll be able to be smoking when you smoke, and it won't bother you or harm you.

THE SECRET OF WILL POWER! You've tried to quit smoking many times before -- you've tried everything. The gum, the patches, said "No, and EVEN WILL POWER -- Nothing else has worked. My program will end your smoking habit forever! In the seminar you will learn the secret of will power so you can quit it in Just Smoking and restore other goals in your life.

WRITTEN LIFETIME GUARANTEE This is my personal guarantee to you. If for any reason, you don't get back to smoking, after the seminar you may attend another IHI Clinic, Inc. Seminar **FREE OF CHARGE**

NO UNWANTED WEIGHT GAIN! You will not feel the need to substitute food for the cigarettes that you will no longer want. You will not feel any anxiety or guilt. The program helps you attain your goal weight and be a health conscious man.

THOUSANDS BECOME NON-SMOKERS! Thousands of people just like you, with the same doubts, have gone before you and successfully stopped smoking with the guarantee program. Please raise the back page for a list of their endorsements.

BEING A FRIEND AND STOP SMOKING TOGETHER!

You Can Too!!

LOSE WEIGHT FREE

With IHI Clinics Method of Hypnosis you can shed those extra pounds and not worry about gaining weight when you stop smoking. **THE WEIGHT LOSS SESSION IS FREE WHEN YOU ATTEND THE STOP SMOKING SEMINAR.** If you only want to attend the Weight Loss Hypnosis Session, your fee is \$29.99 and you must register before the Stop Smoking Seminar begins. The Weight Loss Hypnosis Session will begin following the Stop Smoking Seminar and last about half an hour.

© 1992 IHI CLINICS, INC. IHI CLINICS, INC.
P.O. Box 314
Tucker, GA 30085
1-404-934-8816

THE U.S. GOVERNMENT RATES THESE PROGRAMS AS THE BEST WAY TO STOP SMOKING.

EXHIBIT A

EXHIBIT A

**Thousands
have
become
NON
SMOKERS**

**USING
I H I
Clinic's
METHOD**

You too will have a bright Future as a NON-SMOKER!

ENDORSEMENTS

"I highly recommend this program to any one who smokes or needs help controlling their weight. I am encouraged by the program results."
Mary Jane Myers Roswell, GA

"It was truly painless!"
Victoria Boarden Ellenwood, GA

"My wife and I attended your seminar. I wanted to stop smoking and we both wanted to lose weight. Well I haven't smoked since then and we've both reached our weight goal. I do want to thank you for the new life we have. We're never felt better."
Bill and Kathy Woodfin Lookout Mountain, TN

"I am a cocktail waitress and work around smokers constantly. I didn't think I could stop; but I did and their smoking doesn't bother me one bit. Also since your seminar, I've lost 12 pounds."
Jenny Thigpen Macon, GA

"At first I was skeptical, but now I am amazed at the results — I am still a non-smoker."
Dr. Millicent Ann Dandridge Atlanta, GA

"Before I attended your seminar, I was obsessed with cigarettes. I smoked 3 packs a day. I haven't had the slightest urge since then — I am truly a non-smoker today. Many thanks for a better life."
Louise Ross Tampa, FL

"I lost 38 pounds in seven weeks and it was really easy. I really feel great about myself."
Joe Canbarro Tucker, GA

"I can now wear the clothes, I always wanted too. I can't wait for summer. I'm going to wear a bikini for the first time in my life."
Susan K. Dothan AL

"I'd smoked for 36 years, two packs per day. Your seminar was a miracle for me — I had no withdrawal at all."
George Myers Tampa, FL

"I was amazed at how the pounds just seemed to melt away after your seminar. I didn't experience the first inkling of anxiety either. With your help, I am now a healthy conscious eater."
Susan Iannucci Atlanta, GA

"I wanted to quit, but I didn't think it would work for me. It did, and it was the best bargain in town."
Glinry Nicholson Dublin, GA

"Four of my fraternity brothers attended with me — we all quit and we're even losing weight. Thanks for a great program."
Dick Middleton Thomasville, GA

"You made me a real believer in your seminar. I recommend it to everyone who smokes. It's amazing how I never even think of Cigarettes."
Larry Barwick Sarasota, FL

"It works. I have not smoked since the seminar. It was so easy."
Robert J. Adkins Stockbridge, GA

"It's the damnest thing I've ever seen! I wouldn't have bet five cents that your program would work — but, somehow I'm a non-smoker. I've tried it all before. I considered myself a hard-core smoker — 'one of the few' who just had to smoke in order to function. I wish I could write more but I'm just too excited about my new life to sit still."
Jim Jordan Chattanooga, TN

About your Seminar Leader

Larry Brick, C.H. has presented Stop Smoking Seminars to enthusiastic audiences across the United States. He obtained his BBA degree from the University of Georgia. He is a Certified and Registered Clinical Hypnotherapist with the American Board of Hypnotherapy. He has studied with the American Institute of Hypnotherapy and his seminar is sanctioned by the International Hypnotherapy Institute. Larry is President and co-founder of I H I Clinics, Inc., a Georgia Corporation, based in Albany.

I H I Clinics, Inc.
 P.O. Box 314
 Tucker, GA 30085-0314
 1-404-934-4816

EXHIBIT B

BE A BETTER YOU! COME JOIN US AND . . .

LOSE WEIGHT THRU HYPNOSIS

SAFE ^{300 BM} FAST WITHOUT DIETING WRITTEN GUARANTEE ONLY \$3999 COMPLETE

Cash, Check, Visa, MC, AMEX Discover


THE RESULTS ARE INCREDIBLE
Expect results ranging from 20 to 60 lbs in as little as 3 months, to over 110 lbs in one year. There will be no pre-packaged foods, no calorie counting, no starving, no dieting, and no cravings. You will lose the weight you wish to lose and keep it off permanently. The program works if you want to lose a little or a lot of weight.

LOSE WEIGHT THE EASY WAY
Hypnosis is normal, natural and pleasant. There is no sleep or loss of control. You will leave the session refreshed and feeling good, because you will be in control of your eating habits ONCE AND FOR ALL.

STOP HAVING WEIGHT CONTROL YOUR LIFE
Become the winner you want to be! Feel younger, look younger, gain confidence, and improve your self-esteem.

DIETS DON'T WORK
Say goodbye to diets forever. Remember, you diet, lose weight and 7 months later it's all gained back. The true solution is real behavior modification brought about by using the power of the subconscious mind.

TAKE CONTROL OF YOUR EATING HABITS
See, hear and experience the joyful feeling of becoming a HEALTHY CONSCIOUS EATER. This program eliminates the need, the desire, the craving, and the urge to overeat. You will be free of impulsive or compulsive overeating. You will be able to pass up the non-healthy foods with ease or no conscious effort.



Larry Brick
Certified Hypnotherapist
Presented by
IHI Clinics, Inc.
Tucker, GA
T-(404)-934-4816

<p>ROSWELL Monday - May 23 2:00 PM to 5:00 PM Holiday Inn - Holcomb Bridge 1078 Holcomb Bridge Road (GA 400 East Holcomb Bridge)</p>	<p>GWINNETT Thursday - May 26 7:00 AM to 9:00 AM Marriott Gwinnett Place 1778 Pleasant Hill Road (480 East 40)</p>
<p>MARIETTA Tuesday - May 25 2:00 PM to 5:00 PM Holiday Inn Northwest 2255 Oak Road (1.75 East 1191)</p>	<p>JONESBORO Saturday - May 28 11:00 AM to 1:00 PM Holiday Inn South 6286 Old Dixie Highway (1.75 East 77)</p>
<p>NORTHLAKE Wednesday - May 24 2:00 PM to 5:00 PM Holiday Inn Northlake 1188 Lavaca Road (441 East 28)</p>	<p>GAINESVILLE Sunday - May 22 2:00 PM to 5:00 PM Holiday Inn Gainesville 738 Jackson-Jordan Parkway (1/2 South GA 13)</p>

OUR WRITTEN GUARANTEE

You will lose all the weight you wish to lose. If you don't, or if you ever need reinforcement, you'll be admitted to any IHI Clinics Weight Loss Session free of charge.

THIS PROGRAM WILL WORK FOR YOU! GUARANTEED

Copyright IHI Clinics, Inc. 1994. All Rights Reserved.

BRING THIS AD FOR AN EXTRA BONUS

DECISION AND ORDER

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

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that 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 IHIC is a Georgia corporation, with its principal office and place of business at 1962 Carthage Road, Tucker, Georgia.
2. Respondent Gordon Brick is the President and Chief Executive officer of said corporation. He formulates, directs and controls the acts and practices of said corporation. Respondent Larry Brick is the former President of said corporation. Together with Gordon Brick, he formulated, directed, and controlled the acts and practices of said corporation. Their address is the same as that of said corporation.
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

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. Survey evidence may be appropriate depending on the representation made.

I.

It is ordered, That respondents IHI Clinics, Inc., a corporation, its successors and assigns, and its officers, Gordon Brick, individually and as an officer of said corporation, and Larry Brick, individually and as a former 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 smoking cessation 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 ninety-five percent or more of the participants who attend respondents' smoking cessation seminars permanently abstain from smoking after attending those seminars, unless such is the case.

B. Representing, directly or by implication, that the United States Government has rated the single-session, group hypnosis seminar used by respondents as the best way to stop smoking.

C. Representing, directly or by implication, that participants who attend respondents' single-session group hypnosis seminar are cured of smoking addiction without experiencing craving, stress, weight gain, or other side effects, unless, at the time of making any such representation, respondents possess and rely upon competent and reliable scientific evidence substantiating the representation.

D. 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.

E. Representing through any endorsement or testimonial that any participant(s) of respondents' smoking cessation program or weight loss program have achieved success in smoking abstinence or weight loss unless:

(1) At the time of making such representation, the success claimed is representative of the typical or ordinary experience of all participants of such program, and respondents possess and rely upon competent and reliable scientific evidence that substantiates such representation, or

(2) Respondents disclose, clearly and prominently, and in close proximity to the endorsement or testimonial, either:

(a) What the generally expected results would be for participants in such program, or

(b) 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.

F. Misrepresenting, directly or by implication, the existence, contents, validity, results, conclusions, or interpretations of any test, study, survey or report.

G. 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 respondents named herein shall promptly notify the Commission of the discontinuance of their present business or of their affiliation with the corporate respondent. In addition, for a period of three (3) years from the date of service of this order, each 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.

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.

Complaint

120 F.T.C.

IN THE MATTER OF

ORIGINAL MARKETING, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3596. Complaint, Aug. 9, 1995--Decision, Aug. 9, 1995*

This consent order prohibits, among other things, the Florida-based corporation, two of its officers and an affiliated advertising agency from making performance or benefit claims for any weight-loss or weight-control product or program or acupressure device unless the claims are true and substantiated by competent and reliable scientific evidence. Also, the consent order prohibits the respondents from misrepresenting any endorsement or testimonial for any weight-loss or weight-control product or program or any acupressure device as representing the typical or ordinary experience of users. In addition, the respondents are required to pay refunds to purchasers of Acu-Stop 2000 who have previously returned it, or who return it within 90 days after the order is final, and the individual respondents are required to post a \$300,000 performance bond, or to pay that amount into an escrow account, before marketing any weight-loss or weight-control product or program or any acupressure device.

*Appearances*For the Commission: *Richard L. Cleland and Brian A. Dahl.*For the respondents: *Sheldon Lustigman, Helfgott & Karas, New York, N.Y.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Original Marketing, Inc., d/b/a Acu-Stop 2000, and Franklin & Joseph, Inc., corporations; Barry A. Weiss, individually and as an officer and director of Original Marketing, Inc.; and Roger Franklin, individually and as an officer and director of Original Marketing, Inc. and Franklin & Joseph, Inc. ("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 Original Marketing, Inc. ("OMI") is a Florida corporation doing business under the name Acu-Stop 2000. Its principal place of business is located at 11570 Wiles Road, Pompano Beach, Florida.

Respondent Franklin & Joseph, Inc. is a New York corporation with its principal place of business located at 237 Mamaroneck Avenue, White Plains, New York.

Respondent Barry A. Weiss is or was at relevant times herein an officer and director of OMI. Individually or in concert with others, he formulated, directed, and controlled the acts and practices of OMI, including the acts and practices alleged in this complaint. He resides at 22471 Vista Wood Way, Boca Raton, Florida.

Respondent Roger Franklin is or was at relevant times herein an officer and director of OMI and Franklin & Joseph, Inc. Individually or in concert with others, he formulated, directed, and controlled the acts and practices of OMI and Franklin & Joseph, Inc., including the acts and practices alleged in this complaint. He resides at 33 Maplemoor Lane, White Plains, New York.

PAR. 2. Respondents have advertised, offered for sale, sold, and distributed to the public, the Acu-Stop 2000, an acupressure weight-loss device that nests inside the ear. The Acu-Stop 2000 is a device 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.

PAR. 4. Respondents have disseminated or have caused to be disseminated advertisements and promotional materials for the Acu-Stop 2000, including but not necessarily limited to the attached Exhibits A-E. These advertisements contain the following statements:

- A. YOU'LL PROVE TO YOURSELF:
YOU CAN LOSE 30 POUNDS IN 30 DAYS!
ACU-STOP 2000 GUARANTEES:
This device is all you'll need, ever, to control your weight and get rid of flab. It will work for you or we'll refund every cent you paid for it. Every cent.
21st CENTURY METHOD MEANS:
- No Dieting - No Pills
- No Nervousness
- No Frantic Exercising
- No Strange Formulas
- No Special Foods To Buy

MORE THAN 200,000 SOLD! TESTIMONIALS ABOUND!

Ms. K.B. of California is typical of ACU-STOP 2000 users. She writes:
I've lost five pounds in eight days. My energy level is up. Those diet pills cost a ton of money and can't do this.

Ms. S.L.M. is an adult model who had all but given up on regaining her figure. She writes:

My waist had ballooned to 32 inches. Now it's back to 25 and I'm modeling again. I love you for making me beautiful again.

Mr. P.N. of Minnesota didn't think it would work but decided to give it a try:
30 pounds in 30 days? Right. Actually, I lost 33 pounds in 30 days. I still can't believe it.

NOT A 30-DAY OR 60-DAY SUPPLY. ONE ACU-STOP 2000 IS ALL YOU NEED . . . EVER!

ACU-STOP 2000 is a precision-engineered invention that fits snugly (and invisibly) in the right ear. It contacts and stimulates six precise pressure points, exactly like renowned acupressure. Using it just minutes a day eliminates your craving for food. You'll lose weight at the pace you think best. (If you lose too much weight, use your ACU-STOP 2000 less often.)

* * * *

Ask yourself: Would ACU-STOP 2000 make such an offer if thousands of users hadn't proved how effective it is? Nothing--no, nothing is as effective and as safe. (Exhibit A).

B. YOU TOO WILL BE ABLE TO SAY:

"I LOST 33 POUNDS IN 30 DAYS!"

WE PREDICT:

By the year 2001 this will be the standard. **WHY?** Because only Acu-Stop 2000 means

- No Strenuous Dieting
- No Pills - No Nervousness
- No Frantic Exercising
- No Strange Formulas
- No Special Food To Buy

Please Read Every Word of This ACU-STOP 2000 **GUARANTEE:**

This device is all you'll need, ever, to control your weight and get rid of the flab. It will work for you or we'll refund every cent you paid for the product. Every cent.

ASK THE MORE THAN 200,000 ACU-STOP BUYERS!

Ms. K.B. of Florida is an ACU-STOP user. She writes:

I've lost five pounds in eight days. My energy level is up. Those diet pills cost a ton of money and can't do this.

Ms. S.L.M. is an adult model who had all but given up on regaining her figure. She writes:

My waist had ballooned to 32 inches. Now it's back to 25 and I'm modeling again. I love you for making me beautiful again.

Ms. K.McF. of California didn't think it would work but decided to give it a try:
30 pounds in 30 days? Right. Actually, I lost 33 pounds in 30 days. I still can't believe it.

Results described in this ad may be atypical. [fine print]

278

Complaint

YOU'LL NEVER HAVE TO SPEND ANOTHER CENT. THIS IS NOT A 30-DAY OR 60-DAY SUPPLY. ONE ACU-STOP IS ALL YOU NEED . . . EVER! ACU-STOP 2000 is a precision-engineered invention that fits snugly (and invisibly) in the right ear. It contacts and stimulates six precise pressure points, exactly like renowned acupressure. All of "mainstream" science does not accept the discipline of acupressure. Most doctors do . . . and over 200,000 satisfied customers can't be wrong. Using it just minutes a day eliminates your craving for food. We can't tell you how much weight you will lose. Everyone is different. Results will vary depending on the individual.

* * * *

Ask yourself: Would ACU-STOP 2000 make such an offer if thousands of users hadn't proved how effective it is? Nothing--no, nothing--is as effective and as safe. (Exhibit B).

C. Introducing a real breakthrough in losing weight. So advanced, it won't let you fail! Pure Science or Pure Miracle? Maybe it's a little of both.

* * * *

From now on, every other diet method is a thing of the past.

Think of it. No pills to pop. No favorite foods to give up. No tasteless, unsatisfying meal plans. No endless, wearying exercise. Just one incredible product that can enable you to lose weight fast and easily. Amazing? You bet. Here's why.

Based on a centuries-old understanding of how our bodies work.

The idea for ACU-STOP 2000 comes to us from across the seas in China. Their understanding of human physiology has long been acknowledged by medical experts to be extremely advanced. ACU-STOP 2000 is an acupressure-like device that stimulates those points in your body which regulate appetite . . . and suppresses their activity. It fits almost invisibly in your right ear. You don't have to wear it all day, just for a few minutes. But those few minutes a day can change the rest of your life--because that's all it takes to make those excess pounds and inches you hate disappear. What happens is, your hunger pangs and your craving for food just stop. They go away. Gone. With absolutely no unpleasant side effects, you eat less. And lose more. It's so effective, you'll see results immediately.

Lose weight with none of the drawbacks other diet methods have.

We know how hard it is to lose weight. The emotional and physical toll on your mind and body can be devastating. But with ACU-STOP 2000 you will succeed. It just won't let you fail. And you won't have to worry about any of the negatives of other methods. You don't have to starve yourself, like a prisoner in your own home. You don't have to pop strange chemical pills with who-knows-what side effects (pills that can make you so nervous and irritable, that even if they work friends and family may hate to be around you). And you don't have to undergo strenuous, exhausting exercise day after day. Forget all that. The acupressure method puts you in control without endless exercise and with minimal will power! All you do is stimulate the ear piece and your ravenous appetite goes . . . followed quickly by all those unwanted pounds and inches.

* * * *

Mrs. K.McE, Los Angeles, CA.

I have been overweight for 30 of my 38 years. On Oct. 1st, I weighed myself. I used the Acu-Stop following your instructions, and ate what I liked. On Nov. 1st

Complaint

120 F.T.C.

to my absolute and total amazement I had LOST, YES LOST!! 33 pounds and all of that in just 30 days.

* * * *

Miss H.L., Huntington, NY: I tried your product and lost 20 pounds in the first three weeks. I can't believe how easy it was and I feel so much better about myself. Thank you so much.

Mrs. L.P., Kingwood, TX: I recently ordered one of your Acu-Stop 2000's. I followed the enclosed instructions and within the first month I lost 36 pounds. I'd like to take this opportunity to tell you how very pleased I am with your product. It worked for me better than any diet pill I've tried.

Ms. A.S., Massepequa, NY: I purchased your product several months ago. When I opened the package I didn't quite believe that this product would work. However, I was very surprised--IT WORKED!! I lost my target weight faster than any other product or diet I tried before. I can't thank you enough.

Mrs. K.B., Ft. Lauderdale, Fla.: Using your product I lost seven pounds in the first seven days! I am continuing to use your product because I know that with its help I can continue to lose weight.

Results will vary and these losses are atypical. If you lose too much weight, discontinue use immediately. (Exhibit C).

D. What Pleasure You'll Get From Reading About A Method That REALLY DOES Work . . .

--Without Pills

--Without Diets

--Without Books

--Without Will-Power

ACU-STOP 2000®

Once You Own It,

You'll NEVER Buy Another Pill . . .

You'll NEVER Go On Another Diet . . .

You'll NEVER Have To Plow Through Another Book . . .

You'll NEVER Again Depend On Will-Power!

ACU-STOP 2000 WORKS ON ITS OWN. NOTHING ELSE TO BUY, EVER. TESTED BY DOCTORS AND BACKED BY A ROCK-SOLID 100% GUARANTEE.

* * * *

ONCE YOU UNDERSTAND HOW IT WORKS, YOU'LL UNDERSTAND WHY IT WILL WORK FOR YOU!

Centuries ago, Chinese physicians perfected acupressure.

(Acupressure differs from its cousin, acupuncture, in its effectiveness without needles or discomfort.)

What these sages learned was that light stimulating pressure in the ear can control various cravings. Now, as we approach the 21st century, the scientists at Acu-Stop have refined this knowledge.

Acu-Stop 2000 is a thoroughly tested and proved device that fits invisibly in the right ear. It has no batteries nor moving parts. But activating it controls the appetite.

* * * *

We Make You This Promise:

278

Complaint

You've never experienced such an easy, effortless way to lose surplus pounds and inches. Never!

* * * *

Are You Currently On Another Diet Plan?

ACU-STOP 2000® has been found to accelerate the results of diet pills and meal plans. This means you can reach your weight loss goals considerably faster. The same unconditional guarantee applies, of course. (Exhibit D).

E. LOSE 30 POUND IN 30 DAYS

--WITHOUT DIETING

--WITHOUT EXERCISE

ACU-STOP 2000

THE WEIGHT LOSS METHOD OF THE FUTURE IS AVAILABLE TODAY-

* * * *

LOSE 30 POUNDS IN 30 DAYS

Doctor patented Acu-Stop 2000 is so effective, a loss of 30 pounds in 30 days is not unusual. Our satisfied customers have told us their stories and they are fantastic! Miss H.L., Huntington, NY: I tried your product and lost 20 pounds in the first three weeks. I can't believe how easy it was and feel so much better about myself. Thank you so much.

Mrs. L.P., Kingwood, TX: I recently ordered one of your Acu-Stop 2000's. I followed the enclosed instructions and within the first month I lost 36 pounds. I'd like to take this opportunity to tell you how very pleased I am with your product. It worked for me better than any diet pill I've tried.

Ms. A.S., Masepequa, NY: I purchased your product several months ago. When I opened the package I didn't quite believe that this product would work. However, I was very surprised--IT WORKED!! It lost my target weight faster than any other product or diet I tried before. I can't thank you enough.

Mrs. K.B., Ft. Lauderdale, Fla.: Using your product I lost seven pounds in the first seven days! I am continuing to use your product because I know that with its help I can continue to lose weight.

Mrs. B.K., Hartland, MI: Thank you for inventing this amazing product! This is the first diet that is really easy. Acu-Stop 2000 suppressed my appetite and I eat what I want while still losing weight.

Why Did The U.S. Government Officially Approve Acu-Stop 2000 For A Legal Patent?

From Mike Powers, President

Acu-Stop 2000

* * * *

The Official U.S. Government Document you see here hangs framed on my wall. I'm proud of it for it tells people who have a weight problem that Acu-Stop 2000 has been tested and patented by a Doctor.

Yes, you can finally have the beautiful, slim figure you're after . . . and lose up to 30 pounds in 30 days. No diets. No exercise. No pills. Why?

Because Acu-Stop 2000 will CONTROL your hunger in a remarkable new way. So amazing in fact, that the U.S. Government officially approved Acu-Stop 2000 with the Legal Patent you see above. One of the major problems in America is that people are too fat, and that's not just unsightly, it's unhealthy, too.

Acu-Stop 2000 has the POWER to end this problem. The Chinese invented it, and we perfected it! I can prove it really works. (Exhibit E).

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 attached as Exhibits A-E, respondents have represented, directly or by implication, that:

- A. The Acu-Stop 2000 causes significant weight loss;
- B. The Acu-Stop 2000 causes significant weight loss without the need to diet or exercise;
- C. The Acu-Stop 2000 controls appetite or eliminates a person's craving for food; and
- D. The Acu-Stop 2000 is scientifically proven to cause significant weight loss and control appetite.

PAR. 6. In truth and in fact:

- A. The Acu-Stop 2000 does not cause significant weight loss;
- B. The Acu-Stop 2000 does not cause significant weight loss without the need to diet or exercise;
- C. The Acu-Stop 2000 does not control appetite or eliminate a person's craving for food; and
- D. The Acu-Stop 2000 is not scientifically proven to cause significant weight loss and control appetite.

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

PAR. 7. Through the use of statements contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits A-E, respondents have represented, directly or by implication, that at the time they made the representations set forth in paragraph five (A) - (C), 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) - (C), 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 statements contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits A-C and E, respondents have represented, directly or by implication, that testimonials from consumers appearing in advertisements for the Acu-Stop 2000 reflect the typical or ordinary experience of members of the public who have used the product.

PAR. 10. In truth and in fact, testimonials from consumers appearing in advertisements for the Acu-Stop 2000 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 nine was, and is, false and misleading.

PAR. 11. 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



© 1993 Acu-Stop 2000

YOU'LL PROVE TO YOURSELF:

ACU-STOP 2000 GUARANTEES:

This device is all you'll need, ever, to control your weight and get rid of flab. It will work for you or we'll refund every cent you paid for it. Every cent.

21st CENTURY METHOD MEANS:

- No Dieting ■ No Pills
- No Nervousness
- No Frantic Exercising
- No Strange Formulas
- No Special Foods To Buy

MORE THAN 200,000 SOLD! TESTIMONIALS ABOUND!

Ms. K.B. of California is typical of ACU-STOP 2000 users. She writes:

I've lost five pounds in eight days. My energy level is up. Those diet pills cost a ton of money and can't do this.

Ms. S.L.M. is an adult model who had all but given up on regaining her figure. She writes:

My waist had ballooned to 32 inches. Now it's back to 25 and I'm modeling again. I love you for making me beautiful again.

Mr. P.N. of Minnesota didn't think it would work but decided to give it a try: 30 pounds in 30 days? Right. Actually, I lost 33 pounds in 30 days. I still can't believe it

YOU CAN LOSE 30 POUNDS IN 30 DAYS!

NOT A 30-DAY OR 60-DAY SUPPLY. ONE ACU-STOP 2000 IS ALL YOU NEED...EVER!

ACU-STOP 2000 is a precision-engineered invention that fits snugly (and invisibly) in the right ear. It contacts and stimulates six precise pressure points, exactly like renowned acupuncture. Using it just minutes a day eliminates your craving for food. You'll lose weight at the pace you think best. (If you lose too much weight, use your ACU-STOP 2000 less often.)

NOW:

If you think it won't work for you, we challenge you: Try it. You can't lose, because if after using your ACU-STOP 2000 for one full month you don't agree it's the most effective way to get rid of fat and flab you've ever tried, just send it back for a 100% refund. Ask yourself: Would ACU-STOP 2000 make such an offer if thousands of users hadn't proved how effective it is? Nothing - no, nothing is as effective and as safe.

Only **\$3999**

WHY WAIT 1 MORE DAY? WHY NOT LOOK YOUR ABSOLUTE BEST? WHY WASTE MONEY ON PILLS AND BOOKS?

Operators standing By 24 Hours A Day
 Call Toll Free **1-800-228-3663**
 or mail coupon to
 ACU-STOP 2000
 10343 Royal Palm Blvd.
 Coral Springs, Florida 33065

ACU-STOP 2000 • 10343 Royal Palm Blvd., Suite 339 • Coral Springs, Florida 33065

YES, rush my ACU-STOP 2000. I understand this is all I'll need, ever. I'll use it for one full month. If I'm not delighted with the results I have the absolute right to send it back for a 100% refund of every cent I've paid for the product.

1 Acu-Stop 2000 @ \$39.99, plus \$4.50 Shipping and Handling - Total = \$44.49 Florida residents add \$2.40 sales tax

2 Acu-Stop 2000 @ \$29.99, plus \$4.50 Shipping and Handling - Total = \$64.48 (Save \$20) Florida residents add \$3.60 sales tax

Please indicate payment method:
 Check or money order enclosed.
 Charge to: Visa MasterCard (card no. _____ Expires _____ Signature _____

Please Print: Name _____ Address _____ City _____ State _____ Zip _____

For fastest service call Toll-Free **1-800-228-3663**

EXHIBIT B

Take Your Own Word For It! GUARANTEE

©1993 Acu-Stop 2000

YOU TOO WILL BE ABLE TO SAY:

WE PREDICT:

By the year 2001 this will be the standard. WHY? Because only Acu-Stop 2000 means

- No Strenuous Dieting
- No Pills ■ No Nervousness
- No Frantic Exercising
- No Strange Formulas
- No Special Food To Buy

Please Read Every Word of This ACU-STOP 2000 GUARANTEE:

This device is all you'll need, ever, to control your weight and get rid of the flab. It will work for you or we'll refund every cent you paid for the product. Every cent.

ASK THE MORE THAN 200,000 ACU-STOP BUYERS!

Ms. K.B. of Florida is an Acu-Stop user. She writes: 've lost five pounds in eight days. My energy level is up. Those diet pills cost a ton of money and can't do this.

Ms. S.L.M. is an adult model who had all but given up on regaining her figure. She writes: My waist had ballooned to 32 inches. Now it's back to 25 and I'm modeling again. I owe you for making me beautiful again.

Ms. K. McF. of California didn't think it would work but decided to try it: 30 pounds in 30 days? Right. Actually, I lost 33 pounds in 30 days. I still can't believe it.

"I LOST 33 POUNDS IN 30 DAYS!"

Only **\$39⁹⁹**

YOU'LL NEVER HAVE TO SPEND ANOTHER CENT. THIS IS NOT A 30-DAY OR 60-DAY SUPPLY. ONE ACU-STOP IS ALL YOU NEED...EVER!

ACU-STOP 2000 is a precision-engineered invention that fits snugly (and invisibly) in the right ear. It contacts and stimulates six precise pressure points, exactly like renowned acupressure. All of "mainstream" science does not accept the discipline of acupressure. Most doctors do...and over 200,000 satisfied customers can't be wrong. Using it just minutes a day eliminates your craving for food. We can't tell you how much weight you will lose. Everyone is different. Results will vary depending on the individual.

NOW:

If you think it won't work for you, we challenge you: Try it. You can't lose, because if after using ACU-STOP 2000 for one full month you don't agree it's the most effective way to get rid of fat and flab you've ever tried, just send it back for a 100% refund. Ask yourself: Would ACU-STOP 2000 make such an offer if thousands of users hadn't proved how effective it is? Nothing--no, nothing--is as effective and as safe.

WHY WAIT EVEN ONE MORE DAY? WHY NOT LOOK TRIM IN A SWIMSUIT? WHY WASTE MONEY ON PILLS AND BOOKS?

Operators Standing By 24 Hours A Day

Call Toll Free **1-800-395-7638** or mail coupon to ACU-STOP 2000, 11900 SW 66th Ave., Miami, FL 33186

Results described in this ad may be atypical.

ACU-STOP 2000 • 11900 SW 66th Ave., • Miami, Florida 33186

YES, rush my ACU-STOP 2000. I understand this is all I'll need, ever. I'll use it for one full month. If I'm not delighted with the results, I have the absolute right to send it back for a 100% refund of every cent I've paid for this product.

1 ACU-STOP 2000 @ \$39.99, plus \$4.50 Shipping and Handling Total=\$44.49 (Florida residents add \$2.40 sales tax)

2 ACU-STOP 2000 @ \$29.99, plus \$4.50 Shipping and Handling Total=\$64.48 (Save \$20!) (Florida residents add \$2.40 sales tax)

Please indicate payment method:
 Check or money order enclosed
Charge to: Visa MasterCard
Card No. _____
Expires _____
Signature _____

Please Print
Name _____
Address _____
City _____
State _____ Zip _____

For faster service call Toll-Free 1-800-395-7638

Complaint

120 F.T.C.

EXHIBIT C

lost 33 pounds in 30 days!" *Mrs. K. McE., Los Angeles, CA.

**Introducing
a real
breakthrough
in losing
weight.**

**So advanced,
it won't
let you fail!**

Pure Science or Pure Miracle?
Maybe it's a little of both.



00000

EXHIBIT C

We've changed so many lives We can change yours.

From now on, every other diet method is a thing of the past.

Think of it. No pills to pop. No favorite foods to give up. No tasteless, unsatisfying meal plans. No endless, wearying exercise. Just one incredible product that can enable you to lose weight fast and easily. Amazing? You bet. Here's why.

Based on a centuries-old understanding of how our bodies work.

The idea for ACU-STOP 2000 comes to us from across the seas in China. Their understanding of human physiology has long been acknowledged by medical experts to be extremely advanced.

ACU-STOP 2000 is an acupressure-like device stimulates those points in your body which regulate appetite...and suppresses their activity. It fits almost invisibly in your right ear. You don't have to wear it all day, just for a few minutes. **But those few minutes a day can change the rest of your life because that's all it takes to make those excess pounds and inches you hate disappear.** What happens is, your hunger pangs and your craving food just stop. They go away. Gone. With absolutely no unpleasant side effects, you eat less. And lose more. It's so effective, you'll see results immediately.

*You have nothing to lose
but pounds
and inches.*



You t
You t
You probably
**NOW IS THE
TRY ACU**

Miss H.L., Huntington, NY: I tried your product and lost 20 pounds in the first three weeks. I can't believe how easy it was and I feel so much better about myself. Thank you so much.

Mrs. L.P., Kingwood, TX: I recently ordered one of your Acu-Stop 2000. I followed the enclosed instructions and within the first month I lost 15 pounds. I'd like to take this opportunity to tell you how very pleased I am with your product. It worked for me better than any diet pill I've tried.

Results will vary and these losses are not guaranteed.

Complaint

120 F.T.C.

EXHIBIT C

Lose weight with none of the drawbacks other diet methods have.

We know how hard it is to lose weight. The emotional and physical toll on your mind and body can be devastating. **But with ACU-STOP 2000 you will succeed. It just won't let you fail.** And you won't have to worry about any of the negatives of other methods. You don't have to starve yourself, like a prisoner in your own home. You don't have to pop strange chemical pills with who-knows-what side effects (pills that can make you so nervous and irritable, that even if they work friends and family may hate to be around you). And you don't have to undergo strenuous, exhausting exercise day after day. **Forget all that. The acupuncture method puts you in control without endless exercise and with minimal will power!** All you do is stimulate the ear piece and your ravenous appetite goes... followed quickly by all those unwanted pounds and inches.

Everything you need to know about our money-back guarantee.

It couldn't be simpler. We're so sure you'll be satisfied with ACU-STOP 2000, if you don't lose the weight, we'll refund your money. No questions asked.

Nothing to buy ever again – a small price to pay for looking great.

This may not be your first attempt at losing weight, but it will be your last. Because this method works. You'll never have to spend money on a diet pill, meal, book or exercise aid again. Order ACU-STOP 2000 once and that's it. This isn't a 30 or 60 day supply. This isn't step 1. This is it. Use it until you reach your goal weight, then put it away. If you have to use it again in the future for a minor weight gain, no problem. The stimulator lasts for years. But don't buy ACU-STOP just because of the money you'll save. Buy it because of all the weight you'll lose!

***"I LOST 33 POUNDS IN 30 DAYS!"**

Mrs. K.McE, Los Angeles, CA.

I have been overweight for 30 of my 38 years. On Oct. 1st, I weighed myself. I used Acu-Stop following your instructions, and ate what I liked. On Nov. 1st, to my absolute and total amazement I had LOST, YES LOST!! 33 pounds and all of that in just 30 days.

d pills...
l plans...
en tried prayer...
**IT'S TIME TO
STOP 2000**



Ms. A.S., Massapequa, NY: I purchased your product several months ago. When I opened the package I didn't quite believe that this product would work. However, I was very surprised – IT WORKED!! I lost my target weight faster than any other product or diet I tried before. I can't thank you enough.

Mrs. K.B., Ft. Lauderdale, Fla.: Using your product I lost seven pounds in the first seven days! I am continuing to use your product because I know that with its help I can continue to lose weight.

000001

EXHIBIT C

ORDER TODAY- DON'T WAIT

Even if you've given up all hope of losing weight, ACU-STOP 2000 is right for you. Don't give up. Don't give in. This is different from every other diet method. And it will work. For you. Guaranteed. Call now. Our operators are standing by, 24 hours a day. Now is the time to lose the weight you hate.


CALL NOW - TOLL FREE 1-800-292-1971

MONEY BACK GUARANTEE

We guarantee ACU-STOP 2000 to be fast, safe and effective. If you are not completely satisfied, simply return it within 30 days for a full refund. No questions asked!


**TWO FREE GIFTS
WITH YOUR ORDER!
LIMITED TIME ONLY**

BRILLIANTLY FACETED
ONE CARAT CUBIC ZIRCONIA



Suitable for setting

JEWELRY CASE
from China—
perfect for those
special pieces
that you cherish.



BOTH YOURS - FREE!



**ONLY
\$39.99**
SPECIAL
Buy 2 and pay only
\$29.99 each. Save \$20.

**It controls
your hunger,
so you can
control
your weight.**



**NOTE: If you lose too much weight,
discontinue use immediately.**
Acu-Stop 2000, 10343 Royal Palm Blvd., Suite 339
Coral Springs, FL 33065-9896

EXHIBIT D

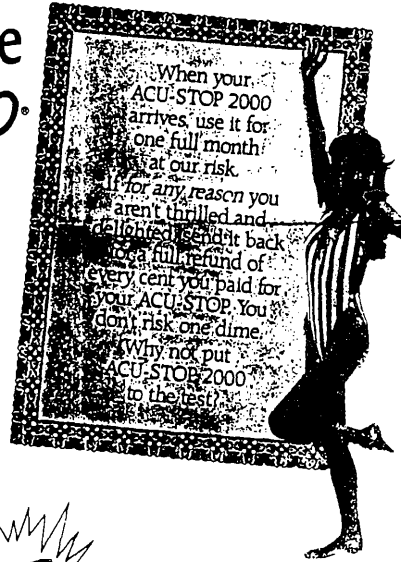
YOU TAKE NO RISK!

Take A Look At The **ACU-STOP 2000**[®] Unconditional Guarantee

Are You Currently
On Another
Diet Plan?

ACU-STOP 2000

has been found to accelerate the results of diet pills and meal plans. This means you can reach your weight loss goals considerably faster. The same unconditional guarantee applies, of course.



TWO FREE GIFTS FROM ACU-STOP 2000

Phone or mail your order within the next 10 days and we'll include a brilliantly faceted one carat cubic zirconia, suitable for setting, and this handsome jewelry case from China. These gifts are yours to keep, our way of saying thanks for trying ACU-STOP 2000.

© 1991 Acu-Stop 2000

Available Only From



EXHIBIT D

**YOU SAY
YOU'VE TRIED**
 — PILL
 — DIET
 — BOOK
 — WILL-POWER
 AND YOUR WEIGHT
 STILL BOUNCES UP AND
 DOWN LIKE A YO-YO?

*What Pleasure You'll Get From
 Reading About A Method
 That REALLY DOES Work...*

- Without Pills
- Without Diets
- Without Books
- Without Will-Power

ACU-STOP 2000®

**Once You Own It,
 You'll NEVER Buy Another Pill...
 You'll NEVER Go On Another Diet...
 You'll NEVER Have To Plow Through Another Book...
 You'll NEVER Again Depend On Will-Power!**

ACU-STOP 2000
 WORKS ON ITS
 OWN. NOTHING
 ELSE TO BUY,
 EVER.



Before



After

TESTED BY
 DOCTORS AND
 BACKED BY A
 ROCK-SOLID
 100% GUARANTEE

\$39⁹⁹ Complete
 plus \$4.50 shipping/handling

nothing else to buy ever!

Complaint

EXHIBIT D

120 F.T.C.

The Totally New Principle.. Ours Alone. And You Can Have It!

ONCE YOU UNDERSTAND HOW IT WORKS,
YOU'LL UNDERSTAND WHY IT WILL
WORK FOR YOU!

(Reading time 1 1/2 minutes)

Centuries ago, Chinese physicians perfected acupuncture.

(Acupuncture differs from its cousin, chiropractic, in its effectiveness without needles or discomfort.)

What these sages learned was that light stimulating pressure in the ear can control various cravings. Now, as we approach the 21st century, the scientists at Acu Stop have refined this knowledge.

Acu Stop 2000 is a thoroughly tested and proved device that fits invisibly in the right ear. It has no batteries nor moving parts. But activating it controls the appetite.

(Yes, if you know the right four stimulation points, you might walk around with your finger in your ear. But it's both uncomfortable and socially unacceptable.)

Not only will no one know you're wearing an Acu Stop 2000, you really don't have to wear it for more than 20 minutes. The effect is long-lasting.



Think What This Means!

■ **No More
PHI-Poppin'**

This can be expensive and dangerous to your health. Or you're trapped with pills, you keep paying and paying... while you ingest a daily dose of chemicals.

■ **No More
Forced Diet**

Even the moderate diet compels you eat foods you don't like and crave foods you do like. You have a slave of a diet. When you have a business dinner, you drink out the window.

■ **No More
Dependent
On Will-Po'**

Why add stress to your life? Today's daily pressure and stressful enough. Have that "empty" feeling which leaves you tense, irritable, without pep and joy.

ACU-STOP 2000 WORKS!



IT HAS PROVED ITSELF
OVER AND OVER AND
OVER. IT WILL WORK
FOR YOU OR YOUR
MONEY BACK!

YOUR LIFE — AS WELL AS
YOUR APPEARANCE — WILL BE
IMPROVED FOREVER!

Note:

Don't lose too much weight. Discontinue when your weight is right, then keep ACU-STOP 2000 handy for the time when you might need it again. It lasts a lifetime.



Why Wait?

One Phone Call Can
End Your Dependence
On Diets And Pills

CALL THE
ACU-STOP 2000
HOTLINE:
1-800-241-3111

Acu-Stop will be on its way to you.

We Make You This Promise:
You've never experienced such an
easy, effortless way to lose surplus
pounds and inches. Never!
And we back up this promise with our

**LOSE 30 POUNDS
IN 30 DAYS**

**-WITHOUT
DIETING**

**-WITHOUT
EXERCISE!**

ACU-STOP 2000

THE WEIGHT LOSS METHOD OF THE FUTURE

**IS AVAILABLE
TODAY-**

EXHIBIT E

Why Did The U.S. Government Officially Approve Acu-Stop 2000 For A Legal Patent?



From Mike Powers, President
Acu-Stop 2000

Coral Springs, Florida
Thursday, 2:30 p.m.

SPECIAL REPORT

Dear Friend,

The Official U.S. Government Document you see here hangs framed on my wall. I'm proud of it for it tells people who have a weight problem that Acu-Stop 2000 has been tested and patented by a Doctor.

I've also framed the letters I get from Acu-Stop 2000 users. These letters hang on my wall, too.

Let's make one thing perfectly clear right now. The Acu-Stop 2000 sure-fire way to CONTROL weight, permanently, does away with pills, diets, and exercise. I'm sure that's good news for you, because if you're like most people who have a FAT problem, you most likely hate to give up the foods you love, deplore long hours of strenuous exercise, and are suspicious of swallowing pills to lose weight.

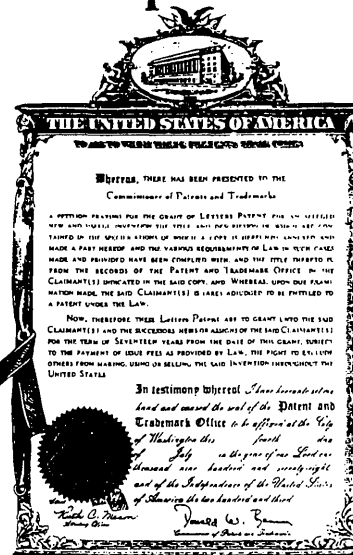
The fact is, statistics clearly show us that pills, crash diets (which are dangerous to health) and long hours of boring exercise rarely conquer fat on the long term. Most overweight women and men who try these methods know that they may lose weight...then gain it back again.

Is this the case with you? Are you tired of being on a roller coaster, losing, gaining, losing, gaining...without permanent results? If so, you have my Written Guarantee that Acu-Stop 2000 will change all that.

Yes, you can finally have the beautiful, slim figure you're after...and lose up to 30 pounds in 30 days. No diets. No exercise. No pills. Why?

Because Acu-Stop 2000 will CONTROL your hunger in a remarkable new way. So amazing in fact, that the U.S. Government officially approved Acu-Stop 2000 with the Legal Patent you see above. One of the major problems in America is that people are too fat, and that's not just unsightly, it's unhealthy, too.

Acu-Stop 2000 has the POWER to end this problem. The Chinese invented it, and we perfected it! I can prove it really works.



U.S. Patent 4098277

Please turn the page

Complaint

120 F.T.C.

EXHIBIT E

← Please read other side first

SPECIAL REPORT

Why Did the U.S. Government Officially Approve Acu-Stop For A Legal Patent?

In America today, health care costs are enormous. One of the leading causes of poor health is heart disease. Being overweight can lead to heart disease...ask your Doctor.



And while you're at it, please show him this letter. I'm sure your Doctor wants to see you shed unwanted pounds fast and sensibly, and so do I. Acu-Stop 2000 makes it easy.

So forget past failures. All I ask is that you give this amazing NEW WEIGHT LOSS MIRACLE an honest try for just 30 days. All over America people are doing it. They have a lot to smile about....



A woman from New York lost 20 pounds the first three weeks! In the first month, a lady from Texas said goodbye to 36 pounds of fat. An Acu-Stop 2000 user from Florida lost a pound a day! I have framed letters hanging on my wall to prove it.

NO CRASH DIETS...NO STRENUOUS EXERCISE...NO PILLS! POUNDS MELT OFF FAST, JUST LIKE MAGIC! YES, IT REALLY WORKS.

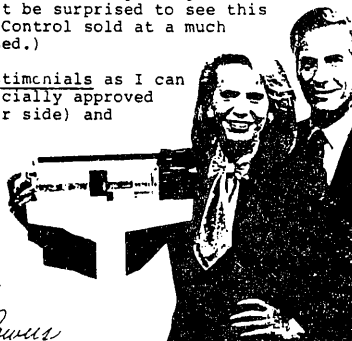
FOR MEN TOO

I'll Even Pay You Money To Help Me Prove That Acu-Stop 2000 Can Change Your Life!

Right now, our Company is planning a Nation Wide Advertising Campaign. Do be surprised to see Acu-Stop 2000 on television and major magazines and newspapers all across America. (Also don't be surprised to see this MAJOR BREAKTHROUGH in the field of Weight Control sold at a much higher price than on the ORDER FORM enclosed.)

Frankly, I'm after as many honest Testimonials as I can lay my hands on. The U.S. Government officially approved Acu-Stop 2000 for a Legal Patent (see other side) and I want to prove it really works.

Do this: Order this proven FAT-FIGHTER right now, by phone or mail. Use it as directed and be thrilled with fast results! Send me a letter... if I feel your letter is suitable for publication I'll send you \$100 right away. Your name will not be published unless I have your permission...but I will frame it and proudly hang it on my wall.



Sincerely, *Mike Powers*

EXHIBIT E

ORDER TODAY - DON'T WAIT

Acu-Stop 2000 is right for you. It's unlike any other diet method you've ever tried, and it works! Call now. Our operators are standing by, 24 hours a day.

Try it for 30 days. You have nothing to lose but unwanted pounds and inches!



ONLY \$39.99

(plus \$4.00 shipping and handling)

AND YOU'LL NEVER NEED ANOTHER DIET OR DIET PILLS AGAIN!



NOTE: If you lose too much weight, discontinue use immediately.

Money Back Guarantee

We guarantee Acu-Stop 2000 to be fast, safe, and effective. If you are not completely satisfied, simply return it within 30 days for a full refund. No questions asked.

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 Original Marketing, 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 11570 Wiles Road, in the City of Pompano Beach, State of Florida.

Respondent Franklin & Joseph, Inc. 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 237 Mamaroneck Avenue, in the City of White Plains, State of New York.

Respondent Barry A. Weiss is an officer and director of Original Marketing, Inc. He formulates, directs and controls the policies, acts

and practices of Original Marketing, Inc. He resides at 22471 Vista Wood Way, in the City of Boca Raton, State of Florida.

Respondent Roger Franklin is an officer and director of Original Marketing, Inc. and Franklin & Joseph, Inc. He formulates, directs and controls the acts and practices of said corporations. He resides at 33 Maplemoor Lane, in the City of White Plains, State of New York.

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 the purposes of this order:

1. "*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.

2. "*Acupressure device*" shall mean any product, program, or service that is intended to function by means of the principles of acupressure.

I.

It is ordered, That respondents, Original Marketing, Inc. and Franklin & Joseph, Inc., corporations, their successors and assigns, and their officers; Barry A. Weiss, individually and as an officer and director of Original Marketing, Inc.; Roger Franklin, individually and as an officer and director of Original Marketing, Inc. and Franklin & Joseph, Inc.; and respondents' agents, representatives and employees, directly or through any partnership, corporation, subsidiary, division or other device, in connection with the advertising, packaging, labeling, promotion, offering for sale, sale, or distribution of the Acu-Stop 2000 or any other acupressure 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. Such product causes significant weight loss;
- B. Such product causes significant weight loss without the need to diet or exercise;
- C. Such product controls appetite or eliminates a person's craving for food; or
- D. Such product is scientifically proven to cause significant weight loss or control appetite.

II.

It is further ordered, That respondents, Original Marketing, Inc. and Franklin & Joseph, Inc., corporations, their successors and assigns, and their officers; Barry A. Weiss, individually and as an officer and director of original Marketing, Inc.; Roger Franklin, individually and as an officer and director of Original Marketing, Inc. and Franklin & Joseph, Inc.; and respondents' agents, representatives and employees, directly or through any partnership, corporation, subsidiary, division or other device, in connection with the advertising, packaging, labeling, promotion, offering for sale, sale, or distribution of any weight-loss or weight-control product or program or any acupuncture device 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, benefits, efficacy, or safety of such product, program, or device unless such representation is true and unless, at the time of making such representation, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

III.

It is further ordered, That respondents, Original Marketing, Inc. and Franklin & Joseph, Inc., corporations, their successors and assigns, and their officers; Barry A. Weiss, individually and as an officer and director of Original Marketing, Inc.; Roger Franklin, individually and as an officer and director of Original Marketing, Inc. and Franklin & Joseph, Inc.; and respondents' agents, representatives and employees, directly or through any partnership, corporation, subsidiary, division or other device, in connection with the advertising, packaging, labeling, promotion, offering for sale, sale, or

distribution of any weight-loss or weight-control product or program or any acupuncture device in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, that any endorsement (as "endorsement" is defined in 16 CFR 255.0(b)) of the product, program, or device represents the typical or ordinary experience of members of the public who use the product, program, or device unless this is the case.

IV.

It is further ordered, That respondents, Original Marketing, Inc. and Franklin & Joseph, Inc., corporations, their successors and assigns, and their officers; Barry A. Weiss, individually and as an officer and director of Original Marketing, Inc.; Roger Franklin, individually and as an officer and director of Original Marketing, Inc. and Franklin & Joseph, Inc.; and respondents' agents, representatives and employees, directly or through any partnership, corporation, subsidiary, division or other device, in connection with the advertising, packaging, labeling, promotion, offering for sale, sale, or distribution of any weight-loss or weight-control product or program or any acupuncture device in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting, in any manner, directly or by implication, the contents, validity, results, conclusions, or interpretations of any test or study.

V.

It is further ordered, That respondents, and their successors and assigns, are jointly and severally liable for, and shall pay refunds to eligible consumers of Acu-Stop 2000 as provided herein. "Eligible consumer" shall mean any person who purchases, or has purchased, an Acu-Stop 2000 from respondents; who returns, or has returned, the device to respondents requesting a refund prior to ninety (90) days after the date this order becomes final; and who has not previously received a refund. "Eligible consumer" shall not include persons who request a credit from a credit card issuer and who do not otherwise request a credit or refund from respondents. Respondents shall

provide to the Commission all information necessary to identify eligible consumers and to verify their eligibility.

A. Not later than the date this order becomes final, respondents shall deposit into an escrow account, to be established by the Commission for the purpose of receiving payments due under the provisions of this order ("escrow account"), the sum of fifty thousand dollars (\$50,000.00). These funds, together with accrued interest, less any amount necessary to pay the costs of administering the escrow account and refund program provided herein, shall be used by the Commission or its representative to pay refunds to those eligible consumers who purchased an Acu-Stop 2000 from respondents prior to January 1, 1995. Any funds remaining in the escrow account after all refunds to consumers under this subparagraph have been paid shall be paid to the United States Treasury.

At any time after this order becomes final, the Commission may direct the escrow agent to transfer funds from the escrow account, including accrued interest, to the Commission to be distributed as herein provided. Respondents shall be notified as to how the funds are distributed, but shall have no right to contest the manner of distribution chosen by the Commission. The Commission, or its representative, shall, in its sole discretion, select the escrow agent. Costs associated with the administration of the escrow account and refund program provided herein, if any, shall be paid from funds in the escrow account.

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

B. Respondents shall pay from their own funds refunds to all eligible consumers who are not paid from the escrow account provided herein. This requirement shall include:

1) All refund requests from eligible consumers who purchased an Acu-Stop 2000 after January 1, 1995, and

2) All refund requests under subparagraph A that exceed the amount available in the escrow account.

All refunds required in subparagraph B.1 shall be paid within thirty (30) days after the receipt of the request, or within thirty (30) days after the date this order becomes final, whichever is later. All refunds required in subparagraph B.2 shall be paid within thirty (30) days after notification to respondents that the funds available in the escrow account to pay refunds have been depleted.

VI.

It is further ordered, That for three (3) years after this order becomes final, respondents, and their successors and assigns, shall maintain documents and records demonstrating the manner and form of respondents' compliance with Part V of this order, and upon request make available to the Commission, at a place it designates for inspection and copying, copies of:

A. All documents and records evidencing the refunds respondents paid, or charge card credits issued, to eligible consumers, as that term is defined in Part V;

B. A list containing the name, mailing address, and purchase price for each eligible consumer who requested a refund;

C. The name and last known address of each consumer who requested a refund but was refused and the reason for each refusal to refund; and

D. Copies of all correspondence and other communications to, or from, any consumers regarding a refund.

VII.

It is further ordered, That the respondents Barry A. Weiss, Roger Franklin, and their agents, representatives, and employees, directly or through any partnership, corporation, subsidiary, division, joint venture or other device, do forthwith cease and desist from advertising, promoting, offering for sale, selling, or distributing any weight-loss or weight-control product or program or any acupuncture device to the general public, unless, prior to advertising, promoting, offering for sale, selling, or distributing to the general public any such product, respondents Weiss and Franklin first obtain a

performance bond in the principal sum of three hundred thousand dollars (\$300,000). Said bond shall be conditioned upon compliance by respondents Weiss and Franklin with the provisions of the Federal Trade Commission Act, and with the provisions of this order. The bond shall be deemed continuous and remain in full force and effect as long as respondents Weiss and Franklin continue to advertise, promote, offer for sale, sell, or distribute any weight-loss or weight-control product or program or any acupuncture device, directly or indirectly, to the general public, and for at least five (5) years after they have ceased any such activity. The bond shall cite this order as the subject matter of the bond and provide surety against respondents' failure to pay consumer redress or disgorgement as set forth herein. Such performance bond shall be an insurance agreement providing surety issued by a surety company that is admitted to do business in a state in which respondents Weiss and Franklin are doing business and that holds a Federal Certificate of Authority as Acceptable Surety on Federal Bonding and Reinsuring.

Respondents Weiss and Franklin shall provide a copy of such performance bond to the associate director of the Federal Trade Commission's Division of Enforcement, 6th Street & Pennsylvania Avenue, N.W., Washington, D.C. 20580, prior to the commencement of any business for which such bond is required.

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

The performance bond or escrow agreement shall provide that the surety company or escrow agent, within thirty (30) days following

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

Respondents Weiss and Franklin may not disclose the existence of the performance bond or escrow account to any consumer, or other purchaser or prospective purchaser, to whom a covered product, program, or device is advertised, promoted, offered for sale, sold, or distributed, without also disclosing at the same time and in a like manner that the performance bond or escrow account is required by order of the Federal Trade Commission in settlement of charges that respondents engaged in false and misleading representations.

VIII.

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

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

B. All tests, reports, studies, surveys, demonstrations or other evidence in their possession or control that contradict, qualify, or call

into question such representation, or the basis relied upon for such representation, including complaints from consumers.

IX.

It is further ordered, That respondents, Original Marketing, Inc. and Franklin & Joseph, Inc., shall:

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

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

X.

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

XI.

It is further ordered, That respondents, Barry A. Weiss and Roger Franklin, shall, for a period of five (5) years from the date of issuance of this order, notify the Commission within thirty (30) days of the discontinuance of his present business or employment and of his affiliation with any new business or employment. Each notice of

affiliation with any new business or employment shall include respondents' 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, Original Marketing, Inc. and Franklin & Joseph, Inc., corporations, their successors and assigns, and their officers; Barry A. Weiss, individually and as an officer and director of Original Marketing, Inc., and Roger Franklin, individually and as an officer and director of Original Marketing, Inc. and Franklin & Joseph, 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 they have complied with this order.

EXHIBIT A

This escrow agreement, made and entered into this ____ day of _____, _____, by and between _____ (hereinafter "_____"); and the Federal Trade Commission, an agency of the Government of the United States of America, by and through _____ (hereinafter "FTC"); and _____ (hereinafter "Escrow Agent");

WITNESSETH:

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

Whereas, the consent order requires that _____ cease and desist from advertising, promoting, offering for sale, selling, or distributing any weight-loss or weight-control product or program or any acupuncture device to the general public unless _____ first establishes and maintains an escrow account, under the terms and conditions specified in the consent order;

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

1. _____ shall establish an Escrow Account at _____, to be styled _____ Escrow Account, _____, Escrow Agent. _____ shall deposit into the Escrow Account an initial sum of at least three hundred thousand dollars (\$300,000.00) in cash, or other approved assets of equivalent value. Thereafter, _____ shall deposit such additional amounts into the Escrow Account as are necessary to maintain the total amount in the Escrow Account at three hundred thousand dollars (\$300,000.00).

2. The Escrow Agent shall be the sole signatory on the Escrow Account and access to the funds held in that account shall be solely through the Escrow Agent. It is understood by the parties to this Escrow Agreement that upon the signing of this Agreement, _____ relinquishes to the Escrow Agent, all legal title to the escrow funds, except as to such amounts in the Escrow Account that are in excess of three hundred thousand dollars (\$300,000.00). Until and unless the Escrow Account is terminated as provided for herein, _____ agrees to make no claim to or demand for return of the funds, directly or indirectly, through counsel or otherwise; and, in the event of bankruptcy, _____ acknowledges that the funds are not part of _____'s estate, nor does the estate have any claim or interest therein.

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

4. The Escrow Agent, within thirty days following receipt of notice that a final judgment or an order of the Commission against _____ for consumer redress of disgorgement in an action brought under the provisions of the Federal Trade Commission Act has been entered, or, in the case of an order of the Commission, has become final, finding that _____ has violated the terms of the consent order or the provisions of the Federal Trade Commission Act, and determining the amount of consumer redress or disgorgement to be paid, which notice shall also be mailed to _____ at his last known address, shall pay to the Commission so much of the funds of the escrow Account as does not exceed the amount of consumer redress or disgorgement ordered, and which remains unsatisfied at the time notice is provided to the Escrow Agent, provided that, if _____ has

agreed to the entry of a court order or an order of the Commission, a specific finding that _____ violated the terms of the consent order or the provisions of the Federal Trade Commission Act shall not be necessary. The Escrow Agent shall have the power to convert to cash so much of the Escrow Account assets as are necessary to satisfy the obligations of the judgment or order.

5. The Escrow Account shall continue until at least five years after _____ last advertises, promotes, offers for sale, sells, or distributes any product specified in the consent order, at which time, if there are no pending FTC investigations, legal or administrative actions by the FTC against _____, or unsatisfied obligations pursuant to a judgment or order described in paragraph 4 herein, for which a claim could be made against the escrow funds under the terms of the consent order, the FTC shall, upon _____'s request, instruct the Escrow Agent to terminate the Escrow Account and return the balance of the Escrow Account to _____. At such time, the Escrow Agent shall be fully and completely released from its agency as herein described. The legal title to the escrow funds shall vest in _____ at such time as the Escrow Agent, pursuant to instructions from the FTC, returns the funds to _____.

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

SIGNATURES

DATE:

Complaint

120 F.T.C.

IN THE MATTER OF

THE ESKIMO PIE CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3597. Complaint, Aug. 11, 1995--Decision, Aug. 11, 1995*

This consent order prohibits, among other things, a Virginia-based corporation from misrepresenting the existence or amount of calories or any other nutrient or ingredient in any frozen dessert product and from falsely claiming that any frozen dessert product has been approved, endorsed or recommended by any person, group or organization. In addition, the consent order requires a disclosure statement, should Eskimo Pie represent that any frozen dessert is a useful or appropriate part of a diabetic's diet.

*Appearances*For the Commission: *C. Steven Baker and Barbara DiGiulio.*For the respondent: *F. Clairborne Johnston, Jr., Mays & Valentine, Richmond, VA. and Stuart M. Pape and Daniel Krakov, Patton, Boggs & Blow, Washington, D.C.*

COMPLAINT

The Federal Trade Commission, having reason to believe that The Eskimo Pie 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 The Eskimo Pie Corporation is a Delaware corporation, with its principal office or place of business at 901 Moorefield Park Drive, Richmond, Virginia.

PAR. 2. Respondent has advertised, labelled, offered for sale, sold, and distributed a number of different varieties of Eskimo Pie Sugar Freedom frozen dessert products to the public. Each of these products is a "food" 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 Eskimo Pie Sugar Freedom Products, including but not necessarily limited to the attached Exhibits 1 through 6. These advertisements contain the following statements:

A. SLIM DOWN FOR SUMMER

[Among the products depicted in this advertisement are boxes of Eskimo Pie Sugar Freedom products. The packages for these products feature the name Sugar Freedom and the NutraSweet name and logo.]

[The advertisement also depicts figures engaged in exercise activities, such as weight lifting, bicycling, and jogging, and a tape measure running through it.] (Exhibit 1).

B. NOW IS YOUR LAST CHANCE TO SLIM DOWN FOR SUMMER, AND THE FOLLOWING GREAT TASTING FOODS CAN HELP.

* * *
SATISFY YOUR SWEET TOOTH WITH SUGAR FREEDOM ESKIMO PIE NOVELTY TREATS. MADE WITH THE GREAT TASTE OF NUTRASWEET, REFRESHING SUGAR FREEDOM ESKIMO PIE COMES IN BARS, CONES, SANDWICHES AND NOW HALF GALLONS.

[Transcript of tape recording attached as Exhibit 2]
(Tape recording attached as Exhibit 3).

C. SWEET SAVINGS

Millions of you who are trying to eat smarter enjoy NutraSweet in things like sodas and gum and yogurts. Many of you stock your kitchens with frozen desserts and jams sweetened with NutraSweet. But what about trying the other products sweetened with the great taste of NutraSweet? You can start by clipping these valuable coupons here and save!

At NutraSweet we believe that you shouldn't have to compromise on the delicious things in life for any reason -- even calories.

* * *

Sugar Freedom Eskimo Pie
[The coupon book in which this appeared contains a cents off coupon for Eskimo Pie Sugar Freedom products.]
(Exhibit 4).

D. [Advertisement depicts 1/2 gallon carton of Eskimo Pie Sugar Freedom, which features the following:]

Sugar Freedom
A Proud Sponsor of the
[ADA Triangle Logo] American Diabetes Association
[NutraSweet Swirl Logo] NutraSweet
(Exhibit 5).

E. [The first side of a coupon states, in part,:]

PROUD PARTNERS.

PURE PLEASURE.

[ADA triangle] AMERICAN DIABETES ASSOCIATION

ESKIMO PIE [logo in bold]

[The other side states, in part,:]

Now Eskimo Pie and the American Diabetes Association are partners in providing the pure pleasure of frozen novelties to everyone! Just look for the ADA logo proudly displayed on all Sugar Freedom Eskimo Pie bars, cones and sandwiches made with NutraSweet.

(Exhibit 6).

PAR. 5. Through the use of statements contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits 1 through 6, respondent represented, directly or by implication:

(a) That Eskimo Pie Sugar Freedom products are significantly reduced in calories compared with comparable foods.

(b) That Eskimo Pie Sugar Freedom products are low in calories.

PAR. 6. In truth and in fact:

(a) Most Eskimo Pie Sugar Freedom products are not significantly reduced in calories compared with comparable foods. Most are not significantly reduced in calories compared with comparable foods on an equivalent weight basis.

(b) Eskimo Pie Sugar Freedom products are not low in calories.

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

PAR. 7. Through the use of statements contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits 5 and 6, respondent represented, directly or by implication, that the American Diabetes Association has approved or endorsed Eskimo Pie Sugar Freedom products.

PAR. 8. In truth and in fact, the American Diabetes Association has not approved or endorsed Eskimo Pie Sugar Freedom products. Therefore, the representation set forth in paragraph seven was, and is, false and misleading.

PAR. 9. Through the use of statements contained in the advertisements referred to in paragraph four, including but not limited to the advertisements attached as Exhibit 5 and 6, respondent has represented, directly or by implication, that Sugar Freedom products are particularly useful or appropriate in the diabetic's diet. Respondent has failed to disclose:

A. That many Sugar Freedom products are high in total fat and saturated fat. Diabetics are at increased risk of heart disease and many diabetics are advised to regulate their total fat and saturated fat intake. Some Sugar Freedom products contain as much as 16 grams of total fat and 10 grams of saturated fat per serving. Some contain over 13 grams of total fat and many contain well over 4 grams of saturated fat per serving. While no food is inherently inappropriate for people with diabetes, in light of respondent's representation that Sugar Freedom products are particularly useful or appropriate in the diabetic's diet, the high total fat and saturated fat content of these Sugar Freedom products would be material to diabetics in deciding to purchase and use them and the failure to disclose these facts is deceptive.

B. That many Sugar Freedom products are not low or reduced in calories. Many diabetics are advised to regulate their caloric intake. Some Sugar Freedom products contain as many as 260 calories per serving. While no food is inherently inappropriate for people with diabetes, in light of respondent's representation that Sugar Freedom products are particularly useful or appropriate in the diabetic's diet, the fact that these Sugar Freedom products are not low or reduced in calories would be material to diabetics in deciding to purchase and use them and the failure to disclose these facts is deceptive.

PAR. 10. The acts and practices of the respondent as alleged in this complaint constitute unfair or deceptive acts of 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

120 F.T.C.

EXHIBIT 1

Slim Down for Summer!

WIN A luxury weekend at the Abbey Resort and Fontana Spa

Fill out this official entry form and mail it to: Slim Down For Summer Sweepstakes, P.O. Box 8307, Northfield, IL 60093. Must be postmarked by July 12, 1992. You can win a luxury weekend for two adults valid through June 11, 1993 at the Abbey Resort and Fontana Spa. Weekend package includes: two membership, breakfast and dinner. Approximate retail value \$200.

NAME _____
 ADDRESS _____
 CITY _____ STATE _____ ZIP _____
 PHONE _____
 E-MAIL _____

<p>MANUFACTURER'S COUPON EXPIRES 08/31/92</p> <p>Save 35¢ on any package of</p> <p>Sugar Freedom ESKIMO PIE novelty or half gallon</p> <p>72400-00117044</p>	<p>MANUFACTURER'S COUPON EXPIRES 08/31/92</p> <p>Save 30¢ on ONE 1.5 Liter, ONE 1 Liter or ONE 4-pack of 12 oz. bottles of</p> <p>Grayson Mountain Water</p> <p>95942-104847</p>	<p>MANUFACTURER'S COUPON EXPIRES 08/31/92</p> <p>Save 50¢ on any TWO packages of</p> <p>DICKSWEET Express Frozen Vegetables for the microwave</p> <p>70510-23024 4412</p>	<p>MANUFACTURER'S COUPON EXPIRES 12/31/91</p> <p>Save 35¢ on any package of</p> <p>CHICO SAN Cereal</p> <p>72400-0033</p>	<p>MANUFACTURER'S COUPON EXPIRES 07/31/92</p> <p>Save 30¢ on any package of</p> <p>Farm Rich Non-Dairy Breakfast Cereal</p> <p>49800-34030 2</p>
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Item 1-98

EXHIBIT 1

Radio Spot


NOW IS YOUR LAST CHANCE TO SLIM DOWN FOR SUMMER, AND THE FOLLOWING GREAT TASTING FOODS CAN HELP

START EACH DAY LIGHT WITH FARM RICH LIGHT NON-DAIRY BREAKFAST CREAMER. CHOLESTEROL FREE AND LOW IN SATURATED FAT. FARM RICH LIGHT NON-DAIRY CREAMER IS DELICIOUS IN COFFEE, ON CEREAL OR ADDED TO SLICED FRUIT.

FOR A TASTY, LOW CALORIE SNACK, TRY CHICO SAN FLAVORED POPCORN CAKES AND RICE CAKES. MADE FROM NUTRITIOUS, WHOLESOME GRAINS AND DELICIOUS ALL-NATURAL FLAVORS, CHICO SAN IS THE IDEAL ALTERNATIVE TO HIGH FAT SNACKS.

QUENCH ANY THIRST WITH GRAYSON MOUNTAIN WATER. BOTTLED AT ITS SOURCE ATOP VIRGINIA'S BLUE RIDGE MOUNTAINS, GRAYSON IS THE FINEST NATURAL DRINKING WATER IN THE WORLD. LOOK FOR GRAYSON IN YOUR FAVORITE GROCERY STORE.

FOR A QUICK SERVING SIDE DISH, TRY PICTSWEET EXPRESS FROZEN VEGETABLES. READY TO SERVE IN THREE MINUTES, U.S.A GROWN PICTSWEET ALL NATURAL VEGETABLES PROVIDE AN EXCELLENT SOURCE OF VITAMINS AND ARE LOW IN FAT.

SATISFY YOUR SWEET TOOTH WITH SUGAR FREEDOM ESKIMO PIE NOVELTY TREATS. MADE WITH THE GREAT TASTE OF NUTRASWEET, REFRESHING SUGAR FREEDOM ESKIMO PIE COMES IN BARS, CONES, SANDWICHES AND NOW HALF GALLONS. 

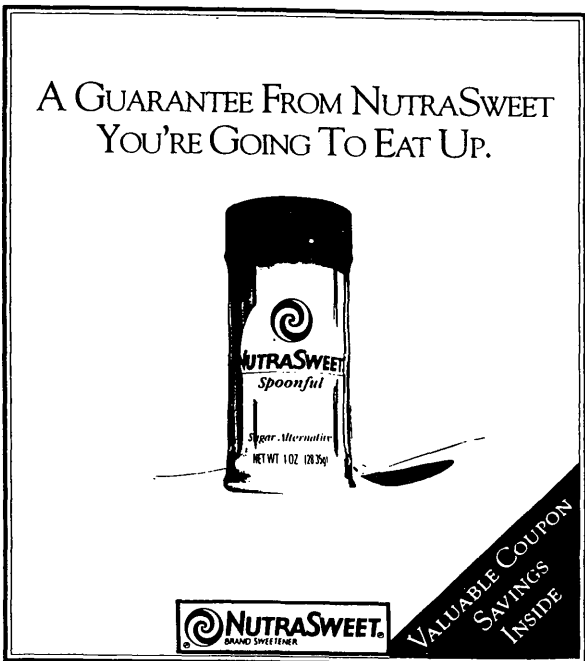
LOOK FOR MONEY SAVING COUPONS AND A CHANCE TO WIN A LUXURY WEEKEND AT THE ABBEY RESORT AND FONTANA SPA IN THIS WEEK'S LOCAL VALUES MAGAZINE AND CHICAGO TRIBUNE.

Complaint

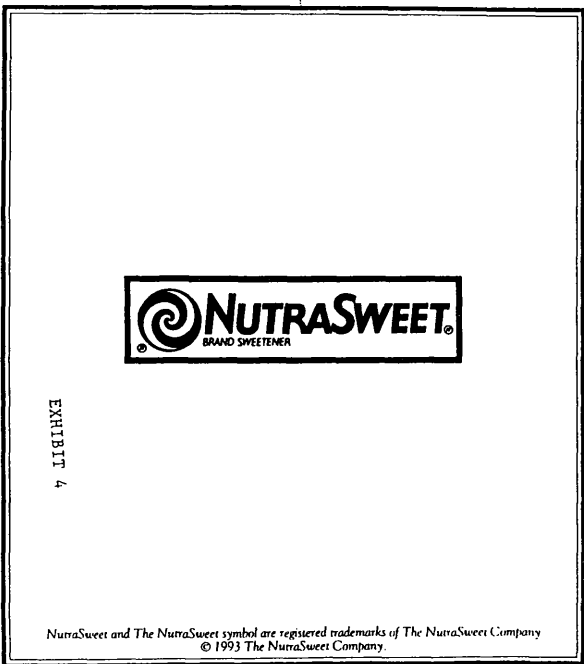
120 F.T.C.

EXHIBIT 3

EXHIBIT THREE IS A TAPE RECORDING
AND IS AVAILABLE UPON REQUEST
FROM THE PUBLIC REFERENCE BRANCH



Item 1-70



2/REG

A TASTEFUL OFFER

A few of the delicious products sweetened with the great taste of NutraSweet® brand sweetener have teamed up to make you a delicious deal—a personal taste satisfaction guarantee.

NutraSweet is putting its money where your mouth is—and giving you money back if you're not completely satisfied with any ONE of the products featured in this booklet.

TRUST THE SWIRL

For over a decade, NutraSweet® brand sweetener has been an important ingredient in thousands of products. Today, products sweetened with NutraSweet are enjoyed by 200 million people around the world, making them feel better about eating and drinking what they want. With 200 million votes of confidence, it's easy to make you this guarantee.

THE NUTRASWEET® SATISFACTION GUARANTEE

IF FOR SOME REASON YOU ARE NOT COMPLETELY SATISFIED WITH ANY ONE OF THE PRODUCTS ADVERTISED IN THIS BOOKLET, FOLLOW THE INSTRUCTIONS ON THE BACK PAGE AND SEND IN FOR A REFUND.
(MAXIMUM REFUND \$4.00 PER HOUSEHOLD)

SWEET SAVINGS

Millions of you who are trying to eat smarter enjoy NutraSweet in things like sodas and gum and yogurts. Many of you stock your kitchens with frozen desserts and jams sweetened with NutraSweet. But what about trying the other products sweetened with the great taste of NutraSweet? You can start by clipping these valuable coupons here and save!

At NutraSweet we believe you shouldn't have to compromise on the delicious things in life for any reason—even calories.

CONSUMER REFUND OFFER

Satisfaction Guarantee.

Maximum refund - \$4.00 per household.

Requests must be received by September 6, 1993.

In the event you are not satisfied with your purchase of ONE of the products offered in the 1993 NutraSweet Spoonful Coupon Booklet, you may send for a refund on the purchase price of that product up to \$4.00.

In order to receive your refund by mail, please send us (1) the original cash register receipt with the purchase price circled, (2) the product's original UPC code (exception: with Diet Barq's can, UPC codes may be written down on a 3" X 5" card) and (3) a completed official refund form found in the 1993 NutraSweet Spoonful Coupon Booklet (no photocopies accepted.) Refund requests that do not contain the register receipt, UPC code and completed refund form will not be honored.

Mail your refund request to NutraSweet Satisfaction Guarantee Program, P. O. Box 83287, Milwaukee, WI 53224. All refund requests must be received by September 6, 1993. Please allow 10 weeks for processing. Refund will be made in the form of a check. Refund limited to purchase of ONLY ONE of those products offered in the 1993 NutraSweet Spoonful Coupon Booklet.

Limit of one refund on one product per household. In issuing refund, the sponsor of this offer shall not be deemed to have acknowledged your reason for refund. Not responsible for lost, late, misdirected or postage due mail or incomplete or illegible requests. Void where taxed, prohibited or restricted. Offer good only in the United States.

Maximum refund \$4.00. Refunds available only through this address. This offer is made exclusively by The NutraSweet Company. Do NOT request your refund from the product's manufacturer or your supermarket.

Please direct any questions or comments regarding this offer to NutraSweet Satisfaction Guarantee Program, P. O. Box 83287, Milwaukee, WI 53224.

STORE COUPON REDEEMABLE AT FACE VALUE ONLY

BUY 3 GET 4TH FREE

Free Diet 7UP or Diet Cherry 7UP
2 liter when you purchase three 2 liters of any 7UP brands
(7UP, Diet 7UP, Cherry 7UP, Diet Cherry 7UP)

Retail Price - good up to \$1.49 Value

©SEVEN-UP, 7UP and DIET 7UP are registered trademarks of The Seven-Up Company, Dallas, Texas 1993
NUTRASWEET and the NUTRASWEET symbol are registered trademarks of The NutraSweet Company for its brand of sweetening ingredient.



STORE COUPON REDEEMABLE AT FACE VALUE ONLY

EXPIRES 6/30/94

NOT SUBJECT TO DOUBLING

Save 35¢

on any Sugar Freedom®
ESKIMO PIE® Product
930218




STORE COUPON REDEEMABLE AT FACE VALUE ONLY

EXPIRES 10/31/93

NOT SUBJECT TO DOUBLING

SAVE \$1.00 NOW!

WHEN YOU BUY ONE 8 QT. BOX
OR THREE 2 QT. ENVELOPES,
ANY FLAVOR,  Item 1-70



KRAFT GENERAL FOODS, INC.

NutraSweet and the NutraSweet symbol are registered trademarks of The NutraSweet Company for its brand of sweetening ingredient.

STORE COUPON REDEEMABLE AT FACE VALUE ONLY EXPIRES 9/30/93 NOT SUBJECT TO DOUBLING

To The Dealer: The Seven-Up Bottling Company will reimburse you the face value of this coupon plus 8¢ handling if you and the consumer have met the offer's terms. Void if prohibited, taxed, restricted, transferred, assigned; if coupon is reproduced, gang cut or mint condition; or if retailer cannot provide invoices to prove sufficient stock upon request. Consumer pays deposit and taxes. Cash value 1/20¢. Good only in U.S.A. ONE COUPON PER CONSUMER PURCHASE. REDEEM BY MAILING TO: THE SEVEN UP BOTTLING COMPANY, P. O. Box 870133 El Paso, TX 88587-0133

51L 373
78000 77001

Retail Price:

STORE COUPON REDEEMABLE AT FACE VALUE ONLY EXPIRES 6/30/94 NOT SUBJECT TO DOUBLING

To The Dealer: We will pay legitimate retailers face value plus 8¢ handling for each coupon received in connection with the retail sale of the products indicated. Coupon void and forfeited if invoices providing purchase of sufficient stock to cover rate of redemption are not produced on request, or if coupon assigned, transferred or presented by one not a retail seller of these products. Presentation for redemption without compliance constitutes fraud. Customer pays any applicable tax. Limit one coupon per purchase (or customer). Cash redemption value 1/20th of a cent. Reproduction prohibited. Send to E.P.C., CMS Dept. #72800, One Fawcett Drive, Del Rio, TX 78840. Void where prohibited by law.

930218

STORE COUPON REDEEMABLE AT FACE VALUE ONLY EXPIRES 10/31/93 NOT SUBJECT TO DOUBLING

Save \$1.00 when you buy one 8 qt. box or three 2 qt. envelopes, any flavor, Sugar Free Kool-Aid® Brand Soft Drink Mix.

This coupon good only on purchase of product indicated. Any other use constitutes fraud. COUPON NOT TRANSFERABLE. LIMIT ONE COUPON PER PURCHASE. To the retailer KGF will reimburse you for the face value of this coupon plus 8¢ if submitted in compliance with KGF Redemption Policy C-1, incorporated herein by reference. Valid only if redeemed by retail distributors of our merchandise or anyone specifically authorized by KGF. Cash value 1/20¢. Mail to: Kraft General Foods, Inc., P.O. Box 103, Kankakee, IL 60902. OFFER EXPIRES 10/31/93

GFHGL 8L3 09
43000 81476 0

STORE COUPON REDEEMABLE AT FACE VALUE ONLY EXPIRES 12/31/93 NOT SUBJECT TO DOUBLING

30¢ OFF! *diet Barq's*
of Diet Barq's Root Beer
6-packs, 12-packs, or 2-liter bottles

STORE COUPON REDEEMABLE AT FACE VALUE ONLY EXPIRES 8/31/93 NOT SUBJECT TO DOUBLING

SAVE 35¢
on your next purchase of *Tropicana Twister Light*

Good on one 46 oz. bottle of Tropicana Twister Light.

801226

STORE COUPON REDEEMABLE AT FACE VALUE ONLY EXPIRES 8/31/93 NOT SUBJECT TO DOUBLING

SAVE 50¢ *Edy's*
on any flavor half gallon or quart of Edy's Sugar Free.


SUGAR FREE

NEW!

STORE COUPON REDEEMABLE AT FACE VALUE ONLY | EXPIRES 12/31/93 | NOT SUBJECT TO DOUBLING


CUSTOMER: Only use this coupon to purchase the products specified. You must pay any sales tax.
 RETAILER: We will reimburse you the face value of this coupon plus 8¢ handling, provided you honor this coupon for retail sales of the product specified and furnish proof of purchase on request. Coupons not redeemed legitimately could violate U.S. mail statutes. Void when duplicated, transferred, assigned, taxed, restricted, or where prohibited. Send to Barq's, Inc. CRC Dept. 95, P.O. Box 1625, Delran, NJ 08075. Cash value 1/100th cent. Limit one coupon per purchase.

1033




5 71702 33030 1

Save 55¢
 on one 8-qt. or 12-qt.
 canister any flavor.
 SUGAR FREE
Crystal Light 100% Natural Flavors



STORE COUPON REDEEMABLE AT FACE VALUE ONLY | EXPIRES 8/31/93 | NOT SUBJECT TO DOUBLING


GROCER: We will reimburse you for the face amount of the coupon plus 8¢ handling provided you and the consumer have complied with the terms of this offer. Presentation for redemption without such compliance constitutes fraud. Invoices proving purchase of sufficient stock of our brand(s) to cover coupon presented for redemption must be shown upon request. Consumer must pay any sales tax. Coupon may not be transferred or assigned and is void where its use is prohibited, taxed or otherwise restricted. Cash value 1/20¢. This offer is limited to one coupon per purchase. Redeem by mailing to: Tropicana Products, Inc., CMS Dept. #48500, One Fawcett Drive, Del Rio, TX 78840.



5 48500 50035 9

STORE COUPON REDEEMABLE AT FACE VALUE ONLY | EXPIRES 10/31/93 | NOT SUBJECT TO DOUBLING

Save 30¢
 When You Buy Any Two
 Weight Watchers®
 Ultimate 90® Yogurt



STORE COUPON REDEEMABLE AT FACE VALUE ONLY | EXPIRES 8/31/93 | NOT SUBJECT TO DOUBLING

ATTENTION GROCER: Edy's will pay you the face value of this coupon plus 8¢ handling, provided you and the consumer have complied with the terms of this offer. Consumer must purchase specific product. This coupon is non-assignable and may not be reproduced. Invoices that prove purchase of sufficient stock of product specified to cover coupons must be shown on request. Ship coupons to EDY'S GRAND ICE CREAM, CMS Dept. #41548, One Fawcett Drive, Del Rio, TX 78840. Limit one coupon per purchase.

41548-8235

STORE COUPON REDEEMABLE AT FACE VALUE ONLY | EXPIRES 9/30/93 | NOT SUBJECT TO DOUBLING

Save 30¢
 On Any Sugar Free or Diet
 Carnation® Hot Cocoa Mix



6651


55¢ STORE COUPON REDEEMABLE AT FACE VALUE ONLY EXPIRES 12/31/93 NOT SUBJECT TO DOUBLING 55¢

This coupon good only on purchase of product indicated. Any other use constitutes fraud. COUPON NOT TRANSFERABLE. LIMIT ONE COUPON PER PURCHASE. To the retailer: KGF will reimburse you for the face value of this coupon plus 8¢ if submitted in compliance with KGF Redemption Policy C-1, incorporated herein by reference. Valid only if redeemed by retail distributors of our merchandise or anyone specifically authorized by KGF. Cash value 1/20th¢. Mail to: Kraft General Foods, Inc., P. O. Box 103 Kankakee, IL 60902. Expires on December 31, 1993. © Kraft General Foods, Inc.

GFHGLAM3 18
5 43000 85155 0

STORE COUPON REDEEMABLE AT FACE VALUE ONLY EXPIRES 10/31/93 NOT SUBJECT TO DOUBLING

Save 50¢
On Any Variety or Size
of Lipton Sugar Free
Iced Tea Mix



STORE COUPON REDEEMABLE AT FACE VALUE ONLY EXPIRES 10/31/93 NOT SUBJECT TO DOUBLING

CONSUMER: Only one coupon is redeemable per purchase on Weight Watchers Ultimate 90 Yogurt. You pay any sales tax. Void if transferred to any person or group prior to redemption. Any other use constitutes fraud! LIMIT ONE COUPON PER PURCHASE.

RETAILER: We will reimburse you 30¢ plus 8¢ for handling provided that you have redeemed it in connection with a consumer purchase of the product specified and in accordance with our coupon redemption policy (available upon request). Void where prohibited, taxed or restricted by law. Send coupons to: Weight Watchers Food Co., P.O. Box 870131, El Paso, TX 88587-0131. Cash value 1/100 of 1¢. Good only in the U.S.A. © 1993 Weight Watchers International, Inc. Owner of the trademark Weight Watchers, all rights reserved.

180084
5 71984 11058 5

STORE COUPON REDEEMABLE AT FACE VALUE ONLY / EXPIRES 12/31/93 / NOT SUBJECT TO DOUBLING

Save 75¢
on one pint of Simple Pleasures® Light
made with



NUTRASWEET & Simplexse
"Not available in all areas."

STORE COUPON REDEEMABLE AT FACE VALUE ONLY EXPIRES 9/30/93 NOT SUBJECT TO DOUBLING

CONSUMER: Limit one coupon per item purchased. This coupon good only on product sizes and flavors indicated.

RETAILER: NESTLÉ USA, INC., will reimburse you face value plus 8¢ if submitted in compliance with NESTLÉ USA Manufacturers Coupon Redemption Policy dated 10/91, available upon request. Consumer must pay sales tax. Good only in USA. Send coupons to NESTLÉ USA, INC., CMS Department 00020, 1 Fawcett Drive, Del Rio, TX 78840. Cash value 1/20¢. Void where prohibited or restricted. ©1993 S.P.N., Nestlé Beverage Co.


6651
5 50000 17430 5



STORE COUPON REDEEMABLE AT FACE VALUE ONLY / EXPIRES 10/31/93 / NOT SUBJECT TO DOUBLING

#23033

RETAILER: Thomas J. Lipton Co. will reimburse you for the face value of this coupon plus 8¢ handling allowance if submitted in compliance with T. J. Lipton's Redemption Policy incorporated by reference herein. Void where taxed, restricted, prohibited or presented by other than retailers of our products. Cash value: 1/100th¢. Mail to: Thomas J. Lipton Co., Dept. #41000, 1 Fawcett Drive, Del Rio, TX 78840. ONE COUPON PER ITEM PURCHASED, REDEEM PROMPTLY



41000 11050


STORE COUPON REDEEMABLE AT FACE VALUE ONLY / EXPIRES 12/31/93 / NOT SUBJECT TO DOUBLING

Simple Pleasures[®] LIGHT
Low Fat Ice Cream

GOOD ON ANY SIMPLE PLEASURES[®] LIGHT FLAVOR

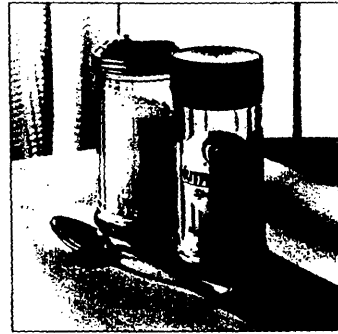
EXPIRES LIMIT ONE COUPON PER PURCHASE. May not be reproduced. Void if counterfeited prior to some redemption or if purchased or used. Cannot be used in conjunction with other coupons. You pay any sales tax, see other end of coupon for details.

RETAILER: Send coupon to THE NUTRASWEET COMPANY, ONE DEPT. FISH, LEWISVILLE, TEXAS 75040. TX 75040 specifies compliance with our Coupon Redemption Policy. Cash available from same address. Reimbursement for value plus 8¢ handling fee per coupon. Cash value 1/100th¢. One business day processing of sufficient stock in cover coupon submitted must be shown upon receipt. ©1993 The Nutrasweet Company.



5 33351 20075 4

MOVE OVER SUGAR.
MAKE ROOM FOR NUTRASWEET[®] SPOONFUL.



You can sprinkle it on cereal. Or spoon it on fruit. You can stir it, mix it, even use it in salad dressings. In fact, you can use it in many ways you use sugar. Because Nutrasweet[®] comes in a new form called Nutrasweet[®] Spoonful[™] that looks, tastes and, spoon it or spoon, measures like sugar. Which raises a question. Why use sugar?

STORE COUPON REDEEMABLE AT FACE VALUE ONLY / EXPIRES 12/31/93 / NOT SUBJECT TO DOUBLING

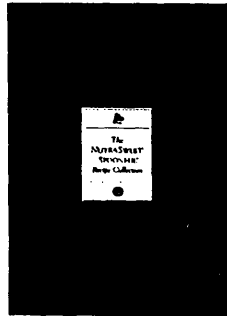
SAVE 55¢
ON NUTRASWEET[®] SPOONFUL[™]
SUGAR ALTERNATIVE
(ON ANY SIZE EXCEPT 0.35 OZ. TRIAL SIZE)



REDEMPTION LIMIT ONE COUPON PER PURCHASE. GOOD ONLY ON PURCHASES OF PRODUCTS INDICATED. MAY NOT BE REPRODUCED. VOID IF TRANSMITTED PRIOR TO STORE REDEMPTION OR IF PURCHASED OR USED. CANNOT BE USED IN CONJUNCTION WITH OTHER COUPONS. YOU PAY ANY SALES TAX. SEE OTHER END OF COUPON FOR DETAILS. NUTRASWEET SPOONFUL COUPONS TO THE NUTRASWEET COMPANY, ONE DEPT. FISH, LEWISVILLE, TEXAS 75040. TX 75040 SPECIFIES COMPLIANCE WITH OUR COUPON REDEMPTION POLICY. CASH AVAILABLE FROM SAME ADDRESS. REIMBURSEMENT FOR FACE VALUE PLUS 8¢ HANDLING FEE PER COUPON. CASH VALUE 1/100th¢ OF 1¢. GOOD ONLY IN U.S.A. ©1993 THE NUTRASWEET COMPANY. NUTRASWEET AND THE NUTRASWEET SPOONFUL ARE REGISTERED TRADEMARKS OF THE NUTRASWEET COMPANY.



THE NUTRASWEET® SPOONFUL®
RECIPE COLLECTION IS NOW AVAILABLE.



Over 40 recipes from appetizers to desserts and more. All under one cover and all available with just one proof of purchase from your NutraSweet® Spoonful® jar. Send one original UPC symbol along with your name, address and zip code to: NutraSweet Spoonful Recipe Collection, P.O. Box 7777-B570, Mt. Prospect, IL 60056-7777. ALLOW 6-8 WEEKS FOR SHIPMENT. Offer good only in the U.S.A. and where prohibited or restricted by law. OFFER EXPIRES 12/31/93 or while supplies last. Limit one per family, household, group or organization.

STORE COUPON REDEEMABLE AT FACE VALUE ONLY / EXPIRES 12/31/93 / NOT SUBJECT TO DOUBLING

THINK OF IT AS TODAY'S SUGAR



© 1991 The NutraSweet Company NutraSweet and the NutraSweet symbol are registered trademarks of The NutraSweet Company

OFFICIAL REFUND FORM

Please see page 4 for details and completely fill out the following: Reason for refund _____

Name _____
Address _____
City/State/Zip _____

Enclose with UPC code and register receipt and mail to: NutraSweet Satisfaction Guarantee Program, P.O. Box 83287, Milwaukee, WI 53224. Please allow 10 weeks for processing.

WE'D LIKE TO KNOW WHAT YOU THINK.

We'd like you to take a few minutes to answer these four questions about NutraSweet®. Just fill in the information and mail this form back to us. We'll be sending the first 5,000 people who send in their answers a special-edition 32 oz. drink cup with NutraSweet® logo. Please print clearly.



Name _____ Age _____ Sex _____
Address _____ City _____ State _____ Zip _____
Telephone _____ Date _____ (ZIP REQUIRED)

- To introduce you to NutraSweet® Spoonful®, we asked you to taste it at the grocery store. Based on its taste, how likely are you to buy products sweetened with NutraSweet®? Would you say you are:
 More likely Just as likely Less likely
- We also gave you this booklet containing coupons for products sweetened with NutraSweet. How effective was this coupon booklet in getting you to try the products featured in this booklet? Would you say it was ...
 Extremely effective Very effective Somewhat effective Not too effective Not at all effective
- How do you feel about the inclusion of a money-back guarantee in a booklet like this? Would you say it is ...
 A positive aspect A neutral aspect A negative aspect
- Now that you have tasted NutraSweet® Spoonful® and were given a coupon booklet for products sweetened with NutraSweet, how effective would you say this promotional approach was in your looking for and trying other products sweetened with NutraSweet not featured in this book? Would you say it was ...
 Extremely effective Very effective Somewhat effective Not too effective Not at all effective

PLEASE ALLOW EIGHT TO TEN WEEKS FOR DELIVERY OF DRINK CUP. Please cut out this page and mail your survey to: NutraSweet Survey, P.O. Box 83197, Milwaukee, WI 53223. Offer limited to the first 5,000 surveys received. Offer expires on July 15, 1993. Void where prohibited. Offer good only in U.S.A. Limit one cup per household. Not responsible for lost, late, postage due or misdirected mail. No mechanical reproductions accepted.

Announcing New Spoon Size Sugar Freedom Eskimo Pie.

NEW *Sugar Freedom* **ESKIMO PIE**
FUDGE RIPPLE
 Frozen Dairy Dessert
 HALF GALLON

50¢ Off
 Sugar Freedom Eskimo Pie Half Gallon

Now you can enjoy the delicious taste of Sugar Freedom Eskimo Pie in our new half gallons. So whether you choose rich Vanilla, creamy Chocolate or luscious Fudge Ripple, there'll be more than enough to please the whole family. Offer good only on Sugar Freedom half gallons.

In The Dealer: We will pay legitimate retailers the face value plus 8¢ handling for each coupon received in connection with the retail sale of the products indicated. Coupon void and forfeited if received pending purchase of sufficient stock are not produced on request, or if coupon assigned, resold, or presented by our own or retail outlets of these products. Redemption for redemption without compliance requires brand. Exchanges, sales any applicable tax. Limit one coupon per purchase for consumer. Cash redemption value: 12/31/91 at a cost. Reproduction prohibited. Send to: P.O. Box 870124, El Paso, Texas, 88187 0120. Void where prohibited by law.

10900 00117390

11-90-1-132

Complaint

120 F.T.C.

EXHIBIT 6



Now Eskimo Pie and the American Diabetes Association are partners in providing the pure pleasure of frozen novelties to everyone! Just look for the ADA logo proudly displayed on all Sugar Freedom® Eskimo Pie® bars, cones and sandwiches made with NutraSweet®.



Good For 35¢ Off Any

*35¢
off*

To the Buyer: You get 35¢ off any regular price item when you buy for yourself for each coupon received in connection with the retail sale of the products indicated. Coupon valid and transferable to immediate purchase of indicated goods to extent rate of redemption is not exceeded on receipt of 10 coupons. Coupon is presented to the sales clerk when you purchase the indicated goods. Instructions for redemption on other companies' coupons must be followed. Coupon valid only when used on the indicated goods. Limit one coupon per purchase (or equivalent). Cash redemption value: 1/100¢ of a cent. Redeemable through 12/31/79. See also 675179 (1) Post. To 86231-6179.

*35¢
off*

10900 113712

EXHIBIT 6

Item 1-150

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 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 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 The Eskimo Pie Corporation is a Delaware corporation, with its office and principal place of business located at 901 Moorefield Park Drive, Richmond, Virginia.

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 The Eskimo Pie 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 manufacturing, labelling, advertising, promotion, offering for sale, sale, or distribution of any frozen dessert 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, logos, symbols, or any other means:

A. The existence or amount of calories or any other nutrient or ingredient in any such product; or

B. That such product has been approved, endorsed or recommended by any person, group or organization.

II.

It is ordered, That respondent The Eskimo Pie 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 manufacturing, labelling, advertising, promotion, offering for sale, sale, or distribution of any frozen dessert product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from failing to disclose clearly and prominently in any advertisement or promotional material that represents, in any manner, directly or by implication, through numerical or descriptive terms, logos, symbols, or any other means, that such product is a useful or appropriate part of a diabetic's diet:

A. The fat content per serving of such product expressed as 1) the number of grams and 2) the percentage of the "Maximum Daily Value," unless such product is low in total fat;

B. The saturated fat content per serving of such product expressed as 1) the number of grams and 2) the percentage of the "Maximum Daily Value" of the saturated fat, unless such product is low in saturated fat; and

C. The statement "Not a reduced calorie food" when such a statement would be required on the label pursuant to regulations promulgated by the Food and Drug Administration.

The statements required by subparagraphs A.1 and A.2 and B.1 and B.2 of this Part shall appear in close proximity. For purposes of this Part, the term "Maximum Daily Value" shall mean the daily reference value or other daily intake limit for total fat or saturated fat established in an effective final regulation of the Food and Drug Administration. For purposes of this Part, "low in fat" and "low in saturated fat" shall mean the qualifying amount for such terms as set forth in regulations promulgated by the Food and Drug Administration.

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 close proximity to the representation that triggers the disclosure in at least twelve (12) point type; and

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.

III.

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

IV.

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 test reports, studies, surveys, demonstrations, or other evidence in its possession or control that contradict, qualify, or call into question such representation, including correspondence from consumers.

V.

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

VI.

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

VII.

It is further ordered, That respondent, or 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 this order.

VIII.

It is further ordered, That respondent shall, within sixty (60) days after service of this order, and at such other time 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

120 F.T.C.

IN THE MATTER OF

APM ENTERPRISES - MINN INC.

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

Docket C-3598-Complaint, Aug. 11, 1995--Decision, Aug. 11, 1995

This consent order requires, among other things, a video dating service franchise to properly and accurately disclose the annual percentage rate ("APR") and other credit terms of financed memberships, as required by the federal Truth in Lending Act, and requires the franchise to establish adjustment refund programs to compensate its past and current members who overpaid finance charges.

Appearances

For the Commission: *Stephen Cohen* and *Judy Nixon*.

For the respondent: *Basil Demeur, Knechtel & Demeur*, Oak Park, IL.

COMPLAINT

The Federal Trade Commission, having reason to believe that Great Expectations Creative Management, Inc. has violated the Federal Trade Commission Act ("FTC Act"), and that Great Expectations, Inc., GEC Illinois, Inc., GEC Tennessee, Inc., GEC Alabama, Inc., Great Southern Video, Inc., New West Video Enterprises, Inc., San Antonio Singles of Texas, Inc., Austin Singles of Texas, Inc., Great Expectations of Baltimore, Inc., Great Expectations of Washington, D.C., Inc., Great Expectations of Washington, Inc., Sterling Connections, Inc., Private Eye Productions, Inc., Great Expectations - Columbus, Inc., JAMS Financial, Inc., V.L.P. Enterprises, Inc., APM Enterprises - Minn Inc., KGE, Inc., G.E.C.H., Inc., MWVE, Inc., GREATEX Denver, Inc., Sun West Video, Inc., and TRIAAC Enterprises, Inc. (hereinafter sometimes referred to collectively as "Great Expectations") have violated the Truth in Lending Act ("TILA"), its implementing Regulation Z, and the FTC Act, and it appearing to the

Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint, and alleges as follows:

PARAGRAPH 1. Great Expectations Creative Management, Inc. ("GECM") 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 16830 Ventura Blvd., Suite P, Encino, CA.

PAR. 2. Great Expectations, Inc. ("GEI") is a corporation organized, existing, and doing business under and by virtue of the laws of the state of California, with its corporate office at 16830 Ventura Blvd., Suite P, Encino, CA, and its principal places of business located at 1640 S. Sepulveda Blvd., Suite 100, Los Angeles, CA, 17207 Ventura Blvd., Encino, CA, and 450 N. Mountain, Suite B, Upland, CA.

PAR. 3. GEC Illinois, Inc. ("GE Illinois") is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Illinois, with its office and principal place of business located at 1701 E. Woodfield Dr., Suite 400, Schaumburg, IL.

PAR. 4. GEC Tennessee, Inc. ("GE Tennessee") 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 5552 Franklin Rd., Suite 200, Nashville, TN.

PAR. 5. GEC Alabama, Inc. ("GE Alabama") is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Alabama, with its office and principal place of business located at 7529 S. Memorial Pkwy., Suite C & D, Huntsville, AL.

PAR. 6. Great Southern Video, Inc., doing business as Great Expectations of Dallas ("GE Dallas"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Texas, with its office and principal place of business located at 14180 Dallas Pkwy., Suite 100, Dallas, TX.

PAR. 7. New West Video Enterprises, Inc., doing business as Great Expectations of Houston ("GE Houston"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Texas, with its office and principal place of business located at 50 Briarhollow, Suite 100, Houston, TX.

PAR. 8. San Antonio Singles of Texas, Inc., doing business as Great Expectations of San Antonio ("GE San Antonio"), is a corporation, organized, existing, and doing business under and by virtue of the laws of the state of Texas, with its corporate office at 10497 Town & Country Way, Suite 214, Houston, TX, and its principal place of business located at 8131 I.H. 10 West, Suite 225, San Antonio, TX.

PAR. 9. Austin Singles of Texas, Inc., doing business as Great Expectations of Austin ("GE Austin"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Texas, with its corporate office at 10497 Town & Country Way, Suite 214, Houston, TX, and its principal place of business located at 9037 Research Blvd., Suite 130, Austin, TX.

PAR. 10. Great Expectations of Baltimore, Inc. ("GE Baltimore") is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Virginia, with its office and principal place of business located at 40 York Rd., Suite 500, Towson, MD.

PAR. 11. Great Expectations of Washington, D.C., Inc. ("GE DC") 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 8601 Westwood Center Dr., Vienna, VA.

PAR. 12. Great Expectations of Washington, Inc., doing business as Great Expectations of Raleigh/Durham ("GE Raleigh"), 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 3714 Benson Dr., Suite 200, Raleigh, NC.

PAR. 13. Sterling Connections, Inc., doing business as Great Expectations of Seattle ("GE Seattle"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Oregon, with its office and principal place of business located at 305 108th Ave., N.E., Suite 205, Bellevue, WA.

PAR. 14. Private Eye Productions, Inc., doing business as Great Expectations of Portland ("GE Portland"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Oregon, with its office and principal place of business located at 5531 S.W. Macadam Ave., Suite 225, Portland, OR.

PAR. 15. Great Expectations - Columbus " Inc. ("GE Columbus") is a corporation organized, existing, and doing business under and by

virtue of the laws of the state of Ohio, with its corporate office at 11835 W. Olympic Blvd., Suite 490, Los Angeles, CA, and its principal place of business located at 1103 Schrock Rd., Suite 101, Columbus, OH.

PAR. 16. JAMS Financial, Inc., doing business as Great Expectations of Milwaukee ("GE Milwaukee"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Wisconsin, with its corporate office at 11835 W. Olympic Blvd., Suite 490, Los Angeles, CA, and its principal place of business located at 16650 W. Bluemound, Suite 100, Brookfield, WI.

PAR. 17. V.L.P. Enterprises, Inc., doing business as Great Expectations of San Diego ("GE San Diego"), 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 3465 Camino Del Rio South, Suite 300, San Diego, CA.

PAR. 18. APM Enterprises - Minn Inc., doing business as Great Expectations of Minneapolis ("GE Minneapolis"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Illinois, with its office and principal place of business located at 3300 Edinborough Way, Suite 300, Edina, MN.

PAR. 19. KGE, Inc., doing business as Great Expectations of Sausalito, Great Expectations of Mountain View, and Great Expectations of Walnut Creek (collectively referred to as "GE-SFA"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of California, with its corporate office at 1943 Landings Dr., Mountain View, CA, and its principal places of business located at 2401 Marinship Way, Suite 100, Sausalito, CA, 2085 Landings Dr., Mountain View, CA, and 1280 Civic Dr., Suite 300, Walnut Creek, CA.

PAR. 20. G.E.C.H., Inc., doing business as Great Expectations of Cherry Hill ("GE Cherry Hill"), 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 places of business located at One Cherry Hill, Suite 600, Cherry Hill, NJ.

PAR. 21. MWVE, Inc., doing business as Great Expectations of Cleveland ("GE Cleveland"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Ohio,

with its office and principal place of business located at 6300 Rockside Rd., Suite 200, Cleveland, OH.

PAR. 22. GREATEX Denver, Inc., doing business as Great Expectations Video Dating, Ltd. ("GE-Denver"), 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 3773 Cherry Creek North Dr., Suite 140, Denver, CO.

PAR. 23. Sun West Video, Inc., doing business as Great Expectations for Singles ("GE Phoenix"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Arizona, with its office and principal place of business located at 5635 N. Scottsdale Rd., Suite 190, Scottsdale, AZ.

PAR. 24. TRIAAC Enterprises, Inc., doing business as Great Expectations of Sacramento ("GE Sacramento"), 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 2277 Fair Oaks Blvd., Suite 195, Sacramento, CA.

RESPONDENTS' COURSE OF BUSINESS

PAR. 25. GECM is a video dating franchisor. It sells and services franchise operations throughout the United States. As part of its regular course of business, GECM has created and disseminated retail installment contracts (Exhibits 1 and 2) to the franchises described in paragraphs two through twenty-four. The GECM retail installment contracts purport to incorporate the disclosures required by the TILA.

PAR. 26. Respondents Great Expectations are video dating franchises respondents have provided financing to their members using retail installment contracts such as Exhibits 1 and 2 to disclose the terms of the financing.

PAR. 27. GECM's TILA disclosure (Exhibit 1) contains erroneous instructions for calculating and disclosing the finance charge and contains a pre-printed annual percentage rate ("APR") of 18%. In addition, Exhibit 1 fails to make the TILA disclosures in the format required by the TILA and fails to identify the creditor as required by the TILA.

PAR. 28. In 1988, GECM learned from its auditor that the calculations and disclosures contained in Exhibit 1 did not comply with the TILA. Nevertheless, it continued to disseminate Exhibit 1

to its franchisees and failed to notify them of the erroneous calculations and disclosures.

PAR. 29. In late 1990, GECM created a new retail installment contract, which also purported to incorporate the disclosures required by the TILA and which contained a pre-printed APR of 19.6%. (Exhibit 2). Exhibit 2 fails to identify the creditor as required by the TILA and fails to provide the information required by the TILA in the itemization of the amount financed. Furthermore, GECM has disseminated Exhibit 2 to its franchisees but has failed to inform them to discontinue using the erroneous calculation and disclosure instructions that it had previously supplied in Exhibit 1.

PAR. 30. Respondents Great Expectations are creditors as that term is defined in the TILA and Regulation Z.

PAR. 31. The acts and practices of respondents Great Expectations and GECM alleged in this complaint have been and are in or affecting commerce, as "commerce" is defined in Section 4 of the FTC Act.

COUNT I

PAR. 32. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 33. Respondent GECM has furnished its franchises with TILA disclosures (Exhibits 1 and 2) that, on their face, violated the TILA. When used by respondents Great Expectations, Exhibits 1 and 2 have resulted in false and misleading disclosures of APRs and finance charges to consumers in violation of Section 5 of the FTC Act.

PAR. 34. In the course and practice of its business as described in paragraphs twenty-five through twenty-nine, and paragraph thirty-three, respondent GECM has provided respondents Great Expectations with the means and instrumentalities to violate the Section 5 of the FTC Act.

PAR. 35. The practices described in paragraph thirty-four constitute unfair or deceptive acts or practices in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. 45(a).

COUNT II

PAR. 36. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 37. Respondents GEI, GE Illinois, GE Tennessee, GE Alabama, GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Columbus, GE Milwaukee, GE San Diego, GE Minneapolis, GE-SFA, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento have furnished their members with TILA disclosures that have failed to accurately calculate and disclose the APR.

PAR. 38. The practice described in paragraph thirty-seven by respondents GEI, GE Illinois, GE Tennessee, GE Alabama, GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Columbus, GE Milwaukee, GE San Diego, GE Minneapolis, GE-SFA, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento violates Sections 107(a) and (c) of the TILA, 15 U.S.C. 1606(a) and (c), and Sections 226.18(e) and 226.22 of Regulation Z, 12 CFR 226.18(e) and 226.22.

COUNT III

PAR. 39. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 40. Respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Columbus, GE Milwaukee, GE-SFA, GE Cleveland, GE Phoenix, GE Sacramento, and GE San Diego have furnished their members with TILA disclosures that have failed to accurately calculate and disclose the finance charge.

PAR. 41. The practice described in paragraph forty by respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Columbus, GE Milwaukee, GE-SFA, GE Cleveland, GE Phoenix, GE Sacramento, and GE San Diego violates Section 106 of the TILA, 15 U.S.C. 1605, and Sections 226.4 and 226.18(d) of Regulation Z, 12 CFR 226.4 and 226.18(d).

COUNT IV

PAR. 42. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 43. Respondents GE Dallas, GE Houston, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, and GE Phoenix have furnished their members with TILA disclosures that have failed to disclose the finance charge more conspicuously than any other disclosure except the APR and the creditor's identity.

PAR. 44. The practice described in paragraph forty-three by respondents GE Dallas, GE Houston, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, and GE Phoenix violates Section 122(a) of the TILA, 15 U.S.C. 1632(a), and Section 226.17(a)(2) of Regulation Z, 12 CFR 226.17(a)(2).

COUNT V

PAR. 45. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 46. Respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento have furnished their members with TILA disclosures that have failed to segregate the disclosures required by the TILA from all other information provided in connection with the transaction, including the itemization of the amount financed.

PAR. 47. The practice described in paragraph forty-six by respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento violates Section 128(b)(1) of the TILA, 15 U.S.C. 1638(b)(1), and Section 226.17(a)(1) of Regulation Z, 12 CFR 226.17(a)(1).

COUNT VI

PAR. 48. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 49. Respondents GEI, GE Illinois, GE Tennessee, GE Alabama, GE Dallas, GE Houston, GE San Antonio, GE Austin, GE-

Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Columbus, GE San Diego, GE Minneapolis, GE-SFA, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento have failed to accurately disclose the itemization of the amount financed.

PAR. 50. The practice described in paragraph forty-nine by respondents GEI, GE Illinois, GE Tennessee, GE Alabama, GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Columbus, GE San Diego, GE Minneapolis, GE-SFA, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento violates Section 128(a) of the TILA, 15 U.S.C. 1638(a), and Section 226.18(c) of Regulation Z, 12 CFR 226.18(c).

COUNT VII

PAR. 51. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 52. Respondents GEI, GE Illinois, GE Tennessee, GE Alabama, GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Columbus, GE Milwaukee, GE San Diego, GE Minneapolis, GE-SFA, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento have failed to disclose the identity of the creditor.

PAR. 53. The practice described in paragraph fifty-two by respondents GEI, GE Illinois, GE Tennessee, GE Alabama, GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Columbus, GE Milwaukee, GE San Diego, GE Minneapolis, GE-SFA, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento violates Section 128(a)(1) of the TILA, 15 U.S.C. 1638(a)(1), and Section 226.18(a) of Regulation Z, 12 CFR 226.18(a).

COUNT VIII

PAR. 54. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 55. Respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, GE Phoenix,

and GE Sacramento have furnished their members with TILA disclosures that have failed to provide a description of the amount financed.

PAR. 56. The practice described in paragraph fifty-five by respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento violates Section 128(a)(8) of the TILA, 15 U.S.C. 1638(a)(8), and Section 226.18(b) of Regulation Z, 12 CFR 226.18(b).

PAR. 57. Respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento have furnished their members with TILA disclosures that have failed to provide a description of the finance charge.

PAR. 58. The practice described in paragraph fifty-seven by respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento violates Section 128(a)(8) of the TILA, 15 U.S.C. 1638(a)(8), and Section 226.18(d) of Regulation Z, 12 CFR 226.18(d).

PAR. 59. Respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento have furnished their members with TILA disclosures that have failed to provide a description of the APR.

PAR. 60. The practice described in paragraph fifty-nine by respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento violates Section 128(a)(8) of the TILA, 15 U.S.C. 1638(a)(8), and Section 226.18(e) of Regulation Z, 12 CFR 226.18(e).

PAR. 61. Respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento have furnished their

members with TILA disclosures that have failed to provide the total of payments and/or a description of the total of payments.

PAR. 62. The practice described in paragraph sixty-one by respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento violates Section 128(a)(5) and/or (8) of the TILA, 15 U.S.C. 1638(a)(5) and/or (8), and Section 226.18(h) of Regulation Z, 12 CFR 226.18(h).

PAR. 63. Respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento have furnished their members with TILA disclosures that have failed to provide the total sale price and/or a description of the total sale price.

PAR. 64. The practice described in paragraph sixty-three by respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento violates Section 128(a)(7) and/or (8) of the TILA, 15 U.S.C. 1638 (a)(7) and/or (8), and Section 226.18(j) of Regulation Z, 12 CFR 226.18(j).

COUNT IX

PAR. 65. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 66. Respondents GE Dallas, GE Houston, GE Phoenix, GE San Antonio, GE Austin, GE Baltimore, GE DC, and GE Raleigh have failed to include set-up or other fees that are charged only to consumers who finance the costs of their memberships in the finance charge and the annual percentage rate disclosed to the consumer. They have also failed to exclude these finance charges from the amount financed that is disclosed to consumers.

PAR. 67. The practices described in paragraph sixty-six by respondents GE Dallas, GE Houston, GE Phoenix, GE San Antonio, GE Austin, GE Baltimore, GE DC, and GE Raleigh violate Sections 106, 107, and 128(a) of the TILA, 15 U.S.C. 1605, 1606, and 1638(a), and Sections 226.4(b), 226.22, and 226.18(b), (d), and (e) of Regulation Z, 12 CFR 226.4(b), 226.22, and 226.18(b), (d), and (e).

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Complaint

COUNT X

PAR. 68. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 69. Respondent GE San Diego has furnished its members with TILA disclosures that have failed to disclose the APR, the finance charge, the amount financed, the total of payments, and the total sales price.

PAR. 70. The practices described in paragraph sixty-nine by respondent GE San Diego violate Section 128(a) of the TILA, 15 U.S.C. 1638(a), and Section 226.18 of Regulation Z, 12 CFR 226.18.

COUNT XI

PAR. 71. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 72. Respondent GE Houston has furnished its members with TILA disclosures that have failed to disclose the amount financed.

PAR. 73. The practice described in paragraph seventy-two by respondent GE Houston violates Section 128(a) of the TILA, 15 U.S.C. 1638(a), and Section 226.18(b) of Regulation Z, 12 CFR 226.18(b).

COUNT XII

PAR. 74. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 75. Respondents GEI, GE Alabama, GE Illinois, GE Portland, GE Dallas, GE Houston, GE Cleveland, GE Phoenix, GE San Antonio, GE Austin, GE Seattle, GE Denver, GE Columbus, GE Milwaukee, GE San Diego, GE Minneapolis, GE SFA, GE Cherry Hill, GE Sacramento, GE DC, GE Baltimore, and GE Raleigh have disclosed understated APRs and finance charges to consumers that have resulted in consumers paying more in financing costs than the amount to which they originally agreed.

PAR. 76. The practices described in paragraph seventy-five are unfair or deceptive acts or practices in violation of Section 5(a) of the FTC Act, 15 U.S.C. 45(a).

Complaint

120 F.T.C.

EXHIBIT 1

Expectations

RETAIL INSTALLMENT CONTRACT

Name - Last	First	Middle	Age
[Redacted]	[Redacted]	[Redacted]	76
Present Address	City	State	Zip
[Redacted]	[Redacted]	CO	80010
Social Security #	Home Phone	How Long At This Address	How Long in Area
[Redacted]	[Redacted]	7 YRS	26 YRS
Employed By	Work Phone	Present Position	
[Redacted]	[Redacted]	[Redacted]	
Income All Sources	Annual	Driver's License #	
[Redacted]	[Redacted]	[Redacted]	
Primary Bank Accounts	Checking	Balance	
Savings	[Redacted]	[Redacted]	
Credit Reference - Banks, Finance Co., Credit Unions	Open	Closed	None
USA			
1st INTERSTATE Bank	Open	Closed	None

The undersigned Great Expectations (Seller) hereby sells, and the undersigned Buyer, hereinafter referred to as "Member" purchases, subject to the provisions of this contract, a MEMBERSHIP in Great Expectations and promises to pay to Great Expectations its share of the TOTAL PAYMENTS (Box 8) in accordance with the Payment Schedule hereinafter set forth.

DESCRIPTION OF GOODS AND SERVICES SOLD:

Interviewing, Testing & Evaluating, Processing & Coding, Background check (if necessary), for the purpose of bringing in contact with the purchaser (client) suitable individuals with similar likes and dislikes, this description intended to be partial only, the purchaser acknowledges receipt of application form, which is made a part hereof as though set out at length.

READ CAREFULLY AND SIGN ONLY WHEN COMPLETELY UNDERSTOOD

Buyer has considered and evaluated the terms of membership as set forth in Great Expectations Membership Agreement dated 10/31/91 and requests financing of the balance due. Acceptance of the terms of both agreements renders null and void Buyer's right to cancel previously provided.

I understand that my failure to participate in Great Expectations does not release me of my obligation to pay this contract in full regardless of the circumstances. I understand that by signing this Agreement I am a Member of Great Expectations.

MEMBER SIGNATURE X [Redacted]

NOTICE TO MEMBER: Upon request, Great Expectations must provide or make available for your examination a statement of its showing how the partial refund of the time price charge is to be computed if any balance of the contract should be returned. Member (Buyer) and Great Expectations (Seller) agree that the terms and conditions of the Member's Contract for Membership constitute part of this contract and are incorporated herein by reference. If due to delinquency, it is necessary to refer this account to collection, then the balance due shall include actual attorney's fee and court costs. In the event Member fails to pay any installment payment when due, the entire balance then owing shall immediately become due and payable, without notice, at the option of Great Expectations or assignee, and Great Expectations shall not be required to provide any services to Member until Member's payment account is made current. If more than one person signs this contract then their obligation shall be joint and several.

ITEMIZATION OF THE AMOUNT FINANCED

1. Cash Price	1595	BALANCE	10. ANNUAL PERCENTAGE RATE	18%
2. Other	0	1595	11. PAYMENT SCHEDULE:	5
3. Down Payment	300	1295	12. DELINQUENCY AND COLLECTION CHARGES:	23%
4. Paid 11/14/91 Second Interview	100	1195	13. PREPAYMENT REBATE:	
5. Other Payments Due 11/30/91	100	1095		
6. Amt. Financed (Unpaid Bal. of Cash Price #3)	1095	1095		
7. Finance Charge @ Bal. x 18% x (5) no. of payments		82.13		
8. Total Payments (Bal. + 7)		1177.13		
9. Deferred Payment Price (Bal. #2 + #7)		1477.13		

DIVIDE by number of payments to calculate each installment and summarize on #11.

Notice to Buyer: (1) Do not sign this agreement before you read it or if it contains any blank spaces to be filled in. (2) You are entitled to a completely filled-in copy of this agreement. (3) You can borrow the full amount due under this agreement at any time. (4) If you desire to pay off in advance the full amount due, the amount which is outstanding will be furnished upon request.

SELLER Great Expectations

Signature of Member X [Redacted]

Business Address: 3773 Cherry Creek N. Dr. #440
City & State: Denver CO 8007

Member (Buyer) acknowledges receipt of an exact copy of this agreement at the time of its execution. Member (Buyer) further acknowledges that the terms in this contract were completely filled-in and that he has read the disclosures contained herein prior to signing the contract.

Authorized Signature: [Redacted]
Name of Member: [Redacted]

Signature of Member X [Redacted]

Complaint

EXHIBIT 2



RETAIL INSTALLMENT CONTRACT

DATE _____

Name Last First Middle Age _____

Home Address _____ City _____ State _____ Zip _____

Social Security # _____ Home Phone _____ How Long At This Address _____ Date of Birth _____

Employed By Name and Address _____ Work Phone _____ Present Position _____

Check All Sources _____ Annual _____ Driver's License # _____

Primary Bank Accounts _____ Checking Name _____

SAVINGS _____ ACCOUNT # _____

The undersigned Great Expectations (Seller) hereby sells, and the undersigned buyer (Member) purchases, subject to the provisions of this MEMBERSHIP in Great Expectations and promises to pay to Great Expectations or its assignee the TOTAL PAYMENTS in accordance with Schedule hereinafter set forth.

DESCRIPTION OF GOODS AND SERVICES SOLD: Interviewing, Evaluating, Processing & Coding, Background Check (if necessary) and P Video Library for the purpose of giving Member access to a Video Library of potentially suitable individuals with similar files and a database, the intended to be done only.

READ CAREFULLY AND SIGN ONLY WHEN COMPLETELY UNDERSTOOD

I have considered and evaluated the terms of membership as set forth in the Great Expectations Membership Agreement dated _____ and hereby financing of the balance due. I understand that my failure to participate in Great Expectations does not relieve me of my obligations under this Contract in full. I understand that by signing this Contract, and the Membership Agreement, I am a Member of Great Expectations.

MEMBER SIGNATURE X _____

NOTICE TO MEMBER: Upon request, Great Expectations must provide or make available for your examination a statement or table showing the amount of the time gross charge is to be computed if any balance of the Contract should be prepaid. Member (Buyer) and Great Expectations (Seller) shall the terms and conditions of the Great Expectations Membership Agreement executed as a part of this Contract and are incorporated herein by reference. In the event Member fails to pay any installment payment when due, the entire balance (less any unearned Finance Charge) then owing shall become due and payable, without demand or notice, at the option of Great Expectations or assignee, and Great Expectations shall not be required to provide any services to Member until Member's payment account is made current.

PURCHASE PRICE: \$ _____ payable in accordance with the Statement of Disclosure below.

PAYMENT SCHEDULE: Member's payments hereunder shall be in equal consecutive monthly installments commencing on the _____ day of _____ month after execution of this Contract and continuing on the same day of each month thereafter until paid in full. Interest on the unpaid balance shall both prior and after maturity.

FEDERAL TRUTH IN LENDING DISCLOSURES (Statement of Disclosure)

ANNUAL PERCENTAGE RATE	FINANCE CHARGE (Line 4)	AMOUNT FINANCED (Line 5)	TOTAL OF PAYMENTS (Line 6)	TOTAL SALES PRICE (Line 7)
The rate or rate range (last as a year) that we use in this contract is 19.6%	The dollar amount of the finance charge we use is \$ _____	The amount of the loan we use is \$ _____	The amount that we have paid after 1 year, including any prepayment penalties, is \$ _____	The total sales price of the goods, including the Finance Charge, is \$ _____ (Line 1-4)

You the buyer have the right to receive at this time an explanation of the amount financed. () I want an explanation. () I do not want an explanation. Your payment schedule will be:

NUMBER OF PAYMENTS	AMOUNT OF PAYMENT	DATE FIRST PAYMENT DUE
_____	_____	_____

DELINQUENCY AND COLLECTION CHARGES: If Buyer shall fail or neglect to pay any installment payment when the same shall become due and such failure or neglect shall continue for a period of more than ten (10) days, then in addition to the amount of such delinquent installment payment the Buyer shall pay to Seller, as a delinquency and collection charge, an amount equal to 5% of such payment except that such charge shall not exceed \$5.00 or be less than \$1.00.

PREPAYMENT: If you pay off early, you will not have to pay a penalty and you may be entitled to a refund of part of the finance charge. See your Great Expectations Membership Agreement for any additional information about non-payment, default, any required repayment in full before the schedule date and prepayments, refunds and penalties.

"ITEMIZATION OF AMOUNT FINANCED"

	Prepayment Refund
1. Total Cash Price \$ _____	Buyer may prepay or all of the unpaid balance without penalty. I am entitled to a refund of the unearned Finance Charge under the terms of the Finance Charge and no refund under the terms of the Finance Charge.
2. Less Downpayment - \$ _____	
3. Amount Financed \$ _____	
4. Finance Charge \$ _____	
5. Total of Payments \$ _____	

Waiver of any default by the Seller shall not operate as a loan default.

Should the buyer default in the payment of any installment hereunder and pay to Seller all actual and reasonable costs of collection including reasonable Attorney fees and disbursements.

Buyer will pay to the Seller a \$10.00 charge for every delinquency after the first.

Should any term hereof be invalid or unenforceable, the remaining terms shall survive.

NOTICE TO BUYER:

- Do not sign this agreement before you read it or if any blank spaces to be filled in.
- You are entitled to a completely filled in copy agreement.
- You can prepay the full amount due under this at any time.
- If you desire to pay off in advance the full amount which is outstanding will be furnished on request.

Seller: GREAT EXPECTATIONS

Business Address _____

City & State: _____

Authorized Signature _____ Title _____

Member (Buyer) acknowledges receipt of an exact copy of this in the form of its execution. Member (Buyer) further acknowledges that in the Contract were completed and filed-in and that the disclosures contained herein prior to signing the Contract.

Signature of Member X _____

Routing: White—FINANCE; Pink—SELLER; Gold—CUSTOMER

Exhibit

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of respondent APM Enterprises - Minn Inc., a corporation, and respondent having been furnished thereafter with a copy of the draft of complaint that 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 Section 5(a) of the Federal Trade Commission Act and the Truth in Lending Act; and

The respondent, its attorney, 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 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. APM Enterprises - Minn Inc., doing business as Great Expectations of Minneapolis ("GE Minneapolis"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Illinois, with its office and principal place of business located at 3300 Edinborough Way, Suite 300, Edina, MN.

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:

A. Respondent GE Minneapolis, 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 offering of credit, do forthwith cease and desist from failing to accurately calculate and disclose the annual percentage rate, as required by Sections 107(a) and (c) of the Truth in Lending Act, 15 U.S.C. 1606(a) and (c), and Sections 226.18(e) and 226.22 of Regulation Z, 12 CFR 226.18(e) and 226.22;

B. Respondent GE Minneapolis, 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 offering of credit, do forthwith cease and desist from failing to segregate the disclosures required by the TILA from all other information provided in connection with the transaction, including from the itemization of the amount financed, as required by Section 128(b)(1) of the TILA, 15 U.S.C. 1638(b)(1), and Section 226.17(a) of Regulation Z, 12 CFR 226.17(a);

C. Respondent GE Minneapolis, 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 offering of credit, do forthwith cease and desist from failing to make all disclosures in the manner, form, and amount required by Sections 122 and 128(a) of the TILA, 15 U.S.C. 1632 and 1638(a), and Sections 226.17 and 226.18 of Regulation Z, 12 CFR 226.17 and 226.18;

D. Respondent GE Minneapolis, 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 offering of credit, do forthwith cease and desist from failing to comply with the TILA, 15 U.S.C. 1601, *et seq.*, and Regulation Z, 12 CFR 226.

II.

REFUND PROGRAM

It is further ordered, That:

A. Within thirty (30) days following the date of service of this order, respondent shall:

1. Determine to whom respondent disclosed on the original TILA disclosure an annual percentage rate that was miscalculated by more than one quarter of one percentage point below the annual percentage rate determined in accordance with Section 226.22 of Regulation Z, 12 CFR 226.22, or that disclosed a finance charge that was miscalculated by more than one dollar below the finance charge determined in accordance with Section 226.4 of Regulation Z, 12 CFR 226.4, so that each such person will not be required to pay a finance charge in excess of the finance charge actually disclosed or the dollar equivalent of the annual percentage rate actually disclosed, whichever is lower, plus a tolerance of one quarter of one percentage point;

2. Calculate a lump sum refund and a monthly payment adjustment, if applicable, in accordance with Section 108(e) of the TILA, 15 U.S.C. 1607(e);

3. Mail a refund check to each eligible consumer in the amount determined above, along with Attachment 1; and

4. Provide the Federal Trade Commission with a list of each such consumer, the amount of the refund, the number of payments refunded, the amount of adjustment for future payments and the number of future payments to be adjusted.

B. No later than fifteen (15) days following the date of service of this order, respondent shall provide the Federal Trade Commission with the name and address of three independent accounting firms, with which it, its officers, employees, attorneys, agents, and franchisees have no business relationship. Staff for the Division of Credit Practices of the FTC shall then have the sole discretion to choose one of the firms ("independent agent") and so advise respondent;

C. Within thirty (30) days following the date of adjustments made pursuant to this section, respondent shall direct the independent agent to review a statistically-valid sample of refunds. Respondent shall provide the Federal Trade Commission with a certified letter from the independent agent confirming that respondent has complied with Part II. A. of this order;

D. All costs associated with the administration of the refund program and payment of refunds shall be borne by the respondent.

III.

It is further ordered, That respondent, its successors and assigns, shall maintain for at least five (5) years from the date of service of this order and, upon thirty (30) days advance written request, make available to the Federal Trade Commission for inspection and copying all documents and other records necessary to demonstrate fully its compliance with this order.

IV.

It is further ordered, That respondent, its successors and assigns, shall distribute a copy of this order to any present or future officers and managerial employees having responsibility with respect to the subject matter of this order and that respondent, its successors and assigns, shall secure from each such person a signed statement acknowledging receipt of said order.

V.

It is further ordered, That respondent, for a period of five (5) years following the date of service of this order, shall promptly notify the Commission at least thirty (30) days prior to any proposed change in its corporate structure such as 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 that may affect compliance obligations arising out of the order.

VI.

It is further ordered, That respondent shall, within one hundred and eighty (180) days of 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.

ATTACHMENT I

Dear Great Expectations Customer:

Several months ago, Great Expectations Minneapolis was contacted by the Federal Trade Commission staff with a view toward reviewing the standard form agreements which are utilized in connection with the business of Great Expectations Minneapolis. We submitted our contracts to the Federal Trade Commission staff for their review.

According to the Federal Trade Commission, the calculations used in calculating or disclosing the annual percentage rate or finance charges were in error. As a result, Great Expectations Minneapolis amended its format in order to comply with the Truth in Lending Act. As part of our settlement with the Federal Trade Commission for any alleged violations of the Truth in Lending Act from the past, we are now sending you the enclosed refund check in the amount of \$_____, which represents the amount you may have been overcharged as a result of possible errors made by Great Expectations in calculating or disclosing the annual percentage rate or finance charge.

[In order to correct any error that we may have made in the past, your future monthly payments have been adjusted to accommodate any possible overcharge which resulted from the calculations engaged in calculating or disclosing the annual percentage rate or finance charge.] We regret any inconvenience this may have caused you.

Sincerely,

Great Expectations

IN THE MATTER OF

G.E.C.H., INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
THE TRUTH IN LENDING ACT AND SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT*Docket C-3599. Complaint, Aug. 11, 1995--Decision, Aug. 11, 1995*

This consent order requires, among other things, a video dating service franchise to properly and accurately disclose the annual percentage rate ("APR") and other credit terms of financed memberships, as required by the federal Truth in Lending Act, and requires the franchise to establish adjustment refund programs to compensate its past and current members who overpaid finance charges.

*Appearances*For the Commission: *Stephen Cohen.*For the respondent: *Pro se.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Great Expectations Creative Management, Inc. has violated the Federal Trade Commission Act ("FTC Act"), and that Great Expectations, Inc., GEC Illinois, Inc., GEC Tennessee, Inc., GEC Alabama, Inc., Great Southern Video, Inc., New West Video Enterprises, Inc., San Antonio Singles of Texas, Inc., Austin Singles of Texas, Inc., Great Expectations of Baltimore, Inc., Great Expectations of Washington, D.C., Inc., Great Expectations of Washington, Inc., Sterling Connections, Inc., Private Eye Productions, Inc., Great Expectations - Columbus, Inc., JAMS Financial, Inc., V.L.P. Enterprises, Inc., APM Enterprises - Minn Inc., KGE, Inc., G.E.C.H., Inc., MWVE, Inc., GREATEX Denver, Inc., Sun West Video, Inc., and TRIAAC Enterprises, Inc. (hereinafter sometimes referred to collectively as "Great Expectations") have violated the Truth in Lending Act ("TILA"), its implementing Regulation Z, and the FTC Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint, and alleges as follows:

PARAGRAPH 1. Great Expectations Creative Management, Inc. ("GECM") 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 16830 Ventura Blvd., Suite P, Encino, CA.

PAR. 2. Great Expectations, Inc. ("GEI") is a corporation organized, existing, and doing business under and by virtue of the laws of the state of California, with its corporate office at 16830 Ventura Blvd., Suite P, Encino, CA, and its principal places of business located at 1640 S. Sepulveda Blvd. Suite 100, Los Angeles, CA, 17207 Ventura Blvd., Encino, CA, and 450 N. Mountain, Suite B, Upland, CA.

PAR. 3. GEC Illinois, Inc. ("GE Illinois") is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Illinois, with its office and principal place of business located at 1701 E. Woodfield Dr., Suite 400, Schaumburg, IL.

PAR. 4. GEC Tennessee, Inc. ("GE Tennessee") 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 5552 Franklin Rd., Suite 200, Nashville, TN.

PAR. 5. GEC Alabama, Inc. ("GE Alabama") is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Alabama, with its office and principal place of business located at 7529 S. Memorial Pkwy., Suite C & D, Huntsville, AL.

PAR. 6. Great Southern Video, Inc., doing business as Great Expectations of Dallas ("GE Dallas"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Texas, with its office and principal place of business located at 14180 Dallas Pkwy., Suite 100, Dallas, TX.

PAR. 7. New West Video Enterprises, Inc., doing business as Great Expectations of Houston ("GE Houston"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Texas, with its office and principal place of business located at 50 Briarhollow, Suite 100, Houston, TX.

PAR. 8. San Antonio Singles of Texas, Inc., doing business as Great Expectations of San Antonio ("GE San Antonio"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Texas, with its corporate office at

10497 Town & Country Way, Suite 214, Houston, TX, and its principal place of business located at 8131 I.H. 10 West, Suite 225, San Antonio, TX.

PAR. 9. Austin Singles of Texas, Inc., doing business as Great Expectations of Austin ("GE Austin"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Texas, with its corporate office at 10497 Town & Country Way, Suite 214, Houston, TX, and its principal place of business located at 9037 Research Blvd., Suite 130, Austin, TX.

PAR. 10. Great Expectations of Baltimore, Inc. ("GE Baltimore") is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Virginia, with its office and principal place of business located at 40 York Rd., Suite 500, Towson, MD.

PAR. 11. Great Expectations of Washington, D.C., Inc. ("GE DC") 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 8601 Westwood Center Dr., Vienna, VA.

PAR. 12. Great Expectations of Washington, Inc., doing business as Great Expectations of Raleigh/Durham ("GE Raleigh"), 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 3714 Benson Dr., Suite 200, Raleigh, NC.

PAR. 13. Sterling Connections, Inc., doing business as Great Expectations of Seattle ("GE Seattle"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Oregon, with its office and principal place of business located at 305 108th Ave., N.E., Suite 205, Bellevue, WA.

PAR. 14. Private Eye Productions, Inc., doing business as Great Expectations of Portland ("GE Portland"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Oregon, with its office and principal place of business located at 5531 S.W. Macadam Ave., Suite 225, Portland, OR.

PAR. 15. Great Expectations - Columbus, Inc. ("GE Columbus") is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Ohio, with its corporate office at 11835 W. Olympic Blvd., Suite 490, Los Angeles, CA, and its

principal place of business located at 1103 Schrock Rd., Suite 101, Columbus, OH.

PAR. 16. JAMS Financial, Inc., doing business as Great Expectations of Milwaukee ("GE Milwaukee"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Wisconsin, with its corporate office at 11835 W. Olympic Blvd., Suite 490, Los Angeles, CA, and its principal place of business located at 16650 W. Bluemound, Suite 100, Brookfield, WI.

PAR. 17. V.L.P. Enterprises, Inc., doing business as Great Expectations of San Diego ("GE San Diego"), 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 3465 Camino Del Rio South, Suite 300, San Diego, CA.

PAR. 18. APM Enterprises - Minn Inc., doing business as Great Expectations of Minneapolis ("GE Minneapolis"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Illinois, with its office and principal place of business located at 3300 Edinborough Way, Suite 300, Edina, MN.

PAR. 19. KGE, Inc., doing business as Great Expectations of Sausalito, Great Expectations of Mountain View, and Great Expectations of Walnut Creek (collectively referred to as "GE-SFA"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of California, with its corporate office at 1943 Landings Dr., Mountain View, CA, and its principal places of business located at 2401 Marinship Way, Suite 100, Sausalito, CA, 2085 Landings Dr., Mountain View, CA, and 1280 Civic Dr., Suite 300, Walnut Creek, CA.

PAR. 20. G.E.C.H., Inc., doing business as Great Expectations of Cherry Hill ("GE Cherry Hill"), 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 places of business located at One Cherry Hill, Suite 600, Cherry Hill, NJ.

PAR. 21. MWVE, Inc., doing business as Great Expectations of Cleveland ("GE Cleveland"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Ohio, with its office and principal place of business located at 6300 Rockside Rd., Suite 200, Cleveland, OH.

PAR. 22. GREATEX Denver, Inc., doing business as Great Expectations Video Dating, Ltd. ("GE-Denver"), 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 3773 Cherry Creek North Dr., Suite 140, Denver, CO.

PAR. 23. Sun West Video, Inc., doing business as Great Expectations for Singles ("GE Phoenix"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Arizona, with its office and principal place of business located at 5635 N. Scottsdale Rd., Suite 190, Scottsdale, AZ.

PAR. 24. TRIAAC Enterprises, Inc., doing business as Great Expectations of Sacramento ("GE Sacramento"), 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 2277 Fair Oaks Blvd., Suite 195, Sacramento, CA.

RESPONDENTS' COURSE OF BUSINESS

PAR. 25. GECM is a video dating franchisor. It sells and services franchise operations throughout the United States. As part of its regular course of business, GECM has created and disseminated retail installment contracts (Exhibits 1 and 2) to the franchises described in paragraphs two through twenty-four. The GECM retail installment contracts purport to incorporate the disclosures required by the TILA.

PAR. 26. Respondents Great Expectations are video dating franchises. Respondents have provided financing to their members using retail installment contracts such as Exhibits 1 and 2 to disclose the terms of the financing.

PAR. 27. GECM's TILA disclosure (Exhibit 1) contains erroneous instructions for calculating and disclosing the finance charge and contains a pre-printed annual percentage rate ("APR") of 18%. In addition, Exhibit 1 fails to make the TILA disclosures in the format required by the TILA and fails to identify the creditor as required by the TILA.

PAR. 28. In 1988, GECM learned from its auditor that the calculations and disclosures contained in Exhibit 1 did not comply with the TILA. Nevertheless, it continued to disseminate Exhibit 1 to its franchisees and failed to notify them of the erroneous calculations and disclosures.

PAR. 29. In late 1990, GECM created a new retail installment contract, which also purported to incorporate the disclosures required by the TILA and which contained a pre-printed APR of 19.6%. (Exhibit 2). Exhibit 2 fails to identify the creditor as required by the TILA and fails to provide the information required by the TILA in the itemization of the amount financed. Furthermore, GECM has disseminated Exhibit 2 to its franchisees but has failed to inform them to discontinue using the erroneous calculation and disclosure instructions that it had previously supplied in Exhibit 1.

PAR. 30. Respondents Great Expectations are creditors as that term is defined in the TILA and Regulation Z.

PAR. 31. The acts and practices of respondents Great Expectations and GECM alleged in this complaint have been and are in or affecting commerce, as "commerce" is defined in Section 4 of the FTC Act.

COUNT I

PAR. 32. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 33. Respondent GECM has furnished its franchises with TILA disclosures (Exhibits 1 and 2) that, on their face, violated the TILA. When used by respondents Great Expectations, Exhibits 1 and 2 have resulted in false and misleading disclosures of APRs and finance charges to consumers in violation of Section 5 of the FTC Act.

PAR. 34. In the course and practice of its business as described in paragraphs twenty-five through twenty-nine, and paragraph thirty-three, respondent GECM has provided respondents Great Expectations with the means and instrumentalities to violate the Section 5 of the FTC Act.

PAR. 35. The practices described in paragraph thirty-four constitute unfair or deceptive acts or practices in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. 45(a).

COUNT II

PAR. 36. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 37. Respondents GEI, GE Illinois, GE Tennessee, GE Alabama, GE Dallas, GE Houston, GE San Antonio, GE Austin, GE

Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Columbus, GE Milwaukee, GE San Diego, GE Minneapolis, GE-SFA, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento have furnished their members with TILA disclosures that have failed to accurately calculate and disclose the APR.

PAR. 38. The practice described in paragraph thirty-seven by respondents GEI, GE Illinois, GE Tennessee GE Alabama, GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Columbus, GE Milwaukee, GE San Diego, GE Minneapolis, GE-SFA, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento violates Sections 107(a) and (c) of the TILA, 15 U.S.C. 1606(a) and (c), and Sections 226.18(e) and 226.22 of Regulation Z, 12 CFR 226.18(e) and 226.22.

COUNT III

PAR. 39. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 40. Respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Columbus, GE Milwaukee, GE-SFA, GE Cleveland, GE Phoenix, GE Sacramento, and GE San Diego have furnished their members with TILA disclosures that have failed to accurately calculate and disclose the finance charge.

PAR. 41. The practice described in paragraph forty by respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Columbus, GE Milwaukee, GE-SFA, GE Cleveland, GE Phoenix, GE Sacramento, and GE San Diego violates Section 106 of the TILA, 15 U.S.C. 1605, and Sections 226.4 and 226.18(d) of Regulation Z, 12 CFR 226.4 and 226.18(d).

COUNT IV

PAR. 42. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 43. Respondents GE Dallas, GE Houston, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, and GE Phoenix have furnished their members with TILA disclosures that

have failed to disclose the finance charge more conspicuously than any other disclosure except the APR and the creditor's identity.

PAR. 44. The practice described in paragraph forty-three by respondents GE Dallas, GE Houston, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, and GE Phoenix violates Section 122(a) of the TILA, 15 U.S.C. 1632(a), and Section 226.17(a)(2) of Regulation Z, 12 CFR 226.17(a)(2).

COUNT V

PAR. 45. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 46. Respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento have furnished their members with TILA disclosures that have failed to segregate the disclosures required by the TILA from all other information provided in connection with the transaction, including the itemization of the amount financed.

PAR. 47. The practice described in paragraph forty-six by respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento violates Section 128(b)(1) of the TILA, 15 U.S.C. 1638(b)(1), and Section 226.17(a)(1) of Regulation Z, 12 CFR 226.17(a)(1).

COUNT VI

PAR. 48. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 49. Respondents GEI, GE Illinois, GE Tennessee, GE Alabama, GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Columbus, GE San Diego, GE Minneapolis, GE-SFA, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento have failed to accurately disclose the itemization of the amount financed.

PAR. 50. The practice described in paragraph forty-nine by respondents GEI, GE Illinois, GE Tennessee, GE Alabama, GE

Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Columbus, GE San Diego, GE Minneapolis, GE-SFA, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento violates Section 128(a) of the TILA, 15 U.S.C. 1638(a), and Section 226.18(c) of Regulation Z, 12 CFR 226.18(c).

COUNT VII

PAR. 51. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 52. Respondents GEI, GE Illinois, GE Tennessee, GE Alabama, GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Columbus, GE Milwaukee, GE San Diego, GE Minneapolis, GE-SFA, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento have failed to disclose the identity of the creditor.

PAR. 53. The practice described in paragraph fifty-two by respondents GEI, GE Illinois, GE Tennessee, GE Alabama, GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Columbus, GE Milwaukee, GE San Diego, GE Minneapolis, GE-SFA, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento violates Section 128(a)(1) of the TILA, 15 U.S.C. 1638(a)(1), and Section 226.18(a) of Regulation Z, 12 CFR 226.18(a).

COUNT VIII

PAR. 54. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 55. Respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento have furnished their members with TILA disclosures that have failed to provide a description of the amount financed.

PAR. 56. The practice described in paragraph fifty-five by respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, GE Phoenix, and GE

Sacramento violates Section 128(a)(8) of the TILA, 15 U.S.C. 1638(a)(8), and Section 226.18(b) of Regulation Z, 12 CFR 226.18(b).

PAR. 57. Respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento have furnished their members with TILA disclosures that have failed to provide a description of the finance charge.

PAR. 58. The practice described in paragraph fifty-seven by respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento violates Section 128(a)(8) of the TILA, 15 U.S.C. 1638(a)(8), and Section 226.18(d) of Regulation Z, 12 CFR 226.18(d).

PAR. 59. Respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento have furnished their members with TILA disclosures that have failed to provide a description of the APR.

PAR. 60. The practice described in paragraph fifty-nine by respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento violates Section 128(a)(8) of the TILA, 15 U.S.C. 1638(a)(8), and Section 226.18(e) of Regulation Z, 12 CFR 226.18(e).

PAR. 61. Respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento have furnished their members with TILA disclosures that have failed to provide the total of payments and/or a description of the total of payments.

PAR. 62. The practice described in paragraph sixty-one by respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento violates Section 128(a)(5) and/or (8) of

the TILA, 15 U.S.C. 1638(a)(5) and/or (8), and Section 226.18(h) of Regulation Z, 12 CFR 226.18(h).

PAR. 63. Respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento have furnished their members with TILA disclosures that have failed to provide the total sale price and/or a description of the total sale price.

PAR. 64. The practice described in paragraph sixty-three by respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento violates Section 128(a)(7) and/or (8) of the TILA, 15 U. S. C. 1638(a)(7) and/or (8), and Section 226.18(j) of Regulation Z, 12 CFR 226.18(j).

COUNT IX

PAR. 65. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 66. Respondents GE Dallas, GE Houston, GE Phoenix, GE San Antonio, GE Austin, GE Baltimore, GE DC, and GE Raleigh have failed to include set-up or other fees that are charged only to consumers who finance the costs of their memberships in the finance charge and the annual percentage rate disclosed to the consumer. They have also failed to exclude these finance charges from the amount financed that is disclosed to consumers.

PAR. 67. The practices described in paragraph sixty-six by respondents GE Dallas, GE Houston, GE Phoenix, GE San Antonio, GE Austin, GE Baltimore, GE DC, and GE Raleigh violate Sections 106, 107, and 128(a) of the TILA, 15 U.S.C. 1605, 1606, and 1638(a), and Sections 226.4(b), 226.22, and 226.18(b), (d), and (e) of Regulation Z, 12 CFR 226.4(b), 226.22, and 226.18(b), (d), and (e).

COUNT X

PAR. 68. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 69. Respondent GE San Diego has furnished its members with TILA disclosures that have failed to disclose the APR, the

finance charge, the amount financed, the total of payments, and the total sales price.

PAR. 70. The practices described in paragraph sixty-nine by respondent GE San Diego violate Section 128(a) of the TILA, 15 U.S.C. 1638(a), and Section 226.18 of Regulation Z, 12 CFR 226.18.

COUNT XI

PAR. 71. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 72. Respondent GE Houston has furnished its members with TILA disclosures that have failed to disclose the amount financed.

PAR. 73. The practice described in paragraph seventy-two by respondent GE Houston violates Section 128(a) of the TILA, 15 U.S.C. 1638(a), and Section 226.18(b) of Regulation Z, 12 CFR 226.18(b).

COUNT XII

PAR. 74. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 75. Respondents GEI, GE Alabama, GE Illinois, GE Portland, GE Dallas, GE Houston, GE Cleveland, GE Phoenix, GE San Antonio, GE Austin, GE Seattle, GE Denver, GE Columbus, GE Milwaukee, GE San Diego, GE Minneapolis, GE SFA, GE Cherry Hill, GE Sacramento, GE DC, GE Baltimore, and GE Raleigh have disclosed understated APRs and finance charges to consumers that have resulted in consumers paying more in financing costs than the amount to which they originally agreed.

PAR. 76. The practices described in paragraph seventy-five are unfair or deceptive acts or practices in violation of Section 5(a) of the FTC Act, 15 U.S.C. 45(a).

Complaint

EXHIBIT 1



RETAIL INSTALLMENT CONTRACT

Name - Last	First	Middle	Age
[Redacted]	[Redacted]	[Redacted]	26
Present Address	City	State	Zip
[Redacted]	[Redacted]	CO	80010
Social Security #	Home Phone	How Long At This Address	How Long in Area
[Redacted]	[Redacted]	2 1/2 YRS	26 YRS
Employed By	Work Phone	Present Position	
[Redacted]	[Redacted]	[Redacted]	
Income All Sources Month	Annual	Driver's License #	
[Redacted]	[Redacted]	[Redacted]	
Primary Bank Accounts			
Savings <input checked="" type="checkbox"/> Balance [Redacted]	Checking <input checked="" type="checkbox"/> Balance [Redacted]		
Credit Reference - Banks, Finance Co., Credit Unions	Open <input type="checkbox"/>	Closed <input type="checkbox"/>	Limit
USA			
1st TIER STATE Bank	Open <input type="checkbox"/>	Closed <input type="checkbox"/>	Limit

The undersigned Great Expectations (Seller) hereby sells, and the undersigned buyer, hereinafter referred to as "Member" purchase subject to the provisions of this contract, a MEMBERSHIP in Great Expectations and promises to pay to Great Expectations its share of the TOTAL PAYMENTS (Box 6) in accordance with the Payment Schedule hereinafter set forth.

DESCRIPTION OF GOODS AND SERVICES SOLD:

Interviewing, Testing & Evaluating, Processing & Coding, Background check (if necessary), for the purpose of bringing in contact with the purchaser (client) suitable individuals with similar likes and dislikes. This description intended to be partial only. The purchaser acknowledges receipt of application form, which is made a part hereto as though set out at length.

READ CAREFULLY AND SIGN ONLY WHEN COMPLETELY UNDERSTOOD

Buyer has considered and evaluated the terms of membership as set forth in Great Expectations Membership Agreement dated 10/31/91 and requests financing of the balance due. Acceptance of the terms of both agreements renders null and void any buyer's right to cancel previously provided.

I understand that my failure to participate in Great Expectations does not relieve me of my obligation to pay this contract in full regardless of the circumstances. I understand that by signing this Agreement I am a member of Great Expectations.

MEMBER SIGNATURE X [Redacted]

NOTICE TO MEMBER: Upon request, Great Expectations must provide or make available for your examination a statement or tabular showing how the partial refund of the time price charge is to be computed if any balance of the contract should be prepaid. Member (Buyer) and Great Expectations (Seller) agree that the terms and conditions on the Member's Contract for Membership constitute a part of this contract and are incorporated herein by reference. If due to delinquency, it is necessary to refer this account for collection, then the balance due shall include actual attorney's fee and court costs. In the event Member fails to pay any installment payment when due, the entire balance then owing shall immediately become due and payable, without notice, at the option of Great Expectations or assignee, and Great Expectations shall not be required to provide any services to Member until Member's payment account is made current. If more than one person signs this contract then their obligation shall be joint and several.

ITEMIZATION OF THE AMOUNT FINANCED

1. Cash Price	1595	BALANCE	10.	ANNUAL PERCENTAGE RATE	18%
2. Other	0	1595	11.	PAYMENT SCHEDULE:	
3. Down Payment	300	1295		5	Effective monthly installment of \$ 235
4. Paid (11/14/91) Second Interview	100	1195			per, commencing 12/15/91, and on the same day in each month thereafter, until fully paid. NO BALLOON PAYMENT.
5. Other Payments Due (11/30/91)	100	1095		12.	DELINQUENCY AND COLLECTION CHARGES: Buyer shall pay or request to pay any delinquency payment when the same shall become due and such charge is in effect for a period of more than ten (10) days, then in addition to the amount of such delinquency installment payment the Buyer shall pay to Seller, as delinquency and collection charge, an amount equal to 1% of such payment, except that such charge shall not exceed \$3.00 or be less than \$1.00.
6. Amt. Financed (Unpaid Bal. in Cash Price #3)	1095	1095		13.	PREPAYMENT RESERVE: Buyer may prepay any part of the unpaid balance without penalty and use payment in full. Buyer shall be entitled to a refund of the unearned portion of the Finance Charge computed under the simple interest date, however, there will be a minimum Finance Charge of \$10.00 and no refund shall be made if the amount of the Finance Charge is less than \$1.00.
7. Finance Charge @ 18% Bal. x 1% x 15 (no. of payments)	82.13	1177.13			
8. Total Payments (Bal. # 7)					
9. Deferred Payment Price (Bal. # 7)	1677.13				

DIVIDE by number of payments to calculate each installment and summarize on #11.

Notice to Buyer: (1) Do not sign this agreement before you read it or if it contains any blank spaces to be filled in. (2) You are entitled to a completely filled-in copy of this agreement. (3) You can prepay the full amount due under this agreement at any time. (4) If you desire to pay off in advance the full amount due, the amount which is outstanding will be furnished upon request.

SELLER Great Expectations

Signature of Member X [Redacted]

Business Address: 3773 Cherry Creek N. Dr. #400
 City & State: Denver, CO 80007

Member: Buyer acknowledges receipt of an exact copy of this instrument at the time of its execution. Member (Buyer) further acknowledges that the blanks in this contract were completely filled-in and that he has read the disclosures contained here prior to signing the contract.

Authorized Signature: [Redacted]
 Signature of Member X [Redacted]

Complaint

120 F.T.C.

EXHIBIT 2



RETAIL INSTALLMENT CONTRACT

DATE _____

Name Last First Middle Age _____

Present Address _____ City _____ State _____ Zip _____

Social Security # _____ Home Phone _____ How Long At This Address _____ Date of Birth _____

Employed By Name and Address _____ Work Phone _____ Present Position _____

Income All Sources _____ Annual _____ Driver's License # _____

Primary Bank Accounts _____
 Savings Name _____
 Checking Name _____

The undersigned Great Expectations (Seller) hereby sells, and the undersigned buyer (Member) purchases, subject to the provisions of this MEMBERSHIP in Great Expectations and promises to pay to Great Expectations or its assigns the TOTAL PAYMENTS in accordance with the Schedule hereafter set forth.

DESCRIPTION OF GOODS AND SERVICES SOLD: Interviewing, Evaluating, Processing & Coding, Background Check (if necessary) and PU Video Library for the purpose of giving Member access to a Video Library of potentially suitable individuals with similar backgrounds and abilities, this is intended to be partial only.

READ CAREFULLY AND SIGN ONLY WHEN COMPLETELY UNDERSTOOD

I have considered and evaluated the terms of membership as set forth in the Great Expectations Membership Agreement (attached) and hereby accepting of the same, and I understand that my failure to participate in Great Expectations does not relieve me of any obligation under this Contract, and the Membership Agreement. I am a Member of Great Expectations.

MEMBER SIGNATURE X _____

NOTICE TO MEMBER: Upon request, Great Expectations must provide or make available for your examination a statement or table showing how the rate of the loan or charge is to be determined if any balance of the Contract should be prepaid. Member (Buyer) and Great Expectations (Seller) agree that the terms and conditions of the Great Expectations Membership Agreement constitute a part of this Contract and are incorporated herein by reference. In the event Member fails to pay any installment payment when due, the entire balance (less any unearned Finance Charge) then owing shall become due and payable, without demand or notice, at the option of Great Expectations or its assignee, and Great Expectations shall not be required to provide to Member until Member's payment account is made current.

PURCHASE PRICE: \$ _____ payable in accordance with the Statement of Disclosure below.

PAYMENT SCHEDULE: Member's payments hereunder shall be in equal consecutive monthly installments commencing on the _____ day of the month after execution of this Contract and continuing on the same day of each month thereafter until paid in full. Interest on the unpaid balance shall be both prior and after maturity.

FEDERAL TRUTH IN LENDING DISCLOSURES
(Statement of Disclosure)

ANNUAL PERCENTAGE RATE	FINANCE CHARGE (Line 4)	AMOUNT FINANCED (Line 3)	TOTAL OF PAYMENTS (Line 5)	TOTAL SALES PRICE
The rate of the loan or charge is to be determined if any balance of the Contract should be prepaid.	The dollar amount of the finance charge is to be determined if any balance of the Contract should be prepaid.	The amount of the loan or charge is to be determined if any balance of the Contract should be prepaid.	The total of all payments to be made is to be determined if any balance of the Contract should be prepaid.	The total sales price of the goods or services is to be determined if any balance of the Contract should be prepaid.
19.6%	\$	\$	\$	(Line 1-4)

You the Buyer have the right to receive at this time an explanation of the amount financed, () want an explanation, () do not want an explanation. Your payment schedule will be:

Payment Schedule	Rate/Date/Yr
Number of Payments	Rate/Date/Yr
Amount of Payment	Rate/Date/Yr

DELINQUENCY AND COLLECTION CHARGES: If Buyer shall fail or neglect to pay any installment payment when the same shall become due and such failure or neglect shall continue for a period of more than ten (10) days, then in addition to the amount of such delinquent installment payment the Buyer shall pay to Seller, as a delinquency and collection charge, an amount equal to 5% of such payment except that such charge shall not exceed \$5.00 or be less than \$1.00.

PREPAYMENT: If you pay off early, you will not have to pay a penalty and you may be entitled to a refund of part of the finance charge.

See your Great Expectations Membership Agreement for any additional information about non-payment, default, any required repayment in full before the scheduled date and prepayments, refunds and penalties.

ITEMIZATION OF AMOUNT FINANCED

	Prepayment Rate
1. Total Cash Price \$ _____	Buyer may prepay or all of the unpaid balance without penalty or payment in full but be entitled to a refund of the amount of the Finance Charge computed under the interest basis. If there will be a Finance Charge or and not refund of the Finance Charge is \$1.00.
2. Less Downpayment - \$ _____	
3. Amount Financed \$ _____	
4. Finance Charge \$ _____	
5. Total of Payments \$ _____	

Waiver of any default by the Seller shall not operate as a release of the Buyer's obligation to pay to Seller all actual and reasonable costs of collection including reasonable Attorney fees and disbursements.

Buyer and pay to the Seller a \$10.00 charge for every delinquency or other installment.

Should any term herein be invalid or unenforceable, the remaining shall be enforceable by such finding.

NOTICE TO BUYER:

1. Do not sign this agreement before you read it or if any blank spaces to be filled in.
2. You are entitled to a completely filled in copy agreement.
3. You can prepay the full amount due under this agreement at any time.
4. If you desire to pay off in advance the full amount amount which is outstanding will be furnished on re

Seller GREAT EXPECTATIONS

Business Address _____

City & State _____

Authorized Signature _____ Title _____

Member (Buyer) acknowledges receipt of an exact copy of this at the time of its execution. Member (Buyer) further acknowledges that the Contract here contained and filed-in and that the conditions contained herein prior to signing the Contract.

Signature of Member X _____

Routing: White—FINANCE; Pink—SELLER; Gold—CUSTOMER

Exhibit

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of G.E.C.H., Inc., a corporation, and respondent having been furnished thereafter with a copy of the draft of complaint that 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 Section 5 (a) of the Federal Trade Commission Act and the Truth in Lending 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 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. G.E.C.H., Inc., doing business as Great Expectations of Cherry Hill ("GE Cherry Hill"), 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 One Cherry Hill, Suite 600, Cherry Hill, NJ.

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:

A. Respondent GE Cherry Hill, 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 offering of credit, do forthwith cease and desist from failing to accurately calculate and disclose the annual percentage rate, as required by Sections 107(a) and (c) of the TILA, 15 U.S.C. 1606(a) and (c), and Sections 226.18(e) and 226.22 of Regulation Z, 12 CFR 226.18(e) and 226.22;

B. Respondent GE Cherry Hill, 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 offering of credit, do forthwith cease and desist from failing to make all disclosures in the manner, form, and amount required by Sections 122 and 128(a) of the TILA, 15 U.S.C. 1632 and 1638(a), and Sections 226.17 and 226.18 of Regulation Z, 12 CFR 226.17 and 226.18;

C. Respondent GE Cherry Hill, 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 offering of credit, do forthwith cease and desist from failing to comply with the TILA, 15 U.S.C. 1601 *et seq.*, and Regulation Z, 12 CFR 226.

II.

REFUND PROGRAM

It is further ordered, That:

A. Within thirty (30) days following the date of service of this order, respondent shall:

1. Determine to whom respondent disclosed on the original TILA disclosure an annual percentage rate that was miscalculated by more

than one quarter of one percentage point below the annual percentage rate determined in accordance with Section 226.22 of Regulation Z, 12 CFR 226.22, or that disclosed a finance charge that was miscalculated by more than one dollar below the finance charge determined in accordance with Section 226.4 of Regulation Z, 12 CFR 226.4, so that each such person will not be required to pay a finance charge in excess of the finance charge actually disclosed or the dollar equivalent of the annual percentage rate actually disclosed, whichever is lower, plus a tolerance of one quarter of one percentage point;

2. Calculate a lump sum refund and a monthly payment adjustment, if applicable, in accordance with Section 108(e) of the TILA, 15 U.S.C. 1607(e);

3. Mail a refund check to each eligible consumer in the amount determined above, along with Attachment 1; and

4. Provide the Federal Trade Commission with a list of each such consumer, the amount of the refund, the number of payments refunded, the amount of adjustment for future payments and the number of future payments to be adjusted;

B. Within thirty (30) days following the date of adjustments made pursuant to this section, respondent shall direct Ira M. Goldberg, Esquire, to review a statistically-valid sample of refunds. Respondent shall provide the Federal Trade Commission with a certified letter from Mr. Goldberg confirming that respondent has complied with Part II. A. of this order;

C. All costs associated with the administration of the refund program and payment of refunds shall be borne by the respondent.

III.

It is further ordered, That respondent, its successors and assigns, shall maintain for at least five (5) years from the date of service of this order and, upon thirty (30) days advance written request, make available to the Federal Trade Commission for inspection and copying all documents and other records necessary to demonstrate fully its compliance with this order.

IV.

It is further ordered, That respondent, its successors and assigns, shall distribute a copy of this order to any present or future officers and managerial employees having responsibility with respect to the subject matter of this order and that respondent, its successors and assigns, shall secure from each such person a signed statement acknowledging receipt of said order.

V.

It is further ordered, That respondent, for a period of five (5) years following the date of service of this order, shall promptly notify the Commission at least thirty (30) days prior to any proposed change in its corporate structure such as 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 that may affect compliance obligations arising out of the order.

VI.

It is further ordered, That respondent shall, within one hundred and eighty (180) days of 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.

ATTACHMENT 1

Dear Great Expectations Member:

Some time ago, the Federal Trade Commission staff notified us that we had made some inadvertent errors in filling out certain Truth in Lending Act disclosure forms, which is the form you signed containing primarily the terms by which you agreed to pay for your Great Expectations membership over some period of time. After receiving the FTC notification, we went back and recomputed your finance charge and determined that we had miscalculated or improperly disclosed that charge, or the annual percentage rate. We are therefore enclosing a refund check payable to your order in the amount of \$***** which represents the amount you were inadvertently overcharged.

[In addition, your future monthly payments have been recalculated and, starting immediately, your monthly payments will be \$*****.]

We hope that your experience with Great Expectations has been a positive one and hope that you will feel free to notify us if there is anything we can do for you. We regret any inconvenience this may have caused you.

Very truly yours,

[signed]

Complaint

120 F.T.C.

IN THE MATTER OF

GREAT EXPECTATIONS OF BALTIMORE, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
THE TRUTH IN LENDING ACT AND SEC. 5 OF
THE FEDERAL TRADE COMMISSION ACT*Docket C-3600. Complaint, Aug. 11, 1995--Decision, Aug. 11, 1995*

This consent order requires, among other things, the video dating service franchises to properly and accurately disclose the annual percentage rate ("APR") and other credit terms of financed memberships, as required by the federal Truth in Lending Act, and requires the franchises to establish adjustment refund programs to compensate their past and current members who overpaid finance charges.

*Appearances*For the Commission: *Stephen Cohen* and *Judy Nixon*.For the respondents: *Allen D. Greif*, Towson, MD.

COMPLAINT

The Federal Trade Commission, having reason to believe that Great Expectations Creative Management, Inc. has violated the Federal Trade Commission Act ("FTC Act"), and that Great Expectations, Inc., GEC Illinois, Inc., GEC Tennessee, Inc., GEC Alabama, Inc., Great Southern Video, Inc., New West Video Enterprises, Inc., San Antonio Singles of Texas, Inc., Austin Singles of Texas, Inc., Great Expectations of Baltimore, Inc., Great Expectations of Washington, D.C., Inc., Great Expectations of Washington, Inc., Sterling Connections, Inc., Private Eye Productions, Inc., Great Expectations - Columbus, Inc., JAMS Financial, Inc., V.L.P. Enterprises, Inc., APM Enterprises - Minn Inc., KGE, Inc., G.E.C.H., Inc., MWVE, Inc., GREATEX Denver, Inc., Sun West Video, Inc., and TRIAAC Enterprises, Inc. (hereinafter sometimes referred to collectively as "Great Expectations") have violated the Truth in Lending Act ("TILA"), its implementing Regulation Z, and the FTC Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint, and alleges as follows:

PARAGRAPH 1. Great Expectations Creative Management, Inc. ("GECM") 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 16830 Ventura Blvd., Suite P, Encino, CA.

PAR. 2. Great Expectations, Inc. ("GEI") is a corporation organized, existing, and doing business under and by virtue of the laws of the state of California, with its corporate office at 16830 Ventura Blvd., Suite P, Encino, CA, and its principal places of business located at 1640 S. Sepulveda Blvd., suite 100, Los Angeles, CA, 17207 Ventura Blvd., Encino, CA, and 450 N. Mountain, Suite B, Upland, CA.

PAR. 3. GEC Illinois, Inc. ("GE Illinois") is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Illinois, with its office and principal place of business located at 1701 E. Woodfield Dr., Suite 400, Schaumburg, IL.

PAR. 4. GEC Tennessee, Inc. ("GE Tennessee") 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 5552 Franklin Rd., suite 200, Nashville, TN.

PAR. 5. GEC Alabama, Inc. ("GE Alabama") is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Alabama, with its office and principal place of business located at 7529 S. Memorial Pkwy., Suite C & D, Huntsville, AL.

PAR. 6. Great Southern Video, Inc., doing business as Great Expectations of Dallas ("GE Dallas"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Texas, with its office and principal place of business located at 14180 Dallas Pkwy., Suite 100, Dallas, TX.

PAR. 7. New West Video Enterprises, Inc., doing business as Great Expectations of Houston ("GE Houston"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Texas, with its office and principal place of business located at 50 Briarhollow, Suite 100, Houston, TX.

PAR. 8. San Antonio Singles of Texas, Inc., doing business as Great Expectations of San Antonio ("GE San Antonio"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Texas, with its corporate office at

10497 Town & Country Way, Suite 214, Houston, TX, and its principal place of business located at 8131 I.H. 10 West, Suite 225, San Antonio, TX.

PAR. 9. Austin Singles of Texas, Inc., doing business as Great Expectations of Austin ("GE Austin"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Texas, with its corporate office at 10497 Town & Country Way, Suite 214, Houston, TX, and its principal place of business located at 9037 Research Blvd., Suite 130, Austin, TX.

PAR. 10. Great Expectations of Baltimore, Inc. ("GE Baltimore") is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Virginia, with its office and principal place of business located at 40 York Rd., Suite 500, Towson, MD.

PAR. 11. Great Expectations of Washington, D.C., Inc. ("GE DC") 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 8601 Westwood Center Dr., Vienna, VA.

PAR. 12. Great Expectations of Washington, Inc., doing business as Great Expectations of Raleigh/Durham ("GE Raleigh"), 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 3714 Benson Dr., Suite 200, Raleigh, NC.

PAR. 13. Sterling Connections, Inc., doing business as Great Expectations of Seattle ("GE Seattle"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Oregon, with its office and principal place of business located at 305 108th Ave., N.E., Suite 205, Bellevue, WA.

PAR. 14. Private Eye Productions, Inc., doing business as Great Expectations of Portland ("GE Portland"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Oregon, with its office and principal place of business located at 5531 S.W. Macadam Ave., Suite 225, Portland, OR.

PAR. 15. Great Expectations - Columbus, Inc. ("GE Columbus") is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Ohio, with its corporate office at 11835 W. Olympic Blvd., Suite 490, Los Angeles, CA, and its principal place of business located at 1103 Schrock Rd., Suite 101, Columbus, OH.

PAR. 16. JAMS Financial, Inc., doing business as Great Expectations of Milwaukee ("GE Milwaukee"), is a corporation, organized, existing, and doing business under and by virtue of the laws of the state of Wisconsin, with its corporate office at 11835 W. Olympic Blvd., Suite 490, Los Angeles, CA, and its principal place of business located at 16650 W. Bluemound, Suite 100, Brookfield, WI.

PAR. 17. V.L.P. Enterprises, Inc., doing business as Great Expectations of San Diego ("GE San Diego"), 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 3465 Camino Del Rio South, Suite 300, San.Diego, CA.

PAR. 18. APM Enterprises - Minn Inc., doing business as Great Expectations of Minneapolis ("GE Minneapolis"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Illinois, with its office and principal place of business located at 3300 Edinborough Way, Suite 300, Edina, MN.

PAR. 19. KGE, Inc., doing business as Great Expectations of Sausalito, Great Expectations of Mountain View, and Great Expectations of Walnut Creek (collectively referred to as "GE-SFA"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of California, with its corporate office at 1943 Landings Dr., Mountain View, CA, and its principal places of business located at 2401 Marinship Way, Suite 100, Sausalito, CA, 2085 Landings Dr., Mountain View, CA, and 1280 Civic Dr., Suite 300, Walnut Creek, CA.

PAR. 20. G.E.C.H., Inc., doing business as Great Expectations of Cherry Hill ("GE Cherry Hill"), 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 places of business located at One Cherry Hill, Suite 600, Cherry Hill, NJ.

PAR. 21. MWVE, Inc., doing business as Great Expectations of Cleveland ("GE Cleveland"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Ohio, with its office and principal place of business located at 6300 Rockside Rd., Suite 200, Cleveland, OH.

PAR. 22. GREATEX Denver, Inc., doing business as Great Expectations Video Dating, Ltd. ("GE-Denver"), 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 3773 Cherry Creek North Dr., Suite 140, Denver, CO.

PAR. 23. Sun West Video, Inc., doing business as Great Expectations for Singles ("GE Phoenix"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Arizona, with its office and principal place of business located at 5635 N. Scottsdale Rd., Suite 190, Scottsdale, AZ.

PAR. 24. TRIAAC Enterprises, Inc., doing business as Great Expectations of Sacramento ("GE Sacramento"), 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 2277 Fair Oaks Blvd., Suite 195, Sacramento, CA.

RESPONDENTS' COURSE OF BUSINESS

PAR. 25. GECM is a video dating franchisor. It sells and services franchise operations throughout the United States. As part of its regular course of business, GECM has created and disseminated retail installment contracts (Exhibits 1 and 2) to the franchises described in paragraphs two through twenty-four. The GECM retail installment contracts purport to incorporate the disclosures required by the TILA.

PAR. 26. Respondents Great Expectations are video dating franchises. Respondents have provided financing to their members using retail installment contracts such as Exhibits 1 and 2 to disclose the terms of the financing.

PAR. 27. GECM's TILA disclosure (Exhibit 1) contains erroneous instructions for calculating and disclosing the finance charge and contains a pre-printed annual percentage rate ("APR") of 18%. In addition, Exhibit 1 fails to make the TILA disclosures in the format required by the TILA and fails to identify the creditor as required by the TILA.

PAR. 28. In 1988, GECM learned from its auditor that the calculations and disclosures contained in Exhibit 1 did not comply with the TILA. Nevertheless, it continued to disseminate Exhibit 1 to its franchisees and failed to notify them of the erroneous calculations and disclosures.

PAR. 29. In late 1990, GECM created a new retail installment contract, which also purported to incorporate the disclosures required by the TILA and which contained a pre-printed APR of 19.6%.

(Exhibit 2). Exhibit 2 fails to identify the creditor as required by the TILA and fails to provide the information required by the TILA in the itemization of the amount financed. Furthermore, GECM has disseminated Exhibit 2 to its franchisees but has failed to inform them to discontinue using the erroneous calculation and disclosure instructions that it had previously supplied in Exhibit 1.

PAR. 30. Respondents Great Expectations are creditors as that term is defined in the TILA and Regulation Z.

PAR. 31. The acts and practices of respondents Great Expectations and GECM alleged in this complaint have been and are in or affecting commerce, as "commerce" is defined in Section 4 of the FTC Act.

COUNT I

PAR. 32. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 33. Respondent GECM has furnished its franchises with TILA disclosures (Exhibits 1 and 2) that, on their face, violated the TILA. When used by respondents Great Expectations, Exhibits 1 and 2 have resulted in false and misleading disclosures of APRs and finance charges to consumers in violation of Section 5 of the FTC Act.

PAR. 34. In the course and practice of its business as described in paragraphs twenty-five through twenty-nine, and paragraph thirty-three, respondent GECM has provided respondents Great Expectations with the means and instrumentalities to violate the Section 5 of the FTC Act.

PAR. 35. The practices described in paragraph thirty-four constitute unfair or deceptive acts or practices in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. 45(a).

COUNT II

PAR. 36. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 37. Respondents GEI, GE Illinois, GE Tennessee, GE Alabama, GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Columbus, GE Milwaukee, GE San Diego, GE Minneapolis, GE-

SFA, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento have furnished their members with TILA disclosures that have failed to accurately calculate and disclose the APR.

PAR. 38. The practice described in paragraph thirty-seven by respondents GEI, GE Illinois, GE Tennessee, GE Alabama, GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Columbus, GE Milwaukee, GE San Diego, GE Minneapolis, GE-SFA, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento violates Sections 107(a) and (c) of the TILA, 15 U.S.C. 1606(a) and (c), and Sections 226.18(e) and 226.22 of Regulation Z, 12 CFR 226.18(e) and 226.22.

COUNT III

PAR. 39. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 40. Respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Columbus, GE Milwaukee, GE-SFA, GE Cleveland, GE Phoenix, GE Sacramento, and GE San Diego have furnished their members with TILA disclosures that have failed to accurately calculate and disclose the finance charge.

PAR. 41. The practice described in paragraph forty by respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Columbus, GE Milwaukee, GE-SFA, GE Cleveland, GE Phoenix, GE Sacramento, and GE San Diego violates Section 106 of the TILA, 15 U.S.C. 1605, and Sections 226.4 and 226.18(d) of Regulation Z, 12 CFR 226.4 and 226.18(d).

COUNT IV

PAR. 42. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 43. Respondents GE Dallas, GE Houston, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, and GE Phoenix have furnished their members with TILA disclosures that have failed to disclose the finance charge more conspicuously than any other disclosure except the APR and the creditor's identity.

PAR. 44. The practice described in paragraph forty-three by respondents GE Dallas, GE Houston, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, and GE Phoenix violates Section 122(a) of the TILA, 15 U.S.C. 1632(a), and Section 226.17(a)(2) of Regulation Z, 12 CFR 226.17(a)(2).

COUNT V

PAR. 45. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 46. Respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento have furnished their members with TILA disclosures that have failed to segregate the disclosures required by the TILA from all other information provided in connection with the transaction, including the itemization of the amount financed.

PAR. 47. The practice described in paragraph forty-six by respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento violates Section 128(b)(1) of the TILA, 15 U.S.C. 1638(b)(1), and Section 226.17(a)(1) of Regulation Z, 12 CFR 226.17(a)(1).

COUNT VI

PAR. 48. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 49. Respondents GEI, GE Illinois, GE Tennessee, GE Alabama, GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Columbus, GE San Diego, GE Minneapolis, GE-SFA, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento have failed to accurately disclose the itemization of the amount financed.

PAR. 50. The practice described in paragraph forty-nine by respondents GEI, GE Illinois, GE Tennessee, GE Alabama, GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Columbus, GE San

Diego, GE Minneapolis, GE-SFA, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento violates Section 128(a) of the TILA, 15 U.S.C. 1638(a), and Section 226.18(c) of Regulation Z, 12 CFR 226.18(c).

COUNT VII

PAR. 51. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 52. Respondents GEI, GE Illinois, GE Tennessee, GE Alabama, GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Columbus, GE Milwaukee, GE San Diego, GE Minneapolis, GE-SFA, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento have failed to disclose the identity of the creditor.

PAR. 53. The practice described in paragraph fifty-two by respondents GEI, GE Illinois, GE Tennessee, GE Alabama, GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Columbus, GE Milwaukee, GE San Diego, GE Minneapolis, GE-SFA, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento violates Section 128(a)(1) of the TILA, 15 U.S.C. 1638(a)(1), and Section 226.18(a) of Regulation Z, 12 CFR 226.18(a).

COUNT VIII

PAR. 54. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 55. Respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento have furnished their members with TILA disclosures that have failed to provide a description of the amount financed.

PAR. 56. The practice described in paragraph fifty-five by respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento violates Section 128(a)(8) of the TILA, 15 U.S.C. 1638(a)(8), and Section 226.18(b) of Regulation Z, 12 CFR 226.18(b).

PAR. 57. Respondents GE Dallas, GE Houston, E San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento have furnished their members with TILA disclosures that have failed to provide a description of the finance charge.

PAR. 58. The practice described in paragraph fifty-seven by respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento violates Section 128(a)(8) of the TILA, 15 U.S.C. 1638(a)(8), and Section 226.18(d) of Regulation Z, 12 CFR 226.18(d).

PAR. 59. Respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento have furnished their members with TILA disclosures that have failed to provide a description of the APR.

PAR. 60. The practice described in paragraph fifty-nine by respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento violates Section 128(a)(8) of the TILA, 15 U.S.C. 1638(a)(8), and Section 226.18(e) of Regulation Z, 12 CFR 226.18(e).

PAR. 61. Respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento have furnished their members with TILA disclosures that have failed to provide the total of payments and/or a description of the total of payments.

PAR. 62. The practice described in paragraph sixty-one by respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento violates Section 128(a)(5) and/or (8) of the TILA, 15 U.S.C. 1638(a)(5) and/or (8), and Section 226.18(h) of Regulation Z, 12 CFR 226.18(h).

PAR. 63. Respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE

Portland, GE Minneapolis, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento have furnished their members with TILA disclosures that have failed to provide the total sale price and/or a description of the total sale price.

PAR. 64. The practice described in paragraph sixty-three by respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento violates Section 128(a)(7) and/or (8) of the TILA, 15 U.S.C. 1638(a)(7), and/or (8), and Section 226.18(j) of Regulation Z, 12 CFR 226.18(j).

COUNT IX

PAR. 65. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 66. Respondents GE Dallas, GE Houston, GE Phoenix, GE San Antonio, GE Austin, GE Baltimore, GE DC, and GE Raleigh have failed to include set-up or other fees that are charged only to consumers who finance the costs of their annual memberships in the finance charge and the annual percentage rate disclosed to the consumer. They have also failed to exclude disclosed to the consumer the amount financed that is disclosed these finance charges from to consumers.

PAR. 67. The practices described in paragraph sixty-six by respondents GE Dallas, GE Houston, GE Phoenix, GE San Antonio, GE Austin, GE Baltimore, GE DC, and GE Raleigh violate Sections 106, 107, and 128(a) of the TILA, 15 U.S.C. 1605, 1606, and 1638(a), and Sections 226.4(b), 226.22, and 226.18(b), (d), and (e) of Regulation Z, 12 CFR 226.4(b), 226.22, and 226.18(b), and (e).

COUNT X

PAR. 68. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 69. Respondent GE San Diego has furnished its members with TILA disclosures that have failed to disclose the APR, the finance charge, the amount financed, the total of payments, and the total sales price.

PAR. 70. The practices described in paragraph sixty-nine by respondent GE San Diego violate Section 128(a) of the TILA, 15 U.S.C. 1638(a), and Section 226.18 of Regulation Z, 12 CFR 226.18.

COUNT XI

PAR. 71. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 72. Respondent GE Houston has furnished its members with TILA disclosures that have failed to disclose the amount financed.

PAR. 73. The practice described in paragraph seventy-two by respondent GE Houston violates Section 128(a) of the TILA, 15 U.S.C. 1638(a), and Section 226.18(b) of Regulation Z, 12 CFR 226.18(b).

COUNT XII

PAR. 74. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 75. Respondents GEI, GE Alabama, GE Illinois, GE Portland, GE Dallas, GE Houston, GE Cleveland, GE Phoenix, GE San Antonio, GE Austin, GE Seattle, GE Denver, GE Columbus, GE Milwaukee, GE San Diego, GE Minneapolis, GE SFA, GE Cherry Hill, GE Sacramento, GE DC, GE Baltimore, and GE Raleigh have disclosed understated APRs and finance charges to consumers that have resulted in consumers paying more in financing costs than the amount to which they originally agreed.

PAR. 76. The practices described in paragraph seventy-five are unfair or deceptive acts or practices in violation of Section 5(a) of the FTC Act, 15 U.S.C. 45(a).

Complaint

120 F.T.C.

EXHIBIT 1

Expectations

RETAIL INSTALLMENT CONTRACT

Name - Last	First	Middle	Age
[Redacted]	[Redacted]	[Redacted]	76
Present Address	City	State	Zip
[Redacted]	[Redacted]	CO	80010
Social Security #	Home Phone	How Long at This Address	How Long in Area
[Redacted]	[Redacted]	5 YRS	26 YRS
Employed By	Work Phone	Present Position	
[Redacted]	[Redacted]	[Redacted]	
Income An Source	Annual	Driver's License #	
[Redacted]	[Redacted]	[Redacted]	
Primary Bank Accounts	Checking <input checked="" type="checkbox"/> Balance <input checked="" type="checkbox"/>		
Savings <input checked="" type="checkbox"/>	[Redacted]		
Credit Reference - Banks, Finance Co., Credit Unions	Open <input type="checkbox"/>	Closed <input type="checkbox"/>	Limit
USA	[Redacted]		
First Interstate Bank	Open <input type="checkbox"/>	Closed <input type="checkbox"/>	Limit

The undersigned Great Expectations (Seller) hereby sells, and the undersigned buyer, hereinafter referred to as "Member" (Buyer) subject to the provisions of this contract, a MEMBERSHIP in Great Expectations and promises to pay to Great Expectations its share of the TOTAL PAYMENTS (Box 8) in accordance with the Payment Schedule hereinafter set forth.

DESCRIPTION OF GOODS AND SERVICES SOLD.

Interviewing, Testing & Evaluating, Processing & Coding, Background checks (if necessary), for the purpose of bringing in contact with the purchaser (client) suitable individuals with similar likes and dislikes, this description intended to be partial only, the Buyer acknowledges receipt of application form, which is made a part hereof as though set out at length.

READ CAREFULLY AND SIGN ONLY WHEN COMPLETELY UNDERSTOOD

Buyer has considered and evaluated the terms of membership as set forth in Great Expectations Membership Agreement dated 10/31/91 and requests financing of the balance due. Acceptance of the terms of both agreements renders null and void a buyer's right to cancel previously provided.

I understand that my failure to participate in Great Expectations does not release me of my obligation to pay this contract in full regardless of the circumstances. I understand that by signing the Agreement I am a Member of Great Expectations.

MEMBER SIGNATURE X [Redacted]

NOTICE TO MEMBER: Upon request, Great Expectations must provide or make available for your examination a statement of its showing how the partial refund of the time price charge is to be computed if any balance of the contract should be prepaid. Member (Buyer) and Great Expectations (Seller) agree that the terms and conditions on the Member's Contract for Membership constitute part of this contract and are incorporated herein by reference. If due to delinquency, it is necessary to refer this account collection, then the balance due shall include actual attorney's fee and court costs. In the event Member fails to pay any installment payment when due, the entire balance then owing shall immediately become due and payable, without notice, at the option of Great Expectations or assignee, and Great Expectations shall not be required to provide any services to Member until Member's payment account is made current. If more than one person signs this contract then their obligation shall be joint and several.

ITEMIZATION OF THE AMOUNT FINANCED

1. Cash Price	1595	BALANCE	10. ANNUAL PERCENTAGE RATE	18%
2. Other	0	1595	11. PAYMENT SCHEDULE:	
3. Down Payment	300	1295	5	Successive monthly installments of \$ 23
4. Paid (11/14/91) Second Interest	100	1195	12/15/91	and on
5. Other Payments Due (11/30/91)	100	1095		and on
6. Amt. Financed (Unpaid Bal. of Cash Price #3)	1095	1095		and on
7. Finance Charge @ 18% = 15% + 15% (no. of payments)	82.13			and on
8. Total Payments (Bal. + 7)	1177.13			and on
9. Deferred Payment Price (Bal. #2 + #7)	1677.13			and on

12. DELINQUENCY AND COLLECTION CHARGES: Buyer shall pay an amount to pay any installment when the same shall become due and such amount shall constitute for a period of more than ten days, then in addition to the amount of such delinquent payment the Buyer shall pay to Seller, delinquency and collection charge, an amount equal to 5% of such delinquent amount, except that such charge shall exceed \$1.00 or be less than \$1.00.

13. PREPAYMENT REBATE: Buyer may prepay any or all of the unpaid balance without penalty and a payment in full Buyer shall be entitled to a rebate of the unpaid portion of the Finance Charge (also under the simple interest rule, however, there shall be no maximum Finance Charge of \$10.00 and no rebate of unearned charge if less than \$1.00.

DIVIDE by number of payments to calculate each installment and summarize on #11.

Notice to Buyer: (1) Do not sign this agreement before you read it or if it contains any blank spaces to be filled in. (2) You are entitled to a completely filled-in copy of this agreement. (3) You can prepay the full amount due under this agreement at any (4) If you desire to pay off in advance the full amount due, the amount which is outstanding will be furnished upon request.

SELLER Great Expectations
 Business Address: 3773 Cherry Creek N. Dr. W.
Denver CO 8007
 Authorized Signature: [Redacted]
 Title: [Redacted]

Signature of Member X [Redacted]
 Member (Buyer) acknowledges receipt of an exact copy of instrument at the time of its execution. Member (Buyer) acknowledges that the blanks in this contract were completed prior to signing the contract.

Exhibit

Complaint

EXHIBIT 2



RETAIL INSTALLMENT CONTRACT

DATE _____

Name: Last _____ First _____ Middle _____ Age _____

Present address _____ City _____ State _____ Zip _____

Social Security # _____ Home Phone _____ How Long At This Address _____ Date of Birth _____

Employed By (Name and Address): _____ Work Phone _____ Present Position _____

Name All Sources _____ Annual _____ Driver's License # _____

Primary Bank Accounts: Savings Name _____ Checking Name _____

ACCORD TO _____

The undersigned Great Expectations (Seller) hereby sells, and the undersigned buyer (Member) purchases, subject to the provisions of this CONTRACT MEMBERSHIP in Great Expectations and promises to pay to Great Expectations or its assigns the TOTAL PAYMENTS in accordance with the Schedule hereinafter set forth.

DESCRIPTION OF GOODS AND SERVICES SOLD: Interviewing, Evaluating, Processing & Coding, Background Check (if necessary) and The Video Library for the purpose of giving Member access to a Video Library of potentially suitable individuals with similar class and status. This is intended to be partial only.

READ CAREFULLY AND SIGN ONLY WHEN COMPLETELY UNDERSTOOD

Have read and understand the terms of membership as set forth in the Great Expectations Membership Agreement dated _____ and hereby accepting the same. I understand that my failure to participate in Great Expectations does not relieve me of my obligation. I understand that by signing this Contract, and the Membership Agreement, I am a Member of Great Expectations.

MEMBER SIGNATURE: X _____

NOTICE TO MEMBER: Upon request, Great Expectations must provide or make available for your examination a statement or table showing how and when the price change is to be computed if any balance of the Contract should be prepaid. Member (Buyer) and Great Expectations (Seller) both agree and concur that the Great Expectations Membership Agreement constitutes a part of this Contract and are incorporated herein by reference. In the event Member fails to pay any installment payment when due, the entire balance (less any unearned Finance Charge) then owing shall be due and payable, without demand or notice, at the option of Great Expectations or assigns, and Great Expectations shall not be required to provide to Member until Member's payment account is made current.

PURCHASE PRICE: \$ _____ payable in accordance with the Statement of Disclosures below.

PAYMENT SCHEDULE: Member's payments hereunder shall be in equal successive monthly installments commencing on the _____ day of _____ month after execution of this Contract and continuing on the same day of each month thereafter until paid in full. Interest on the unpaid balance shall be both prior and after maturity.

FEDERAL TRUTH IN LENDING DISCLOSURES (Statement of Disclosures)				
ANNUAL PERCENTAGE RATE	FINANCE CHARGE (Line 4)	AMOUNT FINANCED (Line 3)	TOTAL OF PAYMENTS (Line 5)	TOTAL SALES PRICE
The rate of interest is 19.6%	The finance charge is \$ _____	The amount of money loaned to you is \$ _____	The total amount of money you will pay is \$ _____	The total price of the goods or services is \$ _____

You the Buyer have the right to finance at this time on a disclosure of the amount financed. () I want an installment, () I do not want an installment. Your payment schedule will be:

Number of Payments	Amount of Payment	First Payment Due
_____	_____	_____

DELINQUENCY AND COLLECTION CHARGES: If Buyer shall fail or neglect to pay any installment payment when the same shall become due and such failure or neglect shall continue for a period of more than ten (10) days, then in addition to the amount of such delinquent installment payment the Buyer shall pay to Seller, as a delinquency and collection charge, an amount equal to 5% of such payment except that such charge shall not exceed \$5.00 or be less than \$1.00.

PREPAYMENT: If you pay off early, you will not have to pay a penalty and you may be entitled to a refund of part of the finance charge.

See your Great Expectations Membership Agreement for any additional information about non-payment, default, any required repayment in full before the scheduled date and prepayments, refunds and penalties.

ITEMIZATION OF AMOUNT FINANCED	
1. Total Cash Price	\$ _____
2. Less Downpayment	\$ _____
3. Amount Financed	\$ _____
4. Finance Charge	\$ _____
5. Total of Payments	\$ _____

Buyer may prepay or all of the unpaid without penalty or payment in full but be entitled to a refund of the unearned portion of the Finance Charge and no refund on unearned charges of \$1.00.

Should the buyer default in the payment of any installment hereunder shall pay to Seller all actual and reasonable costs of collection including reasonable Attorney fees and disbursements.

Buyer will pay to the Seller a \$10.00 charge for every delinquency over installment.

Should any term herein be invalid or unenforceable, the remaining shall be unaffected by such finding.

NOTICE TO BUYER:

1. Do not sign this agreement before you read it or if it has any blank spaces to be filled in.
2. You are entitled to a completely filled in copy of this agreement.
3. You can prepay the full amount due under this agreement at any time.
4. If you desire to pay off in advance the full amount due which is outstanding will be furnished on request.

Seller: GREAT EXPECTATIONS

Business Address: _____

City & State: _____

Authorized Signature: _____

Member (Buyer) acknowledges receipt of an exact copy of this in the form of its execution. Member (Buyer) further acknowledges that in the Contract upon completion and check-in and that the disclosures contained herein prior to signing the Contract.

Signature of Member: X _____

Routing: White—FINANCE; Pink—SELLER; Gold—CUSTOMER

Exhibit

DECISION ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of respondents Great Expectations of Baltimore, Inc., Great Expectations of Washington, D.C., Inc., and Great Expectations of Washington, Inc., corporations, and respondents having been furnished thereafter with a copy of the draft of complaint that 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 violations of Section 5(a) of the Federal Trade Commission Act and the Truth in Lending Act; and

The respondents, their attorney, 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 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 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. Great Expectations of Baltimore, Inc. ("GE Baltimore") is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Virginia, with its office and principal place of business located at 40 York Rd., Suite 500, Towson, MD.

2. Great Expectations of Washington, D.C., Inc. ("GE DC") 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 8601 Westwood Center Dr., Vienna, VA.

3. Great Expectations of Washington, Inc., doing business as Great Expectations of Raleigh/Durham ("GE Raleigh"), 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 3714 Benson Dr., Suite 200, Raleigh, NC.

4. 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:

A. Respondents GE Baltimore, GE DC, and GE Raleigh, their successors and assigns, and their officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the offering of credit, do forthwith cease and desist from failing to accurately calculate and disclose the annual percentage rate, as required by Sections 107(a) and (c) of the TILA, 15 U.S.C. 1606(a) and (c), and Sections 226.18(e) and 226.22 of Regulation Z, 12 CFR 226.18(e) and 226.22;

B. Respondents GE Baltimore, GE DC, and GE Raleigh, their successors and assigns, and their officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the offering of credit, do forthwith cease and desist from failing to accurately calculate and disclose the finance charge, as required by Section 106 of the TILA, 15 U.S.C. 1605, and Sections 226.4 and 226.18(d) of Regulation Z, 12 CFR 226.4 and 226.18(d);

C. Respondents GE Baltimore, GE DC, and GE Raleigh, their successors and assigns, and their officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the offering of credit, do forthwith cease and desist from failing to segregate the disclosures required by the TILA from all other information provided in connection with the transaction, including from the itemization of the amount financed, as required by Section 128(b)(1) of the TILA, 15 U.S.C. 1638(b)(1), and Section 226.17(a) of Regulation Z, 12 CFR 226.17(a);

D. Respondents GE Baltimore, GE DC, and GE Raleigh, their successors and assigns, and their officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the offering of credit, do forthwith cease and desist from failing to make all disclosures in the manner, form, and amount required by Sections 122 and 128(a) of the TILA, 15 U.S.C. 1632 and 1638(a), and Sections 226.17 and 226.18 of Regulation Z, 12 CFR 226.17 and 226.18;

E. Respondents GE Baltimore, GE DC, and GE Raleigh, their successors and assigns, and their officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the offering of credit, do forthwith cease and desist from:

1. Failing to include, in the finance charge and the annual percentage rate disclosed to the consumer, set-up or other fees that are charged only to consumers who finance the costs of their memberships, as required by Sections 106, 107, and 128 of the TILA, 15 U.S.C. 1605, 1606, and 1638, and Sections 226.4(b), 226.22, and 226.18(d) and (e) of Regulation Z, 12 CFR 226.4(b), 226.22, and 226.18(d) and (e); and

2. Failing to exclude, from the amount financed disclosed to the consumer, set-up or other fees that are charged only to consumers who finance the costs of their memberships, as required by Section 128 of the Truth in Lending Act, 15 U.S.C. 1638(a) and Section 226.18(b) of Regulation Z, 12 CFR 226.18(b); and

F. Respondents GE Baltimore, GE DC, and GE Raleigh, their successors and assigns, and their officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the offering of credit, do forthwith cease and desist from failing to comply with the TILA, 15 U.S.C. 1601 *et seq.*, and Regulation Z, 12 CFR 226.

II.

REFUND PROGRAM

It is further ordered, That:

A. Within thirty (30) days following the date of service of this order, respondents shall:

1. Determine to whom respondents disclosed on the original TILA disclosure an annual percentage rate that was miscalculated by more than one quarter of one percentage point below the annual percentage rate determined in accordance with Section 226.22 of Regulation Z, 12 CFR 226.22, or that disclosed a finance charge that was miscalculated by more than one dollar below the finance charge determined in accordance with Section 226.4 of Regulation Z, 12 CFR 226.4, so that each such person will not be required to pay a finance charge in excess of the finance charge actually disclosed or the dollar equivalent of the annual percentage rate actually disclosed, whichever is lower, plus a tolerance of one quarter of one percentage point;

2. Calculate a lump sum refund and a monthly payment adjustment, if applicable, in accordance with Section 108(e) of the TILA, 15 U.S.C. 1607(e);

3. Mail a refund check to each eligible consumer in the amount determined above, along with Attachment 1; and

4. Provide the Federal Trade Commission with a list of each such consumer, the amount of the refund, the number of payments refunded, the amount of adjustment for future payments and the number of future payments to be adjusted.

B. No later than fifteen (15) days following the date of service of this order, respondents shall provide the Federal Trade Commission with the name and address of three independent accounting firms, with which they, their officers, employees, attorneys, agents, and franchisees have no business relationship. Staff for the Division of Credit Practices of the FTC shall then have the sole discretion to choose one of the firms ("independent agent") and so advise respondents;

C. Within thirty (30) days following the date of adjustments made pursuant to this section, respondents shall direct the independent agent to review a statistically-valid sample of refunds. Respondents shall provide the Federal Trade Commission with a certified letter from the independent agent confirming that respondents have complied with Part II.A. of this order;

D. All costs associated with the administration of the refund program and payment of refunds shall be borne by the respondents.

III.

It is further ordered, That respondents, their successors and assigns, shall maintain for at least five (5) years from the date of service of this order and, upon thirty (30) days advance written request, make available to the Federal Trade Commission for inspection and copying all documents and other records necessary to demonstrate fully their compliance with this order.

IV.

It is further ordered, That respondents, their successors and assigns, shall distribute a copy of this order to any present or future officers and managerial employees having responsibility with respect to the subject matter of this order and that respondents, their successors and assigns, shall secure from each such person a signed statement acknowledging receipt of said order.

V.

It is further ordered, That respondents, for a period of five (5) years following the date of service of this order, shall promptly notify the Commission at least thirty (30) days prior to any proposed change in their corporate structure such as 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 that may affect compliance obligations arising out of the order.

VI.

It is further ordered, That respondents shall, within one hundred and eighty (180) days of 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.

ATTACHMENT 1

Dear Great Expectations Customer:

As part of our settlement with the Federal Trade Commission for alleged violations of the Truth in Lending Act, we are sending you the enclosed refund check in the amount of \$*****. The refund represents the amount you were overcharged as a result of errors made by Great Expectations in calculating or disclosing the annual percentage rate or finance charge.

[In addition, your future monthly payments have been reduced. Starting immediately, your monthly payments will be \$*****.]

We regret any inconvenience this may have caused you.

Great Expectations

Complaint

120 F.T.C.

IN THE MATTER OF

KGE, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
THE TRUTH IN LENDING ACT AND SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT*Docket C-3601. Complaint, Aug. 11, 1995--Decision, Aug. 11, 1995*

This consent order requires, among other things, a video dating service franchise to properly and accurately disclose the annual percentage rate ("APR") and other credit terms of financed memberships, as required by the federal Truth in Lending Act, and requires the franchise to establish adjustment refund programs to compensate its past and current members who overpaid finance charges.

Appearances

For the Commission: *Stephen Cohen and Judy Nixon.*

For the respondent: *Gary S. Vandeweghe, Rankin, Luckhardt, Vandeweghe, Landsness & Lahde, San Jose, CA.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Great Expectations Creative Management, Inc. has violated the Federal Trade Commission Act ("FTC Act"), and that Great Expectations, Inc., GEC Illinois, Inc., GEC Tennessee, Inc., GEC Alabama, Inc., Great Southern Video, Inc., New West Video Enterprises, Inc., San Antonio Singles of Texas, Inc., Austin Singles of Texas, Inc., Great Expectations of Baltimore, Inc., Great Expectations of Washington, D.C., Inc., Great Expectations of Washington, Inc., Sterling Connections, Inc., Private Eye Productions, Inc., Great Expectations - Columbus, Inc., JAMS Financial, Inc., V.L.P. Enterprises, Inc., APM Enterprises - Minn Inc., KGE, Inc., G.E.C.H., Inc., MWVE, Inc., GREATEX Denver, Inc., Sun West Video, Inc., and TRIAAC Enterprises, Inc. (hereinafter sometimes referred to collectively as "Great Expectations") have violated the Truth in Lending Act ("TILA"), its implementing Regulation Z, and the FTC Act, and it appearing to the

Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint, and alleges as follows:

PARAGRAPH 1. Great Expectations Creative Management, Inc. ("GECM") 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 16830 Ventura Blvd., Suite P, Encino, CA.

PAR. 2. Great Expectations, Inc. ("GEI") is a corporation organized, existing, and doing business under and by virtue of the laws of the state of California, with its corporate office at 16830 Ventura Blvd., Suite P, Encino, CA, and its principal places of business located at 1640 S. Sepulveda Blvd., Suite 100, Los Angeles, CA, 17207 Ventura Blvd., Encino, CA, and 450 N. Mountain, Suite B, Upland, CA.

PAR. 3. GEC Illinois, Inc. ("GE Illinois") is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Illinois, with its office and principal place of business located at 1701 E. Woodfield Dr., Suite 400, Schaumburg, IL.

PAR. 4. GEC Tennessee, Inc. ("GE Tennessee") 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 5552 Franklin Rd., Suite 200, Nashville, TN.

PAR. 5. GEC Alabama, Inc. ("GE Alabama") is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Alabama, with its office and principal place of business located at 7529 S. Memorial Pkwy., Suite C & D, Huntsville, AL.

PAR. 6. Great Southern Video, Inc., doing business as Great Expectations of Dallas ("GE Dallas"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Texas, with its office and principal place of business located at 14180 Dallas Pkwy., Suite 100, Dallas, TX.

PAR. 7. New West Video Enterprises, Inc., doing business as Great Expectations of Houston ("GE Houston"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Texas, with its office and principal place of business located at 50 Briarhollow, Suite 100, Houston, TX.

PAR. 8. San Antonio Singles of Texas, Inc., doing business as Great Expectations of San Antonio ("GE San Antonio"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Texas, with its corporate office at 10497 Town & Country Way, Suite 214, Houston, TX, and its principal place of business located at 8131 I.H. 10 West, Suite 225, San Antonio, TX.

PAR. 9. Austin Singles of Texas, Inc., doing business as Great Expectations of Austin ("GE Austin"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Texas, with its corporate office at 10497 Town & Country Way, Suite 214, Houston, TX, and its principal place of business located at 9037 Research Blvd., Suite 130, Austin, TX.

PAR. 10. Great Expectations of Baltimore, Inc. ("GE Baltimore") is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Virginia, with its office and principal place of business located at 40 York Rd., Suite 500, Towson, MD.

PAR. 11. Great Expectations of Washington, D.C., Inc. ("GE DC") 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 8601 Westwood Center Dr., Vienna, VA.

PAR. 12. Great Expectations of Washington, Inc., doing business as Great Expectations of Raleigh/Durham ("GE Raleigh"), 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 3714 Benson Dr., Suite 200, Raleigh, NC.

PAR. 13. Sterling Connections, Inc., doing business as Great Expectations of Seattle ("GE Seattle"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Oregon, with its office and principal place of business located at 305 108th Ave., N.E., Suite 205, Bellevue, WA.

PAR. 14. Private Eye Productions, Inc., doing business as Great Expectations of Portland ("GE Portland"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Oregon, with its office and principal place of business located at 5531 S.W. Macadam Ave., Suite 225, Portland, OR.

PAR. 15. Great Expectations - Columbus, Inc. ("GE Columbus") is a corporation organized, existing, and doing business under and by

virtue of the laws of the state of Ohio, with its corporate office at 11835 W. Olympic Blvd., Suite 490, Los Angeles, CA, and its principal place of business located at 1103 Schrock Rd., Suite 101, Columbus, OH.

PAR. 16. JAMS Financial, Inc., doing business as Great Expectations of Milwaukee ("GE Milwaukee"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Wisconsin, with its corporate office at 11835 W. Olympic Blvd., Suite 490, Los Angeles, CA, and its principal place of business located at 16650 W. Bluemound, Suite 100, Brookfield, WI.

PAR. 17. V.L.P. Enterprises, Inc., doing business as Great Expectations of San Diego ("GE San Diego"), 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 3465 Camino Del Rio South, Suite 300, San Diego, CA.

PAR. 18. APM Enterprises - Minn Inc., doing business as Great Expectations of Minneapolis ("GE Minneapolis"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Illinois, with its office and principal place of business located at 3300 Edinborough Way, Suite 300, Edina, MN.

PAR. 19. KGE, Inc., doing business as Great Expectations of Sausalito, Great Expectations of Mountain View, and Great Expectations of Walnut Creek (collectively referred to as "GE-SFA"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of California, with its corporate office at 1943 Landings Dr., Mountain View, CA, and its principal places of business located at 2401 Marinship Way, Suite 100, Sausalito, CA, 2085 Landings Dr., Mountain View, CA, and 1280 Civic Dr., Suite 300, Walnut Creek, CA.

PAR. 20. G.E.C.H., Inc., doing business as Great Expectations of Cherry Hill ("GE Cherry Hill"), 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 places of business located at One Cherry Hill, Suite 600, Cherry Hill, NJ.

PAR. 21. MWVE, Inc., doing business as Great Expectations of Cleveland ("GE Cleveland"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Ohio,

with its office and principal place of business located at 6300 Rockside Rd., Suite 200, Cleveland, OH.

PAR. 22. GREATEX Denver, Inc., doing business as Great Expectations Video Dating, Ltd. ("GE-Denver"), 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 3773 Cherry Creek North Dr., Suite 140, Denver, CO.

PAR. 23. Sun West Video, Inc., doing business as Great Expectations for Singles ("GE Phoenix"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Arizona, with its office and principal place of business located at 5635 N. Scottsdale Rd., Suite 190, Scottsdale, AZ.

PAR. 24. TRIAAC Enterprises, Inc., doing business as Great Expectations of Sacramento ("GE Sacramento"), 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 2277 Fair Oaks Blvd., Suite 195, Sacramento, CA.

RESPONDENTS' COURSE OF BUSINESS

PAR. 25. GECM is a video dating franchisor. It sells and services franchise operations throughout the United States. As part of its regular course of business, GECM has created and disseminated retail installment contracts (Exhibits 1 and 2) to the franchises described in paragraphs two through twenty-four. The GECM retail installment contracts purport to incorporate the disclosures required by the TILA.

PAR. 26. Respondents Great Expectations are video dating franchises. Respondents have provided financing to their members using retail installment contracts such as Exhibits 1 and 2 to disclose the terms of the financing.

PAR. 27. GECM's TILA disclosure (Exhibit 1) contains erroneous instructions for calculating and disclosing the finance charge and contains a pre-printed annual percentage rate ("APR") of 18%. In addition, Exhibit 1 fails to make the TILA disclosures in the format required by the TILA and fails to identify the creditor as required by the TILA.

PAR. 28. In 1988, GECM learned from its auditor that the calculations and disclosures contained in Exhibit 1 did not comply with the TILA. Nevertheless, it continued to disseminate Exhibit 1

to its franchisees and failed to notify them of the erroneous calculations and disclosures.

PAR. 29. In late 1990, GECM created a new retail installment contract, which also purported to incorporate the disclosures required by the TILA and which contained a pre-printed APR of 19.6%. (Exhibit 2). Exhibit 2 fails to identify the creditor as required by the TILA and fails to provide the information required by the TILA in the itemization of the amount financed. Furthermore, GECM has disseminated Exhibit 2 to its franchisees but has failed to inform them to discontinue using the erroneous calculation and disclosure instructions that it had previously supplied in Exhibit 1.

PAR. 30. Respondents Great Expectations are creditors as that term is defined in the TILA and Regulation Z.

PAR. 31. The acts and practices of respondents Great Expectations and GECM alleged in this complaint have been and are in or affecting commerce, as "commerce" is defined in Section 4 of the FTC Act.

COUNT I

PAR. 32. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 33. Respondent GECM has furnished its franchises with TILA disclosures (Exhibits 1 and 2) that, on their face, violated the TILA. When used by respondents Great Expectations, Exhibits 1 and 2 have resulted in false and misleading disclosures of APRs and finance charges to consumers in violation of Section 5 of the FTC Act.

PAR. 34. In the course and practice of its business as described in paragraphs twenty-five through twenty-nine, and paragraph thirty-three, respondent GECM has provided respondents Great Expectations with the means and instrumentalities to violate the Section 5 of the FTC Act.

PAR. 35. The practices described in paragraph thirty-four constitute unfair or deceptive acts or practices in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. 45(a).

COUNT II

PAR. 36. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 37. Respondents GEI, GE Illinois, GE Tennessee, GE Alabama, GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Columbus, GE Milwaukee, GE San Diego, GE Minneapolis, GE-SFA, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento have furnished their members with TILA disclosures that have failed to accurately calculate and disclose the APR.

PAR. 38. The practice described in paragraph thirty-seven by respondents GEI, GE Illinois, GE Tennessee, GE Alabama, GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Columbus, GE Milwaukee, GE San Diego, GE Minneapolis, GE-SFA, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento violates Sections 107(a) and (c) of the TILA, 15 U.S.C. 1606(a) and (c), and Sections 226.18(e) and 226.22 of Regulation Z, 12 CFR 226.18(e) and 226.22.

COUNT III

PAR. 39. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 40. Respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Columbus, GE Milwaukee, GE-SFA, GE Cleveland, GE Phoenix, GE Sacramento, and GE San Diego have furnished their members with TILA disclosures that have failed to accurately calculate and disclose the finance charge.

PAR. 41. The practice described in paragraph forty by respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Columbus, GE Milwaukee, GE-SFA, GE Cleveland, GE Phoenix, GE Sacramento, and GE San Diego violates Section 106 of the TILA, 15 U.S.C. 1605, and Sections 226.4 and 226.18(d) of Regulation Z, 12 CFR 226.4 and 226.18(d).

COUNT IV

PAR. 42. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 43. Respondents GE Dallas, GE Houston, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, and GE Phoenix have furnished their members with TILA disclosures that have failed to disclose the finance charge more conspicuously than any other disclosure except the APR and the creditor's identity.

PAR. 44. The practice described in paragraph forty-three by respondents GE Dallas, GE Houston, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, and GE Phoenix violates Section 122(a) of the TILA, 15 U.S.C. 1632(a), and Section 226.17(a)(2) of Regulation Z, 12 CFR 226.17(a)(2).

COUNT V

PAR. 45. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 46. Respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento have furnished their members with TILA disclosures that have failed to segregate the disclosures required by the TILA from all other information provided in connection with the transaction, including the itemization of the amount financed.

PAR. 47. The practice described in paragraph forty-six by respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento violates Section 128(b)(1) of the TILA, 15 U.S.C. 1638(b)(1), and Section 226.17(a)(1) of Regulation Z, 12 CFR 226.17(a)(1).

COUNT VI

PAR. 48. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 49. Respondents GEI, GE Illinois, GE Tennessee, GE Alabama, GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Columbus, GE San Diego, GE Minneapolis, GE-SFA, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento

have failed to accurately disclose the itemization of the amount financed.

PAR. 50. The practice described in paragraph forty-nine by respondents GEI, GE Illinois, GE Tennessee, GE Alabama, GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Columbus, GE San Diego, GE Minneapolis, GE-SFA, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento violates Section 128(a) of the TILA, 15 U.S.C. 1638(a), and Section 226.18(c) of Regulation Z, 12 CFR 226.18(c).

COUNT VII

PAR. 51. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 52. Respondents GEI, GE Illinois, GE Tennessee, GE Alabama, GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Columbus, GE Milwaukee, GE San Diego, GE Minneapolis, GE-SFA, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento have failed to disclose the identity of the creditor.

PAR. 53. The practice described in paragraph fifty-two by respondents GEI, GE Illinois, GE Tennessee, GE Alabama, GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Columbus, GE Milwaukee, GE San Diego, GE Minneapolis, GE-SFA, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento violates Section 128(a)(1) of the TILA, 15 U.S.C. 1638(a)(1), and Section 226.18(a) of Regulation Z, 12 CFR 226.18(a).

COUNT VIII

PAR. 54. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 55. Respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento have furnished their members with TILA disclosures that have failed to provide a description of the amount financed.

PAR. 56. The practice described in paragraph fifty-five by respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento violates Section 128(a)(8) of the TILA, 15 U.S.C. 1638(a)(8), and Section 226.18(b) of Regulation Z, 12 CFR 226.18(b).

PAR. 57. Respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento have furnished their members with TILA disclosures that have failed to provide a description of the finance charge.

PAR. 58. The practice described in paragraph fifty-seven by respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento violates Section 128(a)(8) of the TILA, 15 U.S.C. 1638(a)(8), and Section 226.18(d) of Regulation Z, 12 CFR 226.18(d).

PAR. 59. Respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento have furnished their members with TILA disclosures that have failed to provide a description of the APR.

PAR. 60. The practice described in paragraph fifty-nine by respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento violates Section 128(a)(8) of the TILA, 15 U.S.C. 1638(a)(8), and Section 226.18(e) of Regulation Z, 12 CFR 226.18(e).

PAR. 61. Respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento have furnished their members with TILA disclosures that have failed to provide the total of payments and/or a description of the total of payments.

PAR. 62. The practice described in paragraph sixty-one by respondents GE Dallas, GE Houston, GE San Antonio, GE Austin,

GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento violates Section 128(a)(5) and/or (8) of the TILA, 15 U.S.C. 1638(a)(5) and/or (8), and Section 226.18(h) of Regulation Z, 12 CFR 226.18(h).

PAR. 63. Respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento have furnished their members with TILA disclosures that have failed to provide the total sale price and/or a description of the total sale price.

PAR. 64. The practice described in paragraph sixty-three by respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento violates Section 128(a)(7) and/or (8) of the TILA, 15 U.S.C. 1638(a)(7) and/or (8), and Section 226.18(j) of Regulation Z, 12 CFR 226.18(j).

COUNT IX

PAR. 65. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 66. Respondents GE Dallas, GE Houston, GE Phoenix, GE San Antonio, GE Austin, GE Baltimore, GE DC, and GE Raleigh have failed to include set-up or other fees that are charged only to consumers who finance the costs of their memberships in the finance charge and the annual percentage rate disclosed to the consumer. They have also failed to exclude these finance charges from the amount financed that is disclosed to consumers.

PAR. 67. The practices described in paragraph sixty-six by respondents GE Dallas, GE Houston, GE Phoenix, GE San Antonio, GE Austin, GE Baltimore, GE DC, and GE Raleigh violate Sections 106, 107, and 128(a) of the TILA, 15 U.S.C. 1605, 1606, and 1638(a), and Sections 226.4(b), 226.22, and 226.18(b), (d), and (e) of Regulation Z, 12 CFR 226.4(b), 226.22, and 226.18(b), (d), and (e).

COUNT X

PAR. 68. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 69. Respondent GE San Diego has furnished its members with TILA disclosures that have failed to disclose the APR, the finance charge, the amount financed, the total of payments, and the total sales price.

PAR. 70. The practices described in paragraph sixty-nine by respondent GE San Diego violate Section 128(a) of the TILA, 15 U.S.C. 1638(a), and Section 226.18 of Regulation Z, 12 CFR 226.18.

COUNT XI

PAR. 71. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 72. Respondent GE Houston has furnished its members with TILA disclosures that have failed to disclose the amount financed.

PAR. 73. The practice described in paragraph seventy-two by respondent GE Houston violates Section 128(a) of the TILA, 15 U.S.C. 1638(a), and Section 226.18(b) of Regulation Z, 12 CFR 226.18(b).

COUNT XII

PAR. 74. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 75. Respondents GEI, GE Alabama, GE Illinois, GE Portland, GE Dallas, GE Houston, GE Cleveland, GE Phoenix, GE San Antonio, GE Austin, GE Seattle, GE Denver, GE Columbus, GE Milwaukee, GE San Diego, GE Minneapolis, GE SFA, GE Cherry Hill, GE Sacramento, GE DC, GE Baltimore, and GE Raleigh have disclosed understated APRs and finance charges to consumers that have resulted in consumers paying more in financing costs than the amount to which they originally agreed.

PAR. 76. The practices described in paragraph seventy-five are unfair or deceptive acts or practices in violation of Section 5(a) of the FTC Act, 15 U.S.C. 45(a).

EXHIBIT 1

Expectations

RETAIL INSTALLMENT CONTRACT

Name - Last First Middle Age
 Present Address City State Zip
 Social Security # Home Phone How Long At This Address How Long In Area
 Employed By Work Phone Present Position
 Income An Sources Annual Driver's License
 Primary Bank Accounts Savings Checking Balance
 Credit Reference - Banks, Finance Co., Credit Unions
 USA
 FIRST STATE BANK

The undersigned Great Expectations (Seller) hereby sells, and the undersigned buyer, hereinafter referred to as "Member" purchases, subject to the provisions of this contract, a MEMBERSHIP in Great Expectations and promises to pay to Great Expectations the total payments (Box 8) in accordance with the Payment Schedule hereinafter set forth.

DESCRIPTION OF GOODS AND SERVICES SOLD:

Interviewing, Testing & Evaluating, Processing & Coding, Background check (if necessary), for the purpose of bringing in contact with the purchaser (client) suitable individuals with similar titles and abilities. This description intended to be partial only. The buyer acknowledges receipt of application form, which is made a part hereto as though set out at length.

READ CAREFULLY AND SIGN ONLY WHEN COMPLETELY UNDERSTOOD

Buyer has considered and evaluated the terms of membership as set forth in Great Expectations Membership Agreement dated 10/31/91 and requests financing of the balance due. Acceptance of the terms of both agreements renders null and void a buyer's right to cancel previously provided.

I understand that my failure to participate in Great Expectations does not release me of my obligation to pay this contract in full, regardless of the circumstances. I understand that by signing this Agreement I am a Member of Great Expectations.

MEMBER SIGNATURE X

NOTICE TO MEMBER: Upon request, Great Expectations must provide or make available for your examination a statement or tab showing how the partial refund of the time price charge is to be computed if any balance of the contract should be prepaid. Member (Buyer) and Great Expectations (Seller) agree that the terms and conditions on the Member's Contract for Membership constitute part of this contract and are incorporated herein by reference. If due to delinquency, it is necessary to refer this account to collection, then the balance due shall include actual attorney's fee and court costs. In the event Member fails to pay any installment payment when due, the entire balance then owing shall immediately become due and payable, without notice, at the option of Great Expectations or assignee, and Great Expectations shall not be required to provide any services to Member until Member's payment account is made current. If more than one person signs this contract then their obligation shall be joint and several.

ITEMIZATION OF THE AMOUNT FINANCED

1. Cash Price	1595	BALANCE	10. ANNUAL PERCENTAGE RATE	18%
2. Other Price	- 0	1595	11. PAYMENT SCHEDULE:	5
3. Down Payment	- 300	1295	Successive monthly installments of \$ 235	
4. Paid (11, 14, 91) Second Interview	- 100	1195	each, commencing 12/15/91, and on same day of each month thereafter, until fully paid.	
5. Other Payments Due (11, 30, 91)	- 100	1095	BALLOON PAYMENT	
6. Amt. Financed (Unpaid Bal. of Cash Price #3)	1095	1095	DELINQUENCY AND COLLECTION CHARGES:	
7. Finance Charge @ 18% Bal. x 14% x 5 no. of payments	82.13		Buyer shall fail to meet to pay any installment payment when the same shall become due and such failure shall constitute for a period of more than ten (10) days, then in addition to the amount of such delinquent installment payment the Buyer shall pay to Seller, a delinquency and collection charge, an amount equal to 5% of such payment, except that such charge shall not exceed \$5.00 or be less than \$1.00.	
8. Total Payments (Bal. & 7)	1177.13		PREPAYMENT REBATE: Buyer may prepay any part of the unpaid balance without penalty and no payment in full. Buyer shall be entitled to a refund of the unearned portion of the Finance Charge computed under the simple interest basis, however, there shall be no refund of the Finance Charge if the amount of prepayment is less than \$1.00.	
9. Deferred Payment Price (Bal. #8 + #7)	1677.13			

DIVIDE by number of payments to calculate each installment and summarize on #11.

NOTICE TO BUYER: (1) Do not sign this agreement before you read it or if it contains any blank spaces to be filled in. (2) You are entitled to a complete, legible copy of this agreement. (3) You can prepay the full amount due under this agreement at any time. (4) If you desire to pay off in advance the full amount due, the amount which is outstanding will be furnished upon request.

SELLER Great Expectations

Signature of Member X

Business Address: 3773 Cherry Creek N. Dr. NW
 City & State: Denver CO 8007

Member (Buyer) acknowledges receipt of an exact copy of instrument at the time of its execution. Member (Buyer) further acknowledges that the blanks in this contract were completed filled-in and that he has read the disclosures contained here prior to signing the contract.

Authorized Signature: [Signature]
 Signature of Member X

Complaint

EXHIBIT 2



RETAIL INSTALLMENT CONTRACT

DATE _____

Name Last First Middle Age _____

Present Address _____ City _____ State _____ Zip _____

Social Security # _____ Home Phone _____ How Long At This Address _____ Date of Birth _____

Employed By Name and Address _____ Work Phone _____ Present Position _____

Home All Sources _____ Annual _____ Driver's License # _____

Primary Bank Accounts _____ Savings _____ Name _____ Checking Home _____ Name _____

The undersigned Great Expectations (Seller) hereby sells, and the undersigned buyer (Member) purchases, subject to the provisions of this MEMBERSHIP in Great Expectations and promises to pay to Great Expectations or its assigns the TOTAL PAYMENTS in accordance with the Schedule hereinafter set forth.

DESCRIPTION OF GOODS AND SERVICES SOLD: Interviewing, Evaluating, Processing & Coding, Background Check (if necessary) and PR Video Library for the purpose of giving Member access to a Video Library of potentially suitable individuals with similar Skills and Outlook. This restriction to be mutual only.

READ CAREFULLY AND SIGN ONLY WHEN COMPLETELY UNDERSTOOD

I have considered and evaluated the terms of membership as set forth in the Great Expectations Membership Agreement dated _____ and hereby financing of the business due. I understand that my failure to participate in Great Expectations does not relieve me of my obligation under this Contract in full. I understand that by signing this Contract, and the Membership Agreement, I am a Member of Great Expectations.

MEMBER SIGNATURE X _____

NOTICE TO MEMBER: Upon request, Great Expectations must provide or make available for your examination a statement or table showing how the kind of the time price charge is to be computed if any balance of the Contract should be prepaid. Member (Buyer) and Great Expectations (Seller) the terms and conditions of the Great Expectations Membership Agreement constitute a part of this Contract and are incorporated herein by reference. Member (Buyer) fails to pay any prepayment payment when due, the entire balance (less any unearned Finance Charge) then owing shall become due and payable, without demand or notice, at the option of Great Expectations or assigns, and Great Expectations shall not be required to provide any services to Member until Member's payment account is made current.

PURCHASE PRICE: \$ _____ payable in accordance with the Statement of Disclosures below.

PAYMENT SCHEDULE: Member's payments hereunder shall be in equal consecutive monthly installments commencing on the _____ day month after execution of this Contract and continuing on the same day of each month thereafter until paid in full. Interest on the unpaid balance shall both prior and after maturity.

FEDERAL TRUTH IN LENDING DISCLOSURES
(Statement of Disclosures)

ANNUAL PERCENTAGE RATE	FINANCE CHARGE APR %	AMOUNT FINANCED APR \$	TOTAL OF PAYMENTS APR \$	TOTAL SALES PRICE APR \$
The rate or rate which is to be used to compute the cost of the loan.	The rate or rate which is to be used to compute the cost of the loan.	The amount of cash or other property to be used to compute the cost of the loan.	The total of all payments to be made under the contract.	The total of all sales price to be received by the seller.
10.6%	\$	\$	\$	\$

You the buyer have the right to receive at this time an itemization of the amount financed. () I want an itemization. () I do not want an itemization. Your payment schedule will be:

Number of Payments	Amount of Payment	First Payment Due

DELINQUENCY AND COLLECTION CHARGES: If Buyer shall fail or neglect to pay any installment payment when the same shall become due and such failure or neglect shall continue for a period of more than ten (10) days, then in addition to the amount of such delinquent installment payment the Buyer shall pay to Seller, as a delinquency and collection charge, an amount equal to 5% of such payment except that such charge shall not exceed \$5.00 or be less than \$1.00.

PREPAYMENT: If you pay off early, you will not have to pay a penalty and you may be entitled to a refund of part of the finance charge.

See your Great Expectations Membership Agreement for any additional information about non-payment, default, any required requirements in full before the schedule date and arrangements, returns and services.

ITEMIZATION OF AMOUNT FINANCED

Item	Amount	Buyer may prepay or all of the unpaid amount without penalty if payment in full. Buyer is entitled to a refund of the unearned portion of the Finance Charge and the Finance Charge and no refund unless otherwise stated.
1. Total Cash Price	\$ _____	
2. Less Downpayment	-\$ _____	
3. Amount Financed	\$ _____	
4. Finance Charge	\$ _____	
5. Total of Payments	\$ _____	

Waiver of any default by the Seller shall not operate as a loan default.

Should the buyer default in the payment of any installment hereunder shall pay to Seller all actual and reasonable costs of collection, including reasonable Attorney fees and disbursements.

Buyer will pay to the Seller a \$10.00 charge for every delinquency after payment.

Should any term hereof be invalid or unenforceable, the remaining shall survive.

NOTICE TO BUYER:

- Do not sign this agreement before you read it or if it has any blank spaces to be filled in.
- You are entitled to a completely filled in copy agreement.
- You can prepay the full amount due under this agreement at any time.
- If you desire to pay off in advance the full amount amount which is outstanding will be furnished on request.

Seller: GREAT EXPECTATIONS

Business Address _____

City & State: _____

Authorized Signature _____ Title _____

Member (Buyer) acknowledges receipt of an exact copy of this on the time of its execution. Member (Buyer) further acknowledges that in this Contract were completed and filed-in and that the disclosure contained herein prior to signing the Contract.

Signature of Member X _____

Routing: White—FINANCE: Pink—SELLER: Gold—CUSTOMER

Exhibit

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of respondent KGE, Inc., a corporation, and respondent having been furnished thereafter with a copy of the draft of complaint that 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 Section 5(a) of the Federal Trade Commission Act and the Truth in Lending Act; 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 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. KGE, Inc., doing business as Great Expectations of Sausalito, Great Expectations of Mountain View, and Great Expectations of Walnut Creek ("GE-SFA"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of California, with its corporate office at 1943 Landings Dr., Mountain View, CA, and its principal places of business located at 2401 Marinship Way, Suite 100, Sausalito, CA, 2085 Landings Dr., Mountain View, CA, and 1280 Civic Dr., Suite 300, Walnut Creek, CA.

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:

A. Respondent GE-SFA, its successors and assigns, and their officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the offering of credit, do forthwith cease and desist from failing to accurately calculate and disclose the annual percentage rate, as required by Sections 107(a) and (c) of the TILA, 15 U.S.C. 1606(a) and (c), and Sections 226.18(e) and 226.22 of Regulation Z, 12 CFR 226.18(e) and 226.22;

B. Respondent GE-SFA, 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 offering of credit, do forthwith cease and desist from failing to accurately calculate and disclose the finance charge, as required by Section 106 of the TILA, 15 U.S.C. 1605, and Sections 226.4 and 226.18(d) of Regulation Z, 12 CFR 226.4 and 226.18(d);

C. Respondent GE-SFA, 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 offering of credit, do forthwith cease and desist from failing to make all disclosures in the manner, form, and amount required by Sections 122 and 128(a) of the TILA, 15 U.S.C. 1632 and 1638(a), and Sections 226.17 and 226.18 of Regulation Z, 12 CFR 226.17 and 226.18;

D. Respondent GE-SFA, 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 offering of credit, do forthwith cease and desist from failing to comply with the TILA, 15 U.S.C. 1601 *et seq.*, and Regulation Z, 12 CFR 226.

II.

REFUND PROGRAM

It is further ordered, That:

A. Within thirty (30) days following the date of service of this order, respondent shall:

1. Determine to whom respondent disclosed on the original TILA disclosure an annual percentage rate that was miscalculated by more than one quarter of one percentage point below the annual percentage rate determined in accordance with Section 226.22 of Regulation Z, 12 CFR 226.22, or that disclosed a finance charge that was miscalculated by more than one dollar below the finance charge determined in accordance with Section 226.4 of Regulation Z, 12 CFR 226.4, so that each such person will not be required to pay a finance charge in excess of the finance charge actually disclosed or the dollar equivalent of the annual percentage rate actually disclosed, whichever is lower, plus a tolerance of one quarter of one percentage point;

2. Calculate a lump sum refund and a monthly payment adjustment, if applicable, in accordance with Section 108(e) of the TILA, 15 U.S.C. 1607(e);

3. Mail a refund check to each eligible consumer in the amount determined above, along with Attachment 1; and

4. Provide the Federal Trade Commission with a list of each such consumer, the amount of the refund, the number of payments refunded, the amount of adjustment for future payments and the number of future payments to be adjusted.

B. No later than fifteen (15) days following the date of service of this order, respondent shall provide the Federal Trade Commission with the name and address of three independent accounting firms, with which it, its officers, employees, attorneys, agents, and franchisees have no business relationship. Staff for the Division of Credit Practices of the FTC shall then have the sole discretion to choose one of the firms ("independent agent") and so advise respondent;

C. Within thirty (30) days following the date of adjustments made pursuant to this section, respondent shall direct the independent agent to review a statistically-valid sample of refunds. Respondent shall provide the Federal Trade Commission with a certified letter from the independent agent confirming that respondent has complied with Part II.A. of this order;

D. All costs associated with the administration of the refund program and payment of refunds shall be borne by the respondent.

III.

It is further ordered, That respondent, its successors and assigns, shall maintain for at least five (5) years from the date of service of this order and, upon thirty (30) days advance written request, make available to the Federal Trade Commission for inspection and copying all documents and other records necessary to demonstrate fully its compliance with this order.

IV.

It is further ordered, That respondent, its successors and assigns, shall distribute a copy of this order to any present or future officers and managerial employees having responsibility with respect to the subject matter of this order and that respondent, its successors and assigns, shall secure from each such person a signed statement acknowledging receipt of said order.

V.

It is further ordered, That respondent, for a period of five (5) years following the date of service of this order, shall promptly notify the Commission at least thirty (30) days prior to any proposed change in its corporate structure such as 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 that may affect compliance obligations arising out of the order.

VI.

It is further ordered, That respondent shall, within one hundred and eighty (180) days of 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.

ATTACHMENT 1

Dear Great Expectations Customer:

As part of our settlement with the Federal Trade Commission for alleged violations of the Truth in Lending Act, we are sending you the enclosed refund check in the amount of \$*****. The refund represents the amount you were overcharged as a result of errors made by Great Expectations in calculating or disclosing the annual percentage rate or finance charge.

[In addition, your future monthly payments have been reduced. Starting immediately, your monthly payments will be \$*****.]

We regret any inconvenience this may have caused you.

Great Expectations

IN THE MATTER OF

TRIAAC ENTERPRISES, INC.

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

Docket C-3602. Complaint, Aug. 11, 1995--Decision, Aug. 11, 1995

This consent order requires, among other things, a video dating service franchise to properly and accurately disclose the annual percentage rate ("APR") and other credit terms of financed memberships, as required by the federal Truth in Lending Act, and requires the franchise to establish adjustment refund programs to compensate its past and current members who overpaid finance charges.

Appearances

For the Commission: *Stephen Cohen* and *Judy Nixon*.

For the respondent: *Pro se*.

COMPLAINT

The Federal Trade Commission, having reason to believe that Great Expectations Creative Management, Inc. has violated the Federal Trade Commission Act ("FTC Act"), and that Great Expectations, Inc., GEC Illinois, Inc., GEC Tennessee, Inc., GEC Alabama, Inc., Great Southern Video, Inc., New West Video Enterprises, Inc., San Antonio Singles of Texas, Inc., Austin Singles of Texas, Inc., Great Expectations of Baltimore, Inc., Great Expectations of Washington, D.C., Inc., Great Expectations of Washington, Inc., Sterling Connections, Inc., Private Eye Productions, Inc., Great Expectations - Columbus, Inc., JAMS Financial, Inc., V.L.P. Enterprises, Inc., APM Enterprises - Minn Inc., KGE, Inc., G.E.C.H., Inc., MWVE, Inc., GREATEX Denver, Inc., Sun West Video, Inc., and TRIAAC Enterprises, Inc. (hereinafter sometimes referred to collectively as "Great Expectations") have violated the Truth in Lending Act ("TILA"), its implementing Regulation Z, and the FTC Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint, and alleges as follows:

PARAGRAPH 1. Great Expectations Creative Management, Inc. ("GECM") 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 16830 Ventura Blvd., Suite P, Encino, CA.

PAR. 2. Great Expectations, Inc. ("GEI") is a corporation organized, existing, and doing business under and by virtue of the laws of the state of California, with its corporate office at 16830 Ventura Blvd., Suite P, Encino, CA, and its principal places of business located at 1640 S. Sepulveda Blvd., Suite 100, Los Angeles, CA, 17207 Ventura Blvd., Encino, CA, and 450 N. Mountain, Suite B, Upland, CA.

PAR. 3. GEC Illinois, Inc. ("GE Illinois") is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Illinois, with its office and principal place of business located at 1701 E. Woodfield Dr., Suite 400, Schaumburg, IL.

PAR. 4. GEC Tennessee, Inc. ("GE Tennessee") 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 5552 Franklin Rd., Suite 200, Nashville, TN.

PAR. 5. GEC Alabama, Inc. ("GE Alabama") is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Alabama, with its office and principal place of business located at 7529 S. Memorial Pkwy., Suite C & D, Huntsville, AL.

PAR. 6. Great Southern Video, Inc., doing business as Great Expectations of Dallas ("GE Dallas"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Texas, with its office and principal place of business located at 14180 Dallas Pkwy., Suite 100, Dallas, TX.

PAR. 7. New West Video Enterprises, Inc., doing business as Great Expectations of Houston ("GE Houston"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Texas, with its office and principal place of business located at 50 Briarhollow, Suite 100, Houston, TX.

PAR. 8. San Antonio Singles of Texas, Inc., doing business as Great Expectations of San Antonio ("GE San Antonio"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Texas, with its corporate office at

10497 Town & Country Way, Suite 214, Houston, TX, and its principal place of business located at 8131 I.H. 10 West, Suite 225, San Antonio, TX.

PAR. 9. Austin Singles of Texas, Inc., doing business as Great Expectations of Austin ("GE Austin"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Texas, with its corporate office at 10497 Town & Country Way, Suite 214, Houston, TX, and its principal place of business located at 9037 Research Blvd., Suite 130, Austin, TX.

PAR. 10. Great Expectations of Baltimore, Inc. ("GE Baltimore") is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Virginia, with its office and principal place of business located at 40 York Rd., Suite 500, Towson, MD.

PAR. 11. Great Expectations of Washington, D.C., Inc. ("GE DC") 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 8601 Westwood Center Dr., Vienna, VA.

PAR. 12. Great Expectations of Washington, Inc., doing business as Great Expectations of Raleigh/Durham ("GE Raleigh"), 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 3714 Benson Dr., Suite 200, Raleigh, NC.

PAR. 13. Sterling Connections, Inc., doing business as Great Expectations of Seattle ("GE Seattle"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Oregon, with its office and principal place of business located at 305 108th Ave., N.E., Suite 205, Bellevue, WA.

PAR. 14. Private Eye Productions, Inc., doing business as Great Expectations of Portland ("GE Portland"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Oregon, with its office and principal place of business located at 5531 S.W. Macadam Ave., Suite 225, Portland, OR.

PAR. 15. Great Expectations - Columbus, Inc. ("GE Columbus") is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Ohio, with its corporate office at 11835 W. Olympic Blvd., Suite 490, Los Angeles, CA, and its principal place of business located at 1103 Schrock Rd., Suite 101, Columbus, OH.

PAR. 16. JAMS Financial, Inc., doing business as Great Expectations of Milwaukee ("GE Milwaukee"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Wisconsin, with its corporate office at 11835 W. Olympic Blvd., Suite 490, Los Angeles, CA, and its principal place of business located at 16650 W. Bluemound, Suite 100, Brookfield, WI.

PAR. 17. V.L.P. Enterprises, Inc., doing business as Great Expectations of San Diego ("GE San Diego"), 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 3465 Camino Del Rio South, Suite 300, San Diego, CA.

PAR. 18. APM Enterprises - Minn Inc., doing business as Great Expectations of Minneapolis ("GE Minneapolis"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Illinois, with its office and principal place of business located at 3300 Edinborough Way, Suite 300, Edina, MN.

PAR. 19. KGE, Inc., doing business as Great Expectations of Sausalito, Great Expectations of Mountain View, and Great Expectations of Walnut Creek (collectively referred to as "GE-SFA"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of California, with its corporate office at 1943 Landings Dr., Mountain View, CA, and its principal places of business located at 2401 Marinship Way, Suite 100, Sausalito, CA, 2085 Landings Dr., Mountain View, CA, and 1280 Civic Dr., Suite 300, Walnut Creek, CA.

PAR. 20. G.E.C.H., Inc., doing business as Great Expectations of Cherry Hill ("GE Cherry Hill"), 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 places of business located at One Cherry Hill, Suite 600, Cherry Hill, NJ.

PAR. 21. MWVE, Inc., doing business as Great Expectations of Cleveland ("GE Cleveland"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Ohio, with its office and principal place of business located at 6300 Rockside Rd., Suite 200, Cleveland, OH.

PAR. 22. GREATEX Denver, Inc., doing business as Great Expectations Video Dating, Ltd. ("GE-Denver"), 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 3773 Cherry Creek North Dr., Suite 140, Denver, CO.

PAR. 23. Sun West Video, Inc., doing business as Great Expectations for Singles ("GE Phoenix"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Arizona, with its office and principal place of business located at 5635 N. Scottsdale Rd., Suite 190, Scottsdale, AZ.

PAR. 24. TRIAAC Enterprises, Inc., doing business as Great Expectations of Sacramento ("GE Sacramento"), 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 2277 Fair Oaks Blvd., Suite 195, Sacramento, CA.

RESPONDENTS' COURSE OF BUSINESS

PAR. 25. GECM is a video dating franchisor. It sells and services franchise operations throughout the United States. As part of its regular course of business, GECM has created and disseminated retail installment contracts (Exhibits 1 and 2) to the franchises described in paragraphs two through twenty-four. The GECM retail installment contracts purport to incorporate the disclosures required by the TILA.

PAR. 26. Respondents Great Expectations are video dating franchises. Respondents have provided financing to their members using retail installment contracts such as Exhibits 1 and 2 to disclose the terms of the financing.

PAR. 27. GECM's TILA disclosure (Exhibit 1) contains erroneous instructions for calculating and disclosing the finance charge and contains a pre-printed annual percentage rate ("APR") of 18%. In addition, Exhibit 1 fails to make the TILA disclosures in the format required by the TILA and fails to identify the creditor as required by the TILA.

PAR. 28. In 1988, GECM learned from its auditor that the calculations and disclosures contained in Exhibit 1 did not comply with the TILA. Nevertheless, it continued to disseminate Exhibit 1 to its franchisees and failed to notify them of the erroneous calculations and disclosures.

PAR. 29. In late 1990, GECM created a new retail installment contract, which also purported to incorporate the disclosures required by the TILA and which contained a pre-printed APR of 19.6%

(Exhibit 2). Exhibit 2 fails to identify the creditor as required by the TILA and fails to provide the information required by the TILA in the itemization of the amount financed. Furthermore, GECM has disseminated Exhibit 2 to its franchisees but has failed to inform them to discontinue using the erroneous calculation and disclosure instructions that it had previously supplied in Exhibit 1.

PAR. 30. Respondents Great Expectations are creditors as that term is defined in the TILA and Regulation Z.

PAR. 31. The acts and practices of respondents Great Expectations and GECM alleged in this complaint have been and are in or affecting commerce, as "commerce" is defined in Section 4 of the FTC Act.

COUNT I

PAR. 32. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 33. Respondent GECM has furnished its franchises with TILA disclosures (Exhibits 1 and 2) that, on their face, violated the TILA. When used by respondents Great Expectations, Exhibits 1 and 2 have resulted in false and misleading disclosures of APRs and finance charges to consumers in violation of Section 5 of the FTC Act.

PAR. 34. In the course and practice of its business as described in paragraphs twenty-five through twenty-nine, and paragraph thirty-three, respondent GECM has provided respondents Great Expectations with the means and instrumentalities to violate the Section 5 of the FTC Act.

PAR. 35. The practices described in paragraph thirty-four constitute unfair or deceptive acts or practices in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. 45(a).

COUNT II

PAR. 36. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 37. Respondents GEI, GE Illinois, GE Tennessee, GE Alabama, GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Columbus, GE Milwaukee, GE San Diego, GE Minneapolis, GE-

SFA, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento have furnished their members with TILA disclosures that have failed to accurately calculate and disclose the APR.

PAR. 38. The practice described in paragraph thirty-seven by respondents GEI, GE Illinois, GE Tennessee, GE Alabama, GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Columbus, GE Milwaukee, GE San Diego, GE Minneapolis, GE-SFA, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento violates Sections 107(a) and (c) of the TILA, 15 U.S.C. 1606(a) and (c), and Sections 226.18(e) and 226.22 of Regulation Z, 12 CFR 226.18(e) and 226.22.

COUNT III

PAR. 39. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 40. Respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Columbus, GE Milwaukee, GE-SFA, GE Cleveland, GE Phoenix, GE Sacramento, and GE San Diego have furnished their members with TILA disclosures that have failed to accurately calculate and disclose the finance charge.

PAR. 41. The practice described in paragraph forty by respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Columbus, GE Milwaukee, GE-SFA, GE Cleveland, GE Phoenix, GE Sacramento, and GE San Diego violates Section 106 of the TILA, 15 U.S.C. 1605, and Sections 226.4 and 226.18(d) of Regulation Z, 12 CFR 226.4 and 226.18(d)

COUNT IV

PAR. 42. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 43. Respondents GE Dallas, GE Houston, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, and GE Phoenix have furnished their members with TILA disclosures that have failed to disclose the finance charge more conspicuously than any other disclosure except the APR and the creditor's identity.

Complaint

120 F.T.C.

PAR. 44. The practice described in paragraph forty-three by respondents GE Dallas, GE Houston, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, and GE Phoenix violates Section 122(a) of the TILA, 15 U.S.C. 1632(a), and Section 226.17(a)(2) of Regulation Z, 12 CFR 226.17(a)(2).

COUNT V

PAR. 45. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 46. Respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento have furnished their members with TILA disclosures that have failed to segregate the disclosures required by the TILA from all other information provided in connection with the transaction, including the itemization of the amount financed.

PAR. 47. The practice described in paragraph forty-six by respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento violates Section 128(b)(1) of the TILA, 15 U.S.C. 1638(b)(1), and Section 226.17(a)(1) of Regulation Z, 12 CFR 226.17(a)(1).

COUNT VI

PAR. 48. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 49. Respondents GEI, GE Illinois, GE Tennessee, GE Alabama, GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Columbus, GE San Diego, GE Minneapolis, GE-SFA, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento have failed to accurately disclose the itemization of the amount financed.

PAR. 50. The practice described in paragraph forty-nine by respondents GEI, GE Illinois, GE Tennessee, GE Alabama, GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Columbus, GE San

Diego, GE Minneapolis, GE-SFA, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento violates Section 128(a) of the TILA, 15 U.S.C. 1638(a), and Section 226.18(c) of Regulation Z, 12 CFR 226.18(c).

COUNT VII

PAR. 51. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 52. Respondents GEI, GE Illinois, GE Tennessee, GE Alabama, GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Columbus, GE Milwaukee, GE San Diego, GE Minneapolis, GE-SFA, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento have failed to disclose the identity of the creditor.

PAR. 53. The practice described in paragraph fifty-two by respondents GEI, GE Illinois, GE Tennessee, GE Alabama, GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Columbus, GE Milwaukee, GE San Diego, GE Minneapolis, GE-SFA, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento violates Section 128(a)(1) of the TILA, 15 U.S.C. 1638(a)(1), and Section 226.18(a) of Regulation Z, 12 CFR 226.18(a).

COUNT VIII

PAR. 54. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 55. Respondents GE Dallas., GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento have furnished their members with TILA disclosures that have failed to provide a description of the amount financed.

PAR. 56. The practice described in paragraph fifty-five by respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento violates Section 128(a)(8) of the TILA, 15 U.S.C.

1638(a)(8), and Section 226.18(b) of Regulation Z, 12 CFR 226.18(b).

PAR. 57. Respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento have furnished their members with TILA disclosures that have failed to provide a description of the finance charge.

PAR. 58. The practice described in paragraph fifty-seven by respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento violates Section 128(a)(8) of the TILA, 15 U.S.C. 1638(a)(8), and Section 226.18(d) of Regulation Z, 12 CFR 226.18(d).

PAR. 59. Respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento have furnished their members with TILA disclosures that have failed to provide a description of the APR.

PAR. 60. The practice described in paragraph fifty-nine by respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento violates Section 128(a)(8) of the TILA, 15 U.S.C. 1638(a)(8), and Section 226.18(e) of Regulation Z, 12 CFR 226.18(e).

PAR. 61. Respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento have furnished their members with TILA disclosures that have failed to provide the total of payments and/or a description of the total of payments.

PAR. 62. The practice described in paragraph sixty-one by respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento violates Section 128(a)(5) and/or (8) of the TILA, 15 U.S.C. 1638(a)(5) and/or (8), and Section 226.18(h) of Regulation Z, 12 CFR 226.18(h).

PAR. 63. Respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento have furnished their members with TILA disclosures that have failed to provide the total sale price and/or a description of the total sale price.

PAR. 64. The practice described in paragraph sixty-three by respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento violates Section 128(a)(7) and/or (8) of the TILA, 15 U.S.C. 1638(a)(7) and/or (8), and Section 226.18(j) of Regulation Z, 12 CFR 226.18(j).

COUNT IX

PAR. 65. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 66. Respondents GE Dallas, GE Houston, GE Phoenix, GE San Antonio, GE Austin, GE Baltimore, GE DC, and GE Raleigh have failed to include set-up or other fees that are charged only to consumers who finance the costs of their memberships in the finance charge and the annual percentage rate disclosed to the consumer. They have also failed to exclude these finance charges from the amount financed that is disclosed to consumers.

PAR. 67. The practices described in paragraph sixty-six by respondents GE Dallas, GE Houston, GE Phoenix, GE San Antonio, GE Austin, GE Baltimore, GE DC, and GE Raleigh violate Sections 106, 107, and 128 (a) of the TILA, 15 U.S.C. 1605, 1606, and 1638(a), and Sections 226.4(b), 226.22, and 226.18 (b), (d), and (e) of Regulation Z, 12 CFR 226.4(b), 226.22, and 226.18(b), (d), and (e).

COUNT X

PAR. 68. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 69. Respondent GE San Diego has furnished its members with TILA disclosures that have failed to disclose the APR, the

finance charge, the amount financed, the total of payments, and the total sales price.

PAR. 70. The practices described in paragraph sixty-nine by respondent GE San Diego violate Section 128 (a) of the TILA, 15 U.S.C. 1638(a), and Section 226.18 of Regulation Z, 12 CFR 226.18.

COUNT XI

PAR. 61. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 62. Respondent GE Houston has furnished its members with TILA disclosures that have failed to disclose the amount financed.

PAR. 73. The practice described in paragraph seventy-two by respondent GE Houston violates Section 128(a) of the TILA, 15 U.S.C. 1638(a), and Section 226.18(b) of Regulation Z, 12 CFR 226.18(b).

COUNT XII

PAR. 74. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 75. Respondents GEI, GE Alabama, GE Illinois, GE Portland, GE Dallas, GE Houston, GE Cleveland, GE Phoenix, GE San Antonio, GE Austin, GE Seattle, GE Denver, GE Columbus, GE Milwaukee, GE San Diego, GE Minneapolis, GE SFA, GE Cherry Hill, GE Sacramento, GE DC, GE Baltimore, and GE Raleigh have disclosed understated APRs and finance charges to consumers that have resulted in consumers paying more in financing costs than the amount to which they originally agreed.

PAR. 76. The practices described in paragraph seventy-five are unfair or deceptive acts or practices in violation of Section 5(a) of the FTC Act, 15 U.S.C. 45(a).

EXHIBIT 1



RETAIL INSTALLMENT CONTRACT

Name - Last: [redacted] First: [redacted] Middle: [redacted] Age: 26

Present Address: [redacted] City: [redacted] State: CO Zip: 80210

Social Security #: [redacted] Home Phone: [redacted] How Long At This Address: 5 YRS How Long in Area: 26 YRS

Employed By: [redacted] Work Phone: [redacted] Present Position: [redacted]

Income All Sources: [redacted] Annual: [redacted] Driver's License #: [redacted]

Primary Bank Accounts: Savings Balance: [redacted] Checking Balance: [redacted]

Credit Reference - Banks, Finance Co., Credit Unions: USA Open Closed Limit: [redacted]

FIRST INTERSTATE BANK Open Closed Limit: [redacted]

The undersigned Great Expectations (Seller) hereby sells, and the undersigned Buyer, hereinafter referred to as "Member" purchase subject to the provisions of this contract, a MEMBERSHIP in Great Expectations and promises to pay to Great Expectations its share of the TOTAL PAYMENTS (Box 8) in accordance with the Payment Schedule hereinafter set forth.

DESCRIPTION OF GOODS AND SERVICES SOLD:

Interviewing, Testing & Evaluating, Processing & Coding, Background check (if necessary), for the purpose of bringing in contact with the purchaser (client) suitable individuals with similar likes and dislikes. This description intended to be partial only. The purchaser acknowledges receipt of application form, which is made a part hereto as though set out at length.

READ CAREFULLY AND SIGN ONLY WHEN COMPLETELY UNDERSTOOD

Buyer has considered and evaluated the terms of membership as set forth in Great Expectations Membership Agreement dated 10/31/91 and requests financing of the balance due. Acceptance of the terms of both agreements renders null and void any buyer's right to cancel previously provided.

I understand that my failure to participate in Great Expectations does not release me of my obligation to pay this contract in full regardless of the circumstances. I understand that by signing this Agreement I am a Member of Great Expectations.

MEMBER SIGNATURE X [redacted]

NOTICE TO MEMBER: Upon request, Great Expectations must provide or make available for your examination a statement or led showing how the partial refund of the time price charge is to be computed if any balance of the contract should be prepaid. Member (Buyer) and Great Expectations (Seller) agree that the terms and conditions on the Member's Contract for Membership constitute part of this contract and are incorporated herein by reference. If due to delinquency, it is necessary to refer this account to collection, then the balance due shall include actual attorney's fee and court costs. In the event Member fails to pay any installment payment when due, the entire balance then owing shall immediately become due and payable, without notice, at the option of Great Expectations or assignee, and Great Expectations shall not be required to provide any services to Member until Member's payment account is made current. If more than one person signs this contract then their obligation shall be joint and several.

ITEMIZATION OF THE AMOUNT FINANCED

1. Cash Price	<u>1595</u>	BALANCE 10.	<u>1595</u>
2. Other:	<u>0</u>		
3. Down Payment	<u>300</u>		<u>1295</u>
4. Paid (11/4/91) Second Interview	<u>100</u>		<u>1195</u>
5. Other Payments Due (11/30/91)	<u>100</u>		<u>1095</u>
6. Amt. Financed (Unpaid Bal. of Cash Price #3)	<u>1095</u>		<u>1095</u>
7. Finance Charge @ 6% Bal. x (1/5) no. of payments			<u>82.13</u>
8. Total Payments (Bal. #7)			<u>1177.13</u>
9. Deferred Payment Price (Bal. #7 x #7)			<u>1677.13</u>

ANNUAL PERCENTAGE RATE 18%
 PAYMENT SCHEDULE:
 11. 5 successive monthly installments of \$ 235 each, commencing 12/15/91, and on the same day of each month thereafter, with final date of BALLOON PAYMENT.
 12. DELINQUENCY AND COLLECTION CHARGES: Buyer shall pay or promise to pay any installment account when the same shall become due and such failure shall continue for a period of more than ten (10) days, then in addition to the amount of such overdue installment payment the Buyer shall pay to Seller, a delinquency and collection charge, an amount equal to 5% of such payment, except that such charge shall exceed \$5.00 or be less than \$1.00.
 13. PREPAYMENT CREDIT: Buyer may prepay any part of the unpaid balance without penalty and all payment in full Buyer shall be entitled to a refund of the unearned portion of the Finance Charge computed under the simple interest basis, however, there shall be a minimum Finance Charge of \$10.00 and no refund if unearned charge is less than \$1.00.

* DIVIDE by number of payments to calculate each installment and summarize on #11

* Notice to Buyer: (1) Do not sign this agreement before you read it or if it contains any blank spaces to be filled in. (2) You are entitled to a complete filled-in copy of this agreement. (3) You can prepay the full amount due under this agreement at any time. (4) If you desire to pay off in advance the full amount due, the amount which is outstanding will be furnished upon request.

SELLER Great Expectations
 Business Address: 3773 Cherry Creek N. Dr. #400
 City & State: Danvers, CO 80017
 Authorized Signatory: [Signature]

Signature of Member X [Signature]
 Member (Buyer) acknowledges receipt of an exact copy of instrument at the time of its execution. Member (Buyer) further acknowledges that the blanks in this contract were completed in his/her presence and that he has read the disclosures contained herein prior to signing the contract.

Complaint

120 F.T.C.

EXHIBIT 2



RETAIL INSTALLMENT CONTRACT

Form with fields for Name (Last, First, Middle, Age), Present Address (City, State, Zip), Social Security #, Home Phone, How Long At This Address, Date of Birth, Employed By (Name and Address, Work Phone, Present Position), Home All Sources Month, Annual, Driver's License #, Primary Bank Accounts (Savings, Checking), Name.

The undersigned Great Expectations (Seller) hereby sells, and the undersigned buyer (Member) purchases, subject to the provisions of this CONTRACT in full. I understand that by signing this Contract, and the Membership Agreement, I am a Member of Great Expectations. DESCRIPTION OF GOODS AND SERVICES SOLD: Interviewing, Evaluating, Preparing & Coding, Background Check (if necessary) and Plus Video Library for the purpose of giving Member access to a Video Library of potentially suitable individuals with similar files and profiles. This is intended to be partial only.

READ CAREFULLY AND SIGN ONLY WHEN COMPLETELY UNDERSTOOD

I have considered and evaluated the terms of membership as set forth in the Great Expectations Membership Agreement dated and received hereon of the balance due. I understand that my failure to participate in Great Expectations does not release me of my obligation to pay the balance due. I understand that by signing this Contract, and the Membership Agreement, I am a Member of Great Expectations.

MEMBER SIGNATURE: X

NOTICE TO MEMBER: Upon request, Great Expectations must provide or make available for your examination a statement or table showing how it computes if any balance of the Contract should be prepaid. Member (Buyer) and Great Expectations (Seller) agree that the terms and conditions of the Great Expectations Membership Agreement constitute a part of this Contract and are incorporated herein by reference. In the event Member fails to pay any installment payment when due, the entire balance (less any unearned Finance Charge) then owing shall immediately become due and payable, without demand or notice, at the option of Great Expectations or assignee, and Great Expectations shall not be required to pay services to Member until Member's payment account is made current.

PURCHASE PRICE: \$ payable in accordance with the Statement of Disclosure below.

PAYMENT SCHEDULE: Member's payments hereunder shall be in equal consecutive monthly installments commencing on the day of month after execution of this Contract and continuing on the same day of each month thereafter until paid in full. Interest on the unpaid balance shall be both pre- and after maturity.

FEDERAL TRUTH IN LENDING DISCLOSURES (Statement of Disclosure) table with columns: ANNUAL PERCENTAGE RATE (19.6%), FINANCE CHARGE (Line 4), SECURITY FINANCED (Line 5), TOTAL OF PAYMENTS (Line 6), TOTAL SALES PRICE (Line 7). Includes text: You the Buyer have the right to finance at this time an installment of the amount financed. () want an installment. () do not want an installment. Your payment schedule will be: Payment Schedule: \$/month for number of months. DELINQUENCY AND COLLECTION CHARGES: If Buyer shall fail or neglect to pay any installment payment when the same shall become due and such failure or neglect shall continue for a period of more than ten (10) days, then in addition to the amount of such delinquent installment payment the Buyer shall pay to Seller, as a delinquency and collection charge, an amount equal to 9% of such payment amount that such charge shall not exceed \$5.00 or be less than \$1.00. PREPAYMENT: If you pay off early, you will not have to pay a penalty and you may be entitled to a refund of part of the finance charge. See your Great Expectations Membership Agreement for any additional information about non-payment, default, any required repayments in full before the schedule date and prepayments, returns and penalties.

ITEMIZATION OF AMOUNT FINANCED table with 5 rows: 1. Total Cash Price, 2. Less Downpayment, 3. Amount Financed, 4. Finance Charge, 5. Total of Payments. Includes text: Whichever of any default by the Seller shall not operate as a mere default. Should the buyer default in the payment of any installment hereunder, Buyer shall pay to Seller all actual and reasonable costs of collection including reasonable Attorney fees and disbursements. Buyer will pay to the Seller a \$10.00 charge for every delinquency after maturity. Should any item hereon be invalid or unenforceable, the remaining to be unaffected by such finding.

NOTICE TO BUYER:

- 1. Do not sign this agreement before you read it or if it contains any blank spaces to be filled in.
2. You are entitled to a completely filled in copy of this agreement.
3. You can prepay the full amount due under this agreement at any time.
4. If you desire to pay off in advance the full amount due which is outstanding will be furnished on request.

Seller: GREAT EXPECTATIONS
Business Address:
City & State:
Authorized Signature: Title

Member (Buyer) acknowledges receipt of an exact copy of this Contract in the time of its execution. Member (Buyer) further acknowledges that the terms and conditions of this Contract were explained and discussed with him or her and that he or she understands and agrees to the terms and conditions contained herein prior to signing this Contract.

Signature of Member: X

Routing: White—FINANCE: Pink—SELLER: Gold—CUSTOMER

© 1989 Great Expectations Credit Management, Inc.

Exhibit

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of TRIAAC Enterprises, Inc., a corporation, and respondent having been furnished thereafter with a copy of the draft of complaint that 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 Section 5(a) of the Federal Trade Commission Act and the Truth in Lending 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 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. TRIAAC Enterprises, Inc., doing business as Great Expectations of Sacramento ("GE Sacramento"), 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 2277 Fair Oaks Blvd., Suite 195, Sacramento, CA.

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:

A. Respondent GE Sacramento, 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 offering of credit, do forthwith cease and desist from failing to accurately calculate and disclose the annual percentage rate, as required by Sections 107(a) and (c) of the TILA, 15 U.S.C. 1606(a) and (c), and Sections 226.18(e) and 226.22 of Regulation Z, 12 CFR 226.18(e) and 226.22;

B. Respondent GE Sacramento, 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 offering of credit, do forthwith cease and desist from failing to accurately calculate and disclose the finance charge, as required by Section 106 of the TILA, 15 U.S.C. 1605, and Sections 226.4 and 226.18(d) of Regulation Z, 12 CFR 226.4 and 226.18(d);

C. Respondent GE Sacramento, 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 offering of credit, do forthwith cease and desist from failing to segregate the disclosures required by the TILA from all other information provided in connection with the transaction, including from the itemization of the amount financed, as required by Section 128(b)(1) of the TILA, 15 U.S.C. 1638(b)(1), and Section 226.17(a) of Regulation Z, 12 CFR 226.17a);

D. Respondent GE Sacramento, 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 offering of credit, do forthwith cease and desist from failing to make all disclosures in the manner, form, and amount required by Sections 122 and 128(a) of the TILA, 15 U.S.C. 1632 and 1638(a), and Sections 226.17 and 226.18 of Regulation Z, 12 CFR 226.17 and 226.18;

E. Respondent GE Sacramento, 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 offering of credit, do forthwith cease and desist from failing to comply with the TILA, 15 U.S.C. 1601 *et seq.*, and Regulation Z, 12 CFR 226.

II.

REFUND PROGRAM

It is further ordered, That:

A. Within thirty (30) days following the date of service of this order, respondent shall:

1. Determine to whom respondent disclosed on the original TILA disclosure an annual percentage rate that was miscalculated by more than one quarter of one percentage point below the annual percentage rate determined in accordance with Section 226.22 of Regulation Z, 12 CFR 226.22, or that disclosed a finance charge that was miscalculated by more than one dollar below the finance charge determined in accordance with Section 226.4 of Regulation Z, 12 CFR 226.4, so that each such person will not be required to pay a finance charge in excess of the finance charge actually disclosed or the dollar equivalent of the annual percentage rate actually disclosed, whichever is lower, plus a tolerance of one quarter of one percentage point;

2. Calculate a lump sum refund and a monthly payment adjustment, if applicable, in accordance with Section 108(e) of the TILA, 15 U.S.C. 1607(e);

3. Mail a refund check to each eligible consumer in the amount determined above, along with Attachment 1; and

4. Provide the Federal Trade Commission with a list of each such consumer, the amount of the refund, the number of payments refunded, the amount of adjustment for future payments and the number of future payments to be adjusted;

B. No later than fifteen (15) days following the date of service of this order, respondent shall provide the Federal Trade Commission with the name and address of three independent accounting firms, with which it, its officers, employees, attorneys, and agents, have no

business relationship. Staff for the Division of Credit Practices of the FTC shall then have the sole discretion to choose one of the firms ("independent agent") and so advise respondent;

C. Within thirty (30) days following the date of adjustments made pursuant to this section, respondent shall direct the independent agent to review a statistically-valid sample of refunds. Respondent shall provide the Federal Trade Commission with a certified letter from the independent agent confirming that respondent has complied with Part II. A. of this order;

D. All costs associated with the administration of the refund program and payment of refunds shall be borne by the respondent.

III.

It is further ordered, that respondent, its successors and assigns, shall maintain for at least five (5) years from the date of service of this order and, upon thirty (30) days advance written request, make available to the Federal Trade Commission for inspection and copying all documents and other records necessary to demonstrate fully its compliance with this order.

IV.

It is further ordered, That respondent, its successors and assigns, shall distribute a copy of this order to any present or future officers and managerial employees having responsibility with respect to the subject matter of this order and that respondent, its successors and assigns, shall secure from each such person a signed statement acknowledging receipt of said order.

V.

It is further ordered, That respondent, for a period of five (5) years following the date of service of this order, shall promptly notify the Commission at least thirty (30) days prior to any proposed change in its corporate structure such as 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 that may affect compliance obligations arising out of the order.

VI.

It is further ordered, That respondent shall, within one hundred and eighty (180) days of 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.

ATTACHMENT 1

Dear Great Expectations Customer:

As part of our settlement with the Federal Trade Commission for alleged violations of the Truth in Lending Act, we are sending you the enclosed refund check in the amount of \$*****. The refund represents the amount you were overcharged as a result of errors made by Great Expectations in calculating or disclosing the annual percentage rate or finance charge.

[In addition, your future monthly payments have been reduced. Starting immediately, your monthly payments will be \$*****.]

We regret any inconvenience this may have caused you.

Great Expectations

Complaint

120 F.T.C.

IN THE MATTER OF

V.L.P. ENTERPRISES, INC.

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

Docket C-3603. Complaint, Aug. 11, 1995--Decision, Aug. 11, 1995

This consent order requires, among other things, a video dating service franchise to properly and accurately disclose the annual percentage rate ("APR") and other credit terms of financed memberships, as required by the federal Truth in Lending Act, and requires the franchise to establish adjustment refund programs to compensate its past and current members who overpaid finance charges.

Appearances

For the Commission: *Stephen Cohen and Judy Nixon.*

For the respondent: *Pro se.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Great Expectations Creative Management, Inc. has violated the Federal Trade Commission Act ("FTC Act"), and that Great Expectations, Inc., GEC Illinois, Inc., GEC Tennessee, Inc., GEC Alabama, Inc., Great Southern Video, Inc., New West Video Enterprises, Inc., San Antonio Singles of Texas, Inc., Austin Singles of Texas, Inc., Great Expectations of Baltimore, Inc., Great Expectations of Washington, D.C., Inc., Great Expectations of Washington, Inc., Sterling Connections, Inc., Private Eye Productions, Inc., Great Expectations - Columbus, Inc., JAMS Financial, Inc., V.L.P. Enterprises, Inc., APM Enterprises - Minn Inc., KGE, Inc., G.E.C.H., Inc., MWVE, Inc., GREATEX Denver, Inc., Sun West Video, Inc., and TRIAAC Enterprises, Inc. (hereinafter sometimes referred to collectively as "Great Expectations") have violated the Truth in Lending Act ("TILA"), its implementing Regulation Z, and the FTC Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint, and alleges as follows:

PARAGRAPH 1. Great Expectations Creative Management, Inc. ("GECM") 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 16830 Ventura Blvd., Suite P, Encino, CA.

PAR. 2. Great Expectations, Inc. ("GEI") is a corporation organized, existing, and doing business under and by virtue of the laws of the state of California, with its corporate office at 16830 Ventura Blvd., Suite P, Encino, CA, and its principal places of business located at 1640 S. Sepulveda Blvd., Suite 100, Los Angeles, CA, 17207 Ventura Blvd., Encino, CA, and 450 N. Mountain, Suite B, Upland, CA.

PAR. 3. GEC Illinois, Inc. ("GE Illinois") is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Illinois, with its office and principal place of business located at 1701 E. Woodfield Dr., Suite 400, Schaumburg, IL.

PAR. 4. GEC Tennessee, Inc. ("GE Tennessee") 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 5552 Franklin Rd., Suite 200, Nashville, TN.

PAR. 5. GEC Alabama, Inc. ("GE Alabama") is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Alabama, with its office and principal place of business located at 7529 S. Memorial Pkwy., Suite C & D, Huntsville, AL.

PAR. 6. Great Southern Video, Inc., doing business as Great Expectations of Dallas ("GE Dallas"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Texas, with its office and principal place of business located at 14180 Dallas Pkwy., Suite 100, Dallas, TX.

PAR. 7. New West Video Enterprises, Inc., doing business as Great Expectations of Houston ("GE Houston"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Texas, with its office and principal place of business located at 50 Briarhollow, Suite 100, Houston, TX.

PAR. 8. San Antonio Singles of Texas, Inc., doing business as Great Expectations of San Antonio ("GE San Antonio"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Texas, with its corporate office at

10497 Town & Country Way, Suite 214, Houston, TX, and its principal place of business located at 8131 I.H. 10 West, Suite 225, San Antonio, TX.

PAR. 9. Austin Singles of Texas, Inc., doing business as Great Expectations of Austin ("GE Austin"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Texas, with its corporate office at 10497 Town & Country Way, Suite 214, Houston, TX, and its principal place of business located at 9037 Research Blvd., Suite 130, Austin, TX.

PAR. 10. Great Expectations of Baltimore, Inc. ("GE Baltimore") is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Virginia, with its office and principal place of business located at 40 York Rd., Suite 500, Towson, MD.

PAR. 11. Great Expectations of Washington, D.C., Inc. ("GE DC") 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 8601 Westwood Center Dr., Vienna, VA.

PAR. 12. Great Expectations of Washington, Inc., doing business as Great Expectations of Raleigh/Durham ("GE Raleigh"), 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 3714 Benson Dr., Suite 200, Raleigh, NC.

PAR. 13. Sterling Connections, Inc., doing business as Great Expectations of Seattle ("GE Seattle"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Oregon, with its office and principal place of business located at 305 108th Ave., N.E., Suite 205, Bellevue, WA.

PAR. 14. Private Eye Productions, Inc., doing business as Great Expectations of Portland ("GE Portland"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Oregon, with its office and principal place of business located at 5531 S.W. Macadam Ave., Suite 225, Portland, OR.

PAR. 15. Great Expectations - Columbus, Inc. ("GE Columbus") is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Ohio, with its corporate office at 11835 W. Olympic Blvd., Suite 490, Los Angeles, CA, and its principal place of business located at 1103 Schrock Rd., Suite 101, Columbus, OH.

PAR. 16. JAMS Financial, Inc., doing business as Great Expectations of Milwaukee ("GE Milwaukee"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Wisconsin, with its corporate office at 11835 W. Olympic Blvd., Suite 490, Los Angeles, CA, and its principal place of business located at 16650 W. Bluemound, Suite 100, Brookfield, WI.

PAR. 17. V.L.P. Enterprises, Inc., doing business as Great Expectations of San Diego ("GE San Diego"), 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 3465 Camino Del Rio South, Suite 300, San Diego, CA.

PAR. 18. APM Enterprises - Minn Inc., doing business as Great Expectations of Minneapolis ("GE Minneapolis"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Illinois, with its office and principal place of business located at 3300 Edinborough Way, Suite 300, Edina, MN.

PAR. 19. KGE, Inc., doing business as Great Expectations of Sausalito, Great Expectations of Mountain View, and Great Expectations of Walnut Creek (collectively referred to as "GE-SFA"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of California, with its corporate office at 1943 Landings Dr., Mountain View, CA, and its principal places of business located at 2401 Marinship Way, Suite 100, Sausalito, CA, 2085 Landings Dr., Mountain View, CA, and 1280 Civic Dr., Suite 300, Walnut Creek, CA.

PAR. 20. G.E.C.H., Inc., doing business as Great Expectations of Cherry Hill ("GE Cherry Hill"), 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 places of business located at One Cherry Hill, Suite 600, Cherry Hill, NJ.

PAR. 21. MWVE, Inc., doing business as Great Expectations of Cleveland ("GE Cleveland"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Ohio, with its office and principal place of business located at 6300 Rockside Rd., Suite 200, Cleveland, OH.

PAR. 22. GREATEX Denver Inc., doing business as Great Expectations Video Dating, Ltd. ("GE-Denver"), 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 3773 Cherry Creek North Dr., Suite 140, Denver, CO.

PAR. 23. Sun West Video, Inc., doing business as Great Expectations for Singles ("GE Phoenix"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Arizona, with its office and principal place of business located at 5635 N. Scottsdale Rd., Suite 190, Scottsdale, AZ.

PAR. 24. TRIAAC Enterprises, Inc., doing business as Great Expectations of Sacramento ("GE Sacramento"), 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 2277 Fair Oaks Blvd., Suite 195, Sacramento, CA.

RESPONDENTS' COURSE OF BUSINESS

PAR. 25. GECM is a video dating franchisor. It sells and services franchise operations throughout the United States. As part of its regular course of business, GECM has created and disseminated retail installment contracts (Exhibits 1 and 2) to the franchises described in paragraphs two through twenty-four. The GECM retail installment contracts purport to incorporate the disclosures required by the TILA.

PAR. 26. Respondents Great Expectations are video dating franchises. Respondents have provided financing to their members using retail installment contracts such as Exhibits 1 and 2 to disclose the terms of the financing.

PAR. 27. GECM's TILA disclosure (Exhibit 1) contains erroneous instructions for calculating and disclosing the finance charge and contains a pre-printed annual percentage rate ("APR") of 18%. In addition, Exhibit 1 fails to make the TILA disclosures in the format required by the TILA and fails to identify the creditor as required by the TILA.

PAR. 28. In 1988, GECM learned from its auditor that the calculations and disclosures contained in Exhibit 1 did not comply with the TILA. Nevertheless, it continued to disseminate Exhibit I to its franchisees and failed to notify them of the erroneous calculations and disclosures.

PAR. 29. In late 1990, GECM created a new retail installment contract, which also purported to incorporate the disclosures required by the TILA and which contained a pre-printed APR of 19.6%

(Exhibit 2). Exhibit 2 fails to identify the creditor as required by the TILA and fails to provide the information required by the TILA in the itemization of the amount financed. Furthermore, GECM has disseminated Exhibit 2 to its franchisees but has failed to inform them to discontinue using the erroneous calculation and disclosure instructions that it had previously supplied in Exhibit 1.

PAR. 30. Respondents Great Expectations are creditors as that term is defined in the TILA and Regulation Z.

PAR. 31. The acts and practices of respondents Great Expectations and GECM alleged in this complaint have been and are in or affecting commerce, as "commerce" is defined in Section 4 of the FTC Act.

COUNT I

PAR. 32. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 33. Respondent GECM has furnished its franchises with TILA disclosures (Exhibits 1 and 2) that, on their face, violated the TILA. When used by respondents Great Expectations, Exhibits 1 and 2 have resulted in false and misleading disclosures of APRs and finance charges to consumers in violation of Section 5 of the FTC Act.

PAR. 34. In the course and practice of its business as described in paragraphs twenty-five through twenty-nine, and paragraph thirty-three, respondent GECM has provided respondents Great Expectations with the means and instrumentalities to violate the Section 5 of the FTC Act.

PAR. 35. The practices described in paragraph thirty-four constitute unfair or deceptive acts or practices in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. 45(a).

COUNT II

PAR. 36. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 37. Respondents GEI, GE Illinois, GE Tennessee, GE Alabama, GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Columbus, GE Milwaukee, GE San Diego, GE Minneapolis, GE-

SFA, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento have furnished their members with TILA disclosures that have failed to accurately calculate and disclose the APR.

PAR. 38. The practice described in paragraph thirty-seven by respondents GEI, GE Illinois, GE Tennessee, GE Alabama, GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Columbus, GE Milwaukee, GE San Diego, GE Minneapolis, GE-SFA, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento violates Sections 107(a) and (c) of the TILA, 15 U.S.C. 1606(a) and (c), and Sections 226.18(e) and 226.22 of Regulation Z, 12 CFR 226.18(e) and 226.22.

COUNT III

PAR. 39. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 40. Respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Columbus, GE Milwaukee, GE-SFA, GE Cleveland, GE Phoenix, GE Sacramento, and GE San Diego have furnished their members with TILA disclosures that have failed to accurately calculate and disclose the finance charge.

PAR. 41. The practice described in paragraph forty by respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Columbus, GE Milwaukee, GE-SFA, GE Cleveland, GE Phoenix, GE Sacramento, and GE San Diego violates Section 106 of the TILA, 15 U.S.C. 1605, and Sections 226.4 and 226.18(d) of Regulation Z, 12 CFR 226.4 and 226.18(d).

COUNT IV

PAR. 42. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 43. Respondents GE Dallas, GE Houston, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, and GE Phoenix have furnished their members with TILA disclosures that have failed to disclose the finance charge more conspicuously than any other disclosure except the APR and the creditor's identity.

PAR. 44. The practice described in paragraph forty-three by respondents GE Dallas, GE Houston, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, and GE Phoenix violates Section 122(a) of the TILA, 15 U.S.C. 1632(a), and Section 226.17(a)(2) of Regulation Z, 12 CFR 226.17(a)(2).

COUNT V

PAR. 45. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 46. Respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento have furnished their members with TILA disclosures that have failed to segregate the disclosures required by the TILA from all other information provided in connection with the transaction, including the itemization of the amount financed.

PAR. 47. The practice described in paragraph forty-six by respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento violates Section 128(b)(1) of the TILA, 15 U.S.C. 1638(b)(1), and Section 226.17(a)(1) of Regulation Z, 12 CFR 226.17(a)(1).

COUNT VI

PAR. 48. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 49. Respondents GEI, GE Illinois, GE Tennessee, GE Alabama, GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Columbus, GE San Diego, GE Minneapolis, GE-SFA, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento have failed to accurately disclose the itemization of the amount financed.

PAR. 50. The practice described in paragraph forty-nine by respondents GEI, GE Illinois, GE Tennessee, GE Alabama, GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Columbus, GE San

Diego, GE Minneapolis, GE-SFA, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento violates Section 128(a) of the TILA, 15 U.S.C. 1638(a), and Section 226.18(c) of Regulation Z, 12 CFR 226.18(c).

COUNT VII

PAR. 51. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 52. Respondents GEI, GE Illinois, GE Tennessee, GE Alabama, GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Columbus, GE Milwaukee, GE San Diego, GE Minneapolis, GE-SFA, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento have failed to disclose the identity of the creditor.

PAR. 53. The practice described in paragraph fifty-two by respondents GEI, GE Illinois, GE Tennessee, GE Alabama, GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Columbus, GE Milwaukee, GE San Diego, GE Minneapolis, GE-SFA, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento violates Section 128(a)(1) of the TILA, 15 U.S.C. 1638(a)(1), and Section 226.18(a) of Regulation Z, 12 CFR 226.18(a).

COUNT VIII

PAR. 54. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 55. Respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento have furnished their members with TILA disclosures that have failed to provide a description of the amount financed.

PAR. 56. The practice described in paragraph fifty-five by respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento violates Section 128(a)(8) of the TILA, 15 U.S.C.

1638(a)(8), and Section 226.18(b) of Regulation Z, 12 CFR 226.18(b).

PAR. 57. Respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento have furnished their members with TILA disclosures that have failed to provide a description of the finance charge.

PAR. 58. The practice described in paragraph fifty-seven by respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento violates Section 128(a)(8) of the TILA, 15 U.S.C. 1638(a)(8), and Section 226.18(d) of Regulation Z, 12 CFR 226.18(d).

PAR. 59. Respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento have furnished their members with TILA disclosures that have failed to provide a description of the APR.

PAR. 60. The practice described in paragraph fifty-nine by respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento violates Section 128(a) (8) of the TILA, 15 U.S.C. 1638(a)(8), and Section 226.18(e) of Regulation Z, 12 CFR 226.18(e).

PAR. 61. Respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento have furnished their members with TILA disclosures that have failed to provide the total of payments and/or a description of the total of payments.

PAR. 62. The practice described in paragraph sixty-one by respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento violates Section 128(a)(5) and/or (8) of the TILA, 15 U.S.C. 1638(a)(5) and/or (8), and Section 226.18(h) of Regulation Z, 12 CFR 226.18(h).

PAR. 63. Respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento have furnished their members with TILA disclosures that have failed to provide the total sale price and/or a description of the total sale price.

PAR. 64. The practice described in paragraph sixty-three by respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento violates Section 128(a)(7) and/or (8) of the TILA, 15 U.S.C. 1638(a)(7) and/or (8), and Section 226.18(j) of Regulation Z, 12 CFR 226.18(j).

COUNT IX

PAR. 65. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 66. Respondents GE Dallas, GE Houston, GE Phoenix, GE San Antonio, GE Austin, GE Baltimore, GE DC, and GE Raleigh have failed to include set-up or other fees that are charged only to consumers who finance the costs of their memberships in the finance charge and the annual percentage rate disclosed to the consumer. They have also failed to exclude these finance charges from the amount financed that is disclosed to consumers.

PAR. 67. The practices described in paragraph sixty-six by respondents GE Dallas, GE Houston, GE Phoenix, GE San Antonio, GE Austin, GE Baltimore, GE DC, and GE Raleigh violate Sections 106, 107, and 128(a) of the TILA, 15 U.S.C. 1605, 1606, and 1638(a), and Sections 226.4(b), 226.22, and 226.18(b), (d), and (e) of Regulation Z, 12 CFR 226.4(b), 226.22, and 226.18(b), (d), and (e).

COUNT X

PAR. 68. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 69. Respondent GE San Diego has furnished its members with TILA disclosures that have failed to disclose the APR, the finance charge, the amount financed, the total of payments, and the total sales price.

PAR. 70. The practices described in paragraph sixty-nine by respondent GE San Diego violate Section 128(a) of the TILA, 15 U.S.C. 1638(a), and Section 226.18 of Regulation Z, 12 CFR 226.18.

COUNT XI

PAR. 71. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 72. Respondent GE Houston has furnished its members with TILA disclosures that have failed to disclose the amount financed.

PAR. 73. The practice described in paragraph seventy-two by respondent GE Houston violates Section 128(a) of the TILA, 15 U.S.C. 1638(a), and Section 226.18(b) of Regulation Z, 12 CFR 226.18(b).

COUNT XII

PAR. 74. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 75. Respondents GEI, GE Alabama, GE Illinois, GE Portland, GE Dallas, GE Houston, GE Cleveland, GE Phoenix, GE San Antonio, GE Austin, GE Seattle, GE Denver, GE Columbus, GE Milwaukee, GE San Diego, GE Minneapolis, GE SFA, GE Cherry Hill, GE Sacramento, GE DC, GE Baltimore, and GE Raleigh have disclosed understated APRs and finance charges to consumers that have resulted in consumers paying more in financing costs than the amount to which they originally agreed.

PAR. 76. The practices described in paragraph seventy-five are unfair or deceptive acts or practices in violation of Section 5(a) of the FTC Act, 15 U.S.C. 45(a).

Complaint

120 F.T.C.

EXHIBIT 1



RETAIL INSTALLMENT CONTRACT

Name - Last		First	Middle	Age
Present Address		City		State
Social Security #	Home Phone	How Long At This Address	How Long In Area	
Employed By	Work Phone	Present Position		
Income at Sources	Annual	Driver's License #		
Primary Bank Accounts	Checking		Balance	
Savings	Open		Closed	
Credit Reference - Banks, Finance Co., Credit Unions	Open		Closed	

USA

First Interstate Bank Open Closed

The undersigned Great Expectations (Seller) hereby sells, and the undersigned Buyer, hereinafter referred to as "Member" purchases, subject to the provisions of this contract, a MEMBERSHIP in Great Expectations and promises to pay to Great Expectations its share of the TOTAL PAYMENTS (Box 8) in accordance with the Payment Schedule hereinafter set forth.

DESCRIPTION OF GOODS AND SERVICES SOLD:

Interviewing, Testing & Evaluating, Processing & Coding, Background check (if necessary), for the purpose of bringing in contact with the purchaser (client) suitable individuals with similar likes and dislikes, this description intended to be partial only; the purchase acknowledges receipt of application form, which is made a part hereof as though set out at length.

READ CAREFULLY AND SIGN ONLY WHEN COMPLETELY UNDERSTOOD

Buyer has considered and evaluated the terms of membership as set forth in Great Expectations Membership Agreement dated 10/31/91 and requests financing of the balance due. Acceptance of the terms of both agreements renders null and void a Buyer's right to cancel previously provided.

I understand that my failure to participate in Great Expectations does not release me of my obligation to pay this contract in full, regardless of the circumstances. I understand that by signing this Agreement I am a Member of Great Expectations.

MEMBER SIGNATURE X

NOTICE TO MEMBER: Upon request, Great Expectations must provide or make available for your examination a statement or list showing how the partial refund of the time price charge is to be computed if any balance of the contract should be prepaid. Member (Buyer) and Great Expectations (Seller) agree that the terms and conditions on the Member's Contract for Membership constitute part of this contract and are incorporated herein by reference. If due to delinquency, it is necessary to refer this account to collection, then the balance due shall include actual attorney's fee and court costs. In the event Member fails to pay any installment payment when due, the entire balance then owing shall immediately become due and payable, without notice, at the option of Great Expectations or assignee, and Great Expectations shall not be required to provide any services to Member until Member's payment account is made current. If more than one person signs this contract then their obligation shall be joint and several.

ITEMIZATION OF THE AMOUNT FINANCED

1. Cash Price	1795	BALANCE	10.
2. Other	0	1795	
3. Down Payment	300	1495	
4. Paid (11/14/91) Second Interview	100	1395	
5. Other Payments Due (11/30/91)	100	1295	
6. Amt. Financed (undpaid Bal. in Cash Price #5)	1095	1095	
7. Finance Charge @ 6% Bal. x 14% x 5 no. of payments		82.13	
8. Total Payment (Bal. # 7)		1177.13	
9. Deferred Payment Price (Bal. # 8 x # 1)		1677.13	

DIVIDE by number of payments to calculate each installment and summarize on #11.

ANNUAL PERCENTAGE RATE 18% PAYMENT SCHEDULE:

5 successive monthly installments of \$ 235 each, commencing 12/15/91, and on 1/15/92, and on 2/15/92, and on 3/15/92, and on 4/15/92, and on 5/15/92.

DELINQUENCY AND COLLECTION CHARGES: Buyer shall pay or request to pay any installment payment when due. If any installment payment is not paid when due, the entire balance then owing shall immediately become due and payable, without notice, at the option of Great Expectations or assignee, and Great Expectations shall not be required to provide any services to Member until Member's payment account is made current. If more than one person signs this contract then their obligation shall be joint and several.

PREPAYMENT PENALTY: Buyer may prepay any part of the unpaid balance without penalty and of payment in full. Buyer shall be entitled to a refund of all the unearned portion of the Finance Charge under the simple interest basis, however, there shall be a maximum Finance Charge of \$10.00 and no refund if unearned charge is less than \$1.00.

"Notice to Buyer: (1) Do not sign this agreement before you read it or if it contains any blank spaces to be filled in. (2) You are entitled to a completely filled-in copy of this agreement. (3) You can prepay the full amount due under this agreement at any time. (4) If you desire to pay off in advance the full amount due, the amount which is outstanding will be furnished upon request."

SELLER Great Expectations Signature of Member X [Signature]

Business Address: 3723 Cherry Creek N. Dr. #440 Member (Buyer) acknowledges receipt of an exact copy of this contract and that he has read the disclosures contained herein and that he has read the disclosures contained herein prior to signing this contract.

City & State: Denver, CO 8007

Authorized Signature: [Signature] Signature of Member X [Signature]

EXHIBIT 2



RETAIL INSTALLMENT CONTRACT

Form with fields for Name (Last, First, Middle, Age), Present Address (City, State, Zip), Social Security #, Home Phone, How Long At This Address, Date of Birth, Employer By Name and Address, Work Phone, Present Position, Home All Sources Month, Annual, Driver's License #, Primary Bank Accounts (Savings, Checking), Name, Address.

The undersigned Great Expectations (Seller) hereby sells, and the undersigned buyer (Member) purchases, subject to the provisions of the MEMBERSHIP in Great Expectations and promises to pay to Great Expectations or its assigns the TOTAL PAYMENTS in accordance with Schedule hereinafter set forth.

DESCRIPTION OF GOODS AND SERVICES SOLD: Interviewing, Evaluating, Processing & Coding, Background Check (if necessary) and 1 Video Library for the purpose of giving Member access to a Video Library of personality suitable individuals with similar likes and dislikes. The Member to be partial only.

READ CAREFULLY AND SIGN ONLY WHEN COMPLETELY UNDERSTOOD

I have considered and evaluated the terms of membership as set forth in the Great Expectations Membership Agreement dated and request financing of the balance due. I understand that my failure to participate in Great Expectations does not relieve me of my obligation to pay to Great Expectations that by signing this Contract, and the Membership Agreement, I am a Member of Great Expectations.

MEMBER SIGNATURE

NOTICE TO MEMBER: Upon request, Great Expectations must provide or make available for your examination a statement or table showing the amount of the time period charge to be calculated if any balance of the Contract should be stopped. Member (Buyer) and Great Expectations (S) that the terms and conditions of the Great Expectations Membership Agreement constitute a part of this Contract and are incorporated herein in the event Member fails to pay any installment payment when due, the entire balance (less any unearned Finance Charge) then owing shall become due and payable, without demand or notice, at the option of Great Expectations or assignee, and Great Expectations shall not be required to advance to Member until Member's payment account is made current.

PURCHASE PRICE: \$ payable in accordance with the Statement of Disclosure below.

PAYMENT SCHEDULE: Member's payments hereunder shall be in equal consecutive monthly installments commencing on the month after execution of this Contract and continuing on the same day of each month hereafter until paid in full. Interest on the unpaid balance shall be both prior and after maturity.

FEDERAL TRUTH IN LENDING DISCLOSURES (Statement of Disclosure)

Table with 5 columns: ANNUAL PERCENTAGE RATE, FINANCE CHARGE, AMOUNT FINANCED, TOTAL OF PAYMENTS, TOTAL SALES PRICE. Includes explanatory text for each column.

You the buyer have the right to rescind at this time an installment of the amount financed. () I want an extension. () I do not want an extension. Your payment schedule will be:

Table with 3 columns: Payment Schedule, Monthly, Total. Includes fields for number of payments, amount of payment, and date first payment due.

DELINQUENCY AND COLLECTION CHARGES: If Buyer shall fail or neglect to pay any installment payment when the same shall become due and such failure or neglect shall continue for a period of more than ten (10) days, then in addition to the amount of such delinquent installment payment the Buyer shall pay to Seller, as a delinquency and collection charge, an amount equal to 5% of such payment except that such charge shall not exceed \$5.00 or be less than \$1.00.

PREPAYMENT: If you pay off early, you will not have to pay a penalty and you may be entitled to a refund of part of the finance charge.

See your Great Expectations Membership Agreement for any additional information about non-payment, default, any required repayments in full before the schedule date and prepayments, returns and penalties.

"ITEMIZATION OF AMOUNT FINANCED"

Table with 2 columns: Item, Amount. Includes Total Cash Price, Less Downpayment, Amount Financed, Finance Charge, Total of Payments.

Warning of any default by the Seller shall not operate as a dishonored.

Should the buyer default in the payment of any installment hereunder shall pay to Seller all actual and reasonable costs of collection including reasonable Attorney fees and disbursements.

Buyer will pay to the Seller a \$10.00 charge for every dishonored other instrument.

Should any term hereof be invalid or unenforceable, the remaining shall be unaffected by such finding.

NOTICE TO BUYER:

- 1. Do not sign this agreement before you read it or if any blank spaces to be filled in.
2. You are entitled to a completely filled in copy agreement.
3. You can prepay the full amount due under this at any time.
4. If you desire to pay off in advance the full amount which is outstanding will be furnished on r

Seller: GREAT EXPECTATIONS

Business Address:

City & State:

Authorized Signature:

Member (Buyer) acknowledges receipt of an exact copy of this of the time of its execution. Member (Buyer) further acknowledges that the Contract were completed and read-in and that the disclosures contained herein prior to signing the Contract.

Signature of Member: X

Title

Routing: White—FINANCE; Pink—SELLER; Gold—CUSTOMER

Exhibit

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of respondent V.L.P. Enterprises, Inc., a corporation, and respondent having been furnished thereafter with a copy of the draft of complaint that 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 Section 5(a) of the Federal Trade Commission Act and the Truth in Lending 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 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. V.L.P. Enterprises, Inc., doing business as Great Expectations of San Diego ("GE San Diego"), 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 3465 Camino Del Rio South, Suite 300, San Diego, CA.

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:

A. Respondent GE San Diego, 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 offering of credit, do forthwith cease and desist from failing to accurately calculate and disclose the annual percentage rate, as required by Sections 107(a) and (c) of the Truth in Lending Act, 15 U.S.C. 1606(a) and (c), and Sections 226.18(e) and 226.22 of Regulation Z, 12 CFR 226.18(e) and 226.22;

B. Respondent GE San Diego, 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 offering of credit, do forthwith cease and desist from failing to accurately calculate and disclose the finance charge, as required by Section 106 of the TILA, 15 U.S.C. 1605, and Sections 226.4 and 226.18(d) of Regulation Z, 12 CFR 226.4 and 226.18(d);

C. Respondent GE San Diego, 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 offering of credit, do forthwith cease and desist from failing to make all disclosures in the manner, form, and amount required by Sections 122 and 128(a) of the TILA, 15 U.S.C. 1632 and 1638(a), and Sections 226.17 and 226.18 of Regulation Z, 12 CFR 226.17 and 226.18;

D. Respondent GE San Diego, 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 offering of credit, do forthwith cease and desist from failing to comply with the TILA, 15 U.S.C. 1601 *et seq.*, and Regulation Z, 12 CFR 226.

II.

REFUND PROGRAM

It is further ordered, That:

A. Within thirty (30) days following the date of service of this order, respondent shall:

1. Determine to whom respondent disclosed on the original TILA disclosure an annual percentage rate that was miscalculated by more than one quarter of one percentage point below the annual percentage rate determined in accordance with Section 226.22 of Regulation Z, 12 CFR 226.22, or that disclosed a finance charge that was miscalculated by more than one dollar below the finance charge determined in accordance with Section 226.4 of Regulation Z, 12 CFR 226.4, so that each such person will not be required to pay a finance charge in excess of the finance charge actually disclosed or the dollar equivalent of the annual percentage rate actually disclosed, whichever is lower, plus a tolerance of one quarter of one percentage point;

2. Calculate a lump sum refund and a monthly payment adjustment, if applicable, in accordance with Section 108(e) of the TILA, 15 U.S.C. 1607(e);

3. Mail a refund check to each eligible consumer in the amount determined above, along with Attachment 1; and

4. Provide the Federal Trade Commission with a list of each such consumer, the amount of the refund, the number of payments refunded, the amount of adjustment for future payments and the number of future payments to be adjusted.

B. No later than fifteen (15) days following the date of service of this order, respondent shall provide the Federal Trade Commission with the name and address of three independent accounting firms, with which it, its officers, employees, attorneys, agents, and franchisees have no business relationship. Staff for the Division of Credit Practices of the FTC shall then have the sole discretion to choose one of the firms ("independent agent") and so advise respondent;

C. Within thirty (30) days following the date of adjustments made pursuant to this section, respondent shall direct the independent agent to review a statistically-valid sample of refunds. Respondent shall provide the Federal Trade Commission with a certified letter from the independent agent confirming that respondent has complied with Part II.A. of this order;

D. All costs associated with the administration of the refund program and payment of refunds shall be borne by the respondent.

III.

It is further ordered, That respondent, its successors and assigns, shall maintain for at least five (5) years from the date of service of this order and, upon thirty (30) days advance written request, make available to the Federal Trade Commission for inspection and copying all documents and other records necessary to demonstrate fully its compliance with this order.

IV.

It is further ordered, That respondent, its successors and assigns, shall distribute a copy of this order to any present or future officers and managerial employees having responsibility with respect to the subject matter of this order and that respondent, its successors and assigns, shall secure from each such person a signed statement acknowledging receipt of said order.

V.

It is further ordered, That respondent, for a period of five (5) years following the date of service of this order, shall promptly notify the Commission at least thirty (30) days prior to any proposed change in its corporate structure such as 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 that may affect compliance obligations arising out of the order.

VI.

It is further ordered, That respondent shall, within one hundred and eighty (180) days of 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.

ATTACHMENT 1

Dear Great Expectations Customer:

As part of our settlement with the Federal Trade Commission for alleged violations of the Truth in Lending Act, we are sending you the enclosed refund check in the amount of \$*****. The refund represents the amount you were overcharged as a result of errors made by Great Expectations in calculating or disclosing the annual percentage rate or finance charge.

[In addition, your future monthly payments have been reduced. Starting immediately, your monthly payments will be \$*****.]

We regret any inconvenience this may have caused you.

Great Expectations

IN THE MATTER OF

GREAT EXPECTATIONS CREATIVE MANAGEMENT, INC., ET AL.

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

Docket C-3604. Complaint, Aug. 11, 1995--Decision, Aug. 11, 1995

This consent order requires, among other things, the franchisor of video dating services and its four franchises to properly and accurately disclose the annual percentage rate ("APR") and other credit terms of financed memberships, as required by the federal Truth in Lending Act and requires the franchises to establish adjustment refund programs to compensate its past and current members who overpaid and were misled by the undisclosed finance charges and APRs. In addition, the consent order prohibits the respondents from providing franchises contracts with pre-printed APRs.

Appearances

For the Commission: *Stephen Cohen, Judy Nixon and David Medine.*

For the respondents: *David Laufer, Kindel & Anderson, Woodland Hills, CA.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Great Expectations Creative Management, Inc. has violated the Federal Trade Commission Act ("FTC Act"), and that Great Expectations, Inc., GEC Illinois, Inc., GEC Tennessee, Inc., GEC Alabama, Inc., Great Southern Video, Inc., New West Video Enterprises, Inc., San Antonio Singles of Texas, Inc., Austin Singles of Texas, Inc., Great Expectations of Baltimore, Inc., Great Expectations of Washington, D.C., Inc., Great Expectations of Washington, Inc., Sterling Connections, Inc., Private Eye Productions, Inc., Great Expectations - Columbus, Inc., JAMS Financial, Inc., V.L.P. Enterprises, Inc., APM Enterprises - Minn Inc., KGE, Inc., G.E.C.H., Inc., MWVE, Inc., GREATEX Denver, Inc., Sun West Video, Inc., and TRIAAC Enterprises, Inc. (hereinafter sometimes referred to collectively as "Great

Expectations") have violated the Truth in Lending Act ("TILA"), its implementing Regulation Z, and the FTC Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint, and alleges as follows:

PARAGRAPH 1. Great Expectations Creative Management, Inc. ("GECM") 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 16830 Ventura Blvd., Suite P, Encino, CA.

PAR. 2. Great Expectations, Inc. ("GEI") is a corporation organized, existing, and doing business under and by virtue of the laws of the state of California, with its corporate office at 16830 Ventura Blvd., Suite P, Encino, CA, and its principal places of business located at 1640 S. Sepulveda Blvd., Suite 100, Los Angeles, CA, 17207 Ventura Blvd., Encino, CA, and 450 N. Mountain, Suite B, Upland, CA.

PAR. 3. GEC Illinois, Inc. ("GE Illinois") is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Illinois, with its office and principal place of business located at 1701 E. Woodfield Dr., Suite 400, Schaumburg, IL.

PAR. 4. GEC Tennessee, Inc. ("GE Tennessee") 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 5552 Franklin Rd., Suite 200, Nashville, TN.

PAR. 5. GEC Alabama, Inc. ("GE Alabama") is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Alabama, with its office and principal place of business located at 7529 S. Memorial Pkwy., Suite C & D, Huntsville, AL.

PAR. 6. Great Southern Video, Inc., doing business as Great Expectations of Dallas ("GE Dallas"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Texas, with its office and principal place of business located at 14180 Dallas Pkwy., Suite 100, Dallas, TX.

PAR. 7. New West Video Enterprises, Inc., doing business as Great Expectations of Houston ("GE Houston"), is a corporation organized, existing, and doing business under and by virtue of the

laws of the state of Texas, with its office and principal place of business located at 50 Briarhollow, Suite 100, Houston, TX.

PAR. 8. San Antonio Singles of Texas, Inc., doing business as Great Expectations of San Antonio ("GE San Antonio"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Texas, with its corporate office at 10497 Town & Country Way, Suite 214, Houston, TX, and its principal place of business located at 8131 I.H. 10 West, Suite 225, San Antonio, TX.

PAR. 9. Austin Singles of Texas, Inc., doing business as Great Expectations of Austin ("GE Austin"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Texas, with its corporate office at 10497 Town & Country Way, Suite 214, Houston, TX, and its principal place of business located at 9037 Research Blvd., Suite 130, Austin, TX.

PAR. 10. Great Expectations of Baltimore, Inc. ("GE Baltimore") is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Virginia, with its office and principal place of business located at 40 York Rd., Suite 500, Towson, MD.

PAR. 11. Great Expectations of Washington, D.C., Inc. ("GE DC") 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 8601 Westwood Center Dr., Vienna, VA.

PAR. 12. Great Expectations of Washington, Inc., doing business as Great Expectations of Raleigh/Durham ("GE Raleigh"), 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 3714 Benson Dr., Suite 200, Raleigh, NC.

PAR. 13. Sterling Connections, Inc., doing business as Great Expectations of Seattle ("GE Seattle"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Oregon, with its office and principal place of business located at 305 108th Ave., N.E., Suite 205, Bellevue, WA.

PAR. 14. Private Eye Productions, Inc., doing business as Great Expectations of Portland ("GE Portland"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Oregon, with its office and principal place of business located at 5531 S.W. Macadam Ave., Suite 225, Portland, OR.

PAR. 15. Great Expectations - Columbus, Inc. ("GE Columbus") is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Ohio, with its corporate office at 11835 W. Olympic Blvd., Suite 490, Los Angeles, CA, and its principal place of business located at 1103 Schrock Rd., Suite 101, Columbus, OH.

PAR. 16. JAMS Financial, Inc., doing business as Great Expectations of Milwaukee ("GE Milwaukee"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Wisconsin, with its corporate office at 11835 W. Olympic Blvd., Suite 490, Los Angeles, CA, and its principal place of business located at 16650 W. Bluemound, Suite 100, Brookfield, WI.

PAR. 17. V.L.P. Enterprises, Inc., doing business as Great Expectations of San Diego ("GE San Diego"), 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 3465 Camino Del Rio South, Suite 300, San Diego, CA.

PAR. 18. APM Enterprises - Minn Inc., doing business as Great Expectations of Minneapolis ("GE Minneapolis"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Illinois, with its office and principal place of business located at 3300 Edinborough Way, Suite 300, Edina, MN.

PAR. 19. KGE, Inc., doing business as Great Expectations of Sausalito, Great Expectations of Mountain View, and Great Expectations of Walnut Creek (collectively referred to as "GE-SFA"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of California, with its corporate office at 1943 Landings Dr., Mountain View, CA, and its principal places of business located at 2401 Marinship Way, Suite 100, Sausalito, CA, 2085 Landings Dr., Mountain View, CA, and 1280 Civic Dr., Suite 300, Walnut Creek, CA.

PAR. 20. G.E.C.H., Inc., doing business as Great Expectations of Cherry Hill ("GE Cherry Hill"), 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 places of business located at One Cherry Hill, Suite 600, Cherry Hill, NJ.

PAR. 21. MWVE, Inc., doing business as Great Expectations of Cleveland ("GE Cleveland"), is a corporation organized, existing, and

doing business under and by virtue of the laws of the state of Ohio, with its office and principal place of business located at 6300 Rockside Rd., Suite 200, Cleveland, OH.

PAR. 22. GREATEX Denver, Inc., doing business as Great Expectations Video Dating, Ltd. ("GE-Denver"), 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 3773 Cherry Creek North Dr., Suite 140, Denver, CO.

PAR. 23. Sun West Video, Inc., doing business as Great Expectations for Singles ("GE Phoenix"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Arizona, with its office and principal place of business located at 5635 N. Scottsdale Rd., Suite 190, Scottsdale, AZ.

PAR. 24. TRIAAC Enterprises, Inc., doing business as Great Expectations of Sacramento ("GE Sacramento"), 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 2277 Fair Oaks Blvd., Suite 195, Sacramento, CA.

RESPONDENTS' COURSE OF BUSINESS

PAR. 25. GECM is a video dating franchisor. It sells and services franchise operations throughout the United States. As part of its regular course of business, GECM has created and disseminated retail installment contracts (Exhibits 1 and 2) to the franchises described in paragraphs two through twenty-four. The GECM retail installment contracts purport to incorporate the disclosures required by the TILA.

PAR. 26. Respondents Great Expectations are video dating franchises. Respondents have provided financing to their members using retail installment contracts such as Exhibits 1 and 2 to disclose the terms of the financing.

PAR. 27. GECM's TILA disclosure (Exhibit 1) contains erroneous instructions for calculating and disclosing the finance charge and contains a pre-printed annual percentage rate ("APR") of 18%. In addition, Exhibit 1 fails to make the TILA disclosures in the format required by the TILA and fails to identify the creditor as required by the TILA.

PAR. 28. In 1988, GECM learned from its auditor that the calculations and disclosures contained in Exhibit 1 did not comply

with the TILA. Nevertheless, it continued to disseminate Exhibit 1 to its franchisees and failed to notify them of the erroneous calculations and disclosures.

PAR. 29. In late 1990, GECM created a new retail installment contract, which also purported to incorporate the disclosures required by the TILA and which contained a pre-printed APR of 19.6% (Exhibit 2). Exhibit 2 fails to identify the creditor as required by the TILA and fails to provide the information required by the TILA in the itemization of the amount financed. Furthermore, GECM has disseminated Exhibit 2 to its franchisees but has failed to inform them to discontinue using the erroneous calculation and disclosure instructions that it had previously supplied in Exhibit 1.

PAR. 30. Respondents Great Expectations are creditors as that term is defined in the TILA and Regulation Z.

PAR. 31. The acts and practices of respondents Great Expectations and GECM alleged in this complaint have been and are in or affecting commerce, as "commerce" is defined in Section 4 of the FTC Act.

COUNT I

PAR. 32. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 33. Respondent GECM has furnished its franchises with TILA disclosures (Exhibits 1 and 2) that, on their face, violated the TILA. When used by respondents Great Expectations, Exhibits 1 and 2 have resulted in false and misleading disclosures of APRs and finance charges to consumers in violation of Section 5 of the FTC Act.

PAR. 34. In the course and practice of its business as described in paragraphs twenty-five through twenty-nine, and paragraph thirty-three, respondent GECM has provided respondents Great Expectations with the means and instrumentalities to violate the Section 5 of the FTC Act.

PAR. 35. The practices described in paragraph thirty-four constitute unfair or deceptive acts or practices in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. 45(a).

COUNT II

PAR. 36. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 37. Respondents GEI, GE Illinois, GE Tennessee, GE Alabama, GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Columbus, GE Milwaukee, GE San Diego, GE Minneapolis, GE-SFA, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento have furnished their members with TILA disclosures that have failed to accurately calculate and disclose the APR.

PAR. 38. The practice described in paragraph thirty-seven by respondents GEI, GE Illinois, GE Tennessee, GE Alabama, GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Columbus, GE Milwaukee, GE San Diego, GE Minneapolis, GE-SFA, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento violates Sections 107(a) and (c) of the TILA, 15 U.S.C. 1606(a) and (c), and Sections 226.18(e) and 226.22 of Regulation Z, 12 CFR 226.18(e) and 226.22.

COUNT III

PAR. 39. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 40. Respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Columbus, GE Milwaukee, GE-SFA, GE Cleveland, GE Phoenix, GE Sacramento, and GE San Diego have furnished their members with TILA disclosures that have failed to accurately calculate and disclose the finance charge.

PAR. 41. The practice described in paragraph forty by respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Columbus, GE Milwaukee, GE-SFA, GE Cleveland, GE Phoenix, GE Sacramento, and GE San Diego violates Section 106 of the TILA, 15 U.S.C. 1605, and Sections 226.4 and 226.18(d) of Regulation Z, 12 CFR 226.4 and 226.18(d).

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COUNT IV

PAR. 42. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 43. Respondents GE Dallas, GE Houston, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, and GE Phoenix have furnished their members with TILA disclosures that have failed to disclose the finance charge more conspicuously than any other disclosure except the APR and the creditor's identity.

PAR. 44. The practice described in paragraph forty-three by respondents GE Dallas, GE Houston, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, and GE Phoenix violates Section 122(a) of the TILA, 15 U.S.C. 1632(a), and Section 226.17(a)(2) of Regulation Z, 12 CFR 226.17(a)(2).

COUNT V

PAR. 45. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 46. Respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento have furnished their members with TILA disclosures that have failed to segregate the disclosures required by the TILA from all other information provided in connection with the transaction, including the itemization of the amount financed.

PAR. 47. The practice described in paragraph forty-six by respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento violates Section 128(b)(1) of the TILA, 15 U.S.C. 1638(b)(1), and Section 226.17(a)(1) of Regulation Z, 12 CFR 226.17(a)(1).

COUNT VI

PAR. 48. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 49. Respondents GEI, GE Illinois, GE Tennessee, GE Alabama, GE Dallas, GE Houston, GE San Antonio, GE Austin, GE

Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Columbus, GE San Diego, GE Minneapolis, GE-SFA, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento have failed to accurately disclose the itemization of the amount financed.

PAR. 50. The practice described in paragraph forty-nine by respondents GEI, GE Illinois, GE Tennessee, GE Alabama, GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Columbus, GE San Diego, GE Minneapolis, GE-SFA, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento violates Section 128(a) of the TILA, 15 U.S.C. 1638(a), and Section 226.18(c) of Regulation Z, 12 CFR 226.18(c).

COUNT VII

PAR. 51. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 52. Respondents GEI, GE Illinois, GE Tennessee, GE Alabama, GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Columbus, GE Milwaukee, GE San Diego, GE Minneapolis, GE-SFA, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento have failed to disclose the identity of the creditor.

PAR. 53. The practice described in paragraph fifty-two by respondents GEI, GE Illinois, GE Tennessee, GE Alabama, GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Columbus, GE Milwaukee, GE San Diego, GE Minneapolis, GE-SFA, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento violates Section 128(a)(1) of the TILA, 15 U.S.C. 1638(a)(1), and Section 226.18(a) of Regulation Z, 12 CFR 226.18(a).

COUNT VIII

PAR. 54. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 55. Respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, GE Phoenix,

and GE Sacramento have furnished their members with TILA disclosures that have failed to provide a description of the amount financed.

PAR. 56. The practice described in paragraph fifty-five by respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento violates Section 128(a)(8) of the TILA, 15 U.S.C. 1638(a)(8), and Section 226.18(b) of Regulation Z, 12 CFR 226.18(b).

PAR. 57. Respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento have furnished their members with TILA disclosures that have failed to provide a description of the finance charge.

PAR. 58. The practice described in paragraph fifty-seven by respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento violates Section 128(a)(8) of the TILA, 15 U.S.C. 1638(a)(8), and Section 226.18(d) of Regulation Z, 12 CFR 226.18(d).

PAR. 59. Respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento have furnished their members with TILA disclosures that have failed to provide a description of the APR.

PAR. 60. The practice described in paragraph fifty-nine by respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento violates Section 128(a)(8) of the TILA, 15 U.S.C. 1638(a)(8), and Section 226.18(e) of Regulation Z, 12 CFR 226.18(e).

PAR. 61. Respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento have furnished their

members with TILA disclosures that have failed to provide the total of payments and/or a description of the total of payments.

PAR. 62. The practice described in paragraph sixty-one by respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento violates Section 128(a)(5) and/or (8) of the TILA, 15 U.S.C. 1638(a)(5) and/or (8), and Section 226.18(h) of Regulation Z, 12 CFR 226.18(h).

PAR. 63. Respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento have furnished their members with TILA disclosures that have failed to provide the total sale price and/or a description of the total sale price.

PAR. 64. The practice described in paragraph sixty-three by respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento violates Section 128(a)(7) and/or (8) of the TILA, 15 U.S.C. 1638(a)(7) and/or (8), and Section 226.18(j) of Regulation Z, 12 CFR 226.18(j).

COUNT IX

PAR. 65. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 66. Respondents GE Dallas, GE Houston, GE Phoenix, GE San Antonio, GE Austin, GE Baltimore, GE DC, and GE Raleigh have failed to include set-up or other fees that are charged only to consumers who finance the costs of their memberships in the finance charge and the annual percentage rate disclosed to the consumer. They have also failed to exclude these finance charges from the amount financed that is disclosed to consumers.

PAR. 67. The practices described in paragraph sixty-six by respondents GE Dallas, GE Houston, GE Phoenix, GE San Antonio, GE Austin, GE Baltimore, GE DC, and GE Raleigh violate Sections 106, 107, and 128(a) of the TILA, 15 U.S.C. 1605, 1606, and 1638(a), and Sections 226.4(b), 226.22, and 226.18(b), (d), and (e) of Regulation Z, 12 CFR 226.4(b), 226.22, and 226.18(b), (d), and (e).

Complaint

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COUNT X

PAR. 68. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 69. Respondent GE San Diego has furnished its members with TILA disclosures that have failed to disclose the APR, the finance charge, the amount financed, the total of payments, and the total sales price.

PAR. 70. The practices described in paragraph sixty-nine by respondent GE San Diego violate Section 128(a) of the TILA, 15 U.S.C. 1638(a), and Section 226.18 of Regulation Z, 12 CFR 226.18.

COUNT XI

PAR. 71. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 72. Respondent GE Houston has furnished its members with TILA disclosures that have failed to disclose the amount financed.

PAR. 73. The practice described in paragraph seventy-two by respondent GE Houston violates Section 128(a) of the TILA, 15 U.S.C. 1638(a), and Section 226.18(b) of Regulation Z, 12 CFR 226.18(b).

COUNT XII

PAR. 74. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 75. Respondents GEI, GE Alabama, GE Illinois, GE Portland, GE Dallas, GE Houston, GE Cleveland, GE Phoenix, GE San Antonio, GE Austin, GE Seattle, GE Denver, GE Columbus, GE Milwaukee, GE San Diego, GE Minneapolis, GE SFA, GE Cherry Hill, GE Sacramento, GE DC, GE Baltimore, and GE Raleigh have disclosed understated APRs and finance charges to consumers that have resulted in consumers paying more in financing costs than the amount to which they originally agreed.

PAR. 76. The practices described in paragraph seventy-five are unfair or deceptive acts or practices in violation of Section 5(a) of the FTC Act, 15 U.S.C. 45(a).

GREAT EXPECTATIONS CREATIVE MANAGEMENT, INC., ET AL. 461

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Complaint

EXHIBIT 1

Expectations RETAIL INSTALLMENT CONTRACT

Name - Last: [redacted] First: [redacted] Middle: [redacted] Age: 26

Present Address: [redacted] City: [redacted] State: CO Zip: 80010

Social Security #: [redacted] Home Phone: [redacted] How Long At This Address: 5 YRS How Long in Area: 26 YRS

Employed By: [redacted] Work Phone: [redacted] Present Position: [redacted]

Income All Sources: [redacted] Annual: [redacted] Driver's License #: [redacted]

Primary Bank Accounts: Savings Balance: [redacted] Checking Balance: [redacted]

Credit Reference - Banks, Finance Co., Credit Unions: [redacted] Open Closed Limit: [redacted]

1. USA

2. FIRST INTERSTATE Bank Open Closed Limit: [redacted]

The undersigned Great Expectations (Seller) hereby sells, and the undersigned Buyer, hereinafter referred to as "Member" purchases, subject to the provisions of this contract, a MEMBERSHIP in Great Expectations and promises to pay to Great Expectations its share of the TOTAL PAYMENTS (Box 8) in accordance with the Payment Schedule hereinafter set forth.

DESCRIPTION OF GOODS AND SERVICES SOLD:
Interviewing, Testing & Evaluating, Processing & Coding, Background check (if necessary), for the purpose of bringing in contact with the purchaser (clients) suitable individuals with similar likes and dislikes, this description intended to be partial only. The purchaser acknowledges receipt of application form, which is made a part hereto as though set out at length.

READ CAREFULLY AND SIGN ONLY WHEN COMPLETELY UNDERSTOOD

Buyer has considered and evaluated the terms of membership as set forth in Great Expectations Membership Agreement dated 10/31/91 and requests financing of the balance due. Acceptance of the terms of both agreements renders null and void any Buyer's right to cancel previously provided.

I understand that my failure to participate in Great Expectations does not relieve me of my obligation to pay this contract in full regardless of the circumstances. I understand that by signing this Agreement I am a Member of Great Expectations.

MEMBER SIGNATURE X [redacted]

NOTICE TO MEMBER: Upon request, Great Expectations must provide or make available for your examination a statement or table showing how the partial refund of the time price charge is to be computed if any balance of the contract should be prepaid. Member (Buyer) and Great Expectations (Seller) agree that the terms and conditions on the Member's Contract for Membership constitute a part of this contract and are incorporated herein by reference. If due to delinquency, it is necessary to refer this account for collection, then the balance due shall include actual attorney's fee and court costs. In the event Member fails to pay any installment payment when due, the entire balance then owing shall immediately become due and payable, without notice, at the option of Great Expectations or assignee, and Great Expectations shall not be required to provide any services to Member until Member's payment account is made current. If more than one person signs this contract then their obligation shall be joint and several.

ITEMIZATION OF THE AMOUNT FINANCED

	1595	BALANCE
1. Cash Price	= 0	= 1595
2. Other:		
3. Down Payment	- 300	= 1295
4. Paid 11/14/91 Second Interview -	100	= 1195
5. Other Payments Due (11/30/91)	100	= 1095
6. Amt. Financed (Unpaid Bal. at Cash Price #3)	1095	= 1095
7. Finance Charge @ 6% Bal. x 14% x 5 (no. of payments)		= 82.13
8. Total Payment (Bal. + 7)		= 1177.13
9. Deferred Payment Price (Bal. #2 + #7)	1477.13	

DIVIDE by number of payments to calculate each installment and summarize on #11.

10. ANNUAL PERCENTAGE RATE 18%
11. PAYMENT SCHEDULE:
5 successive monthly installments of \$ 235.00 each, commencing 12/15/91, and on the same day of each month thereafter, until fully paid. NO BALLOON PAYMENT.
12. DELINQUENCY AND COLLECTION CHARGES: Buyer shall fail or neglect to pay any installment payment when the same shall become due and such failure to report shall constitute for a period of more than ten (10) days, then in addition to the amount of such delinquent installment payment the Buyer shall pay to Seller, as delinquency and collection charge, an amount equal to 1% of such payment, except that such charge shall not exceed \$3.00 or be more than \$1.00.
13. PREPAYMENT REBATE: Buyer may prepay any part of the unpaid balance without penalty and upon payment in full Buyer shall be entitled to a rebate equal to the unearned portion of the Finance Charge computed under the simple interest basis, however, there shall be minimum Finance Charge of \$10.00 and no rebate shall be earned thereon in excess of \$1.00.

*Notice to buyer: (1) Do not sign this agreement before you read it or if it contains any blank spaces to be filled in. (2) You are entitled to a complete itemized copy of this agreement. (3) You can prepay the full amount due under this agreement at any time. (4) If you agree to pay off in advance the full amount due, the amount which is outstanding will be furnished upon request.

SELLER Great Expectations Signature of Member X [redacted]

Business Address: 3773 Cherry Creek N. Dr. #400 Member: Buyer acknowledges receipt of an exact copy of this instrument at the time of its execution. Member (Buyer) further acknowledges that the blanks in this contract were completed and filled-in and that he has read the disclosures contained here prior to signing the contract.

City & State: Danver CO 8007

Authorized Signatures: [redacted] Signature of Member X [redacted]

Exhibit 1

Complaint

120 F.T.C.

EXHIBIT 2



RETAIL INSTALLMENT CONTRACT

DATE _____

Name: Last _____ First _____ Middle _____ Age _____

Present Address _____ City _____ State _____ Zip _____

Social Security # _____ Home Phone _____ How Long At This Address _____ Date of Birth _____

Employed By (Name and Address): _____ Work Phone _____ Present Position _____

Income All Sources _____ Annual _____ Driver's License # _____

Primary Bank Accounts: Savings Checking Name _____ Account # _____

The undersigned Great Expectations (Seller) hereby sells, and the undersigned buyer (Member) purchases, subject to the provisions of this G.E. MEMBERSHIP in Great Expectations and promises to pay to Great Expectations or its assigns the TOTAL PAYMENTS in accordance with the Schedule hereinafter set forth.

DESCRIPTION OF GOODS AND SERVICES SOLD: Interviewing, Evaluating, Processing & Coding, Background Checks (if necessary) and Photo Video Library for the purpose of giving Member access to a Video Library of potentially suitable individuals with similar likes and dislikes. This description is to be printed only.

READ CAREFULLY AND SIGN ONLY WHEN COMPLETELY UNDERSTOOD

I have considered and evaluated the terms of membership as set forth in the Great Expectations Membership Agreement dated _____ and request financing of the balance due. I understand that my failure to participate in Great Expectations does not relieve me of my obligation to Contract in full. I understand that by signing this Contract, and the Membership Agreement, I am a Member of Great Expectations.

MEMBER SIGNATURE: X _____

NOTICE TO MEMBER: Upon request, Great Expectations must provide or make available for your examination a statement or table showing how in return of the time area charge is to be computed if any balance of the Contract should be prepaid. Member (Buyer) and Great Expectations (Seller) that the terms and conditions of the Great Expectations Membership Agreement constitute a part of this Contract and are incorporated herein by reference. The Member hereby agrees to pay any installment payments when due, the entire balance (less any unearned Finance Charge) when owing shall become due and payable, without demand or notice, at the option of Great Expectations or its assigns, and Great Expectations shall not be required to any services to Member until Member's payment account is made current.

PURCHASE PRICE: \$ _____ payable in accordance with the Statement of Disclosure below.

PAYMENT SCHEDULE: Member's payments hereunder shall be in equal consecutive monthly installments commencing on the _____ day of _____ month after execution of this Contract and continuing on the same day of each month thereafter until paid in full. Interest on the unpaid balance shall be both then and after maturity.

FEDERAL TRUTH IN LENDING DISCLOSURES
(Statement of Disclosure)

ANNUAL PERCENTAGE RATE	FINANCE CHARGE	AMOUNT FINANCED	TOTAL OF PAYMENTS	TOTAL SALES PRICE
Line 1	Line 2	Line 3	Line 4	Line 5
19.6%				

The use of any credit as a down payment will reduce the amount of the finance charge and the total amount of payments to be made.

You the buyer have the right to receive at this time an itemization of the amount financed. () I want an itemization. () I do not want an itemization. Your payment schedule will be:

Payment Schedule	APR/MAY/JUN
Number of payments: _____	Number of payments: _____

DELINQUENCY AND COLLECTION CHARGES: If Buyer shall fail or neglect to pay any installment payments when the same shall become due and such failure or neglect shall continue for a period of more than ten (10) days, then in addition to the amount of such delinquent installment payments the Buyer shall pay to Seller, as a delinquency and collection charge, an amount equal to 5% of such payment except that such charge shall not exceed \$5.00 or be less than \$1.00.

PREPAYMENT: If you pay off early, you will not have to pay a penalty and you may be entitled to a refund of part of the finance charge.

See your Great Expectations Membership Agreement for any additional information about non-payment, default, any required repayment in full before the schedule date and prepayments, returns and penalties.

"ITEMIZATION OF AMOUNT FINANCED"

	Proposed Rebate
1. Total Cash Price \$ _____	Buyer may prepay or all of the unpaid balance without penalty and payments in full (Buyer be entitled to a refund of the unearned part of the Finance Charge computed under the interest basis. How there will be a non-Finance Charge of \$ _____ and no refund if unearned charge is less than \$1.00.
2. Less Downpayment - \$ _____	
3. Amount Financed \$ _____	
4. Finance Charge \$ _____	
5. Total of Payments \$ _____	

Waiver of any default by the Seller shall not operate as a waiver of default.

Should the buyer default in the payment of any installment hereunder shall pay to Seller all actual and reasonable costs of collection and including reasonable Attorney fees and disbursements.

Buyer will pay to the Seller a \$10.00 charge for every delinquent or other instrument.

Should any term hereof be invalid or unenforceable, the remaining terms shall survive.

NOTICE TO BUYER:

1. Do not sign this agreement before you read it or if it contains any blank spaces to be filled in.
2. You are entitled to a completely filled in copy of agreement.
3. You can prepay the full amount due under this agreement at any time.
4. If you desire to pay off in advance the full amount due, amount which is outstanding will be furnished on request.

Member (Buyer) acknowledges receipt of an exact copy of this contract at the time of its execution. Member (Buyer) further acknowledges that the Contract was completed and filled-in and that s/he has read and understood the disclosures contained herein prior to signing the Contract.

Seller: GREAT EXPECTATIONS

Business Address: _____

City & State: _____

Authorized Signature: _____

Signature of Member: X _____

Title: _____

Routing: White—FINANCE; Pink—SELLER; Gold—CUSTOMER

©1999 Great Expectations Creative Management, Inc.

Exhibit 2

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of Great Expectations Creative Management, Inc., Great Expectations, Inc., GEC Illinois, Inc., GEC Tennessee, Inc., and GEC Alabama, Inc., corporations, and respondents having been furnished thereafter with a copy of the draft of complaint that 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 violations of Section 5(a) of the Federal Trade Commission Act and the Truth in Lending Act; and

The respondents, their attorney, 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 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 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. Great Expectations Creative Management, Inc. ("G/ECM") 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 16830 Ventura Blvd., Suite P, Encino, CA.

2. Great Expectations, Inc. ("G/EI") is a corporation organized, existing, and doing business under and by virtue of the laws of the state of California, with its corporate office at 16830 Ventura Blvd., Suite P, Encino, CA, and its principal places of business located at

1640 S. Sepulveda Blvd., Suite 100 Los Angeles, CA, 17207 Ventura Blvd., Encino, CA, and 450 N. Mountain, Suite B, Upland, CA.

3. GEC Illinois, Inc. ("GE Illinois") is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Illinois, with its office and principal place of business located at 1701 E. Woodfield Dr., Suite 400, Schaumburg, IL.

4. GEC Tennessee, Inc. ("GE Tennessee") 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 5552 Franklin Rd., Suite 200, Nashville, TN.

5. GEC Alabama, Inc. ("GE Alabama") is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Alabama, with its office and principal place of business located at 7529 S. Memorial Pkwy., Suite C & D, Huntsville, AL.

6. 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:

A. Respondent G/ECM, a corporation, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, do forthwith cease and desist from:

1. Providing a retail installment contract or any other financial instrument or disclosure to its franchisees that violates the Truth in Lending Act ("TILA"), 15 U.S.C. 1601 *et seq.*, and Regulation Z, 12 CFR 226;

2. Providing a retail installment contract or other TILA disclosure that contains a pre-printed annual percentage rate;

3. Providing instructions for calculating or disclosing the annual percentage rate, finance charge, or monthly payments that conflict with the TILA and Regulation Z;

4. Failing to take reasonable steps sufficient to ensure that its franchisees are complying with the TILA or Regulation Z including,

but not limited to, reviewing and randomly testing TILA disclosures used by its franchisees;

5. Failing to terminate, unless prohibited by state law, any franchise that G/ECM knows or should know does not comply with the TILA or Regulation Z;

6. Failing to make available to its franchisees a computer program or other comparable system that accurately calculates the disclosures required by the TILA and Regulation Z; and

7. Failing to provide Attachment 1 to all of its current franchisees;

B. Respondents G/EI, GE Illinois, GE Tennessee, and GE Alabama, their successors and assigns, and their officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the offering of credit, do forthwith cease and desist from failing to accurately calculate and disclose the annual percentage rate, as required by Sections 107(a) and (c) of the TILA, 15 U.S.C. 1606(a) and (c), and Sections 226.18(e) and 226.22 of Regulation Z, 12 CFR 226.18(e) and 226.22;

C. Respondents G/EI, GE Illinois, GE Tennessee, and GE Alabama, their successors and assigns, and their officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the offering of credit, do forthwith cease and desist from failing to make all disclosures in the manner, form, and amount required by Sections 122 and 128(a) of the TILA, 15 U.S.C. 1632 and 1638(a), and Sections 226.17 and 226.18 of Regulation Z, 12 CFR 226.17 and 226.18;

D. Respondents G/EI, GE Illinois, GE Tennessee, and GE Alabama, their successors and assigns, and their officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the offering of credit, do forthwith cease and desist from failing to comply with the TILA, 15 U.S.C. 1601 *et seq.*, and Regulation Z, 12 CFR 226.

II.

REFUND PROGRAM

It is further ordered, That:

A. Within sixty (60) days following the date of service of this order, respondents G/EI, GE Illinois, GE Tennessee, and GE Alabama shall:

1. For each TILA disclosure relating to any executory contract or any contract consummated within two years prior to July 20, 1994, determine to whom respondents disclosed on the original TILA disclosure an annual percentage rate that was miscalculated by more than one quarter of one percentage point below the annual percentage rate determined in accordance with Section 226.22 of Regulation Z, 12 CFR 226.22, or that disclosed a finance charge that was miscalculated by more than one dollar below the finance charge determined in accordance with Section 226.4 of Regulation Z, 12 CFR 226.4, so that each such person will not be required to pay a finance charge in excess of the finance charge actually disclosed or the dollar equivalent of the annual percentage rate actually disclosed, whichever is lower, plus a tolerance of one quarter of one percentage point; provided, however, that no determination need be made for any person that has already received a full refund of all finance charges paid to respondents;

2. Calculate a lump sum refund and a monthly payment adjustment, if applicable, in accordance with Section 108(e) of the TILA, 15 U.S.C. 1607(e);

3. Mail a refund check to each eligible consumer in the amount determined above, along with Attachment 2; provided, however, that should such consumer have a balance due and owing respondents and should respondents have a legal right to collect such balance under state law and under the terms of their contract with the consumer, the refund may be applied to that balance and the excess, if any, shall be refunded to each such consumer;

4. Provide the Federal Trade Commission with a list of each such consumer, the amount of the refund, the number of payments refunded, the amount of adjustment for future payments and the number of future payments to be adjusted;

B. No later than fifteen (15) days following the date of service of this order, respondents G/EI, GE Illinois, GE Tennessee, and GE Alabama shall provide the Federal Trade Commission with the name and address of three independent accounting firms, with which they, their officers, employees, attorneys, and agents, have no business relationship. Staff for the Division of Credit Practices of the FTC shall then have the sole discretion to choose one of the firms ("independent agent") and so advise respondents;

C. Within thirty (30) days following the date of adjustments made pursuant to this section, respondents G/EI, GE Illinois, GE Tennessee, and GE Alabama shall direct the independent agent to review a statistically-valid sample of refunds. Respondents shall provide the Federal Trade Commission with a certified letter from the independent agent confirming that respondents have complied with Part II. A. of this order;

D. All costs associated with the administration of the refund program and payment of refunds shall be borne by respondents G/EI, GE Illinois, GE Tennessee, and GE Alabama.

III.

It is further ordered, That respondents, their successors and assigns, shall maintain for at least five (5) years from the date of service of this order and, upon thirty (30) days advance written request, make available to the Federal Trade Commission for inspection and copying all documents and other records necessary to demonstrate fully their compliance with this order.

IV.

It is further ordered, That respondents, their successors and assigns, shall distribute a copy of this order to any present or future officers and managerial employees having responsibility with respect to the subject matter of this order and that respondents, their successors and assigns, shall secure from each such person a signed statement acknowledging receipt of said order.

V.

It is further ordered, That respondents, for a period of five (5) years following the date of service of this order, shall promptly notify the Commission at least thirty (30) days prior to any proposed change in their corporate structure such as 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 that may affect compliance obligations arising out of the order.

VI.

It is further ordered, That respondents shall, within one hundred and eighty (180) days of 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.

ATTACHMENT 1

IMPORTANT NOTICE TO GREAT EXPECTATIONS' FRANCHISEES

We have reached a settlement with the Federal Trade Commission concerning their claims of alleged violations of the Truth in Lending Act and the Federal Trade Commission Act. The Federal Trade Commission believes that the retail installment contracts and the formula listed on them that we may have provided to you in the past may not comply with the Truth in Lending Act.

As part of our settlement, we agreed to alert you to immediately stop using any retail installment contracts we provided until you can verify that they comply with all local, state, and federal laws. As always, we recommend that you have your forms reviewed by your own attorney. We have a computer software program available for your use that can be used to help you make sure your disclosures are accurately calculated. To obtain a copy of this program, please contact Keith Granirer.

Jeffrey Ullman
President
Great Expectations Creative Management, Inc.

ATTACHMENT 2

Dear Great Expectations Member:

As part of our settlement with the Federal Trade Commission for alleged violations of the Truth in Lending Act, we are sending you the enclosed refund check in the amount of \$_____. The refund represents the amount you may have been overcharged as a result of a possible error in calculating or disclosing the annual percentage rate or finance charge.

[In addition, your future monthly payments have been reduced. Starting immediately, your monthly payments will be \$_____.]

We regret any inconvenience this may have caused you.

Great Expectations

Complaint

120 F.T.C.

IN THE MATTER OF

GREAT EXPECTATIONS OF COLUMBUS, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
THE TRUTH IN LENDING ACT AND SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT*Docket C-3605. Complaint, Aug. 11, 1995--Decision, Aug. 11, 1995*

This consent order requires, among other things, a video dating service franchise to properly and accurately disclose the annual percentage rate ("APR") and other credit terms of financed memberships, as required by the federal Truth in Lending Act, and requires the franchise to establish adjustment refund programs to compensate its past and current members who overpaid finance charges.

Appearances

For the Commission: *Stephen Cohen, Judy Nixon and David Medine.*

For the respondent: *Alan Korpady, Murphy Desmond, Madison, WI.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Great Expectations Creative Management, Inc. has violated the Federal Trade Commission Act ("FTC Act"), and that Great Expectations, Inc., GEC Illinois, Inc., GEC Tennessee, Inc., GEC Alabama, Inc., Great Southern Video, Inc., New West Video Enterprises, Inc., San Antonio Singles of Texas, Inc., Austin Singles of Texas, Inc., Great Expectations of Baltimore, Inc., Great Expectations of Washington, D.C., Inc., Great Expectations of Washington, Inc., Sterling Connections, Inc., Private Eye Productions, Inc., Great Expectations - Columbus, Inc., JAMS Financial, Inc., V.L.P. Enterprises, Inc., APM Enterprises - Minn Inc., KGE, Inc., G.E.C.H., Inc., MWVE, Inc., GREATEX Denver, Inc., Sun West Video, Inc., and TRIAAC Enterprises, Inc. (hereinafter sometimes referred to collectively as "Great Expectations") have violated the Truth in Lending Act ("TILA"), its implementing Regulation Z, and the FTC Act, and it appearing to the

Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint, and alleges as follows:

PARAGRAPH 1. Great Expectations Creative Management, Inc. ("GECM") 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 16830 Ventura Blvd., Suite P, Encino, CA.

PAR. 2. Great Expectations, Inc. ("GEI") is a corporation organized, existing, and doing business under and by virtue of the laws of the state of California, with its corporate office at 16830 Ventura Blvd., Suite P, Encino, CA, and its principal places of business located at 1640 S. Sepulveda Blvd., Suite 100, Los Angeles, CA, 17207 Ventura Blvd., Encino, CA, and 450 N. Mountain, Suite B, Upland, CA.

PAR. 3. GEC Illinois, Inc. ("GE Illinois") is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Illinois, with its office and principal place of business located at 1701 E. Woodfield Dr., Suite 400, Schaumburg, IL.

PAR. 4. GEC Tennessee, Inc. ("GE Tennessee") 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 5552 Franklin Rd., Suite 200, Nashville, TN.

PAR. 5. GEC Alabama, Inc. ("GE Alabama") is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Alabama, with its office and principal place of business located at 7529 S. Memorial Pkwy., Suite C & D, Huntsville, AL.

PAR. 6. Great Southern Video, Inc., doing business as Great Expectations of Dallas ("GE Dallas"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Texas, with its office and principal place of business located at 14180 Dallas Pkwy., Suite 100, Dallas, TX.

PAR. 7. New West Video Enterprises, Inc., doing business as Great Expectations of Houston ("GE Houston"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Texas, with its office and principal place of business located at 50 Briarhollow, Suite 100, Houston, TX.

PAR. 8. San Antonio Singles of Texas, Inc., doing business as Great Expectations of San Antonio ("GE San Antonio"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Texas, with its corporate office at 10497 Town & Country Way, Suite 214, Houston, TX, and its principal place of business located at 8131 I.H. 10 West, Suite 225, San Antonio, TX.

PAR. 9. Austin Singles of Texas, Inc., doing business as Great Expectations of Austin ("GE Austin"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Texas, with its corporate office at 10497 Town & Country Way, Suite 214, Houston, TX, and its principal place of business located at 9037 Research Blvd., Suite 130, Austin, TX.

PAR. 10. Great Expectations of Baltimore, Inc. ("GE Baltimore") is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Virginia, with its office and principal place of business located at 40 York Rd., Suite 500, Towson, MD.

PAR. 11. Great Expectations of Washington, D.C., Inc. ("GE DC") 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 8601 Westwood Center Dr., Vienna, VA.

PAR. 12. Great Expectations of Washington, Inc., doing business as Great Expectations of Raleigh/Durham ("GE Raleigh"), 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 3714 Benson Dr., Suite 200, Raleigh, NC.

PAR. 13. Sterling Connections, Inc., doing business as Great Expectations of Seattle ("GE Seattle"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Oregon, with its office and principal place of business located at 305 108th Ave., N.E., Suite 205, Bellevue, WA.

PAR. 14. Private Eye Productions, Inc., doing business as Great Expectations of Portland ("GE Portland"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Oregon, with its office and principal place of business located at 5531 S.W. Macadam Ave., Suite 225, Portland, OR.

PAR. 15. Great Expectations - Columbus, Inc. ("GE Columbus") is a corporation organized, existing, and doing business under and by

virtue of the laws of the state of Ohio, with its corporate office at 11835 W. Olympic Blvd., Suite 490, Los Angeles, CA, and its principal place of business located at 1103 Schrock Rd., Suite 101, Columbus, OH.

PAR. 16. JAMS Financial, Inc., doing business as Great Expectations of Milwaukee ("GE Milwaukee"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Wisconsin, with its corporate office at 11835 W. Olympic Blvd., Suite 490, Los Angeles, CA, and its principal place of business located at 16650 W. Bluemound, Suite 100, Brookfield, WI.

PAR. 17. V.L.P. Enterprises, Inc., doing business as Great Expectations of San Diego ("GE San Diego"), 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 3465 Camino Del Rio South, Suite 300, San Diego, CA.

PAR. 18. APM Enterprises - Minn Inc., doing business as Great Expectations of Minneapolis ("GE Minneapolis"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Illinois, with its office and principal place of business located at 3300 Edinborough Way, Suite 300, Edina, MN.

PAR. 19. KGE, Inc., doing business as Great Expectations of Sausalito, Great Expectations of Mountain View, and Great Expectations of Walnut Creek (collectively referred to as "GE-SFA"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of California, with its corporate office at 1943 Landings Dr., Mountain View, CA, and its principal places of business located at 2401 Marinship Way, Suite 100 Sausalito, CA, 2085 Landings Dr., Mountain View, CA, and 1280 Civic Dr., Suite 300, Walnut Creek, CA.

PAR. 20. G.E.C.H., Inc., doing business as Great Expectations of Cherry Hill ("GE Cherry Hill"), 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 places of business located at One Cherry Hill, Suite 600, Cherry Hill, NJ.

PAR. 21. MWVE, Inc., doing business as Great Expectations of Cleveland ("GE Cleveland"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Ohio,

with its office and principal place of business located at 6300 Rockside Rd., Suite 200, Cleveland, OH.

PAR. 22. GREATEX Denver, Inc., doing business as Great Expectations Video Dating, Ltd. ("GE-Denver"), 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 3773 Cherry Creek North Dr., Suite 140, Denver, CO.

PAR. 23. Sun West Video, Inc., doing business as Great Expectations for Singles ("GE Phoenix"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Arizona, with its office and principal place of business located at 5635 N. Scottsdale Rd., Suite 190, Scottsdale, AZ.

PAR. 24. TRIAAC Enterprises, Inc., doing business as Great Expectations of Sacramento ("GE Sacramento"), 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 2277 Fair Oaks Blvd., Suite 195, Sacramento, CA.

RESPONDENTS' COURSE OF BUSINESS

PAR. 25. GECM is a video dating franchisor. It sells and services franchise operations throughout the United States. As part of its regular course of business, GECM has created and disseminated retail installment contracts (Exhibits 1 and 2) to the franchises described in paragraphs two through twenty-four. The GECM retail installment contracts purport to incorporate the disclosures required by the TILA.

PAR. 26. Respondents Great Expectations are video dating franchises. Respondents have provided financing to their members using retail installment contracts such as Exhibits 1 and 2 to disclose the terms of the financing.

PAR. 27. GECM's TILA disclosure (Exhibit 1) contains erroneous instructions for calculating and disclosing the finance charge and contains a pre-printed annual percentage rate ("APR") of 18%. In addition, Exhibit 1 fails to make the TILA disclosures in the format required by the TILA and fails to identify the creditor as required by the TILA.

PAR. 28. In 1988, GECM learned from its auditor that the calculations and disclosures contained in Exhibit 1 did not comply with the TILA. Nevertheless, it continued to disseminate Exhibit 1

to its franchisees and failed to notify them of the erroneous calculations and disclosures.

PAR. 29. In late 1990, GECM created a new retail installment contract, which also purported to incorporate the disclosures required by the TILA and which contained a pre-printed APR of 19.6%. (Exhibit 2). Exhibit 2 fails to identify the creditor as required by the TILA and fails to provide the information required by the TILA in the itemization of the amount financed. Furthermore, GECM has disseminated Exhibit 2 to its franchisees but has failed to inform them to discontinue using the erroneous calculation and disclosure instructions that it had previously supplied in Exhibit 1.

PAR. 30. Respondents Great Expectations are creditors as that term is defined in the TILA and Regulation Z.

PAR. 31. The acts and practices of respondents Great Expectations and GECM alleged in this complaint have been and are in or affecting commerce, as "commerce" is defined in Section 4 of the FTC Act.

COUNT I

PAR. 32. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 33. Respondent GECM has furnished its franchises with TILA disclosures (Exhibits 1 and 2) that, on their face, violated the TILA. When used by respondents Great Expectations, Exhibits 1 and 2 have resulted in false and misleading disclosures of APRs and finance charges to consumers in violation of Section 5 of the FTC Act.

PAR. 34. In the course and practice of its business as described in paragraphs twenty-five through twenty-nine, and paragraph thirty-three, respondent GECM has provided respondents Great Expectations with the means and instrumentalities to violate the Section 5 of the FTC Act.

PAR. 35. The practices described in paragraph thirty-four constitute unfair or deceptive acts or practices in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. 45(a).

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COUNT II

PAR. 36. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 37. Respondents GEI, GE Illinois, GE Tennessee, GE Alabama, GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Columbus, GE Milwaukee, GE San Diego, GE Minneapolis, GE-SFA, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento have furnished their members with TILA disclosures that have failed to accurately calculate and disclose the APR.

PAR. 38. The practice described in paragraph thirty-seven by respondents GEI, GE Illinois, GE Tennessee, GE Alabama, GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Columbus, GE Milwaukee, GE San Diego, GE Minneapolis, GE-SFA, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento violates Sections 107(a) and (c) of the TILA, 15 U.S.C. 1606(a) and (c), and Sections 226.18(e) and 226.22 of Regulation Z, 12 CFR 226.18(e) and 226.22.

COUNT III

PAR. 39. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 40. Respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Columbus, GE Milwaukee, GE-SFA, GE Cleveland, GE Phoenix, GE Sacramento, and GE San Diego have furnished their members with TILA disclosures that have failed to accurately calculate and disclose the finance charge.

PAR. 41. The practice described in paragraph forty by respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Columbus, GE Milwaukee, GE-SFA, GE Cleveland, GE Phoenix, GE Sacramento, and GE San Diego violates Section 106 of the TILA, 15 U.S.C. 1605, and Sections 226.4 and 226.18(d) of Regulation Z, 12 CFR 226.4 and 226.18(d).

COUNT IV

PAR. 42. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 43. Respondents GE Dallas, GE Houston, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver and GE Phoenix have furnished their members with TILA disclosures that have failed to disclose the finance charge more conspicuously than any other disclosure except the APR and the creditor's identity.

PAR. 44. The practice described in paragraph forty-three by respondents GE Dallas, GE Houston, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, and GE Phoenix violates Section 122(a) of the TILA, 15 U.S.C. 1632(a), and Section 226.17(a)(2) of Regulation Z, 12 CFR 226.17(a)(2).

COUNT V

PAR. 45. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 46. Respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento have furnished their members with TILA disclosures that have failed to segregate the disclosures required by the TILA from all other information provided in connection with the transaction, including the itemization of the amount financed.

PAR. 47. The practice described in paragraph forty-six by respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento violates Section 128(b)(1) of the TILA, 15 U.S.C. 1638(b)(1), and Section 226.17(a)(1) of Regulation Z, 12 CFR 226.17(a)(1).

COUNT VI

PAR. 48. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 49. Respondents GEI, GE Illinois, GE Tennessee, GE Alabama, GE Dallas, GE Houston, GE San Antonio, GE Austin, GE

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Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Columbus, GE San Diego, GE Minneapolis, GE-SFA, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento have failed to accurately disclose the itemization of the amount financed.

PAR. 50. The practice described in paragraph forty-nine by respondents GEI, GE Illinois, GE Tennessee, GE Alabama, GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Columbus, GE San Diego, GE Minneapolis, GE-SFA, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento violates Section 128(a) of the TILA, 15 U.S.C. 1638(a), and Section 226.18(c) of Regulation Z, 12 CFR 226.18(c).

COUNT VII

PAR. 51. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 52. Respondents GEI, GE Illinois, GE Tennessee, GE Alabama, GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Columbus, GE Milwaukee, GE San Diego, GE Minneapolis, GE-SFA, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento have failed to disclose the identity of the creditor.

PAR. 53. The practice described in paragraph fifty-two by respondents GEI, GE Illinois, GE Tennessee, GE Alabama, GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Columbus, GE Milwaukee, GE San Diego, GE Minneapolis, GE-SFA, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento violates Section 128(a)(1) of the TILA, 15 U.S.C. 1638(a)(1), and Section 226.18(a) of Regulation Z, 12 CFR 226.18(a).

COUNT VIII

PAR. 54. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 55. Respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, GE Phoenix,

and GE Sacramento have furnished their members with TILA disclosures that have failed to provide a description of the amount financed.

PAR. 56. The practice described in paragraph fifty-five by respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento violates Section 128(a)(8) of the TILA, 15 U.S.C. 1638(a)(8), and Section 226.18(b) of Regulation Z, 12 CFR 226.18(b).

PAR. 57. Respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento have furnished their members with TILA disclosures that have failed to provide a description of the finance charge.

PAR. 58. The practice described in paragraph fifty-seven by respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento violates Section 128(a)(8) of the TILA, 15 U.S.C. 1638(a)(8), and Section 226.18(d) of Regulation Z, 12 CFR 226.18(d).

PAR. 59. Respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento have furnished their members with TILA disclosures that have failed to provide a description of the APR.

PAR. 60. The practice described in paragraph fifty-nine by respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento violates Section 128(a)(8) of the TILA, 15 U.S.C. 1638(a)(8), and Section 226.18(e) of Regulation Z, 12 CFR 226.18(e).

PAR. 61. Respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento have furnished their

members with TILA disclosures that have failed to provide the total of payments and/or a description of the total of payments.

PAR. 62. The practice described in paragraph sixty-one by respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento violates Section 128(a)(5) and/or (8) of the TILA, 15 U.S.C. 1638(a)(5) and/or (8), and Section 226.18(h) of Regulation Z, 12 CFR 226.18(h).

PAR. 63. Respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento have furnished their members with TILA disclosures that have failed to provide the total sale price and/or a description of the total sale price.

PAR. 64. The practice described in paragraph sixty-three by respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento violates Section 128(a)(7) and/or (8) of the TILA, 15 U.S.C. 1638(a)(7) and/or (8), and Section 226.18(j) of Regulation Z, 12 CFR 226.18(j).

COUNT IX

PAR. 65. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 66. Respondents GE Dallas, GE Houston, GE Phoenix, GE San Antonio, GE Austin, GE Baltimore, GE DC, and GE Raleigh have failed to include set-up or other fees that are charged only to consumers who finance the costs of their memberships in the finance charge and the annual percentage rate disclosed to the consumer. They have also failed to exclude these finance charges from the amount financed that is disclosed to consumers.

PAR. 67. The practices described in paragraph sixty-six by respondents GE Dallas, GE Houston, GE Phoenix, GE San Antonio, GE Austin, GE Baltimore, GE DC, and GE Raleigh violate Sections 106, 107, and 128(a) of the TILA, 15 U.S.C. 1605, 1606, and 1638(a), and Sections 226.4(b), 226.22, and 226.18(b), (d), and (e) of Regulation Z, 12 CFR 226.4(b), 226.22, and 226.18(b), (d), and (e).

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Complaint

COUNT X

PAR. 68. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 69. Respondent GE San Diego has furnished its members with TILA disclosures that have failed to disclose the APR, the finance charge, the amount financed, the total of payments, and the total sales price.

PAR. 70. The practices described in paragraph sixty-nine by respondent GE San Diego violate Section 128(a) of the TILA, 15 U.S.C. 1638(a), and Section 226.18 of Regulation Z, 12 CFR 226.18.

COUNT XI

PAR. 71. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 72. Respondent GE Houston has furnished its members with TILA disclosures that have failed to disclose the amount financed.

PAR. 73. The practice described in paragraph seventy-two by respondent GE Houston violates Section 128(a) of the TILA, 15 U.S.C. 1638(a), and Section 226.18(b) of Regulation Z, 12 CFR 226.18(b).

COUNT XII

PAR. 74. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 75. Respondents GEI, GE Alabama, GE Illinois, GE Portland, GE Dallas, GE Houston, GE Cleveland, GE Phoenix, GE San Antonio, GE Austin, GE Seattle, GE Denver, GE Columbus, GE Milwaukee, GE San Diego, GE Minneapolis, GE SFA, GE Cherry Hill, GE Sacramento, GE DC, GE Baltimore, and GE Raleigh have disclosed understated APRs and finance charges to consumers that have resulted in consumers paying more in financing costs than the amount to which they originally agreed.

PAR. 76. The practices described in paragraph seventy-five are unfair or deceptive acts or practices in violation of Section 5(a) of the FTC Act, 15 U.S.C. 45(a).

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EXHIBIT 1

Expectations

RETAIL INSTALLMENT CONTRACT

Name - Last	First	Middle	Age
[Redacted]	[Redacted]	[Redacted]	26
Present Address	City	State	Zip
[Redacted]	[Redacted]	CO	80010
Social Security #	Home Phone	How Long At This Address	How Long in Area
[Redacted]	[Redacted]	2 1/2 YRS	26 YRS
Employed By	Work Phone	Present Position	
[Redacted]	[Redacted]	[Redacted]	
Income All Sources (Annual)	Annual	Driver's License	
[Redacted]	[Redacted]	[Redacted]	
Primary Bank Accounts			
Savings <input checked="" type="checkbox"/> Balance [Redacted]	Checking <input checked="" type="checkbox"/> Balance [Redacted]		
Credit Reference - Banks, Finance Co., Credit Unions	Open <input type="checkbox"/> Closed <input type="checkbox"/>	Union <input type="checkbox"/>	
USA			
1st INTERSTATE BANK	Open <input type="checkbox"/> Closed <input type="checkbox"/>	Union <input type="checkbox"/>	

The undersigned Great Expectations (Seller) hereby sells, and the undersigned Buyer, hereinafter referred to as "Member" purchase subject to the provisions of this contract, a MEMBERSHIP in Great Expectations and promises to pay to Great Expectations its assign the TOTAL PAYMENTS (Box 6) in accordance with the Payment Schedule hereinafter set forth.

DESCRIPTION OF GOODS AND SERVICES SOLD:

Interviewing, Testing & Evaluating, Processing & Coding, Background Check (if necessary), for the purpose of bringing in contact with the purchaser (client) suitable individuals with similar likes and dislikes, this description intended to be partial only. The purchase acknowledges receipt of application form, which is made a part hereto as though set out at length.

READ CAREFULLY AND SIGN ONLY WHEN COMPLETELY UNDERSTOOD

Buyer has compared and evaluated the terms of membership as set forth in Great Expectations Membership Agreement dated 10/31/91 and requests financing of the balance due. Acceptance of the terms of both agreements renders null and void any Buyer's right to cancel previously provided.

I understand that my failure to participate in Great Expectations does not release me of my obligation to pay this contract in full regardless of the circumstances. I understand that by signing this Agreement I am a Member of Great Expectations.

MEMBER SIGNATURE X

NOTICE TO MEMBER: Upon request, Great Expectations must provide or make available for your examination a statement or list showing how the partial refund of the time price charge is to be computed if any balance of the contract should be prepaid. Member (Buyer) and Great Expectations (Seller) agree that the terms and conditions on the Member's Contract for Membership constitute a part of this contract and are incorporated herein by reference. If due to delinquency, it is necessary to refer this account for collection, then the balance due shall include actual attorney's fee and court costs. In the event Member fails to pay any installment payment when due, the entire balance then owing shall immediately become due and payable, without notice, at the option of Great Expectations or assignee, and Great Expectations shall not be required to provide any services to Member until Member's payment account is made current, if more than one person signs this contract then their obligation shall be joint and several.

ITEMIZATION OF THE AMOUNT FINANCED

1. Cash Price	1595	BALANCE	1595
2. Other	0		0
3. Down Payment	300		1295
4. Paid (11/11/91) Second Installment	100		1195
5. Other Payments Due (11/30/91)	100		1095
6. Amt. Financed (Unpaid Bal. of Cash Price #3)	1095		1095
7. Finance Charge @ 18% Bal. x 1/5 = 1/5 no. of payments			82.13
8. Total Payments (Bal. # 7)			1177.13
9. Deferred Payment Price (Bal. # 8 x # 1)			1677.13

10. ANNUAL PERCENTAGE RATE	18%
11. PAYMENT SCHEDULE:	5
	Successive monthly installments of \$ 235
	each commencing 12/15/91 and on the same day of each month thereafter, until fully paid.
12. BALLOON PAYMENT DELINQUENCY AND COLLECTION CHARGES:	
	Buyer shall pay or attempt to pay any installment when the same shall become due and such failure to do so shall constitute for a period of more than ten (10) days, then in addition to the amount of such delinquent installment payment the Buyer shall pay to Seller, at Seller's option, a collection charge, an amount equal to 1% of such payment, except that such charge shall not exceed \$5.00 or be less than \$1.00.
13. PREPAYMENT REBATE:	
	Buyer may prepay any part of the unpaid balance without penalty and the payment in full Buyer shall be entitled to a refund of the unearned portion of the Finance Charge computed under the simple interest basis. However, there shall be no refund of Finance Charge of \$10.00 and no refund if the unearned charge is less than \$1.00.

"Notice to Buyer: (1) Do not sign this agreement before you read it or if it contains any blank spaces to be filled in. (2) You are entitled to a completely filled-in copy of this agreement. (3) You can prepay the full amount due under this agreement at any time. (4) If you desire to pay off in advance the full amount due, the amount which is outstanding will be furnished upon request."

SELLER Great Expectations Signature of Member X [Redacted]
 Business Address: 3773 Cherry Creek N. Dr. #100 Member (Buyer) acknowledges receipt of an exact copy of this instrument at the time of its execution. Member (Buyer) further acknowledges that the blanks in this contract were completed in his/her presence and that he has read the disclosures contained herein prior to signing the contract.
 City & State: Denver, CO 80007
 Authorized Signature of Seller: [Redacted] Signature of Member: [Redacted]
 Title: [Redacted] Title: [Redacted]

Exhibit 1

Complaint

EXHIBIT 2



RETAIL INSTALLMENT CONTRACT

Form with fields for Name (Last, First, Middle, Age), Present Address (City, State, Zip), Social Security #, Home Phone, How Long At This Address, Date of Birth, Employed By (Name and Address, Home Phone, Present Position), Income All Sources (Monthly, Annual), Driver's License #, Primary Bank Account (Savings, Checking, Name, Account #).

The undersigned Great Expectations (Seller) hereby sells, and the undersigned buyer (Member) purchases, subject to the provisions of this MEMBERSHIP in Great Expectations and promises to pay to Great Expectations or its assigns the TOTAL PAYMENTS in accordance with the Schedule hereunder set forth.

DESCRIPTION OF GOODS AND SERVICES SOLD: Interviewing, Evaluating, Processing & Coding, Background Check (if necessary) and PV Video Library for the purpose of giving Member access to a Video Library of potentially suitable individuals with similar files and details, this is intended to be partial only.

READ CAREFULLY AND SIGN ONLY WHEN COMPLETELY UNDERSTOOD. I have considered and evaluated the terms of membership as set forth in the Great Expectations Membership Agreement dated and received financing of the balance due. I understand that my failure to participate in Great Expectations does not release me of my obligation to pay in full. I understand that by signing this Contract, and the Membership Agreement, I am a Member of Great Expectations.

MEMBER SIGNATURE: X. NOTICE TO MEMBER: Upon request, Great Expectations must provide or make available for your examination a statement or table showing how much of the time credit charge is to be deducted if any balance of the Contract should be prepaid.

DISBURSE PRICE: \$, payable in accordance with the Statement of Disbursements below. PAYMENT SCHEDULE: Member's payments hereunder shall be in equal consecutive monthly installments commencing on the 1st day of the month after execution of this Contract and continuing on the same day of each month thereafter until paid in full.

FEDERAL TRUTH IN LENDING DISCLOSURES (Statement of Disclosures) table with columns: ANNUAL PERCENTAGE RATE, FINANCE CHARGE, AMOUNT FINANCED, TOTAL OF PAYMENTS, TOTAL SALES PRICE. Includes text: You the buyer have the right to receive at this time an explanation of the amount financed...

ITEMIZATION OF AMOUNT FINANCED table with 5 rows: 1. Total Cash Price, 2. Less Downpayment, 3. Amount Financed, 4. Finance Charge, 5. Total of Payments. Includes text: Waiver of any default by the Seller shall not operate as a tender of funds.

DELINQUENCY AND COLLECTION CHARGES: If Buyer shall fail or neglect to pay any installment... PREPAYMENT: If you pay off early, you will not have to pay a penalty and you may be entitled to a refund of part of the finance charge.

Seller: GREAT EXPECTATIONS. Business Address: City & State: Authorized Signature: Member (Buyer) Signature: Title

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of respondent Great Expectations of Columbus, Inc., a corporation, and respondent having been furnished thereafter with a copy of the draft of complaint that 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 Section 5(a) of the Federal Trade Commission Act and the Truth in Lending Act; and

The respondent, its attorney, 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 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. Great Expectations of Columbus, Inc. ("GE Columbus") is a corporation organized, existing, and doing business under and by virtue of the laws of the state of California, with its corporate office at 11835 West Olympic Boulevard, East Tower, Suite 490, Los Angeles, California, and its principal place of business located at 1103 Schrock Rd., Suite 101 Columbus, OH.

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:

A. Respondent GE Columbus, 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 offering of credit, do forthwith cease and desist from failing to accurately calculate and disclose the annual percentage rate, as required by Sections 107(a) and (c) of the TILA, 15 U.S.C. 1606(a) and (c), and Sections 226.18(e) and 226.22 of Regulation Z, 12 CFR 226.18(e) and 226.22;

B. Respondent GE Columbus, 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 offering of credit, do forthwith cease and desist from failing to accurately calculate and disclose the finance charge, as required by Section 106 of the TILA, 15 U.S.C. 1605, and Sections 226.4 and 226.18(d) of Regulation Z, 12 CFR 226.4 and 226.18(d);

C. Respondent GE Columbus, 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 offering of credit, do forthwith cease and desist from failing to make all disclosures in the manner, form, and amount required by Sections 122 and 128(a) of the TILA, 15 U.S.C. 1632 and 1638(a), and Sections 226.17 and 226.18 of Regulation Z, 12 CFR 226.17 and 226.18;

D. Respondent GE-Columbus, 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 offering of credit, do forthwith cease and desist from failing to comply with the TILA, 15 U.S.C. 1601 *et seq.*, and Regulation Z, 12 CFR 226.

II.

REFUND PROGRAM

It is further ordered, That:

A. Within thirty (30) days following the date of service of this order, respondent shall:

1. Determine to whom respondent disclosed on the original TILA disclosure an annual percentage rate that was miscalculated by more than one quarter of one percentage point below the annual percentage rate determined in accordance with Section 226.22 of Regulation Z, 12 CFR 226.22, or that disclosed a finance charge that was miscalculated by more than one dollar below the finance charge determined in accordance with Section 226.4 of Regulation Z, 12 CFR 226.4, so that each such person will not be required to pay a finance charge in excess of the finance charge actually disclosed or the dollar equivalent of the annual percentage rate actually disclosed, whichever is lower, plus a tolerance of one quarter of one percentage point;

2. Calculate a lump sum refund and a monthly payment adjustment, if applicable, in accordance with Section 108(e) of the TILA, 15 U.S.C. 1607(e);

3. Mail a refund check to each eligible consumer in the amount determined above, along with Attachment 1; and

4. Provide the Federal Trade Commission with a list of each such consumer, the amount of the refund, the number of payments refunded, the amount of adjustment for future payments and the number of future payments to be adjusted.

B. No later than fifteen (15) days following the date of service of this order, respondent shall provide the Federal Trade Commission with the name and address of three independent accounting firms, with which it, its officers, employees, attorneys, agents, and franchisees have no business relationship. Staff for the Division of Credit Practices of the FTC shall then have the sole discretion to choose one of the firms ("independent agent") and so advise respondent;

C. Within thirty (30) days following the date of adjustments made pursuant to this section, respondent shall direct the independent agent to review a statistically-valid sample of refunds. Respondent shall provide the Federal Trade Commission with a certified letter from the independent agent confirming that respondent has complied with Part II.A. of this order;

D. All costs associated with the administration of the refund program and payment of refunds shall be borne by the respondent.

III.

It is further ordered, That respondent, its successors and assigns, shall maintain for at least five (5) years from the date of service of this order and, upon thirty (30) days advance written request, make available to the Federal Trade Commission for inspection and copying all documents and other records necessary to demonstrate fully its compliance with this order.

IV.

It is further ordered, That respondent, its successors and assigns, shall distribute a copy of this order to any present or future officers and managerial employees having responsibility with respect to the subject matter of this order and that respondent, its successors and assigns, shall secure from each such person a signed statement acknowledging receipt of said order.

V.

It is further ordered, That respondent, for a period of five (5) years following the date of service of this order, shall promptly notify the Commission at least thirty (30) days prior to any proposed change in its corporate structure such as 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 that may affect compliance obligations arising out of the order.

VI.

It is further ordered, That respondent shall, within one hundred and eighty (180) days of 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.

ATTACHMENT 1

Dear Great Expectations Customer:

As part of our settlement with the Federal Trade Commission for alleged violations of the Truth in Lending Act, we are sending you the enclosed refund check in the amount of \$*****. The refund represents the amount you were overcharged as a result of errors made by Great Expectations in calculating or disclosing the annual percentage rate or finance charge.

[In addition, your future monthly payments have been reduced. Starting immediately, your monthly payments will be \$*****.]

We regret any inconvenience this may have caused you.

Great Expectations

IN THE MATTER OF

GREAT SOUTHERN VIDEO, INC., ET AL.

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

Docket C-3606. Complaint, Aug. 11, 1995--Decision, Aug. 11, 1995

This consent order requires, among other things, the video dating service franchises to properly and accurately disclose the annual percentage rate ("APR") and other credit terms of financed memberships, as required by the federal Truth in Lending Act, and requires the franchises to establish adjustment refund programs to compensate its past and current members who overpaid finance charges.

Appearances

For the Commission: *Stephen Cohen, Judy Nixon and David Medine.*

For the respondents: *Michael Chesal, Kluger, Peretz, Kaplan & Berlin, Miami, FL.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Great Expectations Creative Management, Inc. has violated the Federal Trade Commission Act ("FTC Act"), and that Great Expectations, Inc., GEC Illinois, Inc., GEC Tennessee, Inc., GEC Alabama, Inc., Great Southern Video, Inc., New West Video Enterprises, Inc., San Antonio Singles of Texas, Inc., Austin Singles of Texas, Inc., Great Expectations of Baltimore, Inc., Great Expectations of Washington, D.C., Inc., Great Expectations of Washington, Inc., Sterling Connections, Inc., Private Eye Productions, Inc., Great Expectations - Columbus, Inc., JAMS Financial, Inc., V.L.P. Enterprises, Inc., APM Enterprises - Minn Inc., KGE, Inc., G.E.C.H., Inc., MWVE, Inc., GREATEX Denver, Inc., Sun West Video, Inc., and TRIAAC Enterprises, Inc. (hereinafter sometimes referred to collectively as "Great Expectations") have violated the Truth in Lending Act ("TILA"), its implementing Regulation Z, and the FTC Act, and it appearing to the

Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint, and alleges as follows:

PARAGRAPH 1. Great Expectations Creative Management, Inc. ("GECM") 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 16830 Ventura Blvd., Suite P, Encino, CA.

PAR. 2. Great Expectations, Inc. ("GEI") is a corporation organized, existing, and doing business under and by virtue of the laws of the state of California, with its corporate office at 16830 Ventura Blvd., Suite P, Encino, CA, and its principal places of business located at 1640 S. Sepulveda Blvd., Suite 100, Los Angeles, CA, 17207 Ventura Blvd., Encino, CA, and 450 N. Mountain, Suite B, Upland, CA.

PAR. 3. GEC Illinois, Inc. ("GE Illinois") is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Illinois, with its office and principal place of business located at 1701 E. Woodfield Dr., Suite 400, Schaumburg, IL.

PAR. 4. GEC Tennessee, Inc. ("GE Tennessee") 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 5552 Franklin Rd., Suite 200, Nashville, TN.

PAR. 5. GEC Alabama, Inc. ("GE Alabama") is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Alabama, with its office and principal place of business located at 7529 S. Memorial Pkwy., Suite C & D, Huntsville, AL.

PAR. 6. Great Southern Video, Inc., doing business as Great Expectations of Dallas ("GE Dallas"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Texas, with its office and principal place of business located at 14180 Dallas Pkwy., Suite 100, Dallas, TX.

PAR. 7. New West Video Enterprises, Inc., doing business as Great Expectations of Houston ("GE Houston"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Texas, with its office and principal place of business located at 50 Briarhollow, Suite 100, Houston, TX.

PAR. 8. San Antonio Singles of Texas, Inc., doing business as Great Expectations of San Antonio ("GE San Antonio"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Texas, with its corporate office at 10497 Town & Country Way, Suite 214, Houston, TX, and its principal place of business located at 8131 I.H. 10 West, Suite 225, San Antonio, TX.

PAR. 9. Austin Singles of Texas, Inc., doing business as Great Expectations of Austin ("GE Austin"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Texas, with its corporate office at 10497 Town & Country Way, Suite 214, Houston, TX, and its principal place of business located at 9037 Research Blvd., Suite 130, Austin, TX.

PAR. 10. Great Expectations of Baltimore, Inc. ("GE Baltimore") is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Virginia, with its office and principal place of business located at 40 York Rd., Suite 500, Towson, MD.

PAR. 11. Great Expectations of Washington, D.C., Inc. ("GE DC") 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 8601 Westwood Center Dr., Vienna, VA.

PAR. 12. Great Expectations of Washington, Inc., doing business as Great Expectations of Raleigh/Durham ("GE Raleigh"), 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 3714 Benson Dr., Suite 200, Raleigh, NC.

PAR. 13. Sterling Connections, Inc., doing business as Great Expectations of Seattle ("GE Seattle"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Oregon, with its office and principal place of business located at 305 108th Ave., N.E., Suite 205, Bellevue, WA.

PAR. 14. Private Eye Productions, Inc., doing business as Great Expectations of Portland ("GE Portland"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Oregon, with its office and principal place of business located at 5531 S.W. Macadam Ave., Suite 225, Portland, OR.

PAR. 15. Great Expectations - Columbus, Inc. ("GE Columbus") is a corporation organized, existing, and doing business under and by

virtue of the laws of the state of Ohio, with its corporate office at 11835 W. Olympic Blvd., Suite 490, Los Angeles, CA, and its principal place of business located at 1103 Schrock Rd., Suite 101, Columbus, OH.

PAR. 16. JAMS Financial, Inc., doing business as Great Expectations of Milwaukee ("GE Milwaukee"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Wisconsin, with its corporate office at 11835 W. Olympic Blvd., Suite 490, Los Angeles, CA, and its principal place of business located at 16650 W. Bluemound, Suite 100, Brookfield, WI.

PAR. 17. V.L.P. Enterprises, Inc., doing business as Great Expectations of San Diego ("GE San Diego"), 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 3465 Camino Del Rio South, Suite 300, San Diego, CA.

PAR. 18. APM Enterprises - Minn Inc., doing business as Great Expectations of Minneapolis ("GE Minneapolis"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Illinois, with its office and principal place of business located at 3300 Edinborough Way, Suite 300, Edina, MN.

PAR. 19. KGE, Inc., doing business as Great Expectations of Sausalito, Great Expectations of Mountain View, and Great Expectations of Walnut Creek (collectively referred to as "GE-SFA"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of California, with its corporate office at 1943 Landings Dr., Mountain View, CA, and its principal places of business located at 2401 Marinship Way, Suite 100, Sausalito, CA, 2085 Landings Dr., Mountain View, CA, and 1280 Civic Dr., Suite 300, Walnut Creek, CA.

PAR. 20. G.E.C.H., Inc., doing business as Great Expectations of Cherry Hill ("GE Cherry Hill"), 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 places of business located at One Cherry Hill, Suite 600, Cherry Hill, NJ.

PAR. 21. MWVE, Inc., doing business as Great Expectations of Cleveland ("GE Cleveland"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Ohio,

with its office and principal place of business located at 6300 Rockside Rd., Suite 200, Cleveland, OH.

PAR. 22. GREATEX Denver, Inc., doing business as Great Expectations Video Dating, Ltd. ("GE-Denver"), 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 3773 Cherry Creek North Dr., Suite 140, Denver, CO.

PAR. 23. Sun West Video, Inc., doing business as Great Expectations for Singles ("GE Phoenix"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Arizona, with its office and principal place of business located at 5635 N. Scottsdale Rd., Suite 190, Scottsdale, AZ.

PAR. 24. TRIAAC Enterprises, Inc., doing business as Great Expectations of Sacramento ("GE Sacramento"), 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 2277 Fair Oaks Blvd., Suite 195, Sacramento, CA.

RESPONDENTS' COURSE OF BUSINESS

PAR. 25. GECM is a video dating franchisor. It sells and services franchise operations throughout the United States. As part of its regular course of business, GECM has created and disseminated retail installment contracts (Exhibits 1 and 2) to the franchises described in paragraphs two through twenty-four. The GECM retail installment contracts purport to incorporate the disclosures required by the TILA.

PAR. 26. Respondents Great Expectations are video dating franchises. Respondents have provided financing to their members using retail installment contracts such as Exhibits 1 and 2 to disclose the terms of the financing.

PAR. 27. GECM's TILA disclosure (Exhibit 1) contains erroneous instructions for calculating and disclosing the finance charge and contains a pre-printed annual percentage rate ("APR") of 18%. In addition, Exhibit 1 fails to make the TILA disclosures in the format required by the TILA and fails to identify the creditor as required by the TILA.

PAR. 28. In 1988, GECM learned from its auditor that the calculations and disclosures contained in Exhibit 1 did not comply with the TILA. Nevertheless, it continued to disseminate Exhibit 1

to its franchisees and failed to notify them of the erroneous calculations and disclosures.

PAR. 29. In late 1990, GECM created a new retail installment contract, which also purported to incorporate the disclosures required by the TILA and which contained a pre-printed APR of 19.6% (Exhibit 2). Exhibit 2 fails to identify the creditor as required by the TILA and fails to provide the information required by the TILA in the itemization of the amount financed. Furthermore, GECM has disseminated Exhibit 2 to its franchisees but has failed to inform them to discontinue using the erroneous calculation and disclosure instructions that it had previously supplied in Exhibit 1.

PAR. 30. Respondents Great Expectations are creditors as that term is defined in the TILA and Regulation Z.

PAR. 31. The acts and practices of respondents Great Expectations and GECM alleged in this complaint have been and are in or affecting commerce, as "commerce" is defined in Section 4 of the FTC Act.

COUNT I

PAR. 32. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 33. Respondent GECM has furnished its franchises with TILA disclosures (Exhibits 1 and 2) that, on their face, violated the TILA. When used by respondents Great Expectations, Exhibits 1 and 2 have resulted in false and misleading disclosures of APRs and finance charges to consumers in violation of Section 5 of the FTC Act.

PAR. 34. In the course and practice of its business as described in paragraphs twenty-five through twenty-nine, and paragraph thirty-three, respondent GECM has provided respondents Great Expectations with the means and instrumentalities to violate the Section 5 of the FTC Act.

PAR. 35. The practices described in paragraph thirty-four constitute unfair or deceptive acts or practices in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. 45(a).

COUNT II

PAR. 36. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 37. Respondents GEI, GE Illinois, GE Tennessee, GE Alabama, GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Columbus, GE Milwaukee, GE San Diego, GE Minneapolis, GE-SFA, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento have furnished their members with TILA disclosures that have failed to accurately calculate and disclose the APR.

PAR. 38. The practice described in paragraph thirty-seven by respondents GEI, GE Illinois, GE Tennessee, GE Alabama, GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Columbus, GE Milwaukee, GE San Diego, GE Minneapolis, GE-SFA, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento violates Sections 107(a) and (c) of the TILA, 15 U.S.C. 1606(a) and (c), and Sections 226.18(e) and 226.22 of Regulation Z, 12 CFR 226.18(e) and 226.22.

COUNT III

PAR. 39. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 40. Respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Columbus, GE Milwaukee, GE-SFA, GE Cleveland, GE Phoenix, GE Sacramento, and GE San Diego have furnished their members with TILA disclosures that have failed to accurately calculate and disclose the finance charge.

PAR. 41. The practice described in paragraph forty by respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Columbus, GE Milwaukee, GE-SFA, GE Cleveland, GE Phoenix, GE Sacramento, and GE San Diego violates Section 106 of the TILA, 15 U.S.C. 1605, and Sections 226.4 and 226.18(d) of Regulation Z, 12 CFR 226.4 and 226.18(d).

COUNT IV

PAR. 42. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 43. Respondents GE Dallas, GE Houston, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, and GE Phoenix have furnished their members with TILA disclosures that have failed to disclose the finance charge more conspicuously than any other disclosure except the APR and the creditor's identity.

PAR. 44. The practice described in paragraph forty-three by respondents GE Dallas, GE Houston, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, and GE Phoenix violates Section 122(a) of the TILA, 15 U.S.C. 1632(a), and Section 226.17(a)(2) of Regulation Z, 12 CFR 226.17(a)(2).

COUNT V

PAR. 45. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 46. Respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento have furnished their members with TILA disclosures that have failed to segregate the disclosures required by the TILA from all other information provided in connection with the transaction, including the itemization of the amount financed.

PAR. 47. The practice described in paragraph forty-six by respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento violates Section 128(b)(1) of the TILA, 15 U.S.C. 1638(b)(1), and Section 226.17(a)(1) of Regulation Z, 12 CFR 226.17(a)(1).

COUNT VI

PAR. 48. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 49. Respondents GEI, GE Illinois, GE Tennessee, GE Alabama, GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Columbus, GE San Diego, GE Minneapolis, GE-SFA, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento

have failed to accurately disclose the itemization of the amount financed.

PAR. 50. The practice described in paragraph forty-nine by respondents GEI, GE Illinois, GE Tennessee, GE Alabama, GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Columbus, GE San Diego, GE Minneapolis, GE-SFA, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento violates Section 128(a) of the TILA, 15 U.S.C. 1638(a), and Section 226.18(c) of Regulation Z, 12 CFR 226.18(c).

COUNT VII

PAR. 51. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 52. Respondents GEI, GE Illinois, GE Tennessee, GE Alabama, GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Columbus, GE Milwaukee, GE San Diego, GE Minneapolis, GE-SFA, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento have failed to disclose the identity of the creditor.

PAR. 53. The practice described in paragraph fifty-two by respondents GEI, GE Illinois, GE Tennessee, GE Alabama, GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Columbus, GE Milwaukee, GE San Diego, GE Minneapolis, GE-SFA, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento violates Section 128(a)(1) of the TILA, 15 U.S.C. 1638(a)(1), and Section 226.18(a) of Regulation Z, 12 CFR 226.18(a).

COUNT VIII

PAR. 54. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 55. Respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento have furnished their members with TILA disclosures that have failed to provide a description of the amount financed.

PAR. 56. The practice described in paragraph fifty-five by respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento violates Section 128(a)(8) of the TILA, 15 U.S.C. 1638(a)(8), and Section 226.18(b) of Regulation Z, 12 CFR 226.18(b).

PAR. 57. Respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento have furnished their members with TILA disclosures that have failed to provide a description of the finance charge.

PAR. 58. The practice described in paragraph fifty-seven by respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento violates Section 128(a)(8) of the TILA, 15 U.S.C. 1638(a)(8), and Section 226.18(d) of Regulation Z, 12 CFR 226.18(d).

PAR. 59. Respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento have furnished their members with TILA disclosures that have failed to provide a description of the APR.

PAR. 60. The practice described in paragraph fifty-nine by respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento violates Section 128(a)(8) of the TILA, 15 U.S.C. 1638(a)(8), and Section 226.18(e) of Regulation Z, 12 CFR 226.18(e).

PAR. 61. Respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento have furnished their members with TILA disclosures that have failed to provide the total of payments and/or a description of the total of payments.

PAR. 62. The practice described in paragraph sixty-one by respondents GE Dallas, GE Houston, GE San Antonio, GE Austin,

GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento violates Section 128(a)(5) and/or (8) of the TILA, 15 U.S.C. 1638(a)(5) and/or (8), and Section 226.18(h) of Regulation Z, 12 CFR 226.18(h).

PAR. 63. Respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento have furnished their members with TILA disclosures that have failed to provide the total sale price and/or a description of the total sale price.

PAR. 64. The practice described in paragraph sixty-three by respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento violates Section 128(a)(7) and/or (8) of the TILA, 15 U.S.C. 1638(a)(7) and/or (8), and Section 226.18(j) of Regulation Z, 12 CFR 226.18(j).

COUNT IX

PAR. 65. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 66. Respondents GE Dallas, GE Houston, GE Phoenix, GE San Antonio, GE Austin, GE Baltimore, GE DC, and GE Raleigh have failed to include set-up or other fees that are charged only to consumers who finance the costs of their memberships in the finance charge and the annual percentage rate disclosed to the consumer. They have also failed to exclude these finance charges from the amount financed that is disclosed to consumers.

PAR. 67. The practices described in paragraph sixty-six by respondents GE Dallas, GE Houston, GE Phoenix, GE San Antonio, GE Austin, GE Baltimore, GE DC, and GE Raleigh violate Sections 106, 107, and 128(a) of the TILA, 15 U.S.C. 1605, 1606, and 1638(a), and Sections 226.4(b), 226.22, and 226.18(b), (d), and (e) of Regulation Z, 12 CFR 226.4(b), 226.22, and 226.18(b), (d), and (e).

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COUNT X

PAR. 68. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 69. Respondent GE San Diego has furnished its members with TILA disclosures that have failed to disclose the APR, the finance charge, the amount financed, the total of payments, and the total sales price.

PAR. 70. The practices described in paragraph sixty-nine by respondent GE San Diego violate Section 128(a) of the TILA, 15 U.S.C. 1638(a), and Section 226.18 of Regulation Z, 12 CFR 226.18.

COUNT XI

PAR. 71. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 72. Respondent GE Houston has furnished its members with TILA disclosures that have failed to disclose the amount financed.

PAR. 73. The practice described in paragraph seventy-two by respondent GE Houston violates Section 128(a) of the TILA, 15 U.S.C. 1638(a), and Section 226.18(b) of Regulation Z, 12 CFR 226.18(b).

COUNT XII

PAR. 74. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 75. Respondents GEI, GE Alabama, GE Illinois, GE Portland, GE Dallas, GE Houston, GE Cleveland, GE Phoenix, GE San Antonio, GE Austin, GE Seattle, GE Denver, GE Columbus, GE Milwaukee, GE San Diego, GE Minneapolis, GE SFA, GE Cherry Hill, GE Sacramento, GE DC, GE Baltimore, and GE Raleigh have disclosed understated APRs and finance charges to consumers that have resulted in consumers paying more in financing costs than the amount to which they originally agreed.

PAR. 76. The practices described in paragraph seventy-five are unfair or deceptive acts or practices in violation of Section 5(a) of the FTC Act, 15 U.S.C. 45(a).

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Complaint

EXHIBIT 1



RETAIL INSTALLMENT CONTRACT

Name - Last First Middle Age
Present Address City State Zip
Social Security # Home Phone How Long At This Address How Long in Area
Employed By Home Phone Present Position
Income All Sources Monthly Annual Driver's License #
Primary Bank Accounts Savings Balance Checking
Credit Reference - Banks, Finance Co., Credit Unions
USA Open Closed Limit
FIRST STATE Bank Open Closed Limit

The undersigned Great Expectations (Seller) hereby sells, and the undersigned Buyer, hereinafter referred to as "Member" purchases subject to the provisions of this contract, a MEMBERSHIP in Great Expectations and promises to pay to Great Expectations its share of the TOTAL PAYMENTS (Box 8) in accordance with the Payment Schedule hereinafter set forth.

DESCRIPTION OF GOODS AND SERVICES SOLD:

Interviewing, Testing & Evaluating, Processing & Coding, Background check (if necessary), for the purpose of bringing in contact with the purchaser (client) suitable individuals with similar likes and dislikes, this description intended to be partial only, the purchaser acknowledges receipt of application form, which is made a part hereto as though set out at length.

READ CAREFULLY AND SIGN ONLY WHEN COMPLETELY UNDERSTOOD

Buyer has considered and evaluated the terms of membership as set forth in Great Expectations Membership Agreement dated 10/31/91 and requests financing of the balance due. Acceptance of the terms of both agreements renders null and void Buyer's right to cancel previously provided.

I understand that my failure to participate in Great Expectations and not release me of my obligation to pay this contract in the respective of the circumstances, I understand that by signing this Agreement I am a Member of Great Expectations.

MEMBER SIGNATURE X _____

NOTICE TO MEMBER: Upon request, Great Expectations must provide or make available for your examination a statement or list showing how the partial refund of the time price charge is to be computed if any balance of the contract should be prepaid. Member (Buyer) and Great Expectations (Seller) agree that the terms and conditions on the Member's Contract for Membership constitute part of this contract and are incorporated herein by reference. If due to delinquency, it is necessary to refer this account to collection, then the balance due shall include actual attorney's fee and court costs. In the event Member fails to pay any installment payment when due, the entire balance then owing shall immediately become due and payable, without notice, at the option of Great Expectations or assignee, and Great Expectations shall not be required to provide any services to Member until Member's payment account is made current. If more than one person signs this contract then their obligation shall be joint and several.

ITEMIZATION OF THE AMOUNT FINANCED

ITEMIZATION OF THE AMOUNT FINANCED		10. BALANCE	11. ANNUAL PERCENTAGE RATE 18%
1. Cash Price	<u>1195</u>		11. PAYMENT SCHEDULE: \$500 successive monthly installments of \$ 235 each commencing 12/15/91, and on 1/15/92, one on 2/15/92 and on 3/15/92, and on 4/15/92, and on 5/15/92, and on 6/15/92, and on 7/15/92, and on 8/15/92, and on 9/15/92, and on 10/15/92, and on 11/15/92, and on 12/15/92, and on 1/15/93, and on 2/15/93, and on 3/15/93, and on 4/15/93, and on 5/15/93, and on 6/15/93, and on 7/15/93, and on 8/15/93, and on 9/15/93, and on 10/15/93, and on 11/15/93, and on 12/15/93, and on 1/15/94, and on 2/15/94, and on 3/15/94, and on 4/15/94, and on 5/15/94, and on 6/15/94, and on 7/15/94, and on 8/15/94, and on 9/15/94, and on 10/15/94, and on 11/15/94, and on 12/15/94, and on 1/15/95, and on 2/15/95, and on 3/15/95, and on 4/15/95, and on 5/15/95, and on 6/15/95, and on 7/15/95, and on 8/15/95, and on 9/15/95, and on 10/15/95, and on 11/15/95, and on 12/15/95, and on 1/15/96, and on 2/15/96, and on 3/15/96, and on 4/15/96, and on 5/15/96, and on 6/15/96, and on 7/15/96, and on 8/15/96, 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EXHIBIT 2



RETAIL INSTALLMENT CONTRACT

DATE _____

Name (Last, First, Middle) _____ Age _____

Present Address _____ City _____ State _____ Zip _____

Social Security # _____ Home Phone _____ New Long At This Address _____ Date of Birth _____

Employed By (Name and Address) _____ Work Phone _____ Present Position _____

Home All Sources Month _____ Annual _____ Driver's License # _____

Primary Bank Accounts Name _____ Checking Name _____ Savings Account # _____

The undersigned Great Expectations (Seller) hereby sells, and the undersigned buyer (Member) purchases, subject to the provisions of this CONTRACT and Membership in Great Expectations and promise to pay to Great Expectations or its assigns the TOTAL PAYMENTS in accordance with the Schedule hereinafter set forth.

DESCRIPTION OF GOODS AND SERVICES SOLD: Interviewing, Evaluating, Procuring & Coding, Background Check (if necessary) and Plus Video Library for the purpose of giving Member access to a Video Library of potentially suitable individuals with similar files and profiles. This is intended to be partial only.

READ CAREFULLY AND SIGN ONLY WHEN COMPLETELY UNDERSTOOD

I have considered and evaluated the terms of membership set forth in the Great Expectations Membership Agreement dated _____ and received financing of the amount due. I understand that my return to purchase in Great Expectations does not relieve me of my obligation to pay to Great Expectations or its assigns the TOTAL PAYMENTS in accordance with the Schedule hereinafter set forth.

MEMBER SIGNATURE: _____

NOTICE TO MEMBER: Upon request, Great Expectations must provide or make available for your examination a statement or statements showing how the amount of the finance charge is to be computed if any balance of the Contract should be prepaid. Member (Buyer) and Great Expectations (Seller) agree that the terms and conditions of the Great Expectations Membership Agreement constitute a part of this Contract and are incorporated herein by reference. In the event Member fails to pay any installment payment when due, the entire balance (plus any unearned Finance Charge) then owing shall be deemed due and payable, without demand or notice, at the option of Great Expectations or its assigns, and Great Expectations shall not be required to provide any services under Member's payment account in such event.

PURCHASE PRICE: \$ _____ payable in accordance with the Statement of Disclosure below.

PAYMENT SCHEDULE: Member's payments hereunder shall be in equal consecutive monthly installments commencing on the _____ day of _____ month after execution of this Contract and continuing on the same day of each month thereafter until paid in full. Interest on the unpaid balance shall be both prior and after maturity.

FEDERAL TRUTH IN LENDING DISCLOSURES (Statement of Disclosure)

ANNUAL PERCENTAGE RATE	FINANCE CHARGE (Line 4)	AMOUNT FINANCED (Line 3)	TOTAL OF PAYMENTS (Line 5)	TOTAL SALES PRICE
The rate of any loan is a variable rate.	The dollar amount of the finance charge will be _____.	The amount of cash received in net of any down payment is _____.	The amount of the total payments to be made is _____.	The total sales price of the merchandise is _____.
19.6%				(Line 1 - 2)

You the buyer have the right to cancel at this time on completion of the amount financed. () I want an extension. () I do not want an extension. Your payment schedule will be:

Payments Schedule	Monthly Payment
_____	_____

DELINQUENCY AND COLLECTION CHARGES: If Buyer does not pay or neglect to pay any installment payment when the same shall become due and such failure or neglect shall continue for a period of more than ten (10) days, then in addition to the amount of such delinquent installment payment the Buyer shall pay to Seller, as a delinquency and collection charge, an amount equal to 9% of such payment unless that such charge shall not exceed \$5.00 or be less than \$1.00.

PREPAYMENT: If you pay off early, you will not have to pay a penalty and you may be entitled to a refund of part of the finance charge. See your Great Expectations Membership Agreement for any additional information about non-payment, default, any required documents to full before the schedule date and prepayments, refunds and penalties.

ITEMIZATION OF AMOUNT FINANCED

Item	Amount	Proposed/Actual
1. Total Cash Price	\$ _____	Proposed/Actual
2. Less Downpayment	\$ _____	Buyer may prepay or all of the unpaid amount without penalty on payment in full. Buyer is entitled to a refund of the amount paid on the Finance Charge computed under the original basis. He shall be entitled to a Finance Charge of _____ and no refund of unearned Finance Charge of \$1.00.
3. Amount Financed	\$ _____	
4. Finance Charge	\$ _____	
5. Total of Payments	\$ _____	

Whether or any default by the Seller shall not appear on a member's default.

Should the buyer default in the payment of any installment hereunder shall pay to Seller at once and non-refundable sums of collection or recovery reasonable Attorney fees and disbursements.

Buyer will pay to the Seller a \$10.00 charge for every delinquent other installment.

Should any term hereof be invalid or unenforceable, the remaining to be unaffected by such finding.

NOTICE TO BUYER:

1. Do not sign this agreement before you read it or if it contains any blank spaces to be filled in.
2. You are entitled to a completely filled in copy agreement.
3. You can prepay the full amount due under this agreement at any time.
4. If you desire to pay off in advance the full amount of amount which is outstanding will be furnished on request.

Member (Buyer) acknowledges receipt of an exact copy of this contract at the time of its execution. Member (Buyer) further acknowledges that the terms of this Contract were completely read and understood and that the Member (Buyer) has read and understood the terms of this Contract before signing the Contract.

Seller: GREAT EXPECTATIONS

Business Address _____

City & State: _____

Authorized Signature: _____

Signature of Member: _____

Routing: White—FINANCE: Pink—SELLER: Gold—CUSTOMER

© 1990 Great Expectations Credit Management, Inc.

Exhibit

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of Great Southern Video, Inc., New West Video Enterprises, Inc., MWVE, Inc., and Sun West Video, Inc., corporations, and respondents having been furnished thereafter with a copy of the draft of complaint that 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 violations of Section 5(a) of the Federal Trade Commission Act and the Truth in Lending Act; and

The respondents, their attorney, 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 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 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. Great Southern Video, Inc., doing business as Great Expectations of Dallas ("GE Dallas"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Texas, with its office and principal place of business located at 14180 Dallas Parkway, Suite 100, Dallas, TX.

2. New West Video Enterprises, Inc., doing business as Great Expectations of Houston ("GE Houston"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Texas, with its office and principal place of business located at 50 Briarhollow, Suite 100, Houston, TX.

3. MWVE, Inc., doing business as Great Expectations of Cleveland, Inc. ("GE Cleveland"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Ohio with its office and principal place of business located at 6300 Rockside Rd., Suite 200, Cleveland, OH.

4. Sun West Video, Inc., doing business as Great Expectations for Singles ("GE Phoenix"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Arizona with its office and principal place of business located at 5635 N. Scottsdale Rd., Suite 190, Scottsdale, AZ.

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.

It is ordered, That:

A. Respondents GE Dallas, GE Houston, GE Cleveland, and GE Phoenix, their successors and assigns, and their officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the offering of credit, do forthwith cease and desist from failing to accurately calculate and disclose the annual percentage rate, as required by Sections 107(a) and (c) of the Truth in Lending Act ("TILA"), 15 U.S.C. 1606(a) and (c), and Sections 226.18(e) and 226.22 of Regulation Z, 12 CFR 226.18(e) and 226.22;

B. Respondents GE Dallas, GE Houston, GE Cleveland, and GE Phoenix, their successors and assigns, and their officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the offering of credit, do forthwith cease and desist from failing to accurately calculate and disclose the finance charge, as required by Section 106 of the TILA, 15 U.S.C. 1605, and Sections 226.4 and 226.18(d) of Regulation Z, 12 CFR 226.4 and 226.18(d);

C. Respondents GE Dallas, GE Houston, GE Cleveland, and GE Phoenix, their successors and assigns, and their officers, agents, representatives, and employees, directly or through any corporation,

subsidiary, division, or other device, in connection with the offering of credit, do forthwith cease and desist from failing to segregate the disclosures required by the TILA from all other information provided in connection with the transaction, including from the itemization of the amount financed, as required by Section 128(b)(1) of the TILA, 15 U.S.C. 1638(b)(1), and Section 226.17(a) of Regulation Z, 12 CFR 226.17(a);

D. Respondents GE Dallas, GE Houston, GE Cleveland, and GE Phoenix, their successors and assigns, and their officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the offering of credit, do forthwith cease and desist from failing to make all disclosures in the manner, form, and amount required by Sections 122 and 128(a) of the TILA, 15 U.S.C. 1632 and 1638(a), and Sections 226.17 and 226.18 of Regulation Z, 12 CFR 226.17 and 226.18;

E. Respondents GE Dallas, GE Houston, and GE Phoenix, their successors and assigns, and their officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the offering of credit, do forthwith cease and desist from:

1. Failing to include, in the finance charge and the annual percentage rate disclosed to the consumer, set-up or other fees that are charged only to consumers who finance the costs of their memberships, as required by Sections 106, 107, and 128 of the TILA, 15 U.S.C. 1605, 1606, and 1638, and Sections 226.4(b), 226.22, and 226.18(d) and (e) of Regulation Z, 12 CFR 226.4(b), 226.22, and 226.18(d) and (e); and

2. Failing to exclude, from the amount financed disclosed to the consumer, set-up or other fees that are charged only to consumers who finance the costs of their memberships, as required by Section 128 of the Truth in Lending Act, 15 U.S.C. 1638(a) and Section 226.18(b) of Regulation Z, 12 CFR 226.18(b); and

F. Respondents GE Dallas, GE Houston, GE Cleveland, and GE Phoenix, their successors and assigns, and their officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the offering

of credit, do forthwith cease and desist from failing to comply with the TILA, 15 U.S.C. 1601 *et seq.*, and Regulation Z, 12 CFR 226.

II.

REFUND PROGRAM

It is further ordered, That:

A. Within thirty (30) days following the date of service of this order, respondents shall:

1. Determine to whom respondents disclosed on the original TILA disclosure an annual percentage rate that was miscalculated by more than one quarter of one percentage point below the annual percentage rate determined in accordance with Section 226.22 of Regulation Z, 12 CFR 226.22, or that disclosed a finance charge that was miscalculated by more than one dollar below the finance charge determined in accordance with Section 226.4 of Regulation Z, 12 CFR 226.4, so that each such person will not be required to pay a finance charge in excess of the finance charge actually disclosed or the dollar equivalent of the annual percentage rate actually disclosed, whichever is lower, plus a tolerance of one quarter of one percentage point;

2. Calculate a lump sum refund and a monthly payment adjustment, if applicable, in accordance with Section 108(e) of the TILA, 15 U.S.C. 1607(e);

3. Mail a refund check to each eligible consumer in the amount determined above, along with Attachment 1; and

4. Provide the Federal Trade Commission with a list of each such consumer, the amount of the refund, the number of payments refunded, the amount of adjustment for future payments and the number of future payments to be adjusted.

B. No later than fifteen (15) days following the date of service of this order, respondents shall provide the Federal Trade Commission with the name and address of three independent accounting firms, with which they, their officers, employees, attorneys, agents, and franchisees have no business relationship. Staff for the Division of Credit Practices of the FTC shall then have the sole discretion to

choose one of the firms ("independent agent") and so advise respondents;

C. Within thirty (30) days following the date of adjustments made pursuant to this section, respondents shall direct the independent agent to review a statistically-valid sample of refunds. Respondents shall provide the Federal Trade Commission with a certified letter from the independent agent confirming that respondents have complied with Part II.A. of this order;

D. All costs associated with the administration of the refund program and payment of refunds shall be borne by the respondents.

III.

It is further ordered, That respondents, their successors and assigns, shall maintain for at least five (5) years from the date of service of this order and, upon thirty (30) days advance written request, make available to the Federal Trade Commission for inspection and copying all documents and other records necessary to demonstrate fully their compliance with this order.

IV.

It is further ordered, That respondents, their successors and assigns, shall distribute a copy of this order to any present or future officers and managerial employees having responsibility with respect to the subject matter of this order and that respondents, their successors and assigns, shall secure from each such person a signed statement acknowledging receipt of said order.

V.

It is further ordered, That respondents, for a period of five (5) years following the date of service of this order, shall promptly notify the Commission at least thirty (30) days prior to any proposed change in their corporate structure such as 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 that may affect compliance obligations arising out of the order.

VI.

It is further ordered, That respondents shall, within one hundred and eighty (180) days of 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.

ATTACHMENT 1

Dear Great Expectations Customer:

As part of our settlement with the Federal Trade Commission for alleged violations of the Truth in Lending Act, we are sending you the enclosed refund check in the amount of \$*****. The refund represents the amount you were overcharged as a result of errors made by Great Expectations in calculating or disclosing the annual percentage rate or finance charge.

[In addition, your future monthly payments have been reduced. Starting immediately, your monthly payments will be \$*****.]

We regret any inconvenience this may have caused you.

Great Expectations

IN THE MATTER OF

JAMS FINANCIAL, INC.

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

Docket C-3607. Complaint, Aug. 11, 1995--Decision, Aug. 11, 1995

This consent order requires, among other things, a video dating service franchise to properly and accurately disclose the annual percentage rate ("APR") and other credit terms of financed memberships, as required by the federal Truth in Lending Act, and requires the franchise to establish adjustment refund programs to compensate its past and current members who overpaid finance charges.

Appearances

For the Commission: *Stephen Cohen, Judy Nixon and David Medine.*

For the respondent: *Alan Korpady, Murphy & Desmond, Madison, WI.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Great Expectations Creative Management, Inc. has violated the Federal Trade Commission Act ("FTC Act"), and that Great Expectations, Inc., GEC Illinois, Inc., GEC Tennessee, Inc., GEC Alabama, Inc., Great Southern Video, Inc., New West Video Enterprises, Inc., San Antonio Singles of Texas, Inc., Austin Singles of Texas, Inc., Great Expectations of Baltimore, Inc., Great Expectations of Washington, D.C., Inc., Great Expectations of Washington, Inc., Sterling Connections, Inc., Private Eye Productions, Inc., Great Expectations - Columbus, Inc., JAMS Financial, Inc., V.L.P. Enterprises, Inc., APM Enterprises - Minn Inc., KGE, Inc., G.E.C.H., Inc., MWVE, Inc., GREATEX Denver, Inc., Sun West Video, Inc., and TRIAAC Enterprises, Inc. (hereinafter sometimes referred to collectively as "Great Expectations") have violated the Truth in Lending Act ("TILA"), its implementing Regulation Z, and the FTC Act, and it appearing to the

Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint, and alleges as follows:

PARAGRAPH 1. Great Expectations Creative Management, Inc. ("GECM") 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 16830 Ventura Blvd., Suite P, Encino, CA.

PAR. 2. Great Expectations, Inc. ("GEI") is a corporation organized, existing, and doing business under and by virtue of the laws of the state of California, with its corporate office at 16830 Ventura Blvd., Suite P, Encino, CA, and its principal places of business located at 1640 S. Sepulveda Blvd., Suite 100, Los Angeles, CA, 17207 Ventura Blvd., Encino, CA, and 450 N. Mountain, Suite B, Upland, CA.

PAR. 3. GEC Illinois, Inc. ("GE Illinois") is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Illinois, with its office and principal place of business located at 1701 E. Woodfield Dr., Suite 400, Schaumburg, IL.

PAR. 4. GEC Tennessee, Inc. ("GE Tennessee") 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 5552 Franklin Rd., Suite 200, Nashville, TN.

PAR. 5. GEC Alabama, Inc. ("GE Alabama") is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Alabama, with its office and principal place of business located at 7529 S. Memorial Pkwy., Suite C & D, Huntsville, AL.

PAR. 6. Great Southern Video, Inc., doing business as Great Expectations of Dallas ("GE Dallas"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Texas, with its office and principal place of business located at 14180 Dallas Pkwy., Suite 100, Dallas, TX.

PAR. 7. New West Video Enterprises, Inc., doing business as Great Expectations of Houston ("GE Houston"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Texas, with its office and principal place of business located at 50 Briarhollow, Suite 100, Houston, TX.

PAR. 8. San Antonio Singles of Texas, Inc., doing business as Great Expectations of San Antonio ("GE San Antonio"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Texas, with its corporate office at 10497 Town & Country Way, Suite 214, Houston, TX, and its principal place of business located at 8131 I.H. 10 West, Suite 225, San Antonio, TX.

PAR. 9. Austin Singles of Texas, Inc., doing business as Great Expectations of Austin ("GE Austin"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Texas, with its corporate office at 10497 Town & Country Way, Suite 214, Houston, TX, and its principal place of business located at 9037 Research Blvd., Suite 130 Austin, TX.

PAR. 10. Great Expectations of Baltimore, Inc. ("GE Baltimore") is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Virginia, with its office and principal place of business located at 40 York Rd., Suite 500, Towson, MD.

PAR. 11. Great Expectations of Washington, D.C., Inc. ("GE DC") 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 8601 Westwood Center Dr., Vienna, VA.

PAR. 12. Great Expectations of Washington, Inc., doing business as Great Expectations of Raleigh/Durham ("GE Raleigh"), 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 3714 Benson Dr., Suite 200, Raleigh, NC.

PAR. 13. Sterling Connections, Inc., doing business as Great Expectations of Seattle ("GE Seattle"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Oregon, with its office and principal place of business located at 305 108th Ave., N.E., Suite 205, Bellevue, WA.

PAR. 14. Private Eye Productions, Inc., doing business as Great Expectations of Portland ("GE Portland"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Oregon, with its office and principal place of business located at 5531 S.W. Macadam Ave., Suite 225, Portland, OR.

PAR. 15. Great Expectations - Columbus, Inc. ("GE Columbus") is a corporation organized, existing, and doing business under and by

virtue of the laws of the state of Ohio, with its corporate office at 11835 W. Olympic Blvd., Suite 490, Los Angeles, CA, and its principal place of business located at 1103 Schrock Rd., Suite 101, Columbus, OH.

PAR. 16. JAMS Financial, Inc., doing business as Great Expectations of Milwaukee ("GE Milwaukee"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Wisconsin, with its corporate office at 11835 W. Olympic Blvd., Suite 490, Los Angeles, CA, and its principal place of business located at 16650 W. Bluemound, Suite 100, Brookfield, WI.

PAR. 17. V.L.P. Enterprises, Inc., doing business as Great Expectations of San Diego ("GE San Diego"), 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 3465 Camino Del Rio South, Suite 300, San Diego, CA.

PAR. 18. APM Enterprises – Minn Inc., doing business as Great Expectations of Minneapolis ("GE Minneapolis"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Illinois, with its office and principal place of business located at 3300 Edinborough Way, Suite 300, Edina, MN.

PAR. 19. KGE, Inc., doing business as Great Expectations of Sausalito, Great Expectations of Mountain View, and Great Expectations of Walnut Creek (collectively referred to as "GE-SFA"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of California, with its corporate office at 1943 Landings Dr., Mountain View, CA, and its principal places of business located at 2401 Marinship Way, Suite 100, Sausalito, CA, 2085 Landings Dr., Mountain View, CA, and 1280 Civic Dr., Suite 300, Walnut Creek, CA.

PAR. 20. G.E.C.H., Inc., doing business as Great Expectations of Cherry Hill ("GE Cherry Hill"), 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 places of business located at One Cherry Hill, Suite 600, Cherry Hill, NJ.

PAR. 21. MWVE, Inc., doing business as Great Expectations of Cleveland ("GE Cleveland"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Ohio,

with its office and principal place of business located at 6300 Rockside Rd., Suite 200, Cleveland, OH.

PAR. 22. GREATEX Denver, Inc., doing business as Great Expectations Video Dating, Ltd. ("GE-Denver"), 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 3773 Cherry Creek North Dr., Suite 140, Denver, CO.

PAR. 23. Sun West Video, Inc., doing business as Great Expectations for Singles ("GE Phoenix"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Arizona, with its office and principal place of business located at 5635 N. Scottsdale Rd., Suite 190, Scottsdale, AZ.

PAR. 24. TRIAAC Enterprises, Inc., doing business as Great Expectations of Sacramento ("GE Sacramento"), 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 2277 Fair Oaks Blvd., Suite 195, Sacramento, CA.

RESPONDENTS' COURSE OF BUSINESS

PAR. 25. GECM is a video dating franchisor. It sells and services franchise operations throughout the United States. As part of its regular course of business, GECM has created and disseminated retail installment contracts (Exhibits 1 and 2) to the franchises described in paragraphs two through twenty-four. The GECM retail installment contracts purport to incorporate the disclosures required by the TILA.

PAR. 26. Respondents Great Expectations are video dating franchises. Respondents have provided financing to their members using retail installment contracts such as Exhibits 1 and 2 to disclose the terms of the financing.

PAR. 27. GECM's TILA disclosure (Exhibit 1) contains erroneous instructions for calculating and disclosing the finance charge and contains a pre-printed annual percentage rate ("APR") of 18%. In addition, Exhibit 1 fails to make the TILA disclosures in the format required by the TILA and fails to identify the creditor as required by the TILA.

PAR. 28. In 1988, GECM learned from its auditor that the calculations and disclosures contained in Exhibit 1 did not comply with the TILA. Nevertheless, it continued to disseminate Exhibit 1

to its franchisees and failed to notify them of the erroneous calculations and disclosures.

PAR. 29. In late 1990, GECM created a new retail installment contract, which also purported to incorporate the disclosures required by the TILA and which contained a preprinted APR of 19.6% (Exhibit 2). Exhibit 2 fails to identify the creditor as required by the TILA and fails to provide the information required by the TILA in the itemization of the amount financed. Furthermore, GECM has disseminated Exhibit 2 to its franchisees but has failed to inform them to discontinue using the erroneous calculation and disclosure instructions that it had previously supplied in Exhibit 1.

PAR. 30. Respondents Great Expectations are creditors as that term is defined in the TILA and Regulation Z.

PAR. 31. The acts and practices of respondents Great Expectations and GECM alleged in this complaint have been and are in or affecting commerce, as "commerce" is defined in Section 4 of the FTC Act.

COUNT I

PAR. 32. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 33. Respondent GECM has furnished its franchises with TILA disclosures (Exhibits 1 and 2) that, on their face, violated the TILA. When used by respondents Great Expectations, Exhibits 1 and 2 have resulted in false and misleading disclosures of APRs and finance charges to consumers in violation of Section 5 of the FTC Act.

PAR. 34. In the course and practice of its business as described in paragraphs twenty-five through twenty-nine, and paragraph thirty-three, respondent GECM has provided respondents Great Expectations with the means and instrumentalities to violate the Section 5 of the FTC Act.

PAR. 35. The practices described in paragraph thirty-four constitute unfair or deceptive acts or practices in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. 45(a).

COUNT II

PAR. 36. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 37. Respondents GEI, GE Illinois, GE Tennessee, GE Alabama, GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Columbus, GE Milwaukee, GE San Diego, GE Minneapolis, GE-SFA, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento have furnished their members with TILA disclosures that have failed to accurately calculate and disclose the APR.

PAR. 38. The practice described in paragraph thirty-seven by respondents GEI, GE Illinois, GE Tennessee, GE Alabama, GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Columbus, GE Milwaukee, GE San Diego, GE Minneapolis, GE-SFA, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento violates Sections 107(a) and (c) of the TILA, 15 U.S.C. 1606(a) and (c), and Sections 226.18(e) and 226.22 of Regulation Z, 12 CFR 226.18(e) and 226.22.

COUNT III

PAR. 39. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 40. Respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Columbus, GE Milwaukee, GE-SFA, GE Cleveland, GE Phoenix, GE Sacramento, and GE San Diego have furnished their members with TILA disclosures that have failed to accurately calculate and disclose the finance charge.

PAR. 41. The practice described in paragraph forty by respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Columbus, GE Milwaukee, GE-SFA, GE Cleveland, GE Phoenix, GE Sacramento, and GE San Diego violates Section 106 of the TILA, 15 U.S.C. 1605, and Sections 226.4 and 226.18(d) of Regulation Z, 12 CFR 226.4 and 226.18(d).

Complaint

120 F.T.C.

COUNT IV

PAR. 42. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 43. Respondents GE Dallas, GE Houston, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, and GE Phoenix have furnished their members with TILA disclosures that have failed to disclose the finance charge more conspicuously than any other disclosure except the APR and the creditor's identity.

PAR. 44. The practice described in paragraph forty-three by respondents GE Dallas, GE Houston, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, and GE Phoenix violates Section 122(a) of the TILA, 15 U.S.C. 1632(a), and Section 226.17(a)(2) of Regulation Z, 12 CFR 226.17(a)(2).

COUNT V

PAR. 45. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 46. Respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento have furnished their members with TILA disclosures that have failed to segregate the disclosures required by the TILA from all other information provided in connection with the transaction, including the itemization of the amount financed.

PAR. 47. The practice described in paragraph forty-six by respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento violates Section 128(b)(1) of the TILA, 15 U.S.C. 1638(b)(1), and Section 226.17(a)(1) of Regulation Z, 12 CFR 226.17(a)(1).

COUNT VI

PAR. 48. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 49. Respondents GEI, GE Illinois, GE Tennessee, GE Alabama, GE Dallas, GE Houston, GE San Antonio, GE Austin, GE

Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Columbus, GE San Diego, GE Minneapolis, GE-SFA, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento have failed to accurately disclose the itemization of the amount financed.

PAR. 50. The practice described in paragraph forty-nine by respondents GEI, GE Illinois, GE Tennessee, GE Alabama, GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Columbus, GE San Diego, GE Minneapolis, GE-SFA, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento violates Section 128(a) of the TILA, 15 U.S.C. 1638(a), and Section 226.18(c) of Regulation Z, 12 CFR 226.18(c).

COUNT VII

PAR. 51. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 52. Respondents GEI, GE Illinois, GE Tennessee, GE Alabama, GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Columbus, GE Milwaukee, GE San Diego, GE Minneapolis, GE-SFA, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento have failed to disclose the identity of the creditor.

PAR. 53. The practice described in paragraph fifty-two by respondents GEI, GE Illinois, GE Tennessee, GE Alabama, GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Columbus, GE Milwaukee, GE San Diego, GE Minneapolis, GE-SFA, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento violates Section 128(a)(1) of the TILA, 15 U.S.C. 1638(a)(1), and Section 226.18(a) of Regulation Z, 12 CFR 226.18(a).

COUNT VIII

PAR. 54. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 55. Respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, GE Phoenix,

and GE Sacramento have furnished their members with TILA disclosures that have failed to provide a description of the amount financed.

PAR. 56. The practice described in paragraph fifty-five by respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento violates Section 128(a)(8) of the TILA, 15 U.S.C. 1638(a)(8), and Section 226.18(b) of Regulation Z, 12 CFR 226.18(b).

PAR. 57. Respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento have furnished their members with TILA disclosures that have failed to provide a description of the finance charge.

PAR. 58. The practice described in paragraph fifty-seven by respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento violates Section 128(a)(8) of the TILA, 15 U.S.C. 1638(a)(8), and Section 226.18(d) of Regulation Z, 12 CFR 226.18(d).

PAR. 59. Respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento have furnished their members with TILA disclosures that have failed to provide a description of the APR.

PAR. 60. The practice described in paragraph fifty-nine by respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento violates Section 128(a)(8) of the TILA, 15 U.S.C. 1638(a)(8), and Section 226.18(e) of Regulation Z, 12 CFR 226.18(e).

PAR. 61. Respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento have furnished their

members with TILA disclosures that have failed to provide the total of payments and/or a description of the total of payments.

PAR. 62. The practice described in paragraph sixty-one by respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento violates Section 128(a)(5) and/or (8) of the TILA, 15 U.S.C. 1638(a)(5) and/or (8), and Section 226.18(h) of Regulation Z, 12 CFR 226.18(h).

PAR. 63. Respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento have furnished their members with TILA disclosures that have failed to provide the total sale price and/or a description of the total sale price.

PAR. 64. The practice described in paragraph sixty-three by respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento violates Section 128(a)(7) and/or (8) of the TILA, 15 U.S.C. 1638(a)(7) and/or (8), and Section 226.18(j) of Regulation Z, 12 CFR 226.18(j).

COUNT IX

PAR. 65. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 66. Respondents GE Dallas, GE Houston, GE Phoenix, GE San Antonio, GE Austin, GE Baltimore, GE DC, and GE Raleigh have failed to include set-up or other fees that are charged only to consumers who finance the costs of their memberships in the finance charge and the annual percentage rate disclosed to the consumer. They have also failed to exclude these finance charges from the amount financed that is disclosed to consumers.

PAR. 67. The practices described in paragraph sixty-six by respondents GE Dallas, GE Houston, GE Phoenix, GE San Antonio, GE Austin, GE Baltimore, GE DC, and GE Raleigh violate Sections 106, 107, and 128(a) of the TILA, 15 U.S.C. 1605, 1606, and 1638(a), and Sections 226.4(b), 226.22, and 226.18(b), (d), and (e) of Regulation Z, 12 CFR 226.4(b), 226.22, and 226.18(b), (d), and (e).

Complaint

120 F.T.C.

COUNT X

PAR. 68. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 69. Respondent GE San Diego has furnished its members with TILA disclosures that have failed to disclose the APR, the finance charge, the amount financed, the total of payments, and the total sales price.

PAR. 70. The practices described in paragraph sixty-nine by respondent GE San Diego violate Section 128(a) of the TILA, 15 U.S.C. 1638(a), and Section 226.18 of Regulation Z, 12 CFR 226.18.

COUNT XI

PAR. 71. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 72. Respondent GE Houston has furnished its members with TILA disclosures that have failed to disclose the amount financed.

PAR. 73. The practice described in paragraph seventy-two by respondent GE Houston violates Section 128(a) of the TILA, 15 U.S.C. 1638(a), and Section 226.18(b) of Regulation Z, 12 CFR 226.18(b).

COUNT XII

PAR. 74. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 75. Respondents GEI, GE Alabama, GE Illinois, GE Portland, GE Dallas, GE Houston, GE Cleveland, GE Phoenix, GE San Antonio, GE Austin, GE Seattle, GE Denver, GE Columbus, GE Milwaukee, GE San Diego, GE Minneapolis, GE SFA, GE Cherry Hill, GE Sacramento, GE DC, GE Baltimore, and GE Raleigh have disclosed understated APRs and finance charges to consumers that have resulted in consumers paying more in financing costs than the amount to which they originally agreed.

PAR. 76. The practices described in paragraph seventy-five are unfair or deceptive acts or practices in violation of Section 5(a) of the FTC Act, 15 U.S.C. 45(a).

Complaint

EXHIBIT 1



RETAIL INSTALLMENT CONTRACT

NAME - Last		First	Middle	Age
[Redacted]		[Redacted]	[Redacted]	26
Present Address			City	State
[Redacted]			[Redacted]	CO 80010
Social Security #	Home Phone	How Long at This Address	How Long in Area	
[Redacted]	[Redacted]	25 YRS	26 YRS	
Employed By		Work Phone	Present Position	
[Redacted]		[Redacted]	[Redacted]	
Income as Services	Annual	Driver's License #		
Month	[Redacted]	[Redacted]		
Primary Bank Accounts		Checking Balance		
Savings Balance	[Redacted]	[Redacted]		
Credit Reference - Bank Finance Co. Credit Unions				
USA				
FIRST INTERSTATE BANK				

The undersigned Great Expectations (Seller) hereby sells, and the undersigned Buyer, hereinafter referred to as "Member" purchases subject to the provisions of this contract, a MEMBERSHIP in Great Expectations and agrees to pay to Great Expectations its share of the TOTAL PAYMENTS (Box 8) in accordance with the Payment Schedule hereinafter set forth.

DESCRIPTION OF GOODS AND SERVICES SOLD:

Interviewing, Testing & Evaluating, Processing & Coding, Background check (if necessary), for the purpose of bringing in contact with the purchaser (client) suitable individuals with similar likes and dislikes, this description intended to be partial only, the purchaser acknowledges receipt of application form, which is made a part hereof as though set out at length.

READ CAREFULLY AND SIGN ONLY WHEN COMPLETELY UNDERSTOOD

Buyer has considered and evaluated the terms of membership as set forth in Great Expectations Membership Agreement dated 10/31/91 and requests financing of the balance due. Acceptance of the terms of both agreements renders null and void any buyer's right to cancel previously provided.

I understand that my failure to participate in Great Expectations does not relieve me of my obligation to pay this contract in full regardless of the circumstances. I understand that by signing this Agreement I am a Member of Great Expectations.

MEMBER SIGNATURE

NOTICE TO MEMBER: Upon request, Great Expectations must provide or make available for your examination a statement or table showing how the partial refund of the time price charge is to be computed if any balance of the contract should be prepaid. Member (Buyer) and Great Expectations (Seller) agree that the terms and conditions on the Member's Contract for Membership constitute a part of this contract and are incorporated herein by reference. If due to delinquency, it is necessary to refer this account for collection, then the balance due shall include actual attorney's fee and court cost. In the event Member fails to pay any installment payment when due, the entire balance then owing shall immediately become due and payable, without notice, at the option of Great Expectations or assignee, and Great Expectations shall not be required to provide any services to Member until Member's payment account is made current. If more than one person signs this contract then their obligation shall be joint and several.

ITEMIZATION OF THE AMOUNT FINANCED

1. Cash Price	1595	BALANCE	1595
2. Other	0		
3. Down Payment	300		1295
4. Paid (11/14/91) Second Interview	100		1195
5. Other Payments Due (11/30/91)	100		1095
6. Amt. Financed (Unpaid Bal. of Cash Price #3)	1095		1095
7. Finance Charge @ 6% Bal. x 17% x 5 no. of payments			82.13
8. Total Payments (Bal 6 - 7)			1177.13
9. Deferred Payment Price (Bal #2 - #7)	1477.13		

10. ANNUAL PERCENTAGE RATE 18%

11. PAYMENT SCHEDULE: 5 successive monthly installments of \$ 235.74 each, commencing 12/15/91, and on the same day of each month thereafter, until fully paid. NO BALLOON PAYMENT.

12. DELINQUENCY AND COLLECTION CHARGES: Buyer shall pay or agree to pay any delinquency charges when the same shall become due and such failure or neglect shall constitute a breach of more than ten (10) days, then in addition to the amount of such delinquency installment payment the Buyer shall pay to Seller, as a consequence and collection charge, an amount equal to 5% of such payment, except that such charge shall not exceed \$1.00 or be less than \$1.00.

13. PREPAYMENT REBATE: Buyer may prepay any part or all of the unpaid balance without penalty and upon payment in full Buyer shall be entitled to a refund of the unearned portion of the Finance Charge computed upon the simple interest date, however, there shall be a minimum Finance Charge of \$10.00 and no refund if the unearned charge is less than \$1.00.

DIVIDE by number of payments to calculate each installment and summarize on #11

*Notice to Buyer: (1) Do not sign this agreement before you read it or if it contains any blank spaces to be filled in. (2) You or anyone to a completely filled-in copy of this agreement. (3) You can prepay the full amount due under this agreement at any time (4) If you desire to pay off in advance the full amount due, the amount which is outstanding will be furnished upon request.

SELLER Great Expectations

Signature of Member

Business Address: 3773 Cherry Creek N. Dr. #1410
 City & State: Denver CO 8007

Member (Buyer) acknowledges receipt of an exact copy of the instrument at the time of its execution. Member (Buyer) further acknowledges that the blanks in this contract were completed as filled-in and that he has read the disclosures contained hereon prior to signing the contract.

Authorized Signatures: [Redacted]

Exhibit 1

EXHIBIT 2



RETAIL INSTALLMENT CONTRACT

Form with fields for Name, Address, Social Security #, Home Phone, New Long At This Address, Date of Birth, Employer, Driver's License #, and Bank Accounts.

The undersigned Great Expectations (Seller) hereby sells, and the undersigned buyer (Member) purchases, subject to the provisions of this CONTRACT... DESCRIPTION OF GOODS AND SERVICES SOLD: Interviewing, Evaluating, Processing & Coding, Background Check...

READ CAREFULLY AND SIGN ONLY WHEN COMPLETELY UNDERSTOOD

I have considered and evaluated the terms of membership as set forth in the Great Expectations Membership Agreement dated... and hereby financing of the balance due. I understand that my failure to participate in Great Expectations does not release me of my obligation...

MEMBER SIGNATURE X

NOTICE TO MEMBER: Upon request, Great Expectations must provide or make available for your examination a statement or copy showing how I... PURCHASE PRICE: \$... PAYMENT SCHEDULE: Member's payments hereunder shall be in equal consecutive monthly installments commencing on the... day 1 month after consummation of the Contract...

FEDERAL TRUTH IN LENDING DISCLOSURES (Statement of Disclosures) table with columns for Annual Percentage Rate, Finance Charge, Total of Payments, and Total Sale Price.

ITEMIZATION OF AMOUNT FINANCED table with rows for Total Cash Price, Less Downpayment, Amount Financed, Finance Charge, and Total of Payments.

DELINQUENCY AND COLLECTION CHARGES: If Buyer shall fail or neglect to pay any installment payment... PREPAYMENT: If you pay off early, you will not have to pay a penalty and you may be entitled to a refund of part of the finance charge.

Should the buyer default in the payment of any installment hereunder... NOTICE TO BUYER: 1. Do not sign this agreement before you read it or if it contains any blank spaces to be filled in.

Signature lines for Seller (GREAT EXPECTATIONS) and Member (Buyer) with fields for Business Address, City & State, and Title.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of respondent JAMS Financial, Inc., a corporation, and respondent having been furnished thereafter with a copy of the draft of complaint that 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 Section 5(a) of the Federal Trade Commission Act and the Truth in Lending Act; and

The respondent, its attorney, 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 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. JAMS Financial, Inc., doing business as Great Expectations of Milwaukee ("GE Milwaukee"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Wisconsin, with its corporate office at 11835 W. Olympic Blvd., Suite 490, Los Angeles, CA, and its principal place of business located at 16650 W. Bluemound, Suite 100, Brookfield, WI.

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:

A. Respondent GE Milwaukee, 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 offering of credit, do forthwith cease and desist from failing to accurately calculate and disclose the annual percentage rate, as required by Sections 107(a) and (c) of the TILA, 15 U.S.C. 1606(a) and (c), and Sections 226.18(e) and 226.22 of Regulation Z, 12 CFR 226.18(e) and 226.22;

B. Respondent GE Milwaukee, 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 offering of credit, do forthwith cease and desist from failing to accurately calculate and disclose the finance charge, as required by Section 106 of the TILA, 15 U.S.C. 1605, and Sections 226.4 and 226.18(d) of Regulation Z, 12 CFR 226.4 and 226.18(d);

C. Respondent GE Milwaukee, 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 offering of credit, do forthwith cease and desist from failing to make all disclosures in the manner, form, and amount required by Sections 122 and 128(a) of the TILA, 15 U.S.C. 1632 and 1638(a), and Sections 226.17 and 226.18 of Regulation Z, 12 CFR 226.17 and 226.18;

D. Respondent GE Milwaukee, 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 offering of credit, do forthwith cease and desist from failing to comply with the TILA, 15 U.S.C. 1601 *et seq.*, and Regulation Z, 12 CFR 226.

II.

REFUND PROGRAM

It is further ordered, That:

A. Within thirty (30) days following the date of service of this order, respondent shall:

1. Determine to whom respondent disclosed on the original TILA disclosure an annual percentage rate that was miscalculated by more than one quarter of one percentage point below the annual percentage rate determined in accordance with Section 226.22 of Regulation Z, 12 CFR 226.22, or that disclosed a finance charge that was miscalculated by more than one dollar below the finance charge determined in accordance with Section 226.4 of Regulation Z, 12 CFR 226.4, so that each such person will not be required to pay a finance charge in excess of the finance charge actually disclosed or the dollar equivalent of the annual percentage rate actually disclosed, whichever is lower, plus a tolerance of one quarter of one percentage point;

2. Calculate a lump sum refund and a monthly payment adjustment, if applicable, in accordance with Section 108(e) of the TILA, 15 U.S.C. 1607(e);

3. Mail a refund check to each eligible consumer in the amount determined above, along with Attachment 1; and

4. Provide the Federal Trade Commission with a list of each such consumer, the amount of the refund, the number of payments refunded, the amount of adjustment for future payments and the number of future payments to be adjusted.

B. No later than fifteen (15) days following the date of service of this order, respondent shall provide the Federal Trade Commission with the name and address of three independent accounting firms, with which it, its officers, employees, attorneys, agents, and franchisees have no business relationship. Staff for the Division of Credit Practices of the FTC shall then have the sole discretion to choose one of the firms ("independent agent") and so advise respondent;

C. Within thirty (30) days following the date of adjustments made pursuant to this section, respondent shall direct the independent agent to review a statistically-valid sample of refunds. Respondent shall provide the Federal Trade Commission with a certified letter from the independent agent confirming that respondent has complied with Part II.A. of this order;

D. All costs associated with the administration of the refund program and payment of refunds shall be borne by the respondent.

III.

It is further ordered, That respondent, its successors and assigns, shall maintain for at least five (5) years from the date of service of this order and, upon thirty (30) days advance written request, make available to the Federal Trade Commission for inspection and copying all documents and other records necessary to demonstrate fully its compliance with this order.

IV.

It is further ordered, That respondent, its successors and assigns, shall distribute a copy of this order to any present or future officers and managerial employees having responsibility with respect to the subject matter of this order and that respondent, its successors and assigns, shall secure from each such person a signed statement acknowledging receipt of said order.

V.

It is further ordered, That respondent, for a period of five (5) years following the date of service of this order, shall promptly notify the Commission at least thirty (30) days prior to any proposed change in its corporate structure such as 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 that may affect compliance obligations arising out of the order.

VI.

It is further ordered, That respondent shall within one hundred and eighty (180) days of 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 its has complied with this order.

ATTACHMENT 1

Dear Great Expectations Customer:

As part of our settlement with the Federal Trade Commission for alleged violations of the Truth in Lending Act, we are sending you the enclosed refund check in the amount of \$*****. The refund represents the amount you were overcharged as a result of errors made by Great Expectations in calculating or disclosing the annual percentage rate or finance charge.

[In addition, your future monthly payments have been reduced. Starting immediately, your monthly payments will be \$*****.]

We regret any inconvenience this may have caused you.

Great Expectations

Complaint

120 F.T.C.

IN THE MATTER OF

SAN ANTONIO SINGLES OF TEXAS, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
THE TRUTH IN LENDING ACT AND SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT*Docket C-3608. Complaint, Aug. 11, 1995--Decision, Aug. 11, 1995*

This consent order requires, among other things, the video dating service franchises to properly and accurately disclose the annual percentage rate ("APR") and other credit terms of financed memberships, as required by the federal Truth in Lending Act, and requires the franchises to establish adjustment refund programs to compensate its past and current members who overpaid finance charges.

Appearances

For the Commission: *Stephen Cohen, Judy Nixon and David Medine.*

For the respondents: *Darryl Burman, Brill & Byrom, Houston, TX.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Great Expectations Creative Management, Inc. has violated the Federal Trade Commission Act ("FTC Act"), and that Great Expectations, Inc., GEC Illinois, Inc., GEC Tennessee, Inc., GEC Alabama, Inc., Great Southern Video, Inc., New West Video Enterprises, Inc., San Antonio Singles of Texas, Inc., Austin Singles of Texas, Inc., Great Expectations of Baltimore, Inc., Great Expectations of Washington, D.C., Inc., Great Expectations of Washington, Inc., Sterling Connections, Inc., Private Eye Productions, Inc., Great Expectations - Columbus, Inc., JAMS Financial, Inc., V.L.P. Enterprises, Inc., APM Enterprises - Minn Inc., KGE, Inc., G.E.C.H., Inc., MWVE, Inc., GREATEX Denver, Inc., Sun West Video, Inc., and TRIAAC Enterprises, Inc. (hereinafter sometimes referred to collectively as "Great Expectations") have violated the Truth in Lending Act ("TILA"), its implementing Regulation Z, and the FTC Act, and it appearing to the

Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint, and alleges as follows:

PARAGRAPH 1. Great Expectations Creative Management, Inc. ("GECM") 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 16830 Ventura Blvd., Suite P, Encino, CA.

PAR. 2. Great Expectations, Inc. ("GEI") is a corporation organized, existing, and doing business under and by virtue of the laws of the state of California, with its corporate office at 16830 Ventura Blvd., Suite P, Encino, CA, and its principal places of business located at 1640 S. Sepulveda Blvd., Suite 100, Los Angeles, CA, 17207 Ventura Blvd., Encino, CA, and 450 N. Mountain, Suite B, Upland, CA.

PAR. 3. GEC Illinois, Inc. ("GE Illinois") is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Illinois, with its office and principal place of business located at 1701 E. Woodfield Dr., Suite 400, Schaumburg, IL.

PAR. 4. GEC Tennessee, Inc. ("GE Tennessee") 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 5552 Franklin Rd., Suite 200, Nashville, TN.

PAR. 5. GEC Alabama, Inc. ("GE Alabama") is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Alabama, with its office and principal place of business located at 7529 S. Memorial Pkwy., Suite C & D, Huntsville, AL.

PAR. 6. Great Southern Video, Inc., doing business as Great Expectations of Dallas ("GE Dallas"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Texas, with its office and principal place of business located at 14180 Dallas Pkwy., Suite 100, Dallas, TX.

PAR. 7. New West Video Enterprises, Inc., doing business as Great Expectations of Houston ("GE Houston"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Texas, with its office and principal place of business located at 50 Briarhollow, Suite 100, Houston, TX.

PAR. 8. San Antonio Singles of Texas, Inc., doing business as Great Expectations of San Antonio ("GE San Antonio"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Texas, with its corporate office at 10497 Town & Country Way, Suite 214, Houston, TX, and its principal place of business located at 8131 I.H. 10 West, Suite 225, San Antonio, TX.

PAR. 9. Austin Singles of Texas, Inc., doing business as Great Expectations of Austin ("GE Austin"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Texas, with its corporate office at 10497 Town & Country Way, Suite 214, Houston, TX, and its principal place of business located at 9037 Research Blvd., Suite 130, Austin, TX.

PAR. 10. Great Expectations of Baltimore, Inc. ("GE Baltimore") is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Virginia, with its office and principal place of business located at 40 York Rd., Suite 500, Towson, MD.

PAR. 11. Great Expectations of Washington, D.C., Inc. ("GE DC") 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 8601 Westwood Center Dr., Vienna, VA.

PAR. 12. Great Expectations of Washington, Inc., doing business as Great Expectations of Raleigh/Durham ("GE Raleigh"), 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 3714 Benson Dr., Suite 200, Raleigh, NC.

PAR. 13. Sterling Connections, Inc., doing business as Great Expectations of Seattle ("GE Seattle"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Oregon, with its office and principal place of business located at 305 108th Ave., N.E., Suite 205, Bellevue, WA.

PAR. 14. Private Eye Productions, Inc., doing business as Great Expectations of Portland ("GE Portland"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Oregon, with its office and principal place of business located at 5531 S.W. Macadam Ave., Suite 225, Portland, OR.

PAR. 15. Great Expectations - Columbus, Inc. ("GE Columbus") is a corporation organized, existing, and doing business under and by

virtue of the laws of the state of Ohio, with its corporate office at 11835 W. Olympic Blvd., Suite 490, Los Angeles, CA, and its principal place of business located at 1103 Schrock Rd., Suite 101, Columbus, OH.

PAR. 16. JAMS Financial, Inc., doing business as Great Expectations of Milwaukee ("GE Milwaukee"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Wisconsin, with its corporate office at 11835 W. Olympic Blvd., Suite 490, Los Angeles, CA, and its principal place of business located at 16650 W. Bluemound, Suite 100, Brookfield, WI.

PAR. 17. V.L.P. Enterprises, Inc., doing business as Great Expectations of San Diego ("GE San Diego"), 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 3465 Camino Del Rio South, Suite 300, San Diego, CA.

PAR. 18. APM Enterprises - Minn Inc., doing business as Great Expectations of Minneapolis ("GE Minneapolis"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Illinois, with its office and principal place of business located at 3300 Edinborough Way, Suite 300, Edina, MN.

PAR. 19. KGE, Inc., doing business as Great Expectations of Sausalito, Great Expectations of Mountain View, and Great Expectations of Walnut Creek (collectively referred to as "GE-SFA"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of California, with its corporate office at 1943 Landings Dr., Mountain View, CA, and its principal places of business located at 2401 Marinship Way, Suite 100, Sausalito, CA, 2085 Landings Dr., Mountain View, CA, and 1280 Civic Dr., Suite 300, Walnut Creek, CA.

PAR. 20. G.E.C.H., Inc., doing business as Great Expectations of Cherry Hill ("GE Cherry Hill"), 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 places of business located at One Cherry Hill, Suite 600, Cherry Hill, NJ.

PAR. 21. MWVE, Inc., doing business as Great Expectations of Cleveland ("GE Cleveland"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Ohio,

with its office and principal place of business located at 6300 Rockside Rd., Suite 200, Cleveland, OH.

PAR. 22. GREATEX Denver, Inc., doing business as Great Expectations Video Dating, Ltd. ("GE-Denver"), 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 3773 Cherry Creek North Dr., Suite 140, Denver, CO.

PAR. 23. Sun West Video, Inc., doing business as Great Expectations for Singles ("GE Phoenix"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Arizona, with its office and principal place of business located at 5635 N. Scottsdale Rd., Suite 190, Scottsdale, AZ.

PAR. 24. TRIAAC Enterprises, Inc., doing business as Great Expectations of Sacramento ("GE Sacramento"), 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 2277 Fair Oaks Blvd., Suite 195, Sacramento, CA.

RESPONDENTS' COURSE OF BUSINESS

PAR. 25. GECM is a video dating franchisor. It sells and services franchise operations throughout the United States. As part of its regular course of business, GECM has created and disseminated retail installment contracts (Exhibits 1 and 2) to the franchises described in paragraphs two through twenty-four. The GECM retail installment contracts purport to incorporate the disclosures required by the TILA.

PAR. 26. Respondents Great Expectations are video dating franchises. Respondents have provided financing to their members using retail installment contracts such as Exhibits 1 and 2 to disclose the terms of the financing.

PAR. 27. GECM's TILA disclosure (Exhibit 1) contains erroneous instructions for calculating and disclosing the finance charge and contains a pre-printed annual percentage rate ("APR") of 18%. In addition, Exhibit 1 fails to make the TILA disclosures in the format required by the TILA and fails to identify the creditor as required by the TILA.

PAR. 28. In 1988, GECM learned from its auditor that the calculations and disclosures contained in Exhibit 1 did not comply with the TILA. Nevertheless, it continued to disseminate Exhibit 1

to its franchisees and failed to notify them of the erroneous calculations and disclosures.

PAR. 29. In late 1990, GECM created a new retail installment contract, which also purported to incorporate the disclosures required by the TILA and which contained a pre-printed APR of 19.6% (Exhibit 2). Exhibit 2 fails to identify the creditor as required by the TILA and fails to provide the information required by the TILA in the itemization of the amount financed. Furthermore, GECM has disseminated Exhibit 2 to its franchisees but has failed to inform them to discontinue using the erroneous calculation and disclosure instructions that it had previously supplied in Exhibit 1.

PAR. 30. Respondents Great Expectations are creditors as that term is defined in the TILA and Regulation Z.

PAR. 31. The acts and practices of respondents Great Expectations and GECM alleged in this complaint have been and are in or affecting commerce, as "commerce" is defined in Section 4 of the FTC Act.

COUNT I

PAR. 32. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 33. Respondent GECM has furnished its franchises with TILA disclosures (Exhibits 1 and 2) that, on their face, violated the TILA. When used by respondents Great Expectations, Exhibits 1 and 2 have resulted in false and misleading disclosures of APRs and finance charges to consumers in violation of Section 5 of the FTC Act.

PAR. 34. In the course and practice of its business as described in paragraphs twenty-five through twenty-nine, and paragraph thirty-three, respondent GECM has provided respondents Great Expectations with the means and instrumentalities to violate the Section 5 of the FTC Act.

PAR. 35. The practices described in paragraph thirty-four constitute unfair or deceptive acts or practices in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. 45(a).

COUNT II

PAR. 36. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 37. Respondents GEI, GE Illinois, GE Tennessee, GE Alabama, GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Columbus, GE Milwaukee, GE San Diego, GE Minneapolis, GE-SFA, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento have furnished their members with TILA disclosures that have failed to accurately calculate and disclose the APR.

PAR. 38. The practice described in paragraph thirty-seven by respondents GEI, GE Illinois, GE Tennessee, GE Alabama, GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Columbus, GE Milwaukee, GE San Diego, GE Minneapolis, GE-SFA, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento violates Sections 107(a) and (c) of the TILA, 15 U.S.C. 1606(a) and (c), and Sections 226.18(e) and 226.22 of Regulation Z, 12 CFR 226.18(e) and 226.22.

COUNT III

PAR. 39. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 40. Respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Columbus, GE Milwaukee, GE-SFA, GE Cleveland, GE Phoenix, GE Sacramento, and GE San Diego have furnished their members with TILA disclosures that have failed to accurately calculate and disclose the finance charge.

PAR. 41. The practice described in paragraph forty by respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Columbus, GE Milwaukee, GE-SFA, GE Cleveland, GE Phoenix, GE Sacramento, and GE San Diego violates Section 106 of the TILA, 15 U.S.C. 1605, and Sections 226.4 and 226.18(d) of Regulation Z, 12 CFR 226.4 and 226.18(d).

COUNT IV

PAR. 42. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 43. Respondents GE Dallas, GE Houston, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, and GE Phoenix have furnished their members with TILA disclosures that have failed to disclose the finance charge more conspicuously than any other disclosure except the APR and the creditor's identity.

PAR. 44. The practice described in paragraph forty-three by respondents GE Dallas, GE Houston, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, and GE Phoenix violates Section 122(a) of the TILA, 15 U.S.C. 1632(a), and Section 226.17(a)(2) of Regulation Z, 12 CFR 226.17(a)(2).

COUNT V

PAR. 45. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 46. Respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento have furnished their members with TILA disclosures that have failed to segregate the disclosures required by the TILA from all other information provided in connection with the transaction, including the itemization of the amount financed.

PAR. 47. The practice described in paragraph forty-six by respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento violates Section 128(b)(1) of the TILA, 15 U.S.C. 1638(b)(1), and Section 226.17(a)(1) of Regulation Z, 12 CFR 226.17(a)(1).

COUNT VI

PAR. 48. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 49. Respondents GEI, GE Illinois, GE Tennessee, GE Alabama, GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Columbus, GE San Diego, GE Minneapolis, GE-SFA, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento

have failed to accurately disclose the itemization of the amount financed.

PAR. 50. The practice described in paragraph forty-nine by respondents GEI, GE Illinois, GE Tennessee, GE Alabama, GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Columbus, GE San Diego, GE Minneapolis, GE-SFA, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento violates Section 128(a) of the TILA, 15 U.S.C. 1638(a), and Section 226.18(c) of Regulation Z, 12 CFR 226.18(c).

COUNT VII

PAR. 51. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 52. Respondents GEI, GE Illinois, GE Tennessee, GE Alabama, GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Columbus, GE Milwaukee, GE San Diego, GE Minneapolis, GE-SFA, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento have failed to disclose the identity of the creditor.

PAR. 53. The practice described in paragraph fifty-two by respondents GEI, GE Illinois, GE Tennessee, GE Alabama, GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Columbus, GE Milwaukee, GE San Diego, GE Minneapolis, GE-SFA, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento violates Section 128(a)(1) of the TILA, 15 U.S.C. 1638(a)(1), and Section 226.18(a) of Regulation Z, 12 CFR 226.18(a).

COUNT VIII

PAR. 54. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 55. Respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento have furnished their members with TILA disclosures that have failed to provide a description of the amount financed.

PAR. 56. The practice described in paragraph fifty-five by respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento violates Section 128(a)(8) of the TILA, 15 U.S.C. 1638(a)(8), and Section 226.18(b) of Regulation Z, 12 CFR 226.18(b).

PAR. 57. Respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento have furnished their members with TILA disclosures that have failed to provide a description of the finance charge.

PAR. 58. The practice described in paragraph fifty-seven by respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento violates Section 128(a)(8) of the TILA, 15 U.S.C. 1638(a)(8), and Section 226.18(d) of Regulation Z, 12 CFR 226.18(d).

PAR. 59. Respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento have furnished their members with TILA disclosures that have failed to provide a description of the APR.

PAR. 60. The practice described in paragraph fifty-nine by respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento violates Section 128(a)(8) of the TILA, 15 U.S.C. 1638(a)(8), and Section 226.18(e) of Regulation Z, 12 CFR 226.18(e).

PAR. 61. Respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento have furnished their members with TILA disclosures that have failed to provide the total of payments and/or a description of the total of payments.

PAR. 62. The practice described in paragraph sixty-one by respondents GE Dallas, GE Houston, GE San Antonio, GE Austin,

GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento violates Section 128(a)(5) and/or (8) of the TILA, 15 U.S.C. 1638(a)(5) and/or (8), and Section 226.18(h) of Regulation Z, 12 CFR 226.18(h).

PAR. 63. Respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento have furnished their members with TILA disclosures that have failed to provide the total sale price and/or a description of the total sale price.

PAR. 64. The practice described in paragraph sixty-three by respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento violates Section 128(a)(7) and/or (8) of the TILA, 15 U.S.C. 1638(a)(7) and/or (8), and Section 226.18(j) of Regulation Z, 12 CFR 226.18(j).

COUNT IX

PAR. 65. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 66. Respondents GE Dallas, GE Houston, GE Phoenix, GE San Antonio, GE Austin, GE Baltimore, GE DC, and GE Raleigh have failed to include set-up or other fees that are charged only to consumers who finance the costs of their memberships in the finance charge and the annual percentage rate disclosed to the consumer. They have also failed to exclude these finance charges from the amount financed that is disclosed to consumers.

PAR. 67. The practices described in paragraph sixty-six by respondents GE Dallas, GE Houston, GE Phoenix, GE San Antonio, GE Austin, GE Baltimore, GE DC, and GE Raleigh violate Sections 106, 107, and 128(a) of the TILA, 15 U.S.C. 1605, 1606, and 1638(a), and Sections 226.4(b), 226.22, and 226.18(b), (d), and (e) of Regulation Z, 12 CFR 226.4(b), 226.22, and 226.18(b), (d), and (e).

COUNT X

PAR. 68. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 69. Respondent GE San Diego has furnished its members with TILA disclosures that have failed to disclose the APR, the finance charge, the amount financed, the total of payments, and the total sales price.

PAR. 70. The practices described in paragraph sixty-nine by respondent GE San Diego violate Section 128(a) of the TILA, 15 U.S.C. 1638(a), and Section 226.18 of Regulation Z, 12 CFR 226.18.

COUNT XI

PAR. 71. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 72. Respondent GE Houston has furnished its members with TILA disclosures that have failed to disclose the amount financed.

PAR. 73. The practice described in paragraph seventy-two by respondent GE Houston violates Section 128(a) of the TILA, 15 U.S.C. 1638(a), and Section 226.18(b) of Regulation Z, 12 CFR 226.18(b).

COUNT XII

PAR. 74. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 75. Respondents GEI, GE Alabama, GE Illinois, GE Portland, GE Dallas, GE Houston, GE Cleveland, GE Phoenix, GE San Antonio, GE Austin, GE Seattle, GE Denver, GE Columbus, GE Milwaukee, GE San Diego, GE Minneapolis, GE SFA, GE Cherry Hill, GE Sacramento, GE DC, GE Baltimore, and GE Raleigh have disclosed understated APRs and finance charges to consumers that have resulted in consumers paying more in financing costs than the amount to which they originally agreed.

PAR. 76. The practices described in paragraph seventy-five are unfair or deceptive acts or practices in violation of Section 5(a) of the FTC Act, 15 U.S.C. 45(a).

EXHIBIT 1

Expectations

RETAIL INSTALLMENT CONTRACT

Name - Last	First	Middle	Age
[Redacted]	[Redacted]	[Redacted]	26
Present Address	City	State	Zip
[Redacted]	[Redacted]	CO	80010
Social Security #	Home Phone	How Long at this Address	How Long in Area
[Redacted]	[Redacted]	25 YRS	26 YRS
Employed By	Work Phone	Present Position	
[Redacted]	[Redacted]	[Redacted]	
Income All Sources	Annual	Driver's License #	
[Redacted]	[Redacted]	[Redacted]	
Primary Bank Accounts	Savings	Checking	Balance
[Redacted]	[Redacted]	[Redacted]	[Redacted]
Credit Reference - Banks, Finance Co., Credit Unions	Open	Closed	None
115A			
2 FIRST STATE Bank	Open	Closed	None

The undersigned Great Expectations (Seller) hereby sells, and the undersigned Buyer, hereinafter referred to as "Member" purchases subject to the provisions of this contract, a MEMBERSHIP in Great Expectations and promises to pay to Great Expectations its share of the TOTAL PAYMENTS (Box 8) in accordance with the Payment Schedule hereinafter set forth.

DESCRIPTION OF GOODS AND SERVICES SOLD

Interviewing, Testing & Evaluating, Processing & Coding, Background check (if necessary), for the purpose of bringing in contact with the purchaser (client) suitable individuals with similar likes and dislikes; this description intended to be partial only; the purchaser acknowledges receipt of application form, which is made a part hereof as though set out at length.

READ CAREFULLY AND SIGN ONLY WHEN COMPLETELY UNDERSTOOD

Buyer has considered and evaluated the terms of membership as set forth in Great Expectations Membership Agreement dated 10/31/91 and requests financing of the balance due. Acceptance of the terms of both agreements renders null and void of buyer's right to cancel previously provided.

I understand that my failure to participate in Great Expectations does not relieve me of my obligation to pay this contract in full regardless of the circumstances. I understand that by signing this Agreement I am a Member of Great Expectations.

MEMBER SIGNATURE X [Redacted]

NOTICE TO MEMBER: Upon request, Great Expectations must provide or make available for your examination a statement or ledger showing how the partial refund of the time price charge is to be computed if any balance of the contract should be prepaid. Member (Buyer) and Great Expectations (Seller) agree that the terms and conditions on the Member's Contract for Membership constitute part of this contract and are incorporated herein by reference. If due to delinquency, it is necessary to refer this account to collection, then the balance due shall include actual attorney's fee and court costs. In the event Member fails to pay any installment payment when due, the entire balance then owing shall immediately become due and payable, without notice, at the option of Great Expectations or assignee, and Great Expectations shall not be required to provide any services to Member until Member's payment account is made current. If more than one person signs this contract then their obligation shall be joint and several.

ITEMIZATION OF THE AMOUNT FINANCED

1. Cash Price	1595	BALANCE	10. ANNUAL PERCENTAGE RATE	18%
2. Other	0	11. PAYMENT SCHEDULE:	5	SUCCESSIVE MONTHLY INSTALLMENTS OF \$ 235
3. Down Payment	300	12. BALLOON PAYMENT	1215.91	and on the same day at each month thereafter, until fully paid.
4. Paid (11/14/91) Second Interview	100	13. DELINQUENCY AND COLLECTION CHARGES:		Buyer shall fail or neglect to pay any installment payment when the same shall become due and such failure neglect shall continue for a period of more than ten (10) days, then in addition to the amount of such overdue installment payment the Buyer shall pay to Seller, at Seller's option and collection charge, an amount equal to 1% of such payment, except that such charge shall not exceed \$5.00 or be less than \$1.00.
5. Other Payments Due (11/30/91)	100	14. PREPAYMENT REBATE:		Buyer may prepay any part of the unpaid balance without penalty and any payment in full Buyer shall be entitled to a refund of the unearned portion of the Finance Charge earned under the simple interest basis, however, there shall be no minimum Finance Charge of \$10.00 and no refund if the unearned charge is less than \$1.00.
6. Finance Charge @ 18% Bal. x 12 = 18%	82.13			
7. Total Payments (Bal 6 + 7)	1177.13			
8. Deferred Payment Price (Bal 2 + 7)	1677.13			

DIVIDE by number of payments to calculate each installment and summarize on #11

Notice to buyer: (1) Do not sign this agreement before you read it or if it contains any blank spaces to be filled in. (2) You are entitled to a completely filled-in copy of this agreement. (3) You can prepay the full amount due under this agreement at any time. (4) If you desire to pay off in advance the full amount due, the amount which is outstanding will be furnished upon request.

SELLER Great Expectations

Signature of Member X [Redacted]

Business Address: 3723 Cherry Creek N. Dr. #400
City & State: Denver, CO 80007

Member (Buyer) acknowledges receipt of an exact copy of this instrument at the time of its execution. Member (Buyer) further acknowledges that the blanks in this contract were completed as filled-in and that he has read the disclosures contained here prior to signing the contract.

Authorized Signature: [Redacted]

Signature of Member X [Redacted]

Exhibit 1

EXHIBIT 2



RETAIL INSTALLMENT CONTRACT

Form with fields for Name (Last, First, Middle, Age), Present Address (City, State, Zip), Social Security #, Home Phone, How Long At This Address, Date of Birth, Employed By (Name and Address, Work Phone, Present Position), Name All Sources Month, Annual, Driver's License #, Primary Bank Account Savings (Name, Checking, Name, Account #).

The undersigned Great Expectations (Seller) hereby sells, and the undersigned buyer (Member) purchases, subject to the provisions of this CONTRACT MEMBERSHIP in Great Expectations and promises to pay to Great Expectations or its assigns the TOTAL PAYMENTS in accordance with the Schedule hereinafter set forth.

DESCRIPTION OF GOODS AND SERVICES SOLD: Interviewing, Evaluating, Processing & Coding, Background Check (if necessary) and Photo Video Library for the purpose of giving Member access to a Video Library of potentially suitable individuals with similar traits and qualities. This is intended to be personal only.

READ CAREFULLY AND SIGN ONLY WHEN COMPLETELY UNDERSTOOD

I have considered and assented to the terms of membership as set forth in the Great Expectations Membership Agreement dated _____ and request financing of the balance due. I understand that my failure to participate in Great Expectations does not relieve me of my obligation to contract in full. I understand that by signing this Contract, and the Membership Agreement, I am a Member of Great Expectations.

MEMBER SIGNATURE X _____

NOTICE TO MEMBER: Upon request, Great Expectations must provide or make available for your examination a statement or table showing how the amount of the time price change is to be computed if any balance of the Contract should be prepaid. Member (Buyer) and Great Expectations (Seller) that the terms and conditions of the Great Expectations Membership Agreement constitute a part of this Contract and are incorporated herein by reference. In the event Member fails to pay any installment payment when due, the terms herein (less any unearned Finance Charge) then owing shall become due and payable, without demand or notice, at the option of Great Expectations or its assigns, and Great Expectations shall not be required to any services to Member until Member's payment account is made current.

PURCHASE PRICE: \$ _____ payable in accordance with the Statement of Disclosure below.

PAYMENT SCHEDULE: Member's payments hereunder shall be in equal consecutive monthly installments commencing on the _____ day of _____ month after execution of this Contract and continuing on the same day of each month thereafter until paid in full. Interest on the unpaid balance shall be both prior and after maturity.

FEDERAL TRUTH IN LENDING DISCLOSURES (Statement of Disclosure)

Table with 5 columns: ANNUAL PERCENTAGE RATE, FINANCE CHARGE, AMOUNT FINANCED, TOTAL OF PAYMENTS, TOTAL SALES PRICE. Row 1: 19.6%, 1, 1, 1, 1.

You the Buyer have the right to receive all this time an explanation of the amount financed. () I want an explanation. () I do not want an explanation. Your payment schedule will be:

Table with 2 columns: Payment Schedule, AMOUNT. Row 1: 1, 1.

DELINQUENCY AND COLLECTION CHARGES: If Buyer shall fail or neglect to pay any installment payment when the same shall become due and such failure or neglect shall continue for a period of more than ten (10) days, then in addition to the amount of such delinquent installment payment the Buyer shall pay to Seller, as a delinquency and collection charge, an amount equal to 9% of such payment except that such charge shall not exceed \$5.00 or be less than \$1.00.

PREPAYMENT: If you pay off early, you will not have to pay a penalty and you may be entitled to a refund of part of the finance charge. See your Great Expectations Membership Agreement for any additional information about non-payment, default, any required payments in full before the schedule date and prepayments, refunds and penalties.

ITEMIZATION OF AMOUNT FINANCED

- 1. Total Cash Price \$ _____ Prepayment Refund Buyer may prepay a or all of the unpaid balance without penalty and payment in full. Buyer is entitled to a refund of the unearned portion of the Finance Charge computed under the interest table. No there will be a no Finance Charge of: and no related unearned finance charge \$10.00.

Worried of any default by the Seller shall not operate as a waiver of default.

Should the Buyer default in the payment of any installment hereunder shall pay to Seller all actual and reasonable costs of collection including reasonable Attorney fees and disbursements.

Buyer will pay to the Seller a \$10.00 charge for every delinquent or other instrument.

Should any term hereof be invalid or unenforceable, the remaining to be unaffected by such finding.

NOTICE TO BUYER:

- 1. Do not sign this agreement before you read it or if it contains any blank spaces to be filled in.
2. You are entitled to a completely filled in copy agreement.
3. You can prepay the full amount due under this agreement at any time.
4. If you desire to pay off in advance the full amount of amount which is outstanding will be furnished on request.

Seller: GREAT EXPECTATIONS

Business Address

City & State

Authorized Signature

Member (Buyer) acknowledges receipt of an exact copy of this form the time of its execution. Member (Buyer) further acknowledges that the terms of this Contract were explained and read-in and that the full disclosures contained herein prior to signing the Contract.

Signature of Member X _____

Routing: White—FINANCE; Pink—SELLER; Gold—CUSTOMER

Exhibit 2

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of San Antonio Singles of Texas, Inc., and Austin Singles of Texas, Inc., corporations, and respondents having been furnished thereafter with a copy of the draft of complaint that 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 violations of Section 5(a) of the Federal Trade Commission Act and the Truth in Lending Act; and

The respondents, their attorney, 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 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 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. San Antonio Singles of Texas, Inc., doing business as Great Expectations of San Antonio ("GE San Antonio"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Texas, with its corporate office at 10497 Town & Country Way, Suite 214, Houston, TX, and its principal place of business located at 8131 I.H. 10 West, Suite 225, San Antonio, TX.

2. Austin Singles of Texas, Inc., doing business as Great Expectations of Austin ("GE Austin"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Texas, with its corporate office at 10497 Town & Country

Way, Suite 214, Houston, TX, and its principal place of business located at 9037 Research Blvd., Suite 130, Austin, TX.

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:

A. Respondents GE San Antonio, and GE Austin, their successors and assigns, and their officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the offering of credit, do forthwith cease and desist from failing to accurately calculate and disclose the annual percentage rate, as required by Sections 107(a) and (c) of the Truth in Lending Act ("TILA"), 15 U.S.C. 1606(a) and (c), and Sections 226.18(e) and 226.22 of Regulation Z, 12 CFR 226.18(e) and 226.22;

B. Respondents GE San Antonio, and GE Austin, their successors and assigns, and their officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the offering of credit, do forthwith cease and desist from failing to accurately calculate and disclose the finance charge, as required by Section 106 of the TILA, 15 U.S.C. 1605, and Sections 226.4 and 226.18(d) of Regulation Z, 12 CFR 226.4 and 226.18(d);

C. Respondents GE San Antonio, and GE Austin, their successors and assigns, and their officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the offering of credit, do forthwith cease and desist from failing to segregate the disclosures required by the TILA from all other information provided in connection with the transaction, including from the itemization of the amount financed, as required by Section 128(b)(1) of the TILA, 15 U.S.C. 1638(b)(1), and Section 226.17(a) of Regulation Z, 12 CFR 226.17(a);

D. Respondents GE San Antonio, and GE Austin, their successors and assigns, and their officers, agents, representatives, and

employees, directly or through any corporation, subsidiary, division, or other device, in connection with the offering of credit, do forthwith cease and desist from failing to make all disclosures in the manner, form, and amount required by Sections 122 and 128(a) of the TILA, 15 U.S.C. 1632 and 1638(a), and Sections 226.17 and 226.18 of Regulation Z, 12 CFR 226.17 and 226.18;

E. Respondents GE San Antonio, and GE Austin, their successors and assigns, and their officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the offering of credit, do forthwith cease and desist from:

1. Failing to include, in the finance charge and the annual percentage rate disclosed to the consumer, set-up or other fees that are charged only to consumers who finance the costs of their memberships, as required by Sections 106, 107, and 128 of the TILA, 15 U.S.C. 1605, 1606, and 1638, and Sections 226.4(b), 226.22, and 226.18(d) and (e) of Regulation Z, 12 CFR 226.4(b), 226.22, and 226.18(d) and (e); and

2. Failing to exclude, from the amount financed disclosed to the consumer, set-up or other fees that are charged only to consumers who finance the costs of their memberships, as required by Section 128 of the Truth in Lending Act, 15 U.S.C. 1638(a) and Section 226.18(b) of Regulation Z, 12 CFR 226.18(b); and

F. Respondents GE San Antonio, and GE Austin, their successors and assigns, and their officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the offering of credit, do forthwith cease and desist from failing to comply with the TILA, 15 U.S.C. 1601 *et seq.*, and Regulation Z, 12 CFR 226.

II.

REFUND PROGRAM

It is further ordered, That:

A. Within thirty (30) days following the date of service of this order, respondents shall:

1. Determine to whom respondents, disclosed on the original TILA disclosure an annual percentage rate that was miscalculated by more than one quarter of one percentage point below the annual percentage rate determined in accordance with Section 226.22 of Regulation Z, 12 CFR 226.22, or that disclosed a finance charge that was miscalculated by more than one dollar below the finance charge determined in accordance with Section 226.4 of Regulation Z, 12 CFR 226.4, so that each such person will not be required to pay a finance charge in excess of the finance charge actually disclosed or the dollar equivalent of the annual percentage rate actually disclosed, whichever is lower, plus a tolerance of one quarter of one percentage point;

2. Calculate a lump sum refund and a monthly payment adjustment, if applicable, in accordance with Section 108(e) of the TILA, 15 U.S.C. 1607(e);

3. Mail a refund check to each eligible consumer in the amount determined above, along with Attachment 1; and

4. Provide the Federal Trade Commission with a list of each such consumer, the amount of the refund, the number of payments refunded, the amount of adjustment for future payments and the number of future payments to be adjusted;

B. No later than fifteen (15) days following the date of service of this order, respondents shall provide the Federal Trade Commission with the name and address of three independent accounting firms, with which they, their officers, employees, attorneys, and agents, have no business relationship. Staff for the Division of Credit Practices of the FTC shall then have the sole discretion to choose one of the firms ("independent agent") and so advise respondents;

C. Within thirty (30) days following the date of adjustments made pursuant to this section, respondents shall direct the independent agent to review a statistically-valid sample of refunds. Respondents shall provide the Federal Trade Commission with a certified letter from the independent agent confirming that respondents have complied with Part II. A. of this order;

D. All costs associated with the administration of the refund program and payment of refunds shall be borne by the respondents.

III.

It is further ordered, That respondents, their successors and assigns, shall maintain for at least five (5) years from the date of service of this order and, upon thirty (30) days advance written request, make available to the Federal Trade Commission for inspection and copying all documents and other records necessary to demonstrate fully their compliance with this order.

IV.

It is further ordered, That respondents, their successors and assigns, shall distribute a copy of this order to any present or future officers and managerial employees having responsibility with respect to the subject matter of this order and that respondents, their successors and assigns, shall secure from each such person a signed statement acknowledging receipt of said order.

V.

It is further ordered, That respondents, for a period of five (5) years following the date of service of this order, shall promptly notify the Commission at least thirty (30) days prior to any proposed change in their corporate structure such as 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 that may affect compliance obligations arising out of the order.

VI.

It is further ordered, That respondents shall, within one hundred and eighty (180) days of 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.

ATTACHMENT 1

Dear Great Expectations Member:

We were recently notified by the Federal Trade Commission staff ("FTC") that we may have inadvertently miscalculated and/or improperly disclosed information in your Retail Installment Contract which the FTC believes is inconsistent with certain provisions of the Truth in Lending Act. After extensive investigation by us, along with conversations with the FTC, we have decided that it would be in the best interest of all parties to [refund] [credit to your account] the amount of \$_____ which would cover any incorrect calculations. [Additionally, please be advised that your future monthly payments have been reduced to \$_____ starting _____.]

We at Great Expectations are always interested in providing our members prompt professional services and are here to answer any questions you may have regarding this or any other matter.

Sincerely,

GREAT EXPECTATIONS

Complaint

120 F.T.C.

IN THE MATTER OF

STERLING CONNECTIONS, INC., ET AL.

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

Docket C-3609. Complaint, Aug. 11, 1995--Decision, Aug. 11, 1995

This consent order requires, among other things, the video dating service franchises to properly and accurately disclose the annual percentage rate ("APR") and other credit terms of financed memberships, as required by the federal Truth in Lending Act, and requires the franchises to establish adjustment refund programs to compensate its past and current members who overpaid finance charges.

Appearances

For the Commission: *Stephen Cohen, Judy Nixon and David Medine.*

For the respondents: *Thomas J. Greenan, Schwabe, Williamson, Ferguson & Burdell, Seattle, WA.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Great Expectations Creative Management, Inc. has violated the Federal Trade Commission Act ("FTC Act"), and that Great Expectations, Inc., GEC Illinois, Inc., GEC Tennessee, Inc., GEC Alabama, Inc., Great Southern Video, Inc., New West Video Enterprises, Inc., San Antonio Singles of Texas, Inc., Austin Singles of Texas, Inc., Great Expectations of Baltimore, Inc., Great Expectations of Washington, D.C., Inc., Great Expectations of Washington, Inc., Sterling Connections, Inc., Private Eye Productions, Inc., Great Expectations - Columbus, Inc., JAMS Financial, Inc., V.L.P. Enterprises, Inc., APM Enterprises - Minn Inc., KGE, Inc., G.E.C.H., Inc., MWVE, Inc., GREATEX Denver, Inc., Sun West Video, Inc., and TRIAAC Enterprises, Inc. (hereinafter sometimes referred to collectively as "Great Expectations") have violated the Truth in Lending Act ("TILA"), its implementing Regulation Z, and the FTC Act, and it appearing to the

Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint, and alleges as follows:

PARAGRAPH 1. Great Expectations Creative Management, Inc. ("GECM") 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 16830 Ventura Blvd., Suite P, Encino, CA.

PAR. 2. Great Expectations, Inc. ("GEI") is a corporation organized, existing, and doing business under and by virtue of the laws of the state of California, with its corporate office at 16830 Ventura Blvd., Suite P, Encino, CA, and its principal places of business located at 1640 S. Sepulveda Blvd., Suite 100, Los Angeles, CA, 17207 Ventura Blvd., Encino, CA, and 450 N. Mountain, Suite B, Upland, CA.

PAR. 3. GEC Illinois, Inc. ("GE Illinois") is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Illinois, with its office and principal place of business located at 1701 E. Woodfield Dr., Suite 400, Schaumburg, IL.

PAR. 4. GEC Tennessee, Inc. ("GE Tennessee") 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 5552 Franklin Rd., Suite 200, Nashville, TN.

PAR. 5. GEC Alabama, Inc. ("GE Alabama") is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Alabama, with its office and principal place of business located at 7529 S. Memorial Pkwy., Suite C & D, Huntsville, AL.

PAR. 6. Great Southern Video, Inc., doing business as Great Expectations of Dallas ("GE Dallas"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Texas, with its office and principal place of business located at 14180 Dallas Pkwy., Suite 100, Dallas, TX.

PAR. 7. New West Video Enterprises, Inc., doing business as Great Expectations of Houston ("GE Houston"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Texas, with its office and principal place of business located at 50 Briarhollow, Suite 100, Houston, TX.

PAR. 8. San Antonio Singles of Texas, Inc., doing business as Great Expectations of San Antonio ("GE San Antonio"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Texas, with its corporate office at 10497 Town & Country Way, Suite 214, Houston, TX, and its principal place of business located at 8131 I.H. 10 West, Suite 225, San Antonio, TX.

PAR. 9. Austin Singles of Texas, Inc., doing business as Great Expectations of Austin ("GE Austin"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Texas, with its corporate office at 10497 Town & Country Way, Suite 214, Houston, TX, and its principal place of business located at 9037 Research Blvd., Suite 130, Austin, TX.

PAR. 10. Great Expectations of Baltimore, Inc. ("GE Baltimore") is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Virginia, with its office and principal place of business located at 40 York Rd., Suite 500, Towson, MD.

PAR. 11. Great Expectations of Washington, D.C., Inc. ("GE DC") 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 8601 Westwood Center Dr., Vienna, VA.

PAR. 12. Great Expectations of Washington, Inc., doing business as Great Expectations of Raleigh/Durham ("GE Raleigh"), 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 3714 Benson Dr., Suite 200, Raleigh, NC.

PAR. 13. Sterling Connections, Inc., doing business as Great Expectations of Seattle ("GE Seattle"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Oregon, with its office and principal place of business located at 305 108th Ave., N.E., Suite 205, Bellevue, WA.

PAR. 14. Private Eye Productions, Inc., doing business as Great Expectations of Portland ("GE Portland"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Oregon, with its office and principal place of business located at 5531 S.W. Macadam Ave., Suite 225, Portland, OR.

PAR. 15. Great Expectations - Columbus, Inc. ("GE Columbus") is a corporation organized, existing, and doing business under and by

virtue of the laws of the state of Ohio, with its corporate office at 11835 W. Olympic Blvd., Suite 490, Los Angeles, CA, and its principal place of business located at 1103 Schrock Rd., Suite 101, Columbus, OH.

PAR. 16. JAMS Financial, Inc., doing business as Great Expectations of Milwaukee ("GE Milwaukee"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Wisconsin, with its corporate office at 11835 W. Olympic Blvd., Suite 490, Los Angeles, CA, and its principal place of business located at 16650 W. Bluemound, Suite 100, Brookfield, WI.

PAR. 17. V.L.P. Enterprises, Inc., doing business as Great Expectations of San Diego ("GE San Diego"), 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 3465 Camino Del Rio South, Suite 300, San Diego, CA.

PAR. 18. APM Enterprises - Minn Inc., doing business as Great Expectations of Minneapolis ("GE Minneapolis"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Illinois, with its office and principal place of business located at 3300 Edinborough Way, Suite 300, Edina, MN.

PAR. 19. KGE, Inc., doing business as Great Expectations of Sausalito, Great Expectations of Mountain View, and Great Expectations of Walnut Creek (collectively referred to as "GE-SFA"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of California, with its corporate office at 1943 Landings Dr., Mountain View, CA, and its principal places of business located at 2401 Marinship Way, Suite 100 Sausalito, CA, 2085 Landings Dr., Mountain View, CA, and 1280 Civic Dr., Suite 300, Walnut Creek, CA.

PAR. 20. G.E.C.H., Inc., doing business as Great Expectations of Cherry Hill ("GE Cherry Hill"), 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 places of business located at One Cherry Hill, Suite 600, Cherry Hill, NJ.

PAR. 21. MWVE, Inc., doing business as Great Expectations of Cleveland ("GE Cleveland"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Ohio,

with its office and principal place of business located at 6300 Rockside Rd., Suite 200, Cleveland, OH.

PAR. 22. GREATEX Denver, Inc., doing business as Great Expectations Video Dating, Ltd. ("GE-Denver"), 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 3773 Cherry Creek North Dr., Suite 140, Denver, CO.

PAR. 23. Sun West Video, Inc., doing business as Great Expectations for Singles ("GE Phoenix"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Arizona, with its office and principal place of business located at 5635 N. Scottsdale Rd., Suite 190, Scottsdale, AZ.

PAR. 24. TRIAAC Enterprises, Inc., doing business as Great Expectations of Sacramento ("GE Sacramento"), 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 2277 Fair Oaks Blvd., Suite 195, Sacramento, CA.

RESPONDENTS' COURSE OF BUSINESS

PAR. 25. GECM is a video dating franchisor. It sells and services franchise operations throughout the United States. As part of its regular course of business, GECM has created and disseminated retail installment contracts (Exhibits 1 and 2) to the franchises described in paragraphs two through twenty-four. The GECM retail installment contracts purport to incorporate the disclosures required by the TILA.

PAR. 26. Respondents Great Expectations are video dating franchises. Respondents have provided financing to their members using retail installment contracts such as Exhibits 1 and 2 to disclose the terms of the financing.

PAR. 27. GECM's TILA disclosure (Exhibit 1) contains erroneous instructions for calculating and disclosing the finance charge and contains a pre-printed annual percentage rate ("APR") of 18%. In addition, Exhibit 1 fails to make the TILA disclosures in the format required by the TILA and fails to identify the creditor as required by the TILA.

PAR. 28. In 1988, GECM learned from its auditor that the calculations and disclosures contained in Exhibit 1 did not comply with the TILA. Nevertheless, it continued to disseminate Exhibit 1

to its franchisees and failed to notify them of the erroneous calculations and disclosures.

PAR. 29. In late 1990, GECM created a new retail installment contract, which also purported to incorporate the disclosures required by the TILA and which contained a preprinted APR of 19.6%. (Exhibit 2). Exhibit 2 fails to identify the creditor as required by the TILA and fails to provide the information required by the TILA in the itemization of the amount financed. Furthermore, GECM has disseminated Exhibit 2 to its franchisees but has failed to inform them to discontinue using the erroneous calculation and disclosure instructions that it had previously supplied in Exhibit 1.

PAR. 30. Respondents Great Expectations are creditors as that term is defined in the TILA and Regulation Z.

PAR. 31. The acts and practices of respondents Great Expectations and GECM alleged in this complaint have been and are in or affecting commerce, as "commerce" is defined in Section 4 of the FTC Act.

COUNT I

PAR. 32. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 33. Respondent GECM has furnished its franchises with TILA disclosures (Exhibits 1 and 2) that, on their face, violated the TILA. When used by respondents Great Expectations, Exhibits 1 and 2 have resulted in false and misleading disclosures of APRs and finance charges to consumers in violation of Section 5 of the FTC Act.

PAR. 34. In the course and practice of its business as described in paragraphs twenty-five through twenty-nine, and paragraph thirty-three, respondent GECM has provided respondents Great Expectations with the means and instrumentalities to violate the Section 5 of the FTC Act.

PAR. 35. The practices described in paragraph thirty-four constitute unfair or deceptive acts or practices in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. 45(a).

COUNT II

PAR. 36. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 37. Respondents GEI, GE Illinois, GE Tennessee, GE Alabama, GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Columbus, GE Milwaukee, GE San Diego, GE Minneapolis, GE-SFA, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento have furnished their members with TILA disclosures that have failed to accurately calculate and disclose the APR.

PAR. 38. The practice described in paragraph thirty-seven by respondents GEI, GE Illinois, GE Tennessee, GE Alabama, GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Columbus, GE Milwaukee, GE San Diego, GE Minneapolis, GE-SFA, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento violates Sections 107(a) and (c) of the TILA, 15 U.S.C. 1606(a) and (c), and Sections 226.18(e) and 226.22 of Regulation Z, 12 CFR 226.18(e) and 226.22.

COUNT III

PAR. 39. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 40. Respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Columbus, GE Milwaukee, GE-SFA, GE Cleveland, GE Phoenix, GE Sacramento, and GE San Diego have furnished their members with TILA disclosures that have failed to accurately calculate and disclose the finance charge.

PAR. 41. The practice described in paragraph forty by respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Columbus, GE Milwaukee, GE-SFA, GE Cleveland, GE Phoenix, GE Sacramento, and GE San Diego violates Section 106 of the TILA, 15 U.S.C. 1605, and Sections 226.4 and 226.18(d) of Regulation Z, 12 CFR 226.4 and 226.18(d).

COUNT IV

PAR. 42. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 43. Respondents GE Dallas, GE Houston, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, and GE Phoenix have furnished their members with TILA disclosures that have failed to disclose the finance charge more conspicuously than any other disclosure except the APR and the creditor's identity.

PAR. 44. The practice described in paragraph forty-three by respondents GE Dallas, GE Houston, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, and GE Phoenix violates Section 122(a) of the TILA, 15 U.S.C. 1632(a), and Section 226.17(a)(2) of Regulation Z, 12 CFR 226.17(a)(2).

COUNT V

PAR. 45. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 46. Respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento have furnished their members with TILA disclosures that have failed to segregate the disclosures required by the TILA from all other information provided in connection with the transaction, including the itemization of the amount financed.

PAR. 47. The practice described in paragraph forty-six by respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento violates Section 128(b)(1) of the TILA, 15 U.S.C. 1638(b)(1), and Section 226.17(a)(1) of Regulation Z, 12 CFR 226.17(a)(1).

COUNT VI

PAR. 48. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 49. Respondents GEI, GE Illinois, GE Tennessee, GE Alabama, GE Dallas, GE Houston, GE San Antonio, GE Austin, GE

Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Columbus, GE San Diego, GE Minneapolis, GE-SFA, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento have failed to accurately disclose the itemization of the amount financed.

PAR. 50. The practice described in paragraph forty-nine by respondents GEI, GE Illinois, GE Tennessee, GE Alabama, GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Columbus, GE San Diego, GE Minneapolis, GE-SFA, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento violates Section 128(a) of the TILA, 15 U.S.C. 1638(a), and Section 226.18(c) of Regulation Z, 12 CFR 226.18(c).

COUNT VII

PAR. 51. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 52. Respondents GEI, GE Illinois, GE Tennessee, GE Alabama, GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Columbus, GE Milwaukee, GE San Diego, GE Minneapolis, GE-SFA, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento have failed to disclose the identity of the creditor.

PAR. 53. The practice described in paragraph fifty-two by respondents GEI, GE Illinois, GE Tennessee, GE Alabama, GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Columbus, GE Milwaukee, GE San Diego, GE Minneapolis, GE-SFA, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento violates Section 128(a)(1) of the TILA, 15 U.S.C. 1638(a)(1), and Section 226.18(a) of Regulation Z, 12 CFR 226.18(a).

COUNT VIII

PAR. 54. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 55. Respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, GE Phoenix,

and GE Sacramento have furnished their members with TILA disclosures that have failed to provide a description of the amount financed.

PAR. 56. The practice described in paragraph fifty-five by respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento violates Section 128(a)(8) of the TILA, 15 U.S.C. 1638(a)(8), and Section 226.18(b) of Regulation Z, 12 CFR 226.18(b).

PAR. 57. Respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento have furnished their members with TILA disclosures that have failed to provide a description of the finance charge.

PAR. 58. The practice described in paragraph fifty-seven by respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento violates Section 128(a)(8) of the TILA, 15 U.S.C. 1638(a)(8), and Section 226.18(d) of Regulation Z, 12 CFR 226.18(d).

PAR. 59. Respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento have furnished their members with TILA disclosures that have failed to provide a description of the APR.

PAR. 60. The practice described in paragraph fifty-nine by respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento violates Section 128(a)(8) of the TILA, 15 U.S.C. 1638(a)(8), and Section 226.18(e) of Regulation Z, 12 CFR 226.18(e).

PAR. 61. Respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento have furnished their

members with TILA disclosures that have failed to provide the total of payments and/or a description of the total of payments.

PAR. 62. The practice described in paragraph sixty-one by respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento violates Section 128(a)(5) and/or (8) of the TILA, 15 U.S.C. 1638(a)(5) and/or (8), and Section 226.18(h) of Regulation Z, 12 CFR 226.18(h).

PAR. 63. Respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore, GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento have furnished their members with TILA disclosures that have failed to provide the total sale price and/or a description of the total sale price.

PAR. 64. The practice described in paragraph sixty-three by respondents GE Dallas, GE Houston, GE San Antonio, GE Austin, GE Baltimore/ GE DC, GE Raleigh, GE Seattle, GE Portland, GE Minneapolis, GE Cherry Hill, GE Cleveland, GE Denver, GE Phoenix, and GE Sacramento violates Section 128(a)(7) and/or (8) of the TILA, 15 U. S. C. 163 8 (a) (7) and/or (8) , and Section 226.18(j) of Regulation Z, 12 CFR 226.18(j).

COUNT IX

PAR. 65. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 66. Respondents GE Dallas, GE Houston, GE Phoenix, GE San Antonio, GE Austin, GE Baltimore, GE DC, and GE Raleigh have failed to include set-up or other fees that are charged only to consumers who finance the costs of their memberships in the finance charge and the annual percentage rate disclosed to the consumer. They have also failed to exclude these finance charges from the amount financed that is disclosed to consumers.

PAR. 67. The practices described in paragraph sixty-six by respondents GE Dallas, GE Houston, GE Phoenix, GE San Antonio, GE Austin, GE Baltimore, GE DC, and GE Raleigh violate Sections 106, 107, and 128(a) of the TILA, 15 U.S.C. 1605, 1606, and 1638(a), and Sections 226.4(b), 226.22, and 226.18(b), (d), and (e) of Regulation Z, 12 CFR 226.4(b), 226.22, and 226.18(b), (d), and (e).

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Complaint

COUNT X

PAR. 68. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 69. Respondent GE San Diego has furnished its members with TILA disclosures that have failed to disclose the APR, the finance charge, the amount financed, the total of payments, and the total sales price.

PAR. 70. The practices described in paragraph sixty-nine by respondent GE San Diego violate Section 128(a) of the TILA, 15 U.S.C. 1638(a), and Section 226.18 of Regulation Z, 12 CFR 226.18.

COUNT XI

PAR. 71. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 72. Respondent GE Houston has furnished its members with TILA disclosures that have failed to disclose the amount financed.

PAR. 73. The practice described in paragraph seventy-two by respondent GE Houston violates Section 128(a) of the TILA, 15 U.S.C. 1638(a), and Section 226.18(b) of Regulation Z, 12 CFR 226.18(b).

COUNT XII

PAR. 74. Paragraphs one through thirty-one are incorporated herein by reference.

PAR. 75. Respondents GEI, GE Alabama, GE Illinois, GE Portland, GE Dallas, GE Houston, GE Cleveland, GE Phoenix, GE San Antonio, GE Austin, GE Seattle, GE Denver, GE Columbus, GE Milwaukee, GE San Diego, GE Minneapolis, GE SFA, GE Cherry Hill, GE Sacramento, GE DC, GE Baltimore, and GE Raleigh have disclosed understated APRs and finance charges to consumers that have resulted in consumers paying more in financing costs than the amount to which they originally agreed.

PAR. 76. The practices described in paragraph seventy-five are unfair or deceptive acts or practices in violation of Section 5(a) of the FTC Act, 15 U.S.C. 45(a).

EXHIBIT 1

Expectations

RETAIL INSTALLMENT CONTRACT

NAME - Last First Middle Age
 26
 Present Address City State Zip
 CO 80010
 Social Security # Home Phone How Long At This Address How Long in Area
 5 YEARS 26 YEARS
 Employed By Work Phone Present Position
 Income All Sources Monthly Annual Driver's License #
 Primary Bank Accounts Savings Checking Balance
 Credit Reference - Banks, Finance Co., Credit Unions
 WSA Open Closed
 FIRST INTERSTATE Bank Open Closed

The undersigned Great Expectations (Seller) hereby sells, and the undersigned Buyer, hereinafter referred to as "Member," purchases subject to the provisions of this contract, a MEMBERSHIP in Great Expectations and promises to pay to Great Expectations its share of the TOTAL PAYMENTS (Box B) in accordance with the Payment Schedule hereinafter set forth.

DESCRIPTION OF GOODS AND SERVICES SOLD:

Interviewing, Testing & Evaluating, Processing & Coding, Background check (if necessary), for the purpose of bringing in contact with the purchaser (client) suitable individuals with similar titles and abilities, this description intended to be partial only. The purchaser acknowledges receipt of application form, which is made a part hereof as though set out at length.

READ CAREFULLY AND SIGN ONLY WHEN COMPLETELY UNDERSTOOD

Buyer has considered and evaluated the terms of membership as set forth in Great Expectations Membership Agreement dated

10/31/91 and requests financing of the balance due. Acceptance of the terms of both agreements renders null and void any buyer's right to cancel previously provided.

I understand that my failure to participate in Great Expectations does not release me from my obligation to pay this contract in full regardless of the circumstances. I understand that by signing this Agreement I am a Member of Great Expectations.

MEMBER SIGNATURE X

NOTICE TO MEMBER: Upon request, Great Expectations must provide or make available for your examination a statement of fact showing how the partial refund of the time price charge is to be computed if any balance of the contract should be prepaid. Member (Buyer) and Great Expectations (Seller) agree that the terms and conditions on the Member's Contract for Membership constitute a part of this contract and are incorporated herein by reference. If due to delinquency, it is necessary to refer this account for collection, then the balance due shall include actual attorney's fee and court costs. In the event Member fails to pay any installment payment when due, the entire balance then owing shall immediately become due and payable, without notice, at the option of Great Expectations or assignee, and Great Expectations shall not be required to provide any services to Member until Member's payment account is made current. If more than one person signs this contract then their obligation shall be joint and several.

ITEMIZATION OF THE AMOUNT FINANCED

1. Cash Price	1595	BALANCE	10. ANNUAL PERCENTAGE RATE 18%
2. Other:	0	1595	11. PAYMENT SCHEDULE:
3. Down Payment	300	1295	5
4. Paid (11/4/91) Second Interview	100	1195	12. THE EXCESSIVE MONTHLY INSTALLMENTS OF \$ 235 PER MONTH COMMENCING 12/15/91, AND ON IN SAME DAY AT EACH MONTH THEREAFTER, UNTIL PAID IN FULL. BALLOON PAYMENT DELINQUENCY AND COLLECTION CHARGES: Buyer shall pay or agree to pay any installment payment when the same shall become due and such failure to pay shall constitute for a period of more than ten (10) days, then in addition to the amount of such delinquent installment payment the Buyer shall pay to Seller, as delinquency and collection charge, an amount equal to 1% of such payment, except that such charge shall not exceed \$5.00 or be less than \$1.00.
5. Other Payments Due (11/30/91)	100	1095	13. PREPAYMENT REBATE: Buyer may prepay any part or all of the unpaid balance without penalty and the payment in full Buyer shall be entitled to a refund of the unearned portion of the Finance Charge computed under the unpaid interest date. However, there will be a maximum Finance Charge of \$10.00 and no refund if the unearned charge is less than \$1.00.
6. Amt. Financed (Unpaid Bal. in Cash Price #5)	1095	1095	
7. Finance Charge (9% Bal. x 14% x 15) no. of payments	82.13	1177.13	
8. Total Payments (Bal. & 7)		1177.13	
9. Deferred Payment Price (Bal. #2 + #7)	1477.13		

DIVIDE by number of payments to calculate each installment and summarize on #11.

Notice to buyer: (1) Do not sign this agreement before you read it or if it contains any blank spaces to be filled in (2) You are entitled to a completely filled-in copy of this agreement (3) You can prepay the full amount due under this agreement at any time (4) If you agree to pay off in advance the full amount due, the amount which is outstanding will be furnished upon request.

SELLER Great Expectations

Signature of Member X

Business Address: 3773 Cherry Creek N. Dr. #110
 City & State: Denver CO 8007

Member (Buyer) acknowledges receipt of an exact copy of this instrument at the time of its execution. Member (Buyer) further acknowledges that the terms in this contract were explained in full and that he has read the disclosures contained hereon prior to signing the contract.

Authorized Signature: [Signature] Title: [Signature]
 Name: [Signature] Title: [Signature]

Signature of Member X

Exhibit 1

Complaint

EXHIBIT 2



RETAIL INSTALLMENT CONTRACT

DATE _____

Name (Last) _____ First _____ Middle _____ Age _____

Present Address _____ City _____ State _____ Zip _____

Social Security # _____ Home Phone _____ How Long At This Address _____ Date of Birth _____

Employed By: Name and Address _____ Work Phone _____ Present Position _____

Home #1 Sources _____ Annual _____ Driver's License # _____

Primary Bank Accounts: Savings Name _____ Checking Name _____

SECURED UNSECURED

The undersigned Great Expectations (Seller) hereby sells, and the undersigned buyer (Member) purchases, subject to the provisions of this CONTRACT MEMBERSHIP in Great Expectations and promises to pay to Great Expectations or its assignee the TOTAL PAYMENTS in accordance with the Schedule hereinafter set forth.

DESCRIPTION OF GOODS AND SERVICES SOLD: Interviewing, Evaluating, Processing & Coding, Background Check (if necessary) and Plus Video Library for the purpose of giving Member access to a Video Library of potentially suitable individuals with similar likes and dislikes, this is intended to be partial only.

READ CAREFULLY AND SIGN ONLY WHEN COMPLETELY UNDERSTOOD

I have considered and evaluated the terms of membership as set forth in the Great Expectations Membership Agreement dated _____ and hereby financing of the balance due. I understand that my failure to participate in Great Expectations does not relieve me of my obligation to Contract in full. I understand that by signing this Contract, and the Membership Agreement, I am a Member of Great Expectations.

MEMBER SIGNATURE X _____

NOTICE TO MEMBER: Upon request, Great Expectations must provide or make available for your examination a statement or table showing how I earned or the same price charge is to be computed if any balance of the Contract should be prepaid. Member (Buyer) and Great Expectations (Seller) that the terms and conditions of the Great Expectations Membership Agreement constitute a part of this Contract and are incorporated herein by reference in the event Member fails to pay any installment payment when due, the entire balance (less any unearned Finance Charge) then owing shall then become due and payable, without demand or notice, at the option of Great Expectations or assignee, and Great Expectations shall not be required to any services to Member and Member's payment account to made current.

PURCHASE PRICE: \$ _____ payable in accordance with the Statement of Disclosure below.

PAYMENT SCHEDULE: Member's payments hereunder shall be in equal consecutive monthly installments commencing on the _____ day of _____ month after execution of this Contract and continuing on the same day of each month thereafter until paid in full. Interest on the unpaid balance shall be both prior and after maturity.

FEDERAL TRUTH IN LENDING DISCLOSURES
(Statement of Disclosure)

ANNUAL PERCENTAGE RATE	FINANCE CHARGE	AMOUNT FINANCED	TOTAL OF PAYMENTS	INITIAL SALES PRICE
LINE A	LINE B	LINE C	LINE D	LINE E
The rate or rate class to be used	The dollar amount the credit will cost me	The amount of cash received to me or my bank	The amount I will pay (not including any down payment or any discount allowed)	The rate used to compute the finance charge
19.6%	\$	\$	\$	(Less 1-4)

You the buyer have the right to receive all this time an explanation of the amount financed. () I want an explanation. () I do not want an explanation. Your payment schedule will be:

Payment Schedule	Max/Min/yr
Number of payments: _____	Amount of payment: _____
_____	_____

DELINQUENCY AND COLLECTION CHARGES: If Buyer shall fail or neglect to pay any installment payment when the same shall become due and such failure or neglect shall continue for a period of more than ten (10) days, then in addition to the amount of such delinquent installments payment the Buyer shall pay to Seller, as a delinquency and collection charge, an amount equal to 5% of such amount unless that such charge shall not exceed \$5.00 or be less than \$1.00.

PREPAYMENT: If you pay off early, you will not have to pay a penalty and you may be entitled to a refund of part of the finance charge.

See your Great Expectations Membership Agreement for any additional information about non-payment, default, any required repayment in full before the schedule date and prepayments, refunds and penalties.

"ITEMIZATION OF AMOUNT FINANCED"

Prepayment Refund

- Total Cash Price \$ _____ Buyer may prepay a or all of the unpaid balance without penalty any payment in full. Buyer is entitled to a refund of the unearned portion of the Finance Charge computed under the interest basis. No grace will be a Finance Charge of and no refund unearned/charge \$1.00.
- Less Downpayment - \$ _____
- Amount Financed \$ _____
- Finance Charge \$ _____
- Total of Payments \$ _____

Waiver of any default by the Seller shall not operate as a waiver default.

Should the buyer default in the payment of any installment hereunder shall pay to Seller all actual and reasonable costs of collection or including reasonable Attorney fees and disbursements.

Buyer will pay to the Seller a \$10.00 charge for every dishonored other instrument.

Should any item herein be found unenforceable, the remaining to be unaffected by such finding.

NOTICE TO BUYER:

- Do not sign this agreement before you read it or if it contains any blank spaces to be filled in.
- You are entitled to a completely filled in copy agreement.
- You can prepay the full amount due under this copy at any time.
- If you desire to pay off in advance the full amount of amount which is outstanding will be furnished on request.

Seller: GREAT EXPECTATIONS

Business Address _____

City & State: _____

Authorized Signature: _____

Member (Buyer) acknowledges receipt of an exact copy of this contract and the terms of its execution. Member (Buyer) further acknowledges that the terms of this Contract were completely read and understood and that she has read and understands the contents hereof prior to signing this Contract.

Signature of Member X _____

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of Sterling Connections, Inc., Private Eye Productions, Inc., and GREATEX Denver, Inc., corporations, and respondents having been furnished thereafter with a copy of the draft of complaint that 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 violations of Section 5(a) of the Federal Trade Commission Act and the Truth in Lending Act; and

The respondents, their attorney, 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 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 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. Sterling Connections, Inc., doing business as Great Expectations of Seattle ("GE Seattle"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Oregon, with its office and principal place of business located at 305 108th Ave., N.E., Suite 205, Bellevue, WA.

2. Private Eye Productions, Inc., doing business as Great Expectations of Portland ("GE Portland"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Oregon, with its office and principal place of business located at 5531 S.W. Macadam Ave., Suite 225, Portland, OR.

3. GREATEX Denver, Inc., doing business as Great Expectations of Denver ("GE-Denver"), 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 3773 Cherry Creek North Dr., Suite 140, Denver, CO.

4. 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:

A. Respondents GE Seattle, GE Portland, and GE Denver, their successors and assigns, and their officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the offering of credit, do forthwith cease and desist from failing to accurately calculate and disclose the annual percentage rate, as required by Sections 107(a) and (c) of the Truth in Lending Act ("TILA"), 15 U.S.C. 1606(a) and (c), and Sections 226.18.(e) and 226.22 of Regulation Z, 12 CFR 226.18(e) and 226.22;

B. Respondents GE Seattle, GE Portland, and GE Denver, their successors and assigns, and their officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the offering of credit, do forthwith cease and desist from failing to segregate the disclosures required by the TILA from all other information provided in connection with the transaction, including from the itemization of the amount financed, as required by Section 128(b)(1) of the TILA, 15 U.S.C. 1638(b)(1), and Section 226.17(a) of Regulation Z, 12 CFR 226.17(a);

C. Respondents GE Seattle, GE Portland, and GE Denver, their successors and assigns, and their officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the offering of credit, do forthwith cease and desist from failing to make all disclosures in the manner, form, and amount required by Sections 122 and 128(a) of the TILA,

15 U.S.C. 1632 and 1638(a), and Sections 226.17 and 226.18 of Regulation Z, 12 CFR 226.17 and 226.18;

D. Respondents GE Seattle, GE Portland, and GE Denver, their successors and assigns, and their officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the offering of credit, do forthwith cease and desist from failing to comply with the TILA, 15 U.S.C. 1601 *et seq.*, and Regulation Z, 12 CFR 226.

II.

REFUND PROGRAM

It is further ordered, That:

A. Within thirty (30) days following the date of service of this order, respondents shall:

1. For each TILA disclosure relating to any executory contract or any contract consummated within two years prior to August 2, 1994, determine to whom respondents disclosed on the original TILA disclosure an annual percentage rate that was miscalculated by more than one eighth of one percentage point below the annual percentage rate determined in accordance with Section 226.22 of Regulation Z, 12 CFR 226.22, or that disclosed a finance charge that was miscalculated by more than one dollar below the finance charge determined in accordance with Section 226.4 of Regulation Z, 12 CFR 226.4, so that each such person will not be required to pay a finance charge in excess of the finance charge actually disclosed or the dollar equivalent of the annual percentage rate actually disclosed, whichever is lower, plus a tolerance of one eighth of one percentage point;

2. Calculate a lump sum refund and a monthly payment adjustment, if applicable, in accordance with Section 108(e) of the TILA, 15 U.S.C. 1607(e);

3. Mail a refund check to each eligible consumer in the amount determined above, along with Attachment 1; and

4. Provide the Federal Trade Commission with a list of each such consumer, the amount of the refund, the number of payments

refunded, the amount of adjustment for future payments and the number of future payments to be adjusted;

B. No later than fifteen (15) days following the date of service of this order, respondents shall provide the Federal Trade Commission with the name and address of three independent accounting firms, with which they, their officers, employees, attorneys, and agents, have no business relationship. Staff for the Division of Credit Practices of the FTC shall then have the sole discretion to choose one of the firms ("independent agent") and so advise respondents;

C. Within thirty (30) days following the date of adjustments made pursuant to this section, respondents shall direct the independent agent to review a statistically-valid sample of refunds. Respondents shall provide the Federal Trade Commission with a certified letter from the independent agent confirming that respondents have complied with Part II A of this order;

D. All costs associated with the administration of the refund program and payment of refunds shall be borne by the respondents.

III.

It is further ordered, That respondents, their successors and assigns, shall maintain for at least five (5) years from the date of service of this order and, upon thirty (30) days advance written request, make available to the Federal Trade Commission for inspection and copying all documents and other records necessary to demonstrate fully their compliance with this order.

IV.

It is further ordered, That respondents, their successors and assigns, shall distribute a copy of this order to any present or future officers and managerial employees having responsibility with respect to the subject matter of this order and that respondents, their successors and assigns, shall secure from each such person a signed statement acknowledging receipt of said order.

V.

It is further ordered, That respondents, for a period of five (5) years following the date of service of this order, shall promptly notify the Commission at least thirty (30) days prior to any proposed change in their corporate structure such as 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 that may affect compliance obligations arising out of the order.

VI.

It is further ordered, That respondents shall, within one hundred and eighty (180) days of 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.

ATTACHMENT 1

Dear Great Expectations Customer:

As part of our settlement with the Federal Trade Commission for alleged violations of the Truth in Lending Act, we are sending you the enclosed refund check in the amount of \$*****. The refund represents the amount you were overcharged as a result of errors made by Great Expectations in calculating or disclosing the annual percentage rate or finance charge.

(In addition, your future monthly payments have been reduced. Starting immediately, your monthly payments will be \$*****.)

We regret any inconvenience this may have caused you.

Great Expectations

IN THE MATTER OF

PHYSICIANS GROUP, INC., ET AL.

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

Docket C-3610. Complaint, Aug. 11, 1995--Decision, Aug. 11, 1995

This consent order prohibits, among other things, a Virginia physicians' group, and its seven board members from attempting to engage in an agreement or agreeing with other physicians to negotiate or refuse to negotiate with a third party payor. In addition, it requires dissolution of the group within 120 days.

Appearances

For the Commission: *Mark J. Horoschak, Rendell A. Davis and William Baer.*

For the respondents: *Heman A. Marshall, Francis Casola and Michael Urbanski, Woods, Rogers & Hazelgrove, Roanoke, 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 the respondents named in the caption hereof have violated and are violating 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 Physicians Group, Inc. ("respondent PGI") is a non-stock corporation organized, existing, and doing business under and by virtue of the laws of the Commonwealth of Virginia, with its principal place of business in Danville, Virginia. For purposes of this proceeding, its address is c/o Dr. Edwin Harvie, Jr., 101 Holbrook Street, Danville, Virginia.

PAR. 2. The individual respondents named in the caption above (hereinafter "physician respondents") are the members of the Board of Directors of respondent PGI, are physicians licensed to practice

medicine in the Commonwealth of Virginia, and are engaged in the business of providing physician services to patients for a fee in Pittsylvania County and Danville, Virginia. Their respective business addresses are as follows:

Edwin J. Harvie, Jr., M.D., Internal Medicine Associates, Ltd.,
101 Holbrook Street, Danville, Virginia;

Eric N. Davidson, M.D., Piedmont Internal Medicine, Inc., 125
Executive Drive, Suite H, Danville, Virginia;

Milton Greenberg, M.D., 171 South Main Street, Danville,
Virginia;

Noah F. Gibson, IV, M.D., 181 North Main Street, Danville,
Virginia;

William W. Henderson, IV, M.D., Danville Pulmonary Clinic,
Inc., 110 Exchange Street, Suite G, Danville, Virginia;

Douglas W. Shiflett, M.D., Internal Medicine Associates, Ltd.,
101 Holbrook Street, Danville, Virginia; and

Lawrence G. Fehrenbaker, M.D., Danville Urologic Clinic, P.O.
Box 1360, Danville, Virginia.

PAR. 3. The acts and practices of respondent PGI and the physician 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. 4. Except to the extent that competition has been restrained as alleged herein, and except to the extent that physician respondents Edwin J. Harvie, Jr. and Douglas W. Shiflett practice together in Internal Medicine Associates, Ltd., the physician respondents have been, and are now, in competition among themselves and with other providers of physician services in Pittsylvania County and Danville, Virginia.

PAR. 5. Physicians often contract with health insurance firms and other third-party payors. Such contracts typically establish the terms and conditions under which the physicians will render services to the subscribers of the third-party payors, including terms and conditions of physician reimbursement and of cost containment. Among such terms and conditions of cost containment are procedures for reviewing the utilization of medical resources by participating physicians and for dealing with physicians who have over utilized. By employing such methods of cost containment, third-party payors

are often able to reduce the cost of medical care for their subscribers. The aggressive use of such cost containment methods can be described as "managed care."

PAR. 6. Absent agreements among competing physicians on the terms upon which they will deal with third-party payors, competing physicians each decide individually whether to enter into contracts with third-party payors and on the terms and conditions under which they are willing to enter into such contracts.

PAR. 7. All members of respondent PGI are physicians practicing in Pittsylvania County and Danville, Virginia. Respondent PGI was formed in February 1986 as a vehicle for its members to deal concertedly with the entry into Pittsylvania County and Danville, Virginia, of managed care. The physician respondents and other PGI members agreed that respondent PGI would represent them in negotiations with third-party payors. Respondent PGI exists in substantial part for the pecuniary benefit of its members.

PAR. 8. The members of PGI have not integrated their medical practices in any economically significant way, nor have they created any efficiencies that might justify their agreement to act collectively with respect to third-party payors.

PAR. 9. In engaging in the conduct described in paragraphs ten through fourteen below, respondent PGI has acted as a combination of its members and has conspired with at least some of its members.

PAR. 10. Beginning in 1986, and continuing to the present, respondent PGI and the physician respondents have conspired to prevent or delay the entry into Pittsylvania County and Danville, Virginia, of third-party payors, to deal concertedly with third-party payors, and to resist the cost containment measures of third-party payors.

PAR. 11. In 1988 and 1989, respondent PGI and the physician respondents conspired to fix the rate of reimbursement they were willing to accept from the Virginia Health Network, a managed care organization. As a result, the Virginia Health Network was not able to establish a network of health care providers in Pittsylvania County and Danville, Virginia.

PAR. 12. In 1992 and 1993, respondent PGI and the physician respondents conspired to fix the terms and conditions of cost containment they were willing to accept from the Key Advantage Plan, a managed care insurance plan for employees of the Commonwealth of Virginia. As a result, the Commonwealth of

Virginia was not able until 1994 to fully implement the Key Advantage Plan in Pittsylvania County and Danville, Virginia.

PAR. 13. Beginning in 1986 and continuing to the present, respondent PGI and the physician respondents have conspired to refuse to deal with, and to fix the terms and conditions of dealing with, other third-party payors attempting to do business in Pittsylvania County and Danville, Virginia.

PAR. 14. The acts and practices of respondent PGI and the physician respondents, as herein alleged, have had the purpose, tendency, and capacity to result in the following effects:

A. Restraining competition among physicians in Pittsylvania County and Danville, Virginia;

B. Depriving consumers in Pittsylvania County and Danville, Virginia, of the benefits of competition among physicians;

C. Fixing or increasing the prices that are paid for physician services in Pittsylvania County and Danville, Virginia;

D. Fixing the terms and conditions upon which physicians in Pittsylvania County and Danville, Virginia, would deal with third-party payors, including, but not limited to, terms and conditions of cost containment, and thereby raising the price to consumers of insurance coverage issued by third-party payors; and

E. Depriving consumers in Pittsylvania County and Danville, Virginia, of the benefits of managed care.

PAR. 15. The combination or conspiracy and the acts and practices of respondent PGI and the physician 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, 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 signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comment filed thereafter by an interested person 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 Physicians Group, Inc. is a non-stock corporation organized, existing, and doing business under and by virtue of the laws of the Commonwealth of Virginia, with its principal place of business in Danville, Virginia. For purposes of this order, its address is Physicians Group, Inc., c/o Dr. Edwin J. Harvie, Jr., 101 Holbrook Street, Danville, Virginia.

The individual respondents named in the caption above are the members of the board of directors of respondent Physicians Group, Inc. Their respective business addresses are as follows:

Edwin J. Harvie, Jr., M.D., Internal Medicine Associates, Ltd.,
101 Holbrook Street, Danville, Virginia;

Eric N. Davidson, M.D., Piedmont Internal Medicine, Inc., 125
Executive Drive, Suite H, Danville, Virginia;

Milton Greenberg, M.D., 171 South Main Street, Danville,
Virginia;

Noah F. Gibson, IV, M.D., 181 North Main Street, Danville, Virginia;

William W. Henderson, IV, M.D., Danville Pulmonary Clinic, Inc., 110 Exchange Street, Suite G, Danville, Virginia;

Douglas W. Shiflett, M.D., Internal Medicine Associates, Ltd., 101 Holbrook Street, Danville, Virginia; and

Lawrence G. Fehrenbaker, M.D., Danville Urologic Clinic, P.O. Box 1360, Danville, Virginia.

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. "*PGI*" means Physicians Group, Inc., its subsidiaries, divisions, committees, and groups and affiliates controlled by PGI; their directors, officers, representatives, agents, and employees; and their successors and assigns.

B. "*Physician respondents*" means Edwin J. Harvie, Jr., M.D., Eric N. Davidson, M.D., Milton Greenberg, M.D., Noah F. Gibson, IV, M.D., William W. Henderson, IV, M.D., Douglas W. Shiflett, M.D., and Lawrence G. Fehrenbaker, M.D.

C. "*Person*" refers to both natural persons and artificial persons, including, but not limited to, corporations, unincorporated entities, and governments.

D. "*Payor*" means any person that purchases, reimburses for, or otherwise pays for all or part of the health care services for itself or for any other person -- including, but not limited to, health insurance companies; preferred provider organizations; prepaid hospital, medical, or other health service plans; health maintenance organizations; government health benefits programs; employers or other persons providing or administering self-insured health benefits programs; and patients who purchase health care for themselves.

E. "*Reimbursement*" means any and all cash or non-cash compensation or other benefits received for the rendering of physician services.

F. "*Cost containment*" means methods used by payors to lower health care costs, including, but not limited to, procedures under which payors review utilization by participating physicians to determine whether a physician service is covered by insurance and whether such service is appropriate, and procedures under which payors deal with physicians who provide services that are determined not to be appropriate.

G. "*Integrated joint venture*" means a joint arrangement to provide health care services in which all physicians participating in the venture who would otherwise be competitors (1) pool their capital to finance the venture, by themselves or together with others, and (2) share a substantial risk of loss from their participation in the venture.

H. "*Professional business entity*" means professional corporation, professional partnership, and professional limited liability company.

II.

It is further ordered, That PGI and each physician respondent, directly or indirectly, or through any corporate or other device, in connection with the provision of physician services in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, forthwith shall cease and desist from:

A. Entering into, attempting to enter into, organizing, attempting to organize, implementing, attempting to implement, continuing, attempting to continue, facilitating, attempting to facilitate, ratifying, or attempting to ratify any combination, conspiracy, agreement, or understanding, with or among any physician(s) to:

1. Negotiate, deal, or refuse to deal with a payor, or
2. Determine any terms, conditions, or requirements upon which physicians deal with a payor, including, but not limited to, terms of reimbursement or of cost containment; and

B. Encouraging, advising, pressuring, inducing, or attempting to induce any physician to:

1. Refuse to deal with a payor, or
2. Deal with a payor on terms collectively determined by physicians, including such terms as terms of reimbursement or terms of cost containment.

Provided that, nothing in this order shall prevent physicians who practice together as partners or employees in the same professional business entity from collectively determining the fees to be charged for services rendered by that professional business entity or from collectively determining other terms on which that professional business entity deals with payors.

Further provided that, nothing in this order shall prevent physicians who participate in the same integrated joint venture from collectively determining the fees to be charged for services rendered by that integrated joint venture or from collectively determining other terms on which that integrated joint venture deals with payors.

Further provided that, nothing in this order shall prevent the exercise of rights permitted under the First Amendment to the United States Constitution to petition any federal or state government executive agency or legislative body concerning legislation, rules, or procedures, or to participate in any federal or state administrative or judicial proceeding.

Further provided that, nothing in this order shall prevent physicians from participating at the request of a payor in utilization review activities organized and controlled by the payor insofar as such participation continues only at the sufferance of the payor.

III.

It is further ordered, That PGI shall:

A. Within ten (10) days after the date on which this order becomes final, cease and desist all business and all other activities of any nature whatsoever, except those activities that are required in order to comply with the terms of this order or that are necessary to effect a winding up of PGI's affairs and its dissolution;

B. Within sixty (60) days after the date on which this order becomes final, and prior to the dissolution provided for in paragraph III.C. below, distribute by first-class mail a copy of this order and the accompanying complaint to each past and present member of PGI and

to each payor who, at any time since February 18, 1986, has communicated any desire, willingness, or interest in contracting for physician services with PGI or with any of the physician respondents; and

C. Dissolve itself within one hundred twenty (120) days after the date on which this order becomes final.

IV.

It is further ordered, That each physician respondent shall:

A. Within thirty (30) days after the date this order becomes final, prepare a list of the names, addresses, and telephone numbers of all payors who, at any time since February 18, 1986, have communicated any desire, willingness, or interest in contracting with him for physician services, and deliver a copy of that list to PGI; and

B. Take all actions necessary to effect dissolution of PGI as required by this order.

V.

It is further ordered, That PGI shall:

A. Within ninety (90) days after the date on which this order becomes final, and prior to the dissolution provided for in paragraph III.C. above, file with the Commission a verified written report demonstrating how it has complied and is complying with this order; and

B. Notify the Commission at least thirty (30) days prior to any proposed change in PGI, such as change of address, assignment, sale resulting in the emergence of a successor, or any other change in PGI that may affect compliance obligations arising out of this order.

VI.

It is further ordered, That each physician respondent shall:

A. Within sixty (60) days after the date this order becomes final, every sixty (60) days thereafter in which PGI is not dissolved, and within the thirty (30) days following dissolution of PGI, file with the

Commission a verified written report setting forth in detail the manner and form in which he intends to comply, is complying, and has complied with this order, including, but not limited to, a full description of his efforts to comply with paragraph IV.B. above;

B. Beginning on January 15, 1996, and continuing annually for three (3) years, on each succeeding January 15, through and including January 15, 1999, and at such other times as the Commission or its staff may by written notice require, file with the Commission a verified written report setting forth in detail the manner and form in which he has complied with the order; and

C. For ten (10) years, notify the Commission at least thirty (30) days prior to any proposed change in his address or in his medical practice, such as dissolution, assignment, sale resulting in the emergence of a successor, or any other change in his medical practice that may affect compliance obligations arising out of this order.

VII.

It is further ordered, That, for the purpose of determining or securing compliance with this order and subject to any recognizable privilege, PGI and each physician 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, calendars, and other records and documents in the possession or under the control of PGI or a physician respondent relating to any matters contained in this order;

B. Upon five business days' notice to PGI and without restraint or interference from it, to interview the officers, directors, or employees of PGI; and

C. Upon five business days' notice to a physician respondent and without restraint or interference from him, to interview the physician respondent or the employees of the physician respondent.

VIII.

It is further ordered, That this order shall terminate twenty (20) years from the date of issuance.

IN THE MATTER OF

EQUIFAX CREDIT INFORMATION SERVICES, INC.

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

Docket C-3611. Complaint, Aug. 14, 1995--Decision, Aug. 14, 1995

This consent order requires, among other things, a Georgia-based corporation to follow reasonable procedures to assure maximum possible accuracy when preparing consumer reports as required by the Fair Credit Reporting Act and to also maintain reasonable procedures to limit the furnishing of consumer reports to the purposes listed under Section 604 of the Fair Credit Reporting Act.

Appearances

For the Commission: *Christopher W. Keller, Donald D'Entremont and David Medine.*

For the respondent: *Kent Mast, Kilpatrick & Cody, Atlanta, GA.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, 15 U.S.C. 41 *et seq.*, and the Fair Credit Reporting Act, 15 U.S.C. 1681 *et seq.*, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Equifax Credit Information Services, Inc. ("Equifax"), a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of said Acts, 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

For the purpose of this complaint, the following definitions apply:

The terms "*person*," "*consumer*," "*consumer report*," "*consumer reporting agency*," and "*file*" are defined as set forth in Sections

603(b), (c), (d), (f), and (g), respectively, of the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. 1681a(b), 1681a(c), 1681a(d), 1681a(f), and 1681a(g).

"Permissible purpose" means any of the purposes listed in Section 604 of the FCRA, 15 U.S.C. 1681b, for which a consumer reporting agency may lawfully furnish a consumer report.

"Subscriber" means any person who, pursuant to an agreement with Equifax, furnishes credit information to Equifax or who requests or obtains a consumer report from Equifax, excluding consumers, public record sources, and independent contractors who provide public record information.

"Credit information" means information described by Section 603(d) of the FCRA, which Equifax maintains with respect to any consumer, that Equifax obtains from subscribers, public records or any other sources and from which Equifax creates consumer reports.

"Mixed file" means a consumer report in which some or all of the information pertains to consumers other than the consumer who is the subject of that consumer report.

"Consumer DTEC report" means a type of consumer report, by whatever name, containing only consumer identifying information such as 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, together with information showing employment or employment status.

PARAGRAPH 1. Respondent Equifax Credit Information Services, 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 1600 Peachtree Street N.W., Atlanta, Georgia.

PAR. 2. Respondent is now and has been regularly engaged in the practice of assembling or evaluating information on consumers for the purpose of furnishing, for monetary fees, consumer reports to third parties. Respondent furnishes these consumer reports to third parties through the means or facilities of interstate commerce. Hence, respondent is a consumer reporting agency, as defined in Section 603(f) of the Fair Credit Reporting Act.

PAR. 3. Respondent has furnished consumer DTEC reports on consumers to subscribers who did not have a permissible purpose to obtain such reports.

PAR. 4. Respondent, by creating or maintaining mixed files as alleged below in paragraphs nine, ten, and eleven, and subsequently making disclosure of the information in mixed files to consumers who request file disclosure pursuant to Section 609 of the Fair Credit Reporting Act, furnishes information pertaining to consumers other than the consumer who is requesting file disclosure. Respondent, by creating or maintaining mixed files as alleged below in paragraphs nine, ten, and eleven, and subsequently displaying the information in mixed files to subscribers, furnishes information to subscribers pertaining to consumers for whom the subscriber does not have a permissible purpose to receive a consumer report.

PAR. 5. Respondent from time to time furnishes to subscribers, in response to subscribers' inquiry requests for consumer reports, consumer reports for which subscribers have no permissible purpose.

PAR. 6. By and through the acts and practices alleged in paragraphs three, four, and five, respondent has violated Section 607(a) of the Fair Credit Reporting Act by failing to maintain reasonable procedures designed to limit the furnishing of consumer reports to the purposes listed under Section 604.

PAR. 7. Respondent includes in consumer reports, other than consumer reports described in Section 605(b) of the Fair Credit Reporting Act, accounts placed for collection or charged to profit and loss that antedate the report by more than seven years, and other adverse items of information, including that accounts have been delinquent, that antedate the report by more than seven years.

PAR. 8. By and through the acts and practices alleged in paragraph seven, respondent has violated Section 605(a) of the Fair Credit Reporting Act by furnishing consumer reports containing derogatory information beyond the statutorily limited period for reporting such information.

PAR. 9. Respondent fails to maintain reasonable procedures, including adequately monitoring, measuring, or testing its information gathering, storing, and assembling systems, to assure maximum possible accuracy of the consumer reports it furnishes. Respondent has, for example, failed adequately to correct its computer system or implement procedures to reduce sufficiently the occurrence or reoccurrence of inaccuracies in consumer reports,

including mixed files and logical errors (such as multiple listings of the same credit account and items that are not likely to pertain to the report subject such as credit accounts opened when the consumer was a minor).

PAR. 10. Respondent fails to follow reasonable procedures to avoid inclusion in a consumer report of public record information that pertains to consumers other than the consumer who is the subject of that consumer report or is otherwise inaccurate, including procedures to sample, verify and otherwise corroborate public record information furnished in consumer reports by respondent.

PAR. 11. By and through respondent's failures as alleged in paragraph nine and ten, respondent fails to take reasonable steps to reduce the incidence of inaccuracies in consumer reports, including mixed files and inaccurate public record information. As a result, information contained in some of the consumer reports that respondent furnishes does not pertain to the consumer who is the subject of the consumer report or is otherwise inaccurate.

PAR. 12. By and through the acts and practices alleged in paragraphs nine, ten, and eleven, respondent has violated Section 607(b) of the Fair Credit Reporting Act by failing to maintain and follow reasonable procedures to assure maximum possible accuracy of the information contained in its consumer reports.

PAR. 13. Respondent fails adequately to prevent the reappearance in consumer reports of either inaccurate or unverified information that has been previously deleted.

PAR. 14. By and through the practices alleged in paragraph thirteen above, respondent has violated Section 607(b) of the Fair Credit Reporting Act by failing to follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the consumer report relates, and Section 611 of the Fair Credit Reporting Act by failing promptly to delete inaccurate or unverified information from its consumer reports.

PAR. 15. Respondent fails adequately to give disclosures required by Section 609 of the Act to each consumer who has requested disclosure, has provided proper identification as required under Section 610 of the Act and has paid or accepted any charges which may be imposed under Section 612 of the Act.

PAR. 16. By and through the acts and practices alleged in paragraph fifteen, respondent has violated Section 609 of the Fair Credit Reporting Act.

PAR. 17. Respondent fails properly to reinvestigate disputes conveyed by consumers concerning their files, including but not limited to failing to reinvestigate disputes as requested by consumers within a reasonable period of time, and failing to follow reasonable procedures designed specifically to resolve (i) disputes by consumers that are due to mixed files and (ii) the specific issue raised in consumer disputes relating to inaccuracy or incompleteness, including the repeated inclusion in consumer reports of previously disputed inaccurate or incomplete items.

PAR. 18. By and through its acts and practices as alleged in paragraph seventeen above, respondent has violated Section 611 of the Fair Credit Reporting Act by failing, within a reasonable period of time, to reinvestigate and record the current status of disputed information.

PAR. 19. Respondent in some instances fails to reinvestigate consumer disputes unless the consumer complies with requirements beyond those in Section 611 of the Fair Credit Reporting Act, including but not limited to:

- a. Requiring the consumer to pay a fee for updating and recording the current status of disputed items;
- b. Requiring the consumer to provide copies of identifying documentation including but not limited to: driver's license, Social Security card, and utility bills; and
- c. Requiring written authorization from the consumer to reinvestigate an item the consumer has disputed.

PAR. 20. By and through the acts and practices alleged in paragraph nineteen, respondent has violated Section 611 of the Fair Credit Reporting Act by refusing to reinvestigate consumer's disputes.

PAR. 21. The acts and practices set forth in this complaint as violations of the Fair Credit Reporting Act constitute unfair or deceptive acts or practices in commerce in violation of Section 5(a) of the Federal Trade Commission Act, pursuant to Section 621(a) of the Fair Credit Reporting Act.

Chairman Pitofsky not participating.

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 violations of the Fair Credit Reporting Act and Section 5(a) 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 the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Acts, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, 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. Proposed respondent Equifax Credit Information Services, 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 1600 Peachtree Street, N.W., Atlanta, 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

For the purpose of this order, the following definitions apply:

"Commission" means the Federal Trade Commission.

"Equifax" means Equifax Credit Information Services, Inc., its successors and assigns, and its officers, agents, and employees acting in such capacity on its behalf, directly or through any corporation, subsidiary, division or other device.

"FCRA" means the Fair Credit Reporting Act, 15 U.S.C. 1681 *et seq.*, as the same from time to time may be amended or modified by statute or by regulations having the effect of statutory provisions.

The terms *"person," "consumer," "consumer report," "consumer reporting agency," "file,"* and *"employment purposes"* are defined as set forth in Sections 603(b), (c), (d), (f), (g), and (h), respectively, of the FCRA, 15 U.S.C. 1681a(b), 1681a(c), 1681a(d), 1681a(f), 1681a(g), and 1681a(h).

"Permissible purpose" means any of the purposes listed in Section 604 of the FCRA, 15 U.S.C. 1681b, for which a consumer reporting agency may lawfully furnish a consumer report.

"Subscriber" means any person who, pursuant to an agreement with Equifax, furnishes credit information to Equifax or who requests or obtains a consumer report from Equifax, excluding consumers, public record sources, and independent contractors who provide public record information.

"Prescreening" means the process whereby Equifax, utilizing credit information, compiles or edits for a subscriber a list of consumers who meet specific criteria and provides this list to the subscriber or a third party (such as a mailing service) on behalf of the subscriber for use in soliciting those consumers for an offer of credit.

"Credit information" means information described by Section 603(d) of the FCRA, which Equifax maintains with respect to any consumer, that Equifax obtains from subscribers, public records or any other sources and from which Equifax creates consumer reports.

"Mixed file" means a consumer report in which some or all of the information pertains to consumers other than the consumer who is the subject of that consumer report.

"Consumer DTEC report" means a type of consumer report, by whatever name, containing only consumer identifying information such as 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, together with information showing employment or employment status.

"Mixed-use subscriber of consumer DTEC reports" means the following subscribers who obtain consumer DTEC reports: attorneys, law firms, detective agencies, private investigators, and protective services firms.

"Joint user" means a user of a consumer report jointly involved with a subscriber in a decision for which there is a permissible purpose to obtain the consumer report and for which the consumer report was initially obtained.

"Approval date" means the date on which the Associate Director for Enforcement of the Bureau of Consumer Protection of the Commission notifies respondent that the methodologies required by paragraph II.1. of this order have received final approval.

I.

It is ordered, That Equifax, in connection with the collection, preparation, assembly, maintenance and furnishing of consumer reports and files, forthwith cease and desist from failing to:

1. Maintain reasonable procedures designed to limit the furnishing of consumer reports to subscribers that have permissible purposes to receive them under Section 604 of the FCRA, as required by Section 607(a) of the FCRA. Such procedures shall include but are not limited to:

a. Continuing to require in Equifax's contracts that those who obtain consumer reports from Equifax in the form of lists developed through prescreening make a firm offer of credit to each consumer on the lists and take reasonable steps to enforce those contracts; and

b. Reasonable procedures to avoid (i) including in a consumer report information identifiable as pertaining to a consumer other than the consumer for whom a permissible purpose exists as to such report; and (ii) displaying files identifiable as pertaining to more than one consumer in response to a subscriber request on one consumer.

2. Maintain reasonable procedures designed to limit the furnishing of consumer DTEC reports to subscribers under the circumstances described by Section 604 of the FCRA, as required by Section 607(a) of the FCRA. Such procedures shall include, with respect to prospective subscribers of consumer DTEC reports, before furnishing any consumer DTEC report to such subscribers, and with respect to current consumer DTEC subscribers, within six months after the effective date of this order:

a. Adoption of procedures requiring all consumer DTEC subscribers to provide written certification that subscribers will not share or provide consumer DTEC reports to anyone else, other than the subject of the report or to a joint user;

b. Continuation of procedures requiring all consumer DTEC subscribers to provide written identification of themselves; written certification of the permissible purpose(s) for which the consumer DTEC reports are sought; and written certification that the consumer DTEC reports will be used for no other purpose(s) than the purpose(s) certified;

c. With respect to each entity that becomes a consumer DTEC report subscriber on or after the effective date of this order, visitation to its place of business to confirm the certifications made pursuant to paragraphs I.2.a. and I.2.b. of this order;

d. Refusing to furnish consumer DTEC reports to subscribers who fail or refuse to provide the certifications required in paragraphs I.2.a. and I.2.b. of this order;

e. Requiring each mixed-use subscriber of consumer DTEC reports to provide a separate certification as to the permissible purpose for each consumer DTEC report it requests before the consumer DTEC report is furnished to it; and

f. Terminating access to consumer DTEC reports by any subscriber who Equifax knows or has reason to know has obtained, after the effective date of this order, a consumer DTEC report for any purpose other than a permissible purpose, unless that subscriber obtained such report through inadvertent error -- *i.e.*, a mechanical, electronic, or clerical error that the subscriber demonstrates was unintentional and occurred notwithstanding the maintenance of procedures reasonably designed to avoid such errors.

3. Maintain reasonable procedures as required by Section 607(a) of the FCRA to avoid including in any Equifax consumer report, other than a consumer report described in Section 605(b) of the FCRA, any information, notice or other statement that indicates directly or indirectly the existence of items of adverse information, the reporting of which is prohibited by Section 605(a) of the FCRA.

4. Follow reasonable procedures to assure maximum possible accuracy of the information concerning the consumer about whom the consumer report relates, as required by Section 607(b) of the FCRA. Such procedures shall include but are not limited to reasonable procedures:

a. To detect, before credit information is available for reporting by Equifax, logical errors in such credit information.

b. To prevent reporting to subscribers that credit information pertains to a particular consumer unless Equifax has identified such information by at least two of the following identifiers: (i) the consumer's name, (ii) the consumer's Social Security number, (iii) the consumer's date of birth, (iv) the consumer's account number with a subscriber or a similar identifier unique to the consumer; provided however that,

(A) For public record information only, if such public record information does not contain at least two of the above identifiers, Equifax may identify such public record information by the consumer's full name (including middle initial and suffix, if available) together with the consumer's full address (including apartment number, if any); and

(B) In the future Equifax may alternatively identify credit information (including public record information) by a discrete identifier that is (i) unique to the consumer, (ii) not utilized by Equifax at the time of execution of this agreement, and (iii) not susceptible of data entry error.

c. To assure that information in a consumer's file that has been determined by Equifax to be inaccurate is not subsequently included in a consumer report furnished on that consumer;

d. To prevent furnishing any consumer report containing information that Equifax knows or has reason to believe is incorrect, including information that the consumer or the source or repository

of the information has stated is not accurate (including that it does not pertain to the consumer) unless Equifax has reason to believe that the statement is frivolous or irrelevant or, upon investigation, not valid;

e. To avoid the occurrence of mixed files, including but not limited to mixing of files as the result of entry of data by subscribers when seeking consumer reports; and

f. To avoid reporting in a consumer report public record information that pertains to consumers other than the consumer who is the subject of the consumer report, or which does not accurately reflect information concerning such subject as it appears on public records, including but not limited to following reasonable procedures to sample, verify or otherwise corroborate public record information furnished by Equifax.

5. Maintain reasonable procedures so that information disputed by a consumer that is deleted or corrected upon reinvestigation by Equifax, does not subsequently appear in uncorrected form in consumer reports pertaining to that consumer; provided, however, that if after Equifax has deleted such information from the file, Equifax reverifies such information, Equifax may reinsert such information in the file and report such information in subsequent consumer reports concerning that consumer if, and only if, Equifax advises the consumer in writing that the information has been reinserted.

6. Make disclosure of the nature and substance of all information (except medical information) in its files on the consumer at the time of the request for disclosure, as required by Sections 609 and 610 of the FCRA, to any consumer who has requested disclosure, has provided proper identification as required under Section 610 of the FCRA, and has paid or accepted any charges that may be imposed under Section 612 of the FCRA.

7. Reinvestigate and record the current status of items of information the completeness or accuracy of which is disputed by a consumer, when the consumer directly conveys the dispute to Equifax, and Equifax does not have reason to believe the dispute is frivolous or irrelevant. Such reinvestigation shall include but not be limited to:

a. Completing any reinvestigation, *i.e.*, verifying, deleting, or modifying all disputed items in the consumer's file, within thirty (30)

days of receipt of the consumer's dispute; provided, however, that if Equifax in good faith cannot determine the nature of the consumer's dispute, Equifax shall attempt to determine the nature of the dispute by contacting the consumer by mail or telephone within five (5) business days of receiving the consumer's dispute, and complete its reinvestigation within thirty (30) days of the consumer's response if Equifax in good faith can then determine the nature of the consumer's dispute;

b. Communicating to the source used to verify the disputed information, a summary of the nature and substance of the consumer's dispute;

c. Accepting the consumer's version of the disputed information and correcting or deleting the disputed information, when the consumer submits to Equifax documentation obtained from the source of the information in dispute which confirms that the disputed information on the consumer report was inaccurate or incomplete, unless Equifax in good faith has reason to doubt the authenticity of the documentation, in which case Equifax need not accept the consumer's version of the dispute if it reinvestigates the dispute by contacting the source of the information and verifies that the documentation is not authentic; and

d. Employing reasonable procedures designed specifically to resolve (i) consumer disputes that Equifax has reason to believe arise from mixed files, and (ii) consumer disputes that indicate the repeated inclusion in consumer reports of previously disputed inaccurate or incomplete items.

8. Reinvestigate consumer disputes in accordance with Section 611 of the FCRA. In connection therewith, Equifax shall impose no requirements beyond those in Section 611 of the FCRA, including but not limited to requirements that the consumer:

a. Pay a fee for updating and recording the current status of disputed information;

b. Provide copies of identifying documentation, including but not limited to driver's license, Social Security card, and utility bills; and

c. Provide a written authorization before reinvestigating information the consumer has disputed.

9. Continue, upon completion of the reinvestigation of information disputed by a consumer, to write the consumer and provide the following:

- a. The results of the reinvestigation conducted by Equifax; and
- b. A statement advising the consumer of the consumer's right to request that Equifax furnish notification that information has been deleted, or furnish a copy or codification or summary of any consumer statement of explanation of the dispute that has been filed by the consumer, to any person specifically designated by the consumer who has within the preceding two years received a consumer report for employment purposes, or within the preceding six months received a consumer report for any other purpose, which contained the deleted or disputed information.

II.

It is further ordered, That Equifax shall, annually for the five (5) year period following the approval date, measure, monitor, and test the extent to which changes in its computer system, including its algorithms, reduce the incidence of mixed files.

1. In complying with this Section, Equifax shall submit, within one hundred eighty (180) days of the effective date of this order, for approval to the Associate Director for Enforcement, Bureau of Consumer Protection, of the Federal Trade Commission ("ADE"):

- a. A proposed methodology for establishing a baseline against which changes may be measured, monitored, and tested; and
- b. A proposed methodology for accurately measuring, monitoring, testing, and reporting the effects of changes made against the baseline established under the preceding paragraph.

2. For five (5) years following the approval date, Equifax shall submit annually to the ADE, in writing, the results of its comparison using the methodologies approved by the ADE as specified in paragraph II.1. above, and to the extent not otherwise provided, shall include with such reports the results of a statistically significant analysis to determine the incidence of mixed files.

III.

It is further ordered, That Equifax shall, annually for five (5) years following the effective date of this order, submit the following information to the ADE within sixty (60) days of the anniversary of the effective date of this order and with respect to the preceding twelve (12) month period:

1. The total number of file disclosures to consumers by Equifax;
2. The number of occasions on which consumers have informed Equifax that they dispute information in files maintained by Equifax;
3. The number of such disputes where the disputed information was verified as accurate;
4. The number of such disputes in which information disputed was deleted from, or modified in, the disputing consumer's file, after reinvestigation response; and
5. The number of such disputes in which information disputed was deleted from the disputing consumer's file because no response to Equifax's verification inquiry was received within thirty days.

IV.

It is further ordered, That, except for Section III above, Equifax shall, until the expiration of five (5) years following the effective date of this order, maintain and upon request make available to the ADE for inspection and copying, all documents demonstrating compliance with this order. Such documents shall include, but are not limited to, representative copies of each form of agreement or contract governing subscriber access to or use of credit information, each periodic audit or similar report concerning the testing or monitoring of its systems for preparation, maintenance, and furnishing of consumer reports and files, instructions given to employees regarding compliance with the provisions of this order, and any notices provided to subscribers in connection with the terms of this order.

V.

It is further ordered, That Equifax shall deliver a copy of this order to all of its present and future management officials having administrative or policy responsibilities with respect to the subject matter of this order.

VI.

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

VII.

It is further ordered, That Equifax shall, within one hundred eighty (180) days of service of this order, deliver to the ADE a report, in writing, setting forth the manner and form in which it has complied with this order as of that date. The Commission shall keep such report and its contents, or any report, document, or other information provided under Sections II, III, or IV above, or any notification provided under Section VI above, strictly confidential, in accordance with the Commission's Rules of Practice.

VIII.

It is further ordered, That if the FCRA is amended (or other similar federal legislation enacted) or the Commission issues any interpretation of the FCRA, relating to any obligation imposed on Equifax herein, which creates any new requirement for compliance with the FCRA that directly conflicts with any obligation imposed on Equifax by this order, Equifax may conform the manner in which it conducts its business as a consumer reporting agency or its use of credit information to the requirements of such statutory provision or interpretation; provided, however, that Equifax shall notify the ADE promptly if it intends to change its conduct as provided for in this Section, and provided further that nothing in this provision shall limit the right of the FTC to challenge any determination of direct conflict

by Equifax hereunder and to seek enforcement of Equifax's obligations under this order to the extent such determination is erroneous. For purposes of this order, and by way of example only, a "direct conflict" between this order and a new statutory amendment or interpretation shall include a requirement in any such amendment or interpretation that a consumer reporting agency complete a task or obligation addressed in this order in a greater period of time than is specified in the order.

IX.

This order does not address the issue of disclosure under Section 609 of Credit Information (whether or not separately maintained in any file), including but not limited to credit information utilized for fraud alert or similar application verification services, which categorizes the identifiers on the consumer or categorizes any other data on the consumer and is susceptible of being furnished to a subscriber, and the order does not in any way limit the right of the Commission to take any appropriate action after entry of this order relating to this issue, nor does it limit in any way Equifax's defenses to any such action.

Chairman Pitofsky not participating.

IN THE MATTER OF

ATLAS SUPPLY COMPANY

SET ASIDE ORDER IN REGARD TO ALLEGED VIOLATION OF
SEC. 2 OF THE CLAYTON ACT AND SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT

Docket 5794. Consent Order, July 19, 1951--Set Aside Order, Aug. 24, 1995

This order reopens a 1951 consent order--which prohibited Atlas from receiving illegal allowances or knowingly accepting or inducing discriminatory prices in their purchase of automotive tires, tubes, batteries, accessories or other automobile products--and sets aside the consent order pursuant to the Commission's Sunset Policy Statement, under which the Commission presumes that the public interest requires terminating competition orders that are more than 20 years old.

ORDER REOPENING PROCEEDING
AND SETTING ASIDE ORDER

On May 23, 1995, Atlas Supply Company ("Atlas") and its shareholders Chevron U.S.A., Inc., and BP Exploration and Oil, Inc., as respondents and successors to four of the six respondents named in the order, filed their Petition To Reopen and Set Aside Order ("Petition") in this matter. Thereafter, Amoco Oil Holding Company and Exxon Corporation, as respondents and successors to the two remaining respondents named in the order, filed Statements in Support of the Petition in which they joined in the Petition. The respondents request that the Commission set aside the 1951 order, pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), Rule 2.51 of the Commission's Rules of Practice, 16 CFR 2.51, and the Commission's 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, and published at 59 Fed. Reg. 45,286-92 (Sept. 1, 1994) ("Sunset Policy Statement"). In the Petition and the Statements in Support of the Petition, each respondent affirmatively states that it has complied with the terms of the order. The Petition was placed on the public record for thirty days, and no comments were received.

The Commission in its Sunset Policy Statement said, in relevant part, that "effective immediately, the Commission will presume, in the context of petitions to reopen and modify existing orders, that the public interest requires setting aside orders in effect for more than twenty years."¹ The Commission's cease and desist order in Docket No. 5794, issued on July 19, 1951, and modified by the Commission on October 8, 1985, has been in effect for forty-four years. Consistent with the Commission's Sunset Policy Statement, the presumption is that the order should be terminated. Nothing to overcome the presumption having been presented, the Commission has determined to reopen the proceeding and set aside the order in Docket No. 5794.

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. 5794 be, and it hereby is, set aside as of the effective date of this order.

¹ Sunset Policy Statement, 59 Fed. Reg. at 45, 289.

IN THE MATTER OF

P. LORILLARD CO.

SET ASIDE ORDER IN REGARD TO ALLEGED VIOLATION
OF SEC. 2 OF THE CLAYTON ACT*Docket 6600. Consent Order, May 7, 1958--Set Aside Order, Aug. 24, 1995*

This order reopens a 1958 consent order--which required Lorillard to offer compensation for promotional services on proportionally equal terms to all competing companies that distribute its tobacco and other products--and sets aside the consent order pursuant to the Commission's Sunset Policy Statement, under which the Commission presumes that the public interest requires terminating competition orders that are more than 20 years old.

ORDER REOPENING AND PROCEEDING
AND SETTING ASIDE ORDER

On May 5, 1995, Lorillard Tobacco Company ("Lorillard"), as respondent and successor to P. Lorillard Co., filed its Petition to Reopen and Set Aside Cease and Desist Order ("Petition") in this matter. Lorillard request that the Commission set aside the 1959 order in this matter pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), Rule 2.51 of the Commission's Rules of Practice, 16 CFR 2.51, and the Statement of Policy With Respect to Duration of Competition Orders and Statement of Intention to Solicit Public Comment With Respect to Duration of Consumer Protection Orders, issued on July 22, 1994, and published at 59 Fed. Reg. 45,286-92 (Sept. 1, 1994) ("Sunset Policy Statement"). In the Petition, Lorillard affirmatively states that it has not engaged in any conduct violating the terms of the order. The Petition was placed on the public record, and the thirty-day comment period expired on June 14, 1995. No comments were received.

The Commission in its Sunset Policy Statement said, in relevant part, that "effective immediately, the Commission will presume, in the context of petitions to reopen and modify existing orders, that the public interest requires setting aside orders in effect for more than twenty years."¹ The Commission's cease and desist order in Docket No. 6600, issued on May 7, 1958, and affirmed by the United States

¹ See Sunset Policy Statement, 59 Fed. Reg. at 45, 289.

Court of Appeals for the Third Circuit on June 4, 1959, has been in effect for thirty-six years. Consistent with the Commission's Sunset Policy Statement, the presumption is that the order should be terminated. Nothing to overcome the presumption having been presented, the Commission has determined to reopen the proceeding and set aside the order in Docket No. 6600.

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. 6600 be, and it hereby is, set aside, as of the effective date of this order.

IN THE MATTER OF

THE VALSPAR CORPORATION, ET AL.

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

Docket C-3478. Consent Order, Jan. 25, 1994--Modifying Order, Aug. 29, 1995

This order reopens a 1994 consent order that settled allegations that Valspar's acquisition of the Resin Products Division of Cargill, Inc. would eliminate competition between two leading U.S. producers of coating resins. This order modifies the consent order by deleting the prior approval requirements in paragraph VI pursuant to the Commission's Prior Approval Policy, under which the Commission presumes that the public interest requires reopening prior approval provisions in outstanding merger orders and making them consistent with the policy.

ORDER REOPENING AND MODIFYING ORDER

On June 27, 1995, McWhorter Technologies, Inc. ("McWhorter," formerly McWhorter, Inc. prior to its spin-off from Valspar Corporation) filed a Petition To Reopen And Modify Order ("Petition") pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), Section 2.51 of the Commission's Rules of Practice and Procedure, 16 CFR 2.51, and the Statement of Federal Trade Commission Policy Concerning Prior Approval And Prior Notice Provisions, issued on June 21, 1995, and published at 60 Fed. Reg. 39,745-47 (August 3, 1995) ("Prior Approval Policy Statement"). McWhorter requests that the order in Docket No. C-3478 be reopened and modified to terminate the prior approval provision in paragraph VI. The Petition was placed on the public record, and the thirty-day comment period expired on August 1, 1995. No comments were received.

The Commission, in its Prior Approval Policy Statement, stated that the availability of the premerger notification and waiting period requirements of Section 7A of the Clayton Act, commonly referred to as the Hart-Scott-Rodino ("HSR") Act, 15 U.S.C. 18a, will adequately protect the public interest in effective enforcement in merger cases, and that, as a general matter, "Commission orders in such cases will not include prior approval or prior notice

requirements." Accordingly, the Commission announced that, when a petition is filed to reopen and modify an order pursuant to the Prior Approval Policy Statement, "the Commission will apply a rebuttable presumption that the public interest requires reopening of the order and modification of the prior approval requirement." Consistent with the Commission's Prior Approval Policy Statement, the presumption is that the prior approval requirements in paragraph VI of this order should be terminated. Nothing to overcome the presumption having been presented, the Commission has determined to reopen the proceedings and modify the order in Docket No. C-3478 to set aside the prior approval requirement in paragraph VI.

The Commission also stated that it would continue to fashion remedies as needed in the public interest, including ordering narrow prior notification requirements in certain limited circumstances. Accordingly, a prior notification provision may be used where there is a credible risk that a company would, but for an order, engage in an anticompetitive merger that would not be subject to the premerger notification and waiting period requirements of the HSR Act. As explained in the Prior Approval Policy Statement, the need for a prior notification requirement will depend on circumstances such as the structural characteristics of the relevant markets, the size and other characteristics of the market participants, and other relevant factors. Based on the record in this case, there is no evidence that a prior notification requirement is warranted.

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-3478 be, and it hereby is, modified to set aside the prior approval requirement in paragraph VI as of the effective date of this order.

CONCURRING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

The Commission has adopted a policy to "apply a rebuttable presumption that the public interest requires the reopening of the order and modification of the prior approval requirement" in merger cases. *See* Statement of Federal Trade Commission Policy Concerning Prior Approval and Prior Notice Provisions, 60 Fed. Reg.

39,745, 39,746 (Aug. 3, 1995), Commissioner Azcuenaga Dissenting (60 Fed. Reg. at 39,476). The order in this case is the first to be modified since the new policy was adopted. Although I dissented from the decision of the Commission to change its policy, the revised order is consistent with the new policy, and I have voted to issue it.

Complaint

120 F.T.C.

IN THE MATTER OF

JERRY'S FORD SALES, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE
TRUTH IN LENDING ACT, REGULATION Z, CONSUMER LEASING ACT
AND THE FEDERAL TRADE COMMISSION ACT

Docket C-3612. Complaint, Aug. 29, 1995--Decision, Aug. 29, 1995

This consent order requires, among other things, three corporations in Virginia and their President and CEO, in any advertisement to promote any extension of consumer credit, to cease and desist from misrepresenting the terms of financing the purchase of a vehicle, including whether there may be a balloon payment and the amount of any balloon payment. The consent order also requires the respondents, in any advertisement to promote any extension of consumer credit, to cease and desist from failing to state all terms required by Sections 226.24(b) and 226.24(c) of Regulation Z. In addition, the consent order also requires the respondents, in any advertisement to aid, promote or assist any consumer lease, to cease and desist from failing to state all terms required by Section 213.5(c) of Regulation M.

Appearances

For the Commission: *Carole L. Reynolds.*

For the respondents: *Basil Mezines and George Tobin, Stein, Mitchell & Mezines, Washington, D.C.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Jerry's Ford Sales, Inc., and John's Ford, Inc. dba Jerry's Leesburg Ford, corporations, hereinafter sometimes referred to collectively as respondent Jerry's Ford, Jerry's Chevrolet Geo Oldsmobile, Inc., a corporation, hereinafter sometimes referred to as respondent Jerry's Chevy, and Jerry C. Cohen, individually and as an officer of the aforementioned corporations, hereinafter sometimes referred to as respondent Cohen, have violated the Truth in Lending Act ("TILA"), 15 U.S.C. 1601-1667, as amended, and its implementing Regulation Z, 12 CFR 226, the Consumer Leasing Act ("CLA"), 15 U.S.C. 1667-1667e, as amended, and its implementing Regulation M, 12 CFR 213, and the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. 45-58, as amended, and it appearing to the Commission that a

proceeding by it in respect thereof would be in the public interest, hereby issues this complaint and alleges:

PARAGRAPH 1. Jerry's Ford Sales, Inc. 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 6510 Little River Turnpike, Annandale, Virginia.

PAR. 2. John's Ford, Inc. dba Jerry's Leesburg Ford is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Virginia, with its principal place of business located at 847 East Market Street, Leesburg, Virginia.

PAR. 3. Jerry's Chevrolet Geo Oldsmobile, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Virginia, with its principal place of business located at 325 East Market Street, Leesburg, Virginia.

PAR. 4. Jerry C. Cohen is an individual and an officer and director of the corporate respondents Jerry's Ford Sales, Inc., John's Ford, Inc. dba Jerry's Leesburg Ford, and Jerry's Chevrolet Geo Oldsmobile, Inc. He formulates, directs and controls the acts and practices of the aforementioned corporate respondents, including the acts and practices hereinafter set forth. His business address is 6510 Little River Turnpike, Annandale, Virginia.

PAR. 5. In the ordinary course and conduct of their business, and at least since January 1, 1993, respondents Jerry's Ford, Jerry's Chevy and Cohen have been engaged in the dissemination of advertisements that promote, directly or indirectly, credit sales and other extensions of other than open end credit in consumer credit transactions, as the terms "advertisement," "credit sale," and "consumer credit," are defined in the TILA and Regulation Z. In the ordinary course and conduct of their business, and at least since January 1, 1993, respondents Jerry's Ford, Jerry's Chevy and Cohen have been engaged in the dissemination of advertisements that promote, directly or indirectly, consumer leases, as the terms "advertisement," and "consumer lease," are defined in the CLA and Regulation M.

PAR. 6. The acts and practices of respondents Jerry's Ford, Jerry's Chevy and Cohen alleged in this complaint have been and are in or affecting commerce, as "commerce" is defined in the FTC Act.

COUNT ONE

PAR. 7. Respondents Jerry's Ford and Cohen, in the course and conduct of their business, in numerous instances including but not limited to Exhibit A have disseminated or caused to be disseminated advertisements that state an initial, low monthly payment. In fine print, the aforementioned respondents' advertisements, *inter alia*, state an initial number of payments and another amount variously described as "optional final payment," "optional final price," or "COP." The aforementioned respondents' advertisements misrepresent that the remaining obligation is optional and fail to disclose that the financing to be signed at purchase requires the consumer to make a substantial balloon payment at the conclusion of the initial payments, which is a mandatory obligation.

PAR. 8. Respondents Jerry's Ford's and Cohen's aforesaid practice constitutes an unfair and deceptive act or practice, in violation of Section 5(a) of the FTC Act, 15 U.S.C. 45(a).

COUNT TWO

PAR. 9. Respondents Jerry's Ford and Cohen, in the course and conduct of their business, in numerous instances including but not limited to Exhibit A have disseminated or caused to be disseminated advertisements that state an initial number and amount of payments required to repay the indebtedness and another amount variously described as "optional final payment," "optional final price," or "COP." Respondents Jerry's Ford's and Cohen's advertisements fail to accurately state the terms of repayment, by failing to disclose that the additional amount is a final payment and by inaccurately stating that the amount is optional when, in fact, it is mandatory, based on the financing to be signed at purchase.

PAR. 10. Respondents Jerry's Ford's and Cohen's aforesaid practice violates Section 144 of the TILA, 15 U.S.C. 1664, and Section 226.24(c) of Regulation Z, 12 CFR 226.24(c).

COUNT THREE

PAR. 11. Respondents Jerry's Ford and Cohen, in the course and conduct of their business, in numerous instances have disseminated or caused to be disseminated advertisements that state a rate of

finance charge without stating that rate as an "annual percentage rate," using that term or the abbreviation "APR," and have failed to calculate that rate in accordance with Regulation Z.

PAR. 12. Respondents Jerry's Ford's and Cohen's aforesaid practice constitutes a violation of Sections 144 and 107 of the TILA, 15 U.S.C. 1664 and 1606, respectively, and Sections 226.24(b) and 226.22 of Regulation Z, 12 CFR 226.24(b) and 226.22, respectively, and also constitutes an unfair and deceptive act or practice, in violation of Section 5(a) of the FTC Act, 15 U.S.C. 45(a).

COUNT FOUR

PAR. 13. Respondents Jerry's Chevy and Cohen, in the course and conduct of their business, in numerous instances including but not limited to Exhibit B have disseminated or caused to be disseminated advertisements that state an initial, low monthly payment and an initial number of payments. Respondents Jerry's Chevy's and Cohen's advertisements fail to disclose that the financing to be signed at purchase requires the consumer to make a substantial final balloon payment.

PAR. 14. Respondents Jerry's Chevy's and Cohen's aforesaid practice constitutes an unfair and deceptive act or practice, in violation of Section 5(a) of the FTC Act, 15 U.S.C. 45(a).

COUNT FIVE

PAR. 15. Respondents Jerry's Chevy and Cohen, in the course and conduct of their business, in numerous instances including but not limited to Exhibit B have disseminated or caused to be disseminated advertisements that state an initial number and amount of payments required to repay the indebtedness, but fail to accurately state the terms of repayment, by failing to disclose the amount of the final balloon payment required at the end of the initial payments, based on the financing to be signed at purchase.

PAR. 16. Respondents Jerry's Chevy's and Cohen's aforesaid practice violates Section 144 of the TILA, 15 U.S.C. 1664, and Section 226.24(c) of Regulation Z, 12 CFR 226.24(c).

Complaint

120 F.T.C.

COUNT SIX

PAR. 17. Respondents Jerry's Ford, Jerry's Chevy and Cohen, in the course and conduct of their business, in numerous instances have disseminated or caused to be disseminated advertisements that state the amount or percentage of any downpayment, the number of payments or period of repayment, or the amount of any payment, but fail to state all of the terms required by Regulation Z, as follows: the amount or percentage of the downpayment, the terms of repayment, and the annual percentage rate, using that term or the abbreviation "APR."

PAR. 18. Respondents Jerry's Ford's, Jerry's Chevy's and Cohen's aforesaid practice violates Section 144 of the TILA, 15 U.S.C. 1664, and Section 226.24(c) of Regulation Z, 12 CFR 226.24(c).

COUNT SEVEN

PAR. 19. Respondents Jerry's Ford, Jerry's Chevy and Cohen, in the course and conduct of their business, in numerous instances have disseminated or caused to be disseminated advertisements that state the amount of any payment, the number of required payments, or that any or no downpayment or other payment is required at consummation of the lease, but fail to state all of the terms required by Regulation M, as applicable and as follows: that the transaction advertised is a lease; the total amount of any payment such as a security deposit or capitalized cost reduction required at the consummation of the lease or that no such payments are required; the number, amount, due dates or periods of scheduled payments, and the total of such payments under the lease; and a statement of whether or not the lessee has the option to purchase the leased property and at what price and time (the method of determining the price may be substituted for disclosure of the price).

PAR. 20. Respondents Jerry's Ford's, Jerry's Chevy's and Cohen's aforesaid practice violates Section 184 of the CLA, 15 U.S.C. 1667c, and Section 213.5(c) of Regulation M, 12 CFR 213.5(c).

600

Complaint

EXHIBIT A



NO MONEY DOWN

MERCURY
LINCOLN

IN THE CAR OR TRUCK OF YOUR CHOICE ON APPROVED CREDIT

3 TAURUS GL 4 DR.
Dual Air Bags, 200A Package, 3 in Stock

1 FACT. PRICE	\$16,880
1 DISC	-325
1 CUST. CASH	-800
JERRY'S DISC.	-2,568

LANCE \$13,999
\$248.87* PER MONTH

'93 TAURUS GL WAGON
Dual Air Bags, 200A Package, 1 in Stock

1 FACT. PRICE	\$18,218
1 DISC	-325
1 CUST. CASH	-800
JERRY'S DISC.	-4,466

LANCE \$14,999

3 TEMPO GL 4 DR.
Air Bag, 771A Package

1 FACT. PRICE	\$12,879
1 DISC	-1,400
1 CUST. CASH	-800
JERRY'S DISC.	-800

LANCE \$9,999

993 T-BIRD
155 A PACK, 3 IN STOCK

14,399

RANGER SALE
'93 RANGER LONGBED
#1 in 48 States Package, 8 in Stock

ORIG. FACT. PRICE	\$13,330
FACT. DISC.	-1,150
JERRY'S DISC.	-6,630
SPECIAL DISC.	-511
FACT. CUST. CASH	-800

BALANCE \$9,550

1993 EXPLORER 4x4
2 DOOR
913A PACKAGE

PAYMENT AS LOW AS \$316.87**

1993 RANGER XLT
864E PACKAGE

PAYMENT AS LOW AS \$184.57***

1993 F150
STYLESIDE, O/D TRANS.
#1 SELLING TRUCK IN AMERICA

PAYMENT AS LOW AS \$191.61****

1993 CROWN VICTORIA
T13A Package, Dual Air Bag, Anti-Lock Brakes, Keyless Entry, Mirror, SL 43000

ORIG. FACT. PRICE	\$29,881
FACT. DISC.	-650
FACT. CUST. CASH	-1,800
JERRY'S DISC.	-3,271

FINAL PRICE \$19,450

1993 COUGAR XR7 260 A PK.
TR, Cruise, Lin Group, Anti-Lock Brakes Sys., Power Windows

ORIG. FACT. PRICE	\$17,641
FACT. CUST. CASH	-313
JERRY'S DISC.	-1,833

FINAL PRICE \$14,995

1993 AEROSTAR XL WAGON
6D1A, Rear Defrost, AM/FM Cass., Clock, Luggage Rack, A/C, Cruise, TR

ORIG. FACT. PRICE	\$18,848
FACT. DISC.	-990
FACT. CUST. CASH	-750
EXTRA DISCOUNT	-990
JERRY'S DISC.	-1,521

FINAL PRICE \$13,865

1993 F150 498PK. 4X4
Limited Slip Axle, Steering Wheel, Step Dumper, KWH

ORIG. FACT. PRICE	\$18,727
FACT. DISC.	-800
JERRY'S DISC.	-1,827

FINAL PRICE \$13,800

37 EXPLORERS AVAILABLE
Take \$500 off Road Exit 5 by Road Credit in 2 weeks or 3 months from now. No cash needed. REDUCED TOLL ROAD TICKET TO SAVINGS!

Jerry's  **FORD**

6510 LITTLE RIVER TURNPIKE (DUKE ST. EXTENDED), ANNANDALE, VA. (703) 256-5000

JERRY'S ANNANDALE • JERRY'S LEESBURG

847 EAST MARKET ST., LEESBURG, VA. (703) 777-2102 • METRO (703) 478-1888

WASHINGTON FILE
3-10-93

Complaint

120 F.T.C.

EXHIBIT B

Chevrolet THE HEARTBEAT OF AMERICA **NO MONEY DOWN** **Oldsmobile** DEMAND THE BEST

JERRY'S LEESBURG

ON THE CAR OR TRUCK OF YOUR CHOICE ON APPROVED CREDIT

NO CREDIT SINCE 1981 **Auto Credit Specialist**

NEW '93 CAVALIER 4 DR. COUPE
 Detroit, Air Cond., Tilt Wheel, AM/FM Stereo, 160 cassette, Sport mirrors, Floor mats, Tinted glass, Body side moulding, Vanity mirrors.
Now \$9,997

'93 PHEVY CHEYENNE 4x4 PICKUP
 (2) in stock, 6100 GVW, Air, Optional axle, Auto OD transmission, AM/FM stereo, ON/OFF road tires, Bedliner, Rear wheel bumper, Sliding rear window.
FACTORY LIST \$17,851
SALE PRICE \$15,977 NEW

'93 OLDSMOBILE 88 ROYAL SEDAN
 Company Official, 158 Option Package.
NEW
 LIST \$21,962
Now \$18,677 SAVE \$3,400

'92 PRIZM 4 DR.
 Air Cond., Auto, AM/FM stereo.
 (3) in stock.
FACTORY LIST \$12,383
***\$8977**

'92 CORSICA LT 4 DR. SEDANS.
 (3) in stock, Auto, P/Door locks, Tilt wheels, AM/FM stereo, Air Cond., Air bags, 4-wheel ABS brakes, V6 engine and more.
FACTORY LIST \$14,299
NOW \$9,997

'92 ASTRO EXTENDED VAN
 Air Cond, Auto, 8 Passenger, 5yr. Bank Rate Finance Available on Approved Credit.
***\$2,877**

'93 Geo Metro Hatch Back
NEW
 (2) in stock, Elec. Def., AM/FM Stereo, A/C, 30 MPG HWY.
\$7,487

1993 Z28's AND CAMAROS IN STOCK FOR IMMEDIATE DELIVERY!

'92 Lumina Euro 4 DR
 Air, Auto P/S, Power Windows, Power Locks, AM/FM Stereo, and more.
\$12,467*
 \$1000 Cash Rebate on 1993 Lumina in Stock

1993 S-10 TAHOE PICKUP
 Special Purchase - (3) in stock, 4200 GVW, V6 engine, 5 speed w/overdrive, Blackout package, Tahoe, Air cond., P/steering, AM/FM w/cassette, 205 White Letter tires, Sliding rear window. Factory list before package discount \$13,461.
SALE PRICE
AFTER FACTORY REBATE \$9,995

NO MONEY DOWN
SMART BUY **SAVE \$3,466**

Payment based on Smart Buy through GMAC at 9.9% on approved credit.
***\$199/48 Mo.**

SUBURBANS AND BLAZERS IN STOCK FOR DELIVERY!

2.9% FINANCING AVAILABLE ON SELECTED MODELS

FREE CELLULAR PHONE (with purchase of any car or truck)

ADDITIONAL REBATES
 College Grad. *500**
 1st Time Buyer *500**
 GM Employees SAVE

Jerry's Chevrolet **Geo**
 Leesburg
 325 E. Market St., Leesburg 703-778-8300
 *Manufacturer's Suggested Retail Price, MSRP, includes destination charge, excludes taxes, title, license, and dealer fees.

Jerry's OLDSMOBILE
 Leesburg Metro 589-1902
 In Town, Rt. 7 East, next to McDonalds
 *11/6/93

EXHIBIT B

The Loudon... Time... Miles... 1000... 1000... 1000...

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 that the Bureau of Consumer Protection proposed to present to the Commission for its consideration and that, if issued by the Commission, would charge the respondents with violation of the Truth in Lending Act, 15 U.S.C. 1601 *et seq.* and its implementing Regulation Z, 12 CFR 226, the Consumer Leasing Act, 15 U.S.C. 1667 *et seq.* and its implementing Regulation M, 12 CFR 213 and the Federal Trade Commission Act, 15 U.S.C. 45 *et seq.*; 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 considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts and Regulation, 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 Jerry's Ford Sales, 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 6510 Little River Turnpike, Annandale, Virginia.

2. Respondent John's Ford, Inc. dba Jerry's Leesburg Ford is a corporation organized, existing, and doing business under and by virtue of the laws of the Commonwealth of Virginia, with its principal office and place of business located at 847 East Market Street, Leesburg, Virginia.

3. Respondent Jerry's Chevrolet Geo Oldsmobile, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the Commonwealth of Virginia, with its principal office and place of business located at 325 East Market Street, Leesburg, Virginia.

4. Respondent Jerry C. Cohen is an individual and an officer and director of the aforementioned corporate respondents. He formulates, directs and controls the acts and practices of the aforementioned corporate respondents, including the acts and practices hereinafter set forth. His business address is 6510 Little River Turnpike, Annandale, Virginia.

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

ORDER

I.

It is ordered, That respondent Jerry's Ford Sales, Inc., John's Ford, Inc. dba Jerry's Leesburg Ford, Jerry's Chevrolet Geo Oldsmobile Inc., corporations, their successors and assigns and their officers, and Jerry C. Cohen, individually and as an officer of the corporate respondents, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division, or any other device, in connection with any advertisement to promote directly or indirectly any extension of consumer credit, as "advertisement," and "consumer credit" are defined in the TILA and Regulation Z, do forthwith cease and desist from:

A. Misrepresenting in any manner, directly or by implication, the terms of financing the purchase of a vehicle, including but not limited to whether there may be a balloon payment and the amount of any balloon payment.

B. Stating a rate of finance charge without stating the rate as an "annual percentage rate" or the abbreviation "APR," using that term, and failing to calculate the rate in accordance with Regulation Z. If the annual percentage rate may be increased after consummation, the advertisement shall state that fact. The advertisement shall not state any other rate, except that a simple annual rate or periodic rate that

is applied to an unpaid balance may be stated in conjunction with, but not more conspicuously than, the annual percentage rate.

(Sections 144 and 107 of the TILA, 15 U.S.C. 1664 and 1606, and Sections 226.24(b) and 226.22 of Regulation Z, 12 CFR 226.24(b) and 226.22, as more fully set out in Sections 226.24(b) and 226.22 of the Federal Reserve Board's Official Staff Commentary to Regulation Z, 12 CFR 226.24(b) and 226.22, respectively).

C. Stating any number or amount of payment(s) required to repay the debt, without stating accurately, clearly and conspicuously, all of the terms required by Regulation Z, as follows:

- (1) The amount or percentage of the downpayment;
- (2) The terms of repayment, including the amount of any balloon payment, and
- (3) The annual percentage rate, using that term or the abbreviation "APR." If the annual percentage rate may be increased after consummation of the credit transaction, that fact must also be disclosed.

(Section 144 of the TILA, 15 U.S.C. 1664, and Section 226.24(c) of Regulation Z, 12 CFR 226.24(c), as more fully set out in Section 226.24(c) of the Federal Reserve Board's Official Staff Commentary to Regulation Z, 12 CFR 226.24(c)).

D. Stating the amount or percentage of any downpayment, the number of payments or period of repayment, the amount of any payment, or the amount of any finance charge, without stating, clearly and conspicuously, all of the terms required by Regulation Z, as follows:

- (1) The amount or percentage of the downpayment;
- (2) The terms of repayment, and
- (3) The annual percentage rate, using that term or the abbreviation "APR." If the annual percentage rate may be increased after consummation of the credit transaction, that fact must also be disclosed.

(Section 144 of the TILA, 15 U.S.C. 1664, and Section 226.24(c) of Regulation Z, 12 CFR 226.24(c)).

E. Failing to state only those terms that actually are or will be arranged or offered by the creditor, in any advertisement for credit that states specific credit terms, as required by Regulation Z. (Section 144 of the TILA, 15 U.S.C. 1664, and Section 226.24(a) of Regulation Z, 12 CFR 226.24(a)).

F. Failing to comply in any other respect with Regulation Z and the TILA. (Regulation Z, 12 CFR 226, as amended, and the TILA, 15 U.S.C. 1601-1667, as amended).

II.

It is further ordered, That respondents Jerry's Ford Sales, Inc., John's Ford, Inc. dba Jerry's Leesburg Ford, Jerry's Chevrolet Geo Oldsmobile, Inc., corporations, their successors and assigns and their officers, and Jerry C. Cohen, individually and as an officer of the corporate respondents, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division, or any other device, in connection with any advertisement to aid, promote or assist directly or indirectly any consumer lease, as "advertisement," and "consumer lease" are defined in the CLA and Regulation M, do forthwith cease and desist from:

A. Stating the amount of any payment, the number of required payments, or that any or no downpayment or other payment is required at consummation of the lease, unless all of the following items are disclosed, clearly and conspicuously, as applicable, as required by Regulation M:

- (1) That the transaction advertised is a lease;
- (2) The total amount of any payment such as a security deposit or capitalized cost reduction required at the consummation of the lease, or that no such payments are required;
- (3) The number, amounts, due dates or periods of scheduled payments, and the total of such payments under the lease;
- (4) A statement of whether or not the lessee has the option to purchase the leased property and at what price and time (the method of determining the price may be substituted for disclosure of the price), and

(5) A statement of the amount or method of determining the amount of any liabilities the lease imposes upon the lessee at the end of the term and a statement that the lessee shall be liable for the difference, if any, between the estimated value of the leased property and its realized value at the end of the lease term, if the lessee has such liability.

(Section 184 of the CLA, 15 U.S.C. 1667c, and Section 213.5(c) of Regulation M, 12 CFR 213.5(c)).

B. Stating that a specific lease of any property at specific amounts or terms is available unless the lessor usually and customarily leases or will lease such property at those amounts or terms, as required by Regulation M.

(Section 184 of the CLA, 15 U.S.C. 1667c, and Section 213.5(a) of Regulation M, 12 CFR 213.5(a)).

C. Failing to comply in any other respect with Regulation M and the CLA.

(Regulation M, 12 CFR 213, and the CLA, 15 U.S.C. 1667-1667e, as amended).

III.

It is further ordered, That respondents, their successors and assigns shall distribute a copy of this order to any present or future officers, agents, representatives, and employees having responsibility with respect to the subject matter of this order and that respondents, their successors and assigns shall secure from each such person a signed statement acknowledging receipt of said order.

IV.

It is further ordered, That respondents, their successors and assigns shall promptly notify the Commission at least thirty (30) days prior to any proposed change in the corporate entity 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.

V.

It is further ordered, That for five years after the date of service of this order respondents, their successors and assigns shall maintain and upon request make available all records that will demonstrate compliance with the requirements of this order.

VI.

It is further ordered, That respondents, their successors and assigns shall, within sixty days (60) days of 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.

VII.

It is further ordered, That this order will terminate on August 29, 2015, or twenty years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

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

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

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

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

IN THE MATTER OF

SUPERMARKET DEVELOPMENT CORPORATION, ET AL.

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

Docket C-3224. Consent Order, Mar. 17, 1988--Modifying Order, Sept. 5, 1995

This order reopens a 1988 consent order (110 FTC 369) that settled allegations that the acquisition of the El Paso Division of Safeway Stores, Inc., by Supermarket Development Corporation and Furr's, Inc. would reduce supermarket competition in 12 towns in New Mexico and western Texas, and required, for ten years, prior Commission approval before acquiring supermarket assets. This order modifies the consent order by substituting for the prior-approval requirement a provision requiring Furr's Supermarket to notify the Commission at least 30 days before acquiring certain supermarkets in those areas.

ORDER REOPENING AND MODIFYING ORDER

On April 3, 1995, Furr's Supermarkets, Inc. ("FSI"), a successor to respondent Supermarket Development Corporation ("SDC") and its subsidiary Furr's, Inc. ("Furr's"), filed an Application to Modify Consent Order ("Application") in Docket No. C-3224, pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Section 2.51 of the Commission's Rules of Practice and Procedure, 16 CFR 2.51. The Application requested that the Commission reopen and modify paragraph IV, the prior approval provision of the order in Docket No. C-3224, to permit FSI to acquire fee simple interests in real estate on which FSI currently operates a retail grocery store as a lessee. In its Application, FSI asserts that the public interest supports its request for reopening and modification. The Application was placed on the public record for thirty days, and no comments were received. Subsequently, on July 14 and 21, 1995, FSI filed amendments to its Application, requesting that the Commission set aside the prior approval requirement in its entirety, or in the alternative, substitute a prior notice requirement, citing the Statement of Federal Trade Commission Concerning Prior Approval and Prior Notice Provisions, issued on June 22, 1995, and published at 60 Fed. Reg. 39,745-47 (August 3, 1995) ("Prior Approval Policy Statement").

The Commission, in its Prior Approval Policy Statement, said, in relevant part, that "the Commission will apply a rebuttable presumption that the public interest requires reopening of the order and modification of the prior approval requirement." Consistent with the Commission's Prior Approval Policy Statement, the presumption is that the prior approval requirement in this order should be terminated. Nothing to overcome the presumption having been presented, the Commission has determined to reopen the proceedings and modify the order in Docket No. C-3224 to set aside the prior approval requirement.

The Commission also stated that it would continue to fashion remedies as needed in the public interest, including ordering narrow prior notification requirements in certain limited circumstances. Accordingly, a prior notification provision may be used where there is a credible risk that a company would, but for an order, engage in an anticompetitive merger that would not be subject to the premerger notification and waiting period requirements of Section 7A of the Clayton Act, commonly referred to as the Hart-Scott-Rodino ("HSR") Act, 15 U.S.C. 18a. As explained in the Prior Approval Policy Statement, the need for a prior notification requirement will depend on circumstances such as the structural characteristics of the relevant markets, the size and other characteristics of the market participants, and other relevant factors.

The Commission has determined that the record in this case evidences a credible risk that the respondent and its successors could engage in future anticompetitive acquisitions that would not be reportable under the HSR Act. The complaint in Docket No. C-3224 charged that respondent SDC's proposed acquisition of the El Paso Division of Safeway Stores, Inc. would, if consummated, violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act by substantially lessening competition in the retail sale and distribution of food and grocery store items in supermarkets in twelve relevant geographic markets consisting of individual cities and towns in Texas and New Mexico. (Complaint, ¶¶ 13-15, 18-19). The complaint also alleged that there were nineteen cities and towns in Texas and New Mexico in which respondent SDC and Safeway both operated grocery stores (*Id.*, at ¶ 12), and paragraph IV of the order required respondent to obtain prior Commission approval before acquiring any retail grocery store or any interest in a retail grocery store in those nineteen cities and towns.

There has been no showing that the competitive conditions that gave rise to the Commission's complaint and order in Docket No. C-3224 no longer exist. Moreover, the size and localized nature of the relevant markets and the likely size and other characteristics of the market participants and relevant transactions as identified in the complaint and order indicate that future acquisitions that would currently be covered by the provisions of paragraph IV of the order would probably not be subject to the premerger notification and waiting period requirements of the HSR Act. Accordingly, pursuant to the Prior Approval Policy Statement, the Commission has determined to modify paragraph IV of the order to substitute a prior notification requirement for the prior approval requirement.

The Commission has also determined, pursuant to the Prior Approval Policy Statement, to exclude from paragraph IV FSI's acquisitions of fee simple interests in real estate on which FSI currently operates a retail grocery store as a lessee. FSI has a contractual right to operate each of the leased stores for terms that extend beyond the remainder of the order. FSI's change in status from a leaseholder to a feeowner in any one or more of these stores would have no practical effect on competition in the relevant markets. Under the circumstances, it is unnecessary to require prior notice of these transactions.

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

It is further ordered, That paragraph IV of the order in Docket No. C-3224 be, and hereby is, modified, as of the effective date of this order, to read as follows:

It is further ordered, That for a period commencing on the date of service of this order and continuing for ten years from and after the date of service of this order, Furr's shall not, without prior notification to the Federal Trade Commission, acquire, directly or indirectly, through subsidiaries or otherwise, any retail grocery store, including any facility that has been operated as a retail grocery store within six months of the date of offer to purchase the facility, or any interest in a retail grocery store or any interest in any individual, firm, partnership, corporation or other legal or business entity that directly or indirectly owns or operates a retail grocery store in the following cities or towns:

Albuquerque, New Mexico; Alamogordo, New Mexico; Artesia, New Mexico; Carlsbad, New Mexico; Clovis, New Mexico; El Paso, Texas; Espanola, New Mexico; Fort Stockton, Texas; Hobbs, New Mexico; Las Cruces, New Mexico; Las Vegas, New Mexico; Lovington, New Mexico; Midland, Texas; Odessa, Texas; Pecos, Texas; Portales, New Mexico; Roswell, New Mexico; Santa Fe, New Mexico; and Silver City, New Mexico.

The prior notification required by this paragraph 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"), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of Furr's and not of any other party to the transaction. Furr's shall provide the Notification to the Commission at least thirty days prior to consummating any such transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information, Furr's shall not consummate the transaction until twenty days after substantially complying with such request for additional information. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition. Provided, however, that prior notification shall not be required by this paragraph for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. 18a.

Provided further that these prohibitions shall not relate to the construction of new facilities by Furr's, or the leasing of a facility by Furr's not presently a grocery store in those locations, or the acquisition by Furr's of the fee simple interest in real estate for a facility in which it currently operates a retail grocery store as the lessee.

One year from the date of service of this order and annually thereafter, Furr's shall file with the Commission a verified written report of its compliance with this paragraph.

IN THE MATTER OF

GIANT FOOD, INC.

SET ASIDE ORDER IN REGARD TO ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT

Docket 6459. Modified Consent Order, April 13, 1964--Set Aside Order, Sept. 7, 1995

This order reopens a 1964 consent order--which prohibited Giant from inducing its suppliers to offer, or to receive from its suppliers, compensation for promotional services or facilities on terms that Giant knew were not proportionally equal to the terms those suppliers offered other retailers--and sets aside the consent order pursuant to the Commission's 1994 Sunset Policy Statement, under which the Commission presumed that the public interest requires terminating competition orders that are more than 20 years old.

ORDER REOPENING PROCEEDING
AND SETTING ASIDE ORDER

On June 5, 1995, Giant Food, Inc. ("Giant Food") filed its Request To Reopen and Vacate Order ("Petition") in this matter. Respondent requests that the Commission set aside the 1964 order, pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), Rule 2.51 of the Commission's Rules of Practice, 16 CFR 2.51, and the Statement of Policy With Respect to Duration of Competition Orders and Statement of Intention to Solicit Public Comment With Respect to Duration of Consumer Protection Orders, issued on July 22, 1994, and published at 59 Fed. Reg. 45,286-92 (Sept. 1, 1994) ("Sunset Policy Statement"). In the Petition, respondent affirmatively states that it has complied with the terms of the order. The Petition was placed on the public record for thirty days, and no comments were received.

The Commission in its Sunset Policy Statement said, in relevant part, that "effective immediately, the Commission will presume, in the context of petitions to reopen and modify existing orders, that the public interest requires setting aside orders in effect for more than twenty years."¹ The Commission's cease and desist order in Docket No. 6459, issued on June 1, 1961, affirmed as modified by the United States Court of Appeals for the District of Columbia Circuit on June

¹ Sunset Policy Statement, 59 Fed. Reg. at 45,289.

14, 1962, and modified by the Commission in accordance with the direction of the court on April 13, 1964, has been in effect for over thirty-one years. Consistent with the Commission's Sunset Policy Statement, the presumption is that the order should be terminated. Nothing to overcome the presumption having been presented, the Commission has determined to reopen the proceeding and set aside the order in Docket No. 6459.

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. 6459 be, and it hereby is, set aside, as of the effective date of this order.

IN THE MATTER OF

THE SCOTTS 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-3613. Complaint, Sept. 8, 1995--Decision, Sept. 8, 1995

This consent order requires, among other things, Scotts, an Ohio-based corporation, to divest its Peters Consumer Water Soluble Fertilizer Business and related assets to Alljack & Company or another Commission-approved buyer by no later than December 31, 1995. If the divestiture is not completed on time, the consent order permits the Commission to appoint a trustee to complete the transaction. In addition, the Commission substituted a 10-year prior-notice provision for the 10-year prior-approval provision contained in the proposed consent agreement as it was published for public comment.

Appearances

For the Commission: *Howard Morse, Robert Cook and William Baer.*

For the respondent: *Jack Schafer, Covington & Burling, Washington, D.C.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that the Scotts Company ("Scotts") has entered into an agreement and plan of merger with Stern's Miracle-Gro Products, Inc. ("Miracle-Gro"), whereby Scotts will acquire all of the outstanding voting securities of Miracle-Gro in exchange for voting securities of Scotts, in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, 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, 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 Scotts is a corporation organized and existing under the laws of Ohio, with its principal place of business at 14111 Scottslawn Road, Marysville, Ohio. Scotts is a leading producer and marketer of consumer lawn care products. Its total revenues exceeded \$600 million in its fiscal year ended October 31, 1994.

2. At all times relevant herein, the respondent has been, and is now, a corporation as "corporation" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44; and at all times relevant herein, the respondent has been, and is now, engaged in commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44, and Section 1 of the Clayton Act, 15 U.S.C. 12.

II. THE PROPOSED MERGER

3. Miracle-Gro is a privately-held corporation organized and existing under the laws of New Jersey. Miracle-Gro is the leading marketer of water soluble fertilizer in the United States. Miracle-Gro earned profits of approximately \$30 million on sales in excess of \$100 million in 1994.

4. On or about January 26, 1995, Scotts and Miracle-Gro executed an Agreement and Plan of Merger, wherein Scotts and Miracle-Gro agreed that Scotts would acquire the voting securities of Miracle-Gro in exchange for voting securities of Scotts (the "Proposed Merger"). The transaction is valued at approximately \$200 million.

III. THE RELEVANT MARKET

5. Water soluble fertilizer for consumer use ("consumer water soluble fertilizer") is one relevant line of commerce within which to analyze the effect of the Proposed Merger on competition. Water soluble fertilizer is a crystalline powder, easily dissolved in water, which is composed principally of nitrogen, phosphorous, and potash. Water soluble fertilizer for consumer use is typically sold in packages of less than 20 pounds; the five pound package is the most popular size. Water soluble fertilizer is typically applied to houseplants, gardens, shrubs, and flowers using a watering can or a hose-end

sprayer. Water soluble fertilizer produces noticeable effects on plants within a few days but lasts only a few weeks.

6. Consumer water soluble fertilizer is highly differentiated through branding. Scotts markets consumer water soluble fertilizer under the Peters brand name. Miracle-Gro markets consumer water soluble fertilizer under the Miracle-Gro brand name.

7. Fertilizer is also sold in granular form. Granular fertilizer is typically applied by dropping it onto the soil or, in some cases, mixing it with the soil. It takes several weeks for granular fertilizer to produce noticeable effects on plants; however, granular fertilizer does not have to be reapplied for two months to a year after application.

8. Consumers are not likely to switch from water soluble fertilizer to granular fertilizer in response to price changes because of differences between the two types of product in terms of convenience, method of application, and performance characteristics. Meaningful price comparisons between the various types of fertilizer are difficult to make.

9. Specialty fertilizers (such as liquid fertilizers, plant spikes, and organic fertilizers) also differ in characteristics and uses from water soluble fertilizer. Consumers are not likely to switch from water soluble fertilizer to those products in response to a price increase.

10. Water soluble fertilizers sold for agricultural and commercial use are sold in substantially larger packages than consumer water soluble fertilizer and are not alternatives for consumers.

11. The United States is one relevant geographic area within which to analyze the likely effect of the Proposed Merger on competition. The ability of domestic marketers of consumer water soluble fertilizer to engage in anticompetitive behavior is not significantly affected by the possible diversion of product produced overseas into the United States.

IV. CONCENTRATION

12. Miracle-Gro is by far the best selling consumer water soluble fertilizer in the United States. Scotts' Peters product is the third best selling consumer water soluble fertilizer in the United States. Miracle-Gro accounts for more than 70 percent and Scotts' Peters brand accounts for approximately six to seven percent of consumer water soluble fertilizer sales in the United States.

13. The United States consumer water soluble fertilizer market is highly concentrated as measured by the Herfindahl-Hirschmann Index ("HHI"). The Proposed Merger would increase the HHI by approximately 900 points, from approximately 5,500 to approximately 6,400.

14. Even if the relevant market is expanded to include other types of consumer garden fertilizer, or even consumer fertilizers generally, the market is highly concentrated with Scotts and Miracle-Gro having a combined market share of more than 35 percent of sales.

V. ENTRY CONDITIONS

15. Entry into the United States consumer water soluble fertilizer market would not be timely, likely, or sufficient to deter or offset the possible adverse effects of the Proposed Merger on competition.

16. Consumers typically purchase water soluble fertilizer on the basis of brand name and do so, in part, because the misapplication or overapplication of fertilizer can destroy the plants that the fertilizer is to benefit. The brand name is a signal that the product will consistently perform as it is expected to perform.

17. Consumers who purchase water soluble fertilizer on the basis of brand name are reluctant to try an unknown brand, even in response to a price change. That reluctance is, in part, based on the possibility of killing plants if the fertilizer does not perform as it is expected to perform. The price of the fertilizer is small relative to the replacement cost of the plants to which it is applied.

18. To achieve sufficient scale to affect competition in the United States consumer water soluble fertilizer market, and to do so in a timely manner, an entrant would have to employ a "pull" marketing strategy. A pull marketing strategy uses advertising to create a brand reputation to generate a high level of consumer demand to pull the product through retail distribution.

19. A pull marketing strategy involves a substantial sunk investment in advertising. In addition, a pull marketing strategy also involves a high degree of risk, because there is no guarantee that the marketing effort will succeed. The high sunk cost and high degree of risk would discourage the use of a pull marketing strategy by potential entrants or potential fringe expanders. Miracle-Gro spends approximately \$25 million annually on national advertising. The cost

of entry to new entrants or fringe expanders is likely to be even greater than the cost of entry originally borne by existing competitors.

20. Entry using a "push" marketing strategy involves the use of point of purchase promotions to attract customers in the store, as well as the use of retailer incentives to encourage retailers to recommend the product to customers in the store. Entry using a push marketing strategy would not involve the high sunk cost or high degree of risk that is associated with a pull marketing strategy. However, entry using a push marketing strategy would require many years to achieve sufficient sales to significantly impact competition.

21. Even entry using a pull marketing strategy may require considerable time. Lawn and garden retailing, including fertilizer retailing, is a highly seasonal business in which most sales are made to consumers during the spring growing season. Products to be sold during the spring growing season typically must be presented to retailers during the preceding summer; orders for such products typically are taken during the fall; and delivery of such products typically is made during early winter. An entrant or fringe expander that fails to make significant sales during one year must wait until the next year to gain sales.

VI. EFFECT OF THE PROPOSED MERGER ON COMPETITION

22. Miracle-Gro already exercises market power in the consumer water soluble fertilizer market. Miracle-Gro refuses to negotiate its prices with retailers and earns substantial profits.

23. Miracle-Gro is the closest substitute for Scotts' Peters brand in the United States consumer water soluble fertilizer market. Consumers who purchase Scotts' Peters brand are more likely to switch to Miracle-Gro than to any other brand.

24. Scotts' marketing strategy for Peters included competing more aggressively with Miracle-Gro during 1995. That strategy included technical improvements to the Peters product, a reduction of the price of the Peters product, and the production of television commercials directly comparing Peters to Miracle-Gro.

25. The merger of Scotts and Miracle-Gro may substantially lessen competition or tend to create a monopoly in the United States consumer water soluble fertilizer market, because, among other things:

- a. It will increase concentration substantially in a highly concentrated market;
- b. It will eliminate actual, direct, substantial, and potentially increased competition between Scotts' Peters brand and Miracle-Gro;
- c. It will facilitate coordinated interaction among sellers of water soluble fertilizer for United States consumer use;
- d. It will facilitate the unilateral exercise of market power by the merged firm;
- e. It will eliminate competition between the two closest substitutes among differentiated products in the consumer water soluble fertilizer market;
- f. It will likely result in increased prices for consumer water soluble fertilizer; and
- g. It will allow the merged firm to reduce innovation by delaying or reducing product development.

VII. VIOLATIONS CHARGED

26. The Agreement and Plan of Merger between Scotts and Miracle-Gro, described in paragraph three, violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

27. The Proposed Merger would, if consummated, 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 of the proposed acquisition by proposed respondent, the Scotts Company ("Scotts") of Stern's Miracle-Gro Products, Inc. ("Miracle-Gro"), and 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 proposed respondent, its 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 proposed 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, and having duly considered the comment filed thereafter by an interested person 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 Scotts is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its office and principal place of business located at 14111 Scottslawn Road, Marysville, Ohio.

ORDER

I.

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

A. "*Respondent*" or "*Scotts*" means the Scotts Company, its directors, officers, employees, agents and representatives, predecessors, successors and assigns, its subsidiaries, divisions, groups and affiliates controlled by the Scotts Company, and the respective directors, officers, employees, agents, representatives, successors and assigns of each.

B. "*Miracle-Gro*" means Stern's Miracle-Gro Products, Inc., its predecessors, successors and assigns, its subsidiaries, divisions, groups and affiliates controlled by Stern's Miracle-Gro Products, Inc.

C. "*Alljack*" means Alljack & Company and Celex Corporation, their predecessors, successors and assigns, subsidiaries, divisions, groups, and affiliates.

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

E. The term "*water soluble fertilizer*" means fertilizer that is sold as a powder, composed principally of nitrogen, phosphorous and potash, to be dissolved in water prior to application for use principally on houseplants, gardens, shrubs and flowers.

F. The term "*consumer water soluble fertilizer*" means water soluble fertilizer packaged for sale in containers of less than 20 pounds.

G. The term "*Peters Consumer Water Soluble Fertilizer*" means consumer water soluble fertilizer sold under the Peters brand name.

H. The term "*Peters Consumer Water Soluble Fertilizer Business*" means all assets, properties, business and goodwill, tangible and intangible, relating to the manufacture or sale of Peters Consumer Water Soluble Fertilizer in the United States, including, without limitation, the following:

1. All Peters trademarks;
2. Inventory;
3. The right to use the same packaging and trade dress that Peters has used for consumer water soluble fertilizer, provided that the right to use the Scotts trademark is limited to the right to sell existing inventory;
4. All customer lists, distribution agreements, vendor lists, catalogs, sales promotion literature, advertising materials, research materials, technical information, inventions, trade secrets, intellectual property, patents, technology, know-how (including, but not limited to manufacturing know-how), specifications, designs, drawings, processes, quality control data, and formulas;
5. All rights, titles and interests 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;
6. All rights under warranties and guarantees, express or implied;
7. All books, records, and files; and
8. All items of prepaid expense.

The term "Peters Consumer Water Soluble Fertilizer Business" does not include accounts receivable, the Peters production facilities located at Allentown, Pennsylvania, the use of intangible assets (including the use of the Peters trademarks on water soluble fertilizer in containers of 20 pounds or more) for the production or sale of agricultural or commercial products, or the use of the Peters trademarks on potting soil, perlite, or vermiculite.

I. The term "*Peters Business*" means all assets, properties, business and goodwill, tangible and intangible, relating to the manufacture or sale of all products that Scotts has sold under the Peters trademarks during the five (5) years preceding the date on which this agreement is accepted by the Commission, including, without limitation, the Allentown, Pennsylvania plant where Peters products are manufactured and including, without limitation, the following:

1. The Peters Consumer Water Soluble Fertilizer Business;
2. All machinery, fixtures, equipment, vehicles, transportation facilities, furniture, tools and other tangible personal property;
3. All customer lists, vendor lists, catalogs, sales promotion literature, advertising materials, research materials, technical information, management information systems, software, inventions, trade secrets, intellectual property, patents, technology, know-how, specifications, designs, drawings, processes, quality control data, and assets relating to research and development;
4. Inventory and storage capacity;
5. All rights, titles and interests in and to owned or leased real property, together with appurtenances, licenses and permits;
6. All rights, titles and interests 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;
7. All rights under warranties and guarantees, express or implied;
8. All books, records, and files; and
9. All items of prepaid expense.

II.

It is further ordered, That:

A. Scotts shall divest, through sale or exclusive perpetual license, absolutely and in good faith, no later than December 31, 1995, the Peters Consumer Water Soluble Fertilizer Business as an ongoing business and shall also, at the time of such divestiture, divest such additional ancillary assets and ancillary businesses and effect such arrangements as are necessary to assure the marketability and the viability and competitiveness of the Peters Consumer Water Soluble Fertilizer Business.

B. The divestiture shall be made either

1. No later than ten (10) days from the date this order becomes final, to Alljack, pursuant to the agreements between Scotts and Alljack, which are Confidential Appendices II and III, or

2. 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 Peters Consumer Water Soluble Fertilizer Business is to ensure that the Peters Consumer Water Soluble Fertilizer Business continues to operate as an ongoing business in the same business in which it is engaged at the time this Agreement is accepted by the Commission and to remedy the lessening of competition resulting from the acquisition, as alleged in the Commission's complaint.

C. Pending divestiture of the Peters Consumer Water Soluble Fertilizer Business, respondent shall take such actions as are necessary to maintain the viability and marketability of the Peters Consumer Water Soluble Fertilizer Business, and to prevent the destruction, removal, wasting, deterioration, or impairment of any part of the Peters Consumer Water Soluble Fertilizer Business.

D. Unless the acquirer has its own source of supply, the divestiture shall include an agreement by Scotts (the "Supply Agreement") to supply water soluble fertilizer for a period of two (2) years from the date of the divestiture required by this paragraph II. The water soluble fertilizer supplied pursuant to the Supply Agreement shall, at the option of the acquirer, be of the same

chemical composition as, and of a quality equal to or greater than, the water soluble fertilizer marketed by the Peters Consumer Water Soluble Fertilizer Business at the time this agreement is accepted by the Commission for comment. The Supply Agreement shall obligate Scotts to supply such water soluble fertilizer at a price equal to direct cash cost of raw materials, packaging, and labor (based on expenses during the previous fiscal year), plus ten (10) percent. The Supply Agreement shall obligate Scotts to supply annually, at a minimum, at the option of the acquirer, an amount of water soluble fertilizer, in containers ready for sale or in bulk, equal to the greatest unit amount of Peters Consumer Water Soluble Fertilizer produced by or on behalf of the Peters Consumer Water Soluble Fertilizer Business during

1. The twelve (12) months prior to the divestiture required by this paragraph II, and
2. Each of the five (5) calendar years preceding the divestiture required by this paragraph II.

E. The divestiture shall include a non-exclusive perpetual license, with no continuing royalty, to manufacture Peters Consumer Water Soluble Fertilizer for sale in the United States as it has been manufactured at any time during the twelve (12) months preceding the date on which this agreement containing consent order is accepted by the Commission for public comment, as well as a royalty-free license for all improvements to Peters' Water Soluble Fertilizer technology that have been made up to the time of the divestiture required by this paragraph II. Such license shall give the acquirer the right to make any improvements to the licensed technology; provided, however, that such license need not give the acquirer rights in Scotts intellectual property that Scotts has not used in connection with Peters Consumer Water Soluble Fertilizer.

F. Respondent shall not offer consumer water soluble fertilizer (including, but not limited to, consumer water soluble fertilizer bearing the Miracle-Gro trademark) for sale using the Scotts trademark for a period of two (2) years following the divestiture required by this paragraph II; provided, however, during that two (2) year period, Scotts may continue to sell the following products using the Scotts trademark:

1. Scotts Water-Soluble Plant Food Powder, All Purpose Formula (8 ounce and 16 ounce sizes);
2. Scotts Water-Soluble Plant Food Powder, Houseplant/Foliage Formula (8 ounce and 16 ounce sizes); and
3. Scotts Water-Soluble Plant Food Powder, African Violet/Flowering Formula (8 ounce size).

G. At the time of the execution of a divestiture agreement between Scotts and a proposed acquirer of the Peters Consumer Water Soluble Fertilizer Business, Scotts shall provide the acquirer with a complete list of all Scotts employees who have spent the majority of their time on the development, distribution, marketing, or sale of Peters Consumer Water Soluble Fertilizer during the twelve (12) months prior to the date on which this agreement is accepted by the Commission. Such list shall state each such individual's name, position, address, telephone number, and a description of the duties of and work performed by the individual in connection with the Peters Consumer Water Soluble Fertilizer Business.

H. Scotts shall provide the individuals identified pursuant to paragraph II.G. of this order with financial incentives to continue in their employment positions during the period covered by the Hold Separate Agreement, hereto attached, and to accept employment with the Commission-approved acquirer, if such employment is offered, at the time of the divestiture. Such incentives shall include:

1. Continuation of all employee benefits offered by Scotts until the date of the divestiture; and
2. A bonus equal to 25 percent of the total annual compensation of any employee who agrees to employment with the Commission-approved acquirer, payable upon the beginning of such employee's employment by the Commission-approved acquirer.

I. The divestiture agreement may protect Scott's interest in the Scotts trademark on inventory acquired by the acquirer of the Peters Consumer Water Soluble Fertilizer Business and may provide for the continued use by Scotts of the Peters trademarks for agricultural and commercial products and consumer soil products.

J. Respondent 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 such time as respondent has made the divestiture required by this order.

III.

It is further ordered, That:

A. If Scotts has not divested, absolutely and in good faith and with the Commission's prior approval, the Peters Consumer Water Soluble Fertilizer Business by December 31, 1995, the Commission may appoint a trustee to divest the Peters Consumer Water Soluble Fertilizer Business. If the trustee has not divested the Peters Consumer Water Soluble Fertilizer Business within six (6) months after the trustee's appointment, then the trustee may divest either the Peters Consumer Water Soluble Fertilizer Business or the Peters Business. 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, Scotts 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 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, 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 Peters Consumer Water Soluble Fertilizer Business or the Peters Business.

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 of the Peters Consumer Water Soluble Fertilizer Business or the Peters Business required by this order.

4. The trustee shall have six (6) months from the date the Commission approves the trust agreement described in paragraph III.B.3. to accomplish the divestiture of the Peters Consumer Water Soluble Fertilizer Business, which shall be subject to the prior approval of the Commission. If no acquirer of the Peters Consumer Water Soluble Fertilizer Business is approved by the Commission by the end of the six (6) month period (or at the end of any extensions to that period pursuant to this paragraph III.B.4.), then the trustee shall have twelve (12) additional months to accomplish the divestiture of the Peters Consumer Water Soluble Fertilizer Business or the Peters Business, which 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 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 Peters Consumer Water Soluble Fertilizer Business or the Peters Business, or to any other relevant information, as the trustee may request. Respondent shall develop such financial or other information as such trustee may 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 the respondent shall extend the time for divestiture under this paragraph in an amount equal to the delay, as determined by the Commission, or, in the case of 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 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 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 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 (based on sales price) contingent on the trustee's divesting the Peters Consumer Water Soluble Fertilizer Business or the Peters Business.

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 of the Peters Consumer Water Soluble Fertilizer Business or the Peters Business required by this order.

11. The trustee shall have no obligation or authority to operate or maintain the Peters Consumer Water Soluble Fertilizer Business or the Peters Business.

12. The trustee shall report in writing to respondent and 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, Scotts shall not, without prior notification to the Commission, directly or indirectly:

A. Acquire any stock, share capital, equity, or other interest in any person engaged in the sale of consumer water soluble fertilizer in the United States within the year preceding such acquisition; provided, however, that an acquisition of securities will be exempt from the requirements of this paragraph if, after such acquisition of securities, Scotts will hold cumulatively no more than two (2) percent of the outstanding shares of any class of securities of such person; or

B. Enter into any agreement or other arrangement to transfer direct or indirect ownership, management, or control of any assets used for or previously used for (and still suitable for use for) the sale of consumer water soluble fertilizer in the United States; provided, however, that prior notice shall not be necessary for the acquisition of assets used to manufacture consumer water soluble fertilizer, the acquisition of assets in the ordinary course of business, or the acquisition of assets valued at less than \$100,000 from the same person within any twelve (12) month period.

The prior notifications required by this paragraph 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"), 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 shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of Scotts and not of any other party to the transaction. Scotts shall provide the Notification to the Commission at least thirty days prior to consummating any such transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information, Scotts shall not consummate the transaction until twenty days after substantially complying with such request for additional information. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition. Notwithstanding, prior notification shall not be required by this paragraph for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. 18a.

V.

It is further ordered, That within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until respondent has fully complied with the divestiture 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 paragraphs II and III 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 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 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; provided, however, that respondent is not obligated to produce copies of documents subject to any legally recognized privilege.

VI.

It is further ordered, That one (1) year from the date this order becomes final, annually for the next nine (9) years on the anniversary of the date this order becomes final, and at such other times as the Commission may require, respondent shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and is complying with paragraphs II and IV of this order.

VII.

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.

VIII.

It is further ordered, That, for the purpose of determining or securing compliance with this order, and subject to any legally recognized privilege, upon request, respondent 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 respondent relating to any matters contained in this order; and

B. Upon five (5) days notice to respondent, with respondent's counsel present, and without restraint or interference, to interview officers, employees, or agents of respondent.

APPENDIX I

AGREEMENT TO HOLD SEPARATE

This Agreement to Hold Separate ("Hold Separate") is by and between the Scotts Company ("Scotts"), a corporation organized, existing, and doing business under and by virtue of the laws of Ohio, with its office and principal place of business at 14111 Scottslawn Road, Marysville, Ohio 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 January 26, 1995, Scotts entered into an Agreement and Plan of Merger with Stern's Miracle-Gro Products, Inc. ("Miracle-Gro") to acquire all of the voting securities of Miracle-Gro in exchange for voting securities of Scotts (hereinafter the "Acquisition");

Whereas, Scotts is a leading producer and marketer of consumer lawn care products, including consumer water soluble fertilizer under the Peters brand name;

Whereas, Miracle-Gro, with its principal office and place of business located at 800 Port Washington Blvd., Port Washington, New York is the leading marketer of water soluble fertilizer in the United States;

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

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;

Whereas, the Commission is concerned that if an understanding is not reached, preserving the *status quo ante* of the Peters Consumer Water Soluble Fertilizer Business (as defined in paragraph I of the consent order) and Miracle-Gro 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;

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 Peters Consumer Water Soluble Fertilizer Business, the Peters Business, or Miracle-Gro and the Commission's right to have the Peters Consumer Water Soluble Fertilizer Business, the Peters Business, and Miracle-Gro continue as viable competitors;

Whereas, the Commission is concerned that the exchange of competitively sensitive information between persons operating and managing Miracle-Gro, the Peters Business, and the Peters Consumer Water Soluble Fertilizer Business may lessen the competitive viability of any divestiture if the Commission accepts the proposed consent order and makes it final;

Whereas, the purposes of the Hold Separate and the consent order are:

1. To preserve the Peters Consumer Water Soluble Fertilizer Business, the Peters Business, and Miracle-Gro as viable, independent businesses pending the Commission's final approval of the consent order and the divestiture of a viable and ongoing enterprise,
2. To remedy any anticompetitive effects of the Acquisition,
3. To preserve the Peters Consumer Water Soluble Fertilizer Business, the Peters Business, and Miracle-Gro as, ongoing and competitive entities engaged in the same business in which they are presently employed until the Commission gives final approval to the consent order and the divestiture is achieved, and
4. To protect the competitive viability of Miracle-Gro, the Peters Business, and the Peters Consumer Water Soluble Fertilizer Business by preventing the exchange of competitively sensitive information among persons managing or operating those businesses;

Whereas, Scotts' entering into this Hold Separate shall in no way be construed as an admission by Scotts that the Acquisition is illegal;

Whereas, Scotts understands 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 it will not seek further relief from Scotts with respect to the Acquisition if the consent order is made final, except that the Commission may exercise any and all rights to enforce this Hold Separate, the 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 Peters Consumer Water Soluble Fertilizer Business or the Peters Business pursuant to the consent order, as follows:

1. Scotts agrees to execute and be bound by the consent order.
2. To ensure the complete independence and viability of the Peters Consumer Water Soluble Fertilizer Business, the Peters Business and Miracle-Gro and to assure that no competitive information is exchanged between Miracle-Gro and either the Peters Consumer Water Soluble Fertilizer Business or the Peters Business, Scotts shall hold Miracle-Gro separate and apart as it is presently constituted, from the date this Hold Separate is accepted until the earlier of the completion of the divestiture obligations required by the consent order or three (3) days after the Commission withdraws its acceptance of the consent order pursuant to Section 2.34 of the Commission's Rules, on the following terms and conditions:

- a. Except as required by law, and except to the extent that necessary information is exchanged in defending investigations or litigation, obtaining legal advice, or complying with this Hold Separate or the consent order, Scotts (including, but not limited to, any officer, director, employee, or agent of Scotts) shall not receive or have access to, or the use of, any material confidential information of Miracle-Gro or the activities of the board of directors of Miracle-Gro (the "Miracle-Gro Board") not in the public domain that relates to water soluble fertilizer, nor shall Miracle-Gro (including, but not limited to any officer, director, employee or agent of Miracle-Gro) receive or have access to, or the use of, any material confidential information of Scotts or the activities of the board of directors of Scotts (the "Scotts Board") not in the public domain that relates to

water soluble fertilizer; provided, however, after the consent order is made final, Scotts and Miracle-Gro may exchange information concerning water soluble fertilizer sold outside the United States. Scotts may receive on a regular basis from Miracle-Gro aggregate financial and other information necessary to allow Scotts to file financial reports, tax returns, personnel reports, and reports with the Securities and Exchange Commission. 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 Scotts from sources other than Miracle-Gro or the Miracle-Gro Board and includes but is not limited to customer lists, price lists, prices, marketing methods, advertising plans, patents, technologies, processes, or other trade secrets.)

b. Except as expressly provided in this Hold Separate, all manufacturing, sales, licensing, and other business relationships relating to water soluble fertilizer between Scotts and Miracle-Gro shall be conducted at arm's length and on commercial terms available to other persons. Furthermore, Scotts and Miracle-Gro may not integrate or coordinate the marketing of the products of Scotts and Miracle-Gro.

c. Scotts shall circulate a notice of this Hold Separate and consent order, in the form attached hereto as Attachment A, to the management employees (including, but not limited to, officers) of Scotts and Miracle-Gro (including, but not limited to, members of the board of directors of Scotts (the "Scotts Board") and members of board of directors of Miracle-Gro (the "Miracle-Gro Board"), as well as to any employees or agents of Scotts or Miracle-Gro who participate directly or indirectly in managing or operating any business affected by this Hold Separate or the consent order. Scotts shall also appropriately display a notice of this Hold Separate and consent order in the form attached hereto as Attachment A.

d. Scotts shall report in writing to the Commission every sixty (60) days concerning Scott's efforts to accomplish the purposes of this Hold Separate.

e. Scotts shall maintain the marketability, viability, and competitiveness of the Peters Consumer Water Soluble Fertilizer Business and the Peters Business, and shall not cause or permit the destruction removal, wasting, deterioration, or impairment of any

assets or business it may have to divest except in the ordinary course of business and except for ordinary wear and tear, and Scotts shall not sell, transfer, encumber (other than in the normal course of business), or otherwise impair the marketability, viability or competitiveness of the Peters Consumer Water Soluble Fertilizer Business or the Peters Business.

f. Scotts shall continue to provide to the Peters Business and the Peters Consumer Water Soluble Fertilizer Business such support services as it provided during the twelve (12) months and the calendar year prior to the acceptance of the consent order by the Commission. The Peters Business and the Peters Consumer Water Soluble Fertilizer Business shall be staffed with sufficient employees to maintain the viability and competitiveness of the Peters Business and the Peters Consumer Water Soluble Fertilizer Business, which employees shall be the employees of the Peters Business or the Peters Consumer Water Soluble Fertilizer Business that have managed and operated the Peters Business and the Peters Consumer Water Soluble Fertilizer Business during the twelve (12) months prior to the Commission's acceptance of consent order by the Commission and may also be hired from sources other than the Peters Business or the Peters Consumer Water Soluble Fertilizer Business. The compensation of the management employees of the Peters Business and the Peters Consumer Water Soluble Fertilizer Business shall be based in significant part on the sales of the Peters Business or the Peters Consumer Water Soluble Fertilizer Business, as applicable. Scotts shall facilitate the efforts of the Peters Business and the Peters Consumer Water Soluble Fertilizer Business to promote Peters products (including, but not limited to Peters Consumer Water Soluble Fertilizer products) to retailers, both at trade shows and otherwise, pending the divestiture required by the consent order. Scotts' obligation to facilitate those efforts shall include, without limitation, permitting the Peters Business and the Peters Consumer Water Soluble Fertilizer Business to participate either with Scotts or independently in all industry trade shows. Scotts shall provide the Peters Business and the Peters Consumer Water Soluble Fertilizer Business with any funds to accomplish the foregoing.

g. Scotts shall cause the Peters Consumer Water Soluble Fertilizer Business to expend in 1995 at an annual rate at least equal to the funds expended for 1993 or 1994 (whichever is greater) for advertising and promotion of Peters Consumer Water Soluble

Fertilizer during 1995 and shall cause the Peters Consumer Water Soluble Fertilizer Business to increase such spending as reasonably necessary in light of competitive conditions. If the Peters Consumer Water Soluble Fertilizer Business is not divested by December 31, 1995, then Scotts shall thereafter cause the Peters Consumer Water Soluble Fertilizer Business to expend for advertising and promotion of Peters Consumer Water Soluble Fertilizer at an annual rate of no less than 200 percent of the amount expended for 1995 for that purpose until such time as divestiture has been accomplished.

h. The Peters Business shall be staffed with sufficient employees to maintain the viability and competitiveness of the Peters Business, which employees shall be the employees of the Peters Business that have managed and operated the Peters Business during the twelve (12) months prior to the Commission's acceptance of Agreement by the Commission and may also be hired from sources other than the Peters Business. Each Peters Business management employee shall execute a confidentiality agreement prohibiting the disclosure of any confidential information of the Peters Business.

3. Scotts agrees that it will comply with the provisions of this paragraph three of this Hold Separate, in addition to the terms and conditions in paragraph two, from the date this Hold Separate is accepted until the earlier of the Commission's final approval of the consent order or three (3) days after the Commission withdraws its acceptance of the consent order pursuant to Section 2.34 of the Commission's Rules:

a. All earnings and profits of Miracle-Gro shall be retained separately by Miracle-Gro. Miracle-Gro shall be held separate and apart and shall be operated independently of Scotts except to the extent that Scotts must exercise direction and control over Miracle-Gro to assure compliance with this Agreement or the consent order. Except as expressly provided in this Hold Separate, all manufacturing, sales, licensing, and other business relationships between Scotts and Miracle-Gro shall be conducted at arm's length and on commercial terms available to other persons.

b. Except as required by law, and except to the extent that necessary information is exchanged in defending investigations or litigation, obtaining legal advice, or complying with this Hold Separate or the consent order, Scotts (including, but not limited to,

any officer, director, employee, or agent of Scotts) shall not receive or have access to, or the use of, any material confidential information of Miracle-Gro or the activities of the Miracle-Gro Board not in the public domain, nor shall Miracle-Gro (including, but not limited to, any officer, director, employee or agent of Miracle-Gro) receive or have access to, or the use of, any material confidential information about the Peters Consumer Water Soluble Fertilizer Business or the Peters Business not in the public domain. Scotts may receive on a regular basis from Miracle-Gro aggregate financial and other information necessary to allow Scotts to file financial reports, tax returns, personnel reports, and reports with the Securities and Exchange Commission. Any such information that is obtained pursuant to this subparagraph shall be used only for the purpose set forth in this subparagraph.

c. Scotts shall not change the composition of the Miracle-Gro Board and, except as expressly provided in this Hold Separate, Scotts shall not change the composition of the management of Miracle-Gro (except that the Miracle-Gro Board shall have the power to remove management employees for cause) and members of the Miracle-Gro Board shall not serve as officers, directors, employees, or agents of Scotts. Scotts shall not exercise direction or control over, or influence directly or indirectly, Miracle-Gro or the Miracle-Gro Board; provided, however, Scotts may exercise only such direction and control as is necessary to assure compliance with this Hold Separate the order and with all applicable laws. Meetings of the Scotts Board and meetings of the Miracle-Gro Board shall be audio recorded and the recording retained for two (2) years after the termination of the Hold Separate. Notwithstanding, in order to maintain Miracle-Gro's value, Scotts may direct the management of Miracle-Gro with regard to the following matters: investment decisions relating to Miracle-Gro's cash, decisions relating to the handling of claims and litigation, proposed acquisitions and divestitures outside of the ordinary course of business, and changes in Miracle-Gro's corporate structure.

d. The Chairman of the Miracle-Gro Board shall have the power to remove members of the Miracle-Gro Board for cause and to require Scotts to appoint replacement members to the Miracle-Gro Board who are not officers, directors, employees, or agents of Scotts. If the Chairman of the Miracle-Gro Board ceases to act or fails to act

diligently, a substitute chairman shall be appointed from among the members of the Miracle-Gro Board.

e. If necessary, Scotts shall provide Miracle-Gro with sufficient working capital to maintain the same level of sales as during the twelve (12) months preceding the date of the Hold Separate.

f. All material transactions of Miracle-Gro, out of the ordinary course of business and not precluded by this Hold Separate, shall be subject to a majority vote of the Miracle-Gro Board. The Miracle-Gro Board shall serve at the cost and expense of Scotts. Scotts shall indemnify the Miracle-Gro 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 Miracle-Gro Board directors.

g. Scotts shall take all reasonable steps, consistent with the other provisions of this Hold Separate, to maintain the marketability, viability, and competitiveness of Miracle-Gro, and not to cause or permit the destruction, removal, wasting, deterioration, or impairment of any assets or business it may have to divest except in the ordinary course of business and except for ordinary wear and tear, and Scotts shall not sell, transfer, encumber (other than in the normal course of business), or otherwise impair the marketability, viability or competitiveness of Miracle-Gro.

4. Should the Federal Trade Commission seek in any proceeding to compel Scotts to divest itself of the Peters Consumer Water Soluble Fertilizer Business, the Peters Business, Miracle-Gro, or any additional assets, or to seek any other equitable relief, Scotts 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. Scotts also shall 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 Scotts made to its General Counsel, Scotts, the Peters Consumer Water Soluble Fertilizer Business, the Peters Business and Miracle-Gro shall permit any duly authorized representative or representatives of the Commission:

a. Access during the office hours of Scotts, the Peters Consumer Water Soluble Fertilizer Business, the Peters Business, or Miracle-Gro 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 Scotts, the Peters Consumer Water Soluble Fertilizer Business, the Peters Business, or Miracle-Gro relating to compliance with this Hold Separate;

b. Upon five (5) days notice to Scotts, the Peters Consumer Water Soluble Fertilizer Business, the Peters Business, or Miracle-Gro and without restraint or interference from it, to interview officers or employees of Scotts, the Peters Consumer Water Soluble Fertilizer Business, the Peters Business, or Miracle-Gro, which officers or employees may have counsel present, regarding any such matters.

6. This Hold Separate shall not be binding until approved by the Commission.

ATTACHMENT A

NOTICE OF DIVESTITURE AND REQUIREMENT FOR CONFIDENTIALITY

The Scotts Company ("Scotts") has entered into an Agreement Containing Consent Order ("consent order") and an Agreement to Hold Separate with the Federal Trade Commission ("Commission") relating to the divestiture of the Peters Consumer Water Soluble Fertilizer Business or the Peters Business. Until after the Commission's order becomes final and the Peters Consumer Water Soluble Fertilizer Business or the Peters Business is divested, Stern's Miracle-Gro Products, Inc. ("Miracle-Gro") must be managed and maintained as a separate, ongoing business, independent of all other Scotts businesses. All competitive information relating to Miracle-Gro must be retained and maintained on a confidential basis by the persons involved in Miracle-Gro, and such persons are prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any such information to or with any other person whose employment involves any other Scotts business, including the Peters Consumer Water Soluble Fertilizer Business or the Peters Business.

Any violation of the Agreement Containing Consent Order or the Agreement to Hold Separate, incorporated by reference as part of the

Agreement Containing Consent Order, may subject Scotts to civil penalties and other relief as provided by law.

APPENDIX II

[CONFIDENTIAL]

APPENDIX III

[CONFIDENTIAL]

CONCURRING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

The Commission has adopted a policy not to include prior approval requirements in its orders in merger cases. *See* Statement of Federal Trade Commission Policy Concerning Prior Approval and Prior Notice Provisions, 60 Fed. Reg. 39,745 (Aug. 3, 1995), Commissioner Azcuenaga dissenting (60 Fed. Reg. at 39,476). This is the first new order to be issued since the policy was adopted. Although I dissented from the decision of the Commission to change its policy, the order is consistent with the new policy, and I have voted to issue it.

IN THE MATTER OF

FOOD SERVICE EQUIPMENT INDUSTRY INC., ET AL.

SET ASIDE ORDER IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 4433. Consent Order, Oct. 15, 1941--Set Aside Order, Sept. 21, 1995

This order reopens a 1941 consent order--which prohibited the Food Service from selling certain equipment through anyone other than recognized dealers, and from selling equipment directly to buyers--and sets aside the consent order, as to respondent Food Service Equipment Distributors Association, 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 June 30, 1995, the Foodservice Equipment Distributors Association, formerly known as Food Service Equipment Industry, Inc. ("FEDA") filed its Petition To Reopen and Set Aside Consent Order ("Petition") in this matter. FEDA requests that the Commission set aside the 1941 order 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, FEDA affirmatively states that it has not engaged in any conduct violating the terms of the order. The Petition was placed on the public record, and the thirty-day comment period expired on August 18, 1995. 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. 4433 was issued on October 15, 1941, and has been in

¹ See Sunset Policy Statement, 59 Fed. Reg. at 45, 289.

effect for approximately 54 years. Consistent with the Commission's July 22, 1994, Sunset Policy Statement, the presumption is that the order should be terminated. Nothing to overcome the presumption having been presented, the Commission has determined to reopen the proceeding and set aside the order in Docket No. 4433 as to respondent Foodservice Equipment Distributors Association.

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. 4433 be, and it hereby is, set aside as to respondent Foodservice Equipment Distributors Association, as of the effective date of this order.

IN THE MATTER OF

ALPINE INDUSTRIES, INC., ET AL.

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

Docket C-3614. Complaint, Sept. 22, 1995--Decision, Sept. 22, 1995

This consent order prohibits, among other things, two Minnesota-based sister companies and their principal officer from making unsubstantiated claims about the ability of any air cleaning product to eliminate, remove, clear or clean any indoor air pollutant -- or any quantity of indoor air pollutants -- from a user's environment.

Appearances

For the Commission *Kerry O'Brien, Linda Badger, Jeffrey Klurfeld and Joan Bernstein.*

For the respondents: *William Erhart, Marvin & Erhart, Anoka, MN.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Alpine Industries, Inc., a corporation, Living Air Corp., a corporation, and William J. Converse, individually and as an officer of Alpine Industries, Inc. and Living Air Corp. ("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 Alpine Industries, Inc. is a Tennessee corporation, with its principal office or place of business at 9199 Central Avenue N.E., Blaine, Minnesota.

Respondent Living Air Corp. is a Tennessee corporation, with its principal office or place of business at 11673 Tulip Street, Coon Rapids, Minnesota.

Respondent William J. Converse is an officer of Alpine Industries, Inc. and Living Air Corp. Individually or in concert with others, he formulates, directs and controls the acts and practices of

Alpine Industries, Inc. and Living Air Corp., including the acts and practices alleged in this complaint. His principal office or place of business is the same as that of Living Air Corp.

PAR. 2. Respondents have advertised, labelled, offered for sale, sold, and distributed ozone generators, including the "Living Air Model XL15," as air cleaning products for use in homes, offices, and other commercial establishments.

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 their Living Air Model XL15 ozone generator, including but not necessarily limited to the attached Exhibits A-B. These advertisements contain the following statements:

A. WHAT IS INDOOR AIR POLLUTION? . . . WHAT CAN BE DONE ABOUT IT? . . . Air filters are only partially effective.

...

HOW DOES LIVING AIR WORK? . . . Ozone breaks down or oxidizes impurities in the air. It destroys mold, mildew, fungi and bacteria. Ozone rids the air of harmful smoke and odors created by cigarettes, cooking, pets and disease. Living Air purifiers recreate outdoor air inside of your home or business. . . .

Each Living Air unit is equipped with a purifier control knob to regulate the amount of ozone being produced. Simply set the control for the number of square feet being serviced YOU CONTROL THE AMOUNT OF OZONE. . . .

OZONE • WHAT IT IS AND HOW IT WORKS . . . All that's left behind is the safe, pure, breathable oxygen necessary to life. . . . •NO HARSH AND HAZARDOUS CHEMICALS •NO HEAVY PERFUME ODORS •NO CLEANING PRODUCT ODORS •NO POLLUTANTS •NO MOLDS •NO FUNGI •NO BACTERIA. . . . (Exhibit A: promotional material)

B. Government Agencies rate INDOOR AIR POLLUTION as the nation's biggest pollution problem

Styrene, benzene, allergens, trichlorethylene, sulphur dioxide, dust mites, bacteria, carbon tetrachloride, chloroform, pollens, dust, hydrocarbons, formaldehyde, ammonia, mold spores. . . .

Indoor Air Pollutants

DUST . . . Causes eye irritation, allergies, eye-ear-nose-throat infections, asthma attacks, fatigue and depression.

BACTERIA . . . Causes colds, flu, respiratory infections, eye infections. . .

MOLD SPORES . . . Causes allergies, sinus headaches, irritability, fatigue and depression. . . .

How does indoor air pollution affect your body?

...

EYE AND NASAL IRRITANTS

Sulfur dioxide (lethal poison), ammonia, acrolein (in tobacco smoke, a carcinogen), benzene (carcinogen), formaldehyde, pollen, mold spores, dust, dust mites, bacteria. . .

BRONCHIAL CONSTRICTORS

Sulphur dioxide (lethal poison), ammonia, allergens, bacteria. . .

PULMONARY IRRITANTS

Chloroform (lethal poison, suspected carcinogen), nitrogen dioxide (lethal poison), carbon tetrachloride (suspected carcinogen), formaldehyde, small particulates, bacteria. . .

POISONS

Cyanide (from tobacco smoke), hydrocarbons (tobacco smoke and other combustions), nitrogen dioxide, sulphur dioxide.

CARCINOGENS

Acrolein, benzene, chloroform, carbon tetrachloride.

ASPHYXIANT

Hydrocarbons. . . .

Inefficient Air Filtration Systems

. . . AIR FILTRATION SYSTEMS ARE NOT THAT EFFICIENT. . . Much of the air is unaffected, and remains polluted!

Media Filters and Electronic Air Cleaners

. . .

BOTH TYPES HAVE THE SAME MAJOR DRAWBACKS:

1. Air filtration systems only affect the air that passes through them. Much of the air in your building does not get to the filter on a regular basis.
2. Filters have to be CLEANED or REPLACED regularly. They get clogged, reduce airflow, lose efficiency and make the blower motor work harder.

AIR PURIFICATION - The Natural Way

. . .

Together, activated oxygen and negative ions both clean and purify the air naturally. . . .

LIVING AIR PURIFICATION - How Does It Work?

. . .

•NO HARSH AND HAZARDOUS CHEMICALS •NO HEAVY PERFUME ODORS •NO CLEANING PRODUCT ODORS •NO POLLUTANTS •NO MILDEW •NO MOLDS •NO FUNGI •NO BACTERIA. . . .

A QUIZ . . . How would you answer?

Does anyone in your family suffer from allergies?

Would you like to relieve their suffering?

Do you worry about bacteria in the air?

Would you feel more comfortable knowing that bacteria in the air was being killed by nature?

Does the thought of breathing in dust and the accompanying dust mites bother you?

Would you be more comfortable if you didn't have to worry about them?

. . . .

Does tobacco smoke bother or irritate anyone?

Would you like to reduce or eliminate that irritation? (Exhibit B: promotional material)

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-B, respondents have represented, directly or by implication, that:

A. When used as directed, the Living Air Model XL15 eliminates, removes, clears, or cleans formaldehyde, sulfur dioxide, ammonia, trichlorethylene, benzene, chloroform, carbon tetrachloride, odors, nitrogen dioxide, mold, mildew, bacteria, dust, cigarette smoke, pollen, and hydrocarbons from a user's environment.

B. The use of ozone is more effective in cleaning or purifying indoor air than air cleaning products that use filters.

C. The Living Air Model XL15 does not create harmful by-products.

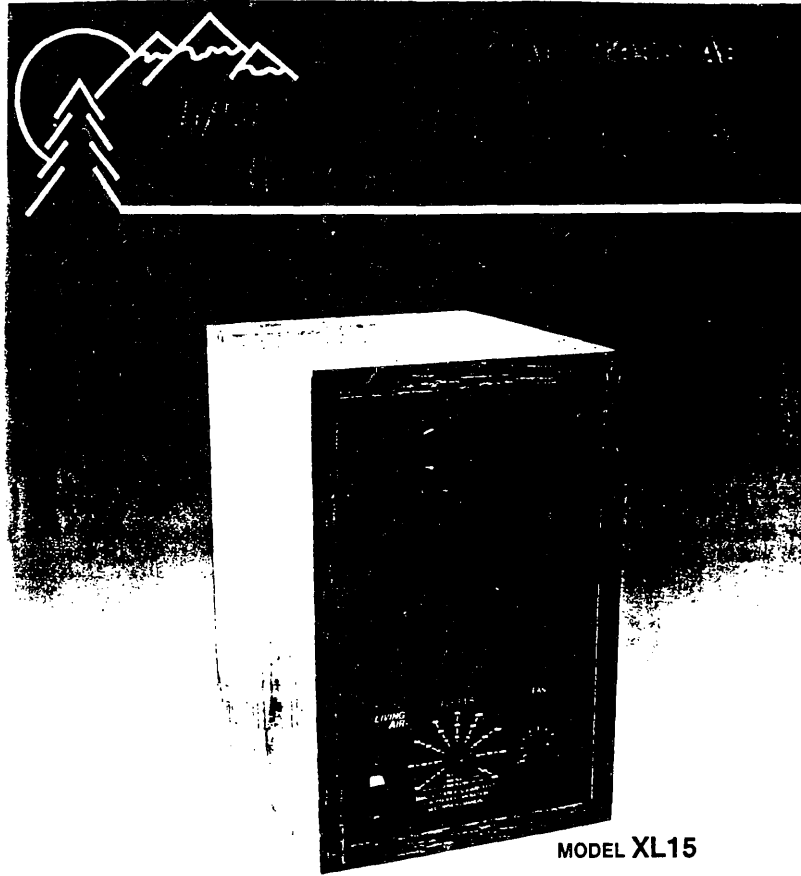
D. When used as directed, the Living Air Model XL15 prevents or provides relief from colds, flu, allergies, asthma, sinus headaches, and ear, eye, nose and throat infections.

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-B, 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. 7. 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 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.

EXHIBIT A



Living Air Purification Systems

■ ■ ■ BREATHE EASY

EXHIBIT A

Complaint

120 F.T.C.

EXHIBIT A

**WHAT IS INDOOR AIR POLLUTION?**

Smoke, mold, mildew, odors and dust are some of the indoor pollutants easy to see and smell. Others like gases, bacteria and pollen are more difficult to detect. Recently, many people have found themselves to be allergic to various chemicals found in their work place. These pollutants can enter the air from synthetic material like carpeting, upholstery and various wall paneling. Static electricity, although not technically defined as a pollutant, is a common problem in various indoor environments.

WHY IS IT SUCH A PROBLEM?

During the energy crisis of the 1970s we began to insulate and seal our buildings more tightly. This saved energy, but it also caused pollutants to be trapped indoors.

WHAT CAN BE DONE ABOUT IT?

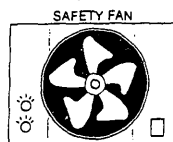
Many different devices have been used in unsuccessful attempts to clean indoor air. Spray and wick products, basically perfumes, are pollutants themselves. Air filters are only partially effective. Early ionizers removed particles from the air but also darkened the walls.

HOW DOES LIVING AIR WORK?

Living Air engineering has created the new generation of air purifiers by combining an all new ionizer with an ozone generator. Airborne particles such as dust, pollen and bacteria are electrically charged (ionized) to remove them from the breathable air.

Ozone breaks down or oxidizes impurities in the air. It destroys mold, mildew, fungi and bacteria. Ozone rids the air of harmful smoke and odors created by cigarettes, cooking, pets and disease.

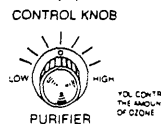
Living Air purifiers recreate outdoor air inside of your home or business.



The machines are mechanically safe. The safety fan stops immediately if anything is inserted between the blades, even a

tender finger. This feature works even if the front grill is removed.

Each Living Air unit is equipped with a purifier control knob to regulate the amount of ozone being produced. Simply set the control for the number of square feet being serviced.

**WHEN WILL I SEE RESULTS?**

Almost immediately! If unusual pollutants are introduced—a visiting cigar smoker or other unusual odor—you can raise the ozone level for a short time and quickly clean up the air.

Result times can often vary; if pollutant concentration is severe it will take longer for the machine to have its full effect.

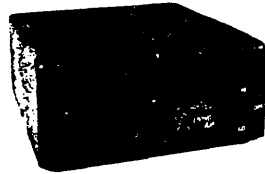
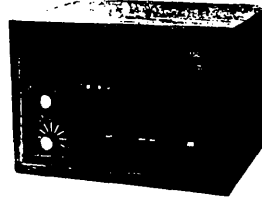
IS IT EXPENSIVE?

No, not at all. The machines are quite affordable. There are no costly filters that need to be replaced over and over again. Maintenance is simple: ozone plates and lint screens can be removed and gently hand washed. Low operating cost is another big plus. The machines will add only a few pennies a day to the average utility bill.

EXHIBIT A

MODEL 150

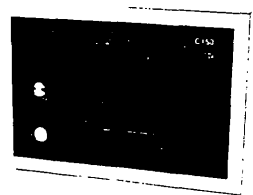
The MODEL 150 is a very versatile machine. A self-contained portable air purification unit, it removes annoying odors and pollutants from almost every home, small office or shop. Eliminates tobacco smoke, odors, mold, mildew, fungi and bacteria. The 150 works best where forced-air heating/cooling systems are operating on a continuous air circulation basis.

**MODEL PEAK**

This powerful little unit is designed to knock out air pollution associated with heavy automobile traffic. Plug the PEAK into your car's cigarette lighter and say goodbye to smog, gas and exhaust fumes. The PEAK, with its standard adaptor, can also be plugged into any standard wall socket. As quick as that, it can begin to clean and revitalize the air in your office, motel room or other small, confined space.

MODEL C150

The Model C150 was created for general purpose applications where space is confined and the problems are severe. Ideal for offices and shops having unusually persistent odors, continuous sources of pollution, or high humidity. High ozone output boosts the overall air purification efficiency that is often necessary to clean up trouble spots.

**MODEL XL15**

The XL15 is perfect for areas as small as ten square feet or as large as 2,500 square feet. The large 350 CFM fan is very powerful yet extremely quiet. That makes it perfect for air cleaning applications where unnecessary noise may be a concern. Beauty salon operators love this model, even the ones who do acrylic nails. Greater fan speed and higher ozone output capabilities makes the XL15 perfect for air cleaning jobs whether big and small. Other possible applications: medical or dental labs, law offices, fur storage rooms, paint stores, public rest rooms, employee break rooms, pet shops, photography labs and graphic design studios.

EXHIBIT A

OZONE • WHAT IT IS AND HOW IT WORKS

The air we breathe is made up of two joined oxygen atoms (O₂). If we take three O₂ molecules and recombine them so that there are two units with three oxygen atoms each, we now have ozone (O₃). These ozone molecules travel through the air. When they encounter a pollutant one oxygen atom will break away and attach itself to the pollutant thereby oxidizing it. All that's left behind is the safe, pure, breathable oxygen necessary to life.

IONS • INDOOR SPACE TRAVELERS

Living Air's pulsating negative ion field generator reestablishes the ratio of negative to positive ions found in the outdoors. Ionized (charged) particles are removed from the air by attraction to solid surfaces.

•NO HARSH AND HAZARDOUS CHEMICALS •NO HEAVY PERFUME ODORS •NO CLEANING PRODUCT ODORS
•NO POLLUTANTS •NO MOLDS •NO FUNGI •NO BACTERIA

- Dust
- Pollen
- Smoke
- Odors
- Mold
- Mildew
- Static Electricity

FEATURES

Model	Height	Width	Depth	Weight	Power Usage
XL 15	11 3/4"	8"	9 3/4"	16 LB.	30 Watts
150	8"	11 3/4"	9 3/4"	16 LB.	30 Watts
C150	8"	11 3/4"	9 3/4"	17 LB.	30 Watts
PEAK	3"	6 1/2"	6 1/2"	4 LB.	15 Watts

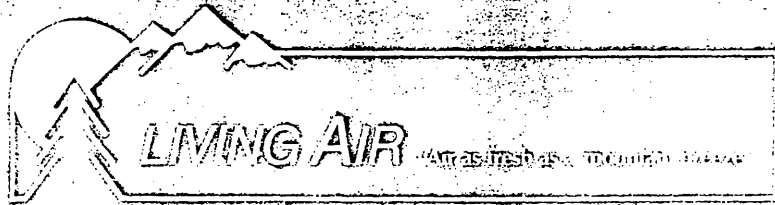
DIMENSIONS & ELECTRICAL SPECIFICATIONS

Model	Ozone Output Control	Fan Control	Washable Lint Screen	Ozone Plates	Activated Charcoal Filter	Fan	Ozone Output MG/HR Max
XL 15	1	1	1	2*	0	350 CFM	312
150	1	1	1	1	0	75 CFM	134
C150	1	1	1	2	0	75 CFM	312
PEAK	Combined Feature		1	1	1	17 CFM	15

*Plus one 1/4 plate

DISTRIBUTED BY:





The FACTS Concerning
**INDOOR AIR
POLLUTION**

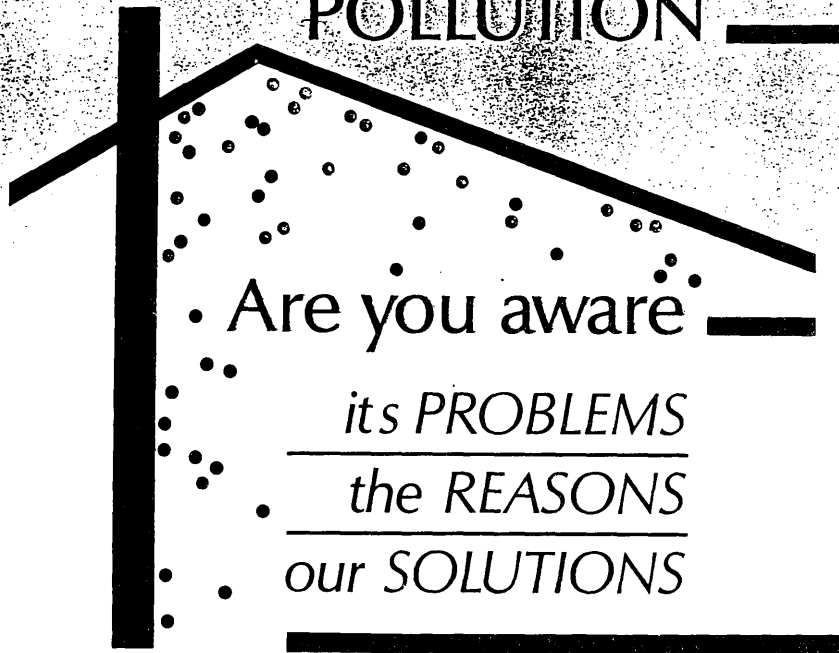


EXHIBIT B

The average person spends

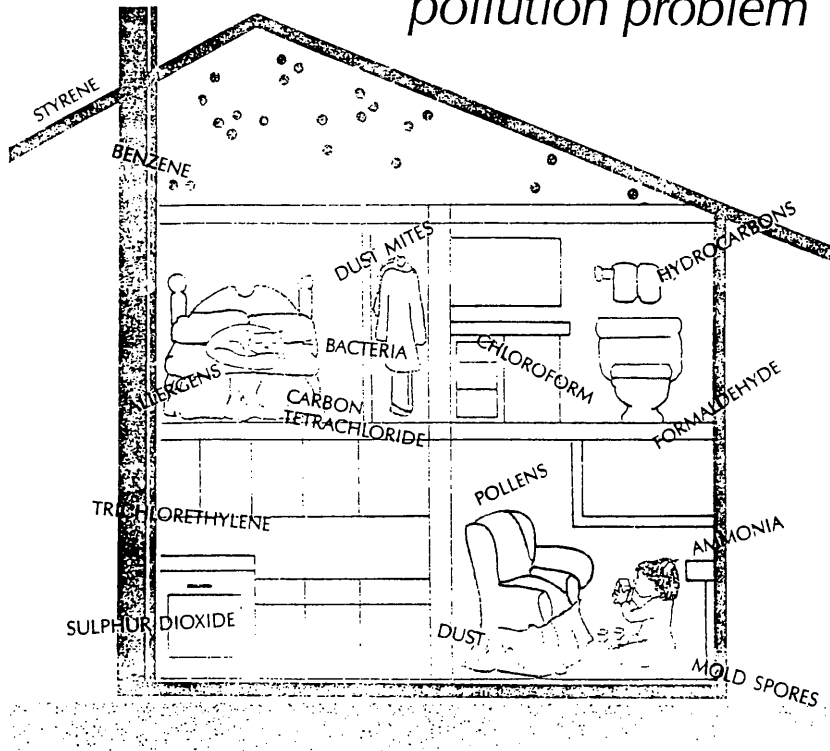
90% of their time indoors

During the energy crisis in the 1970s building construction practices changed—Homes, offices, schools and all types of buildings are now insulated and sealed more tightly. This saves energy, but also causes pollutants to be trapped indoors.

EXHIBIT B

Government Agencies rate INDOOR AIR POLLUTION

*as the nation's biggest
pollution problem*



Complaint

120 F.T.C.

EXHIBIT B

Tightly Constructed Buildings Don't Breathe . . .

- ☒ Little or no AIR EXCHANGE.
- ☒ Indoor air is RE-CIRCULATED.
- ☒ INDOOR AIR POLLUTION is trapped indoors!

Clothing-

Pollens, oils (from smoke), gases, other allergens and odors, attach themselves to the fabric. Once indoors, clothing releases allergens, gases and odors into the air. . .

Furnishings-

New carpeting, drapes, furniture and upholstery emit chemical fumes, noxious gases and odors. . .

Construction Materials-

Paint, plywood, particle board (from cabinets, furniture, paneling) emit chemical fumes, noxious gases and odors. . .

Stoves, Furnaces, Water Heaters-

Escaping unvented fumes contain carbon monoxide and nitrogen dioxide. . .

Heating/Cooling Systems

Ductwork gathers dust and moisture, creating mold and mold spores, and hosting bacteria and dust mites, and circulates dust, mold spores, bacteria and dust mites throughout the building. . .

649

Complaint

EXHIBIT B

Indoor Air Pollutants

DUST

Did you know? 42,000 dust mites can live in only one ounce of dust! Forty pounds of dust generated per year per 1,500 square feet of space, hosting 15 species of dust mites!

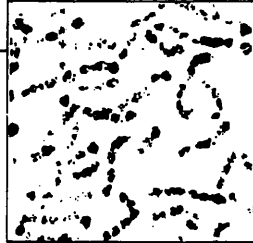
Causes eye irritation, allergies, eye-ear-nose-throat infections, asthma attacks, fatigue and depression.



BACTERIA

Did you know? Bacteria are found in your heating and cooling system, house pets, garbage, bathrooms—everywhere in your home!

Causes colds, flu, respiratory infections, eye infections...



MOLD SPORES

Did you know? Mold spores are found in your heating and cooling system, in damp clothing, cleaning materials and the moisture in your ceilings, walls, carpets, drapes...

Causes allergies, sinus headaches, irritability, fatigue and depression.



Complaint

120 F.T.C.

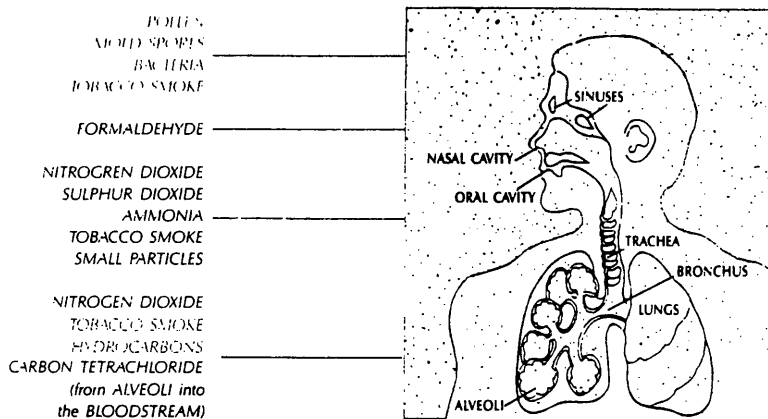
EXHIBIT B

Some Pollutants, Their Sources & Symptoms

BENZENE	Paint, new carpets, new drapes, upholstery	Headaches, eye/skin irritation, fatigue, cancer
AMMONIA	Tobacco smoke, cleaning supplies	Eye/skin irritation, headaches, nose-bleeds, sinus problems
CHLOROFORM	Paint, new drapes, upholster, new carpeting	Headaches, asthma attacks, dizziness, eye irritation, skin irritation
FORMALDEHYDE	Tobacco smoke, plywood, cabinets, furniture, particle board, office dividers, new carpets, new drapes, wallpaper, panelling	Headaches, eye/skin irritation, drowsiness, fatigue, respiratory problems, memory loss, depression, gynecological problems, cancer
SULPHUR DIOXIDE	Tobacco smoke	Asthma attacks, eye/skin irritation, sinus problems, lung cancer
HYDROCARBONS	Tobacco smoke, gas burners, furnaces	Headaches, fatigue, nausea, dizziness, breathing difficult
TRICHLORETHYLENE	Paints, glues, furniture, wallpaper	Headaches, eye/skin irritation, respiratory irritation
CARBON TETRACHLORIDE	Paint, new drapes, new carpets, cleaning supplies	Headaches, dizziness, fatigue

EXHIBIT B

How does indoor air pollution affect your body?



EYE AND NASAL IRRITANTS

Sulphur dioxide (lethal poison), ammonia, acrolein (in tobacco smoke, a carcinogen), benzene (carcinogen), formaldehyde, pollen, mold spores, dust, dust mites, bacteria...

BRONCHIAL CONSTRICTORS

Sulphur dioxide (lethal poison), ammonia, allergens, bacteria...

PULMONARY IRRITANTS

Chloroform (lethal poison, suspected carcinogen), nitrogen dioxide (lethal poison), carbon tetrachloride (suspected carcinogen), formaldehyde, small particles of bacteria

POISONS

Cyanide (from tobacco smoke), hydrocarbons (tobacco smoke and other combustions), nitrogen dioxide, sulphur dioxide.

CARCINOGENS

Acrolein, benzene, chloroform, carbon tetrachloride.

ASPHYXIANT

Hydrocarbons.

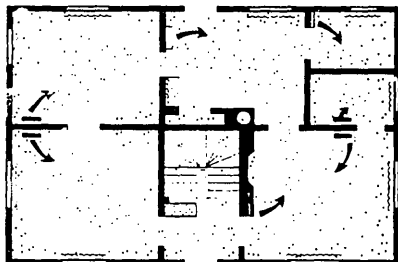
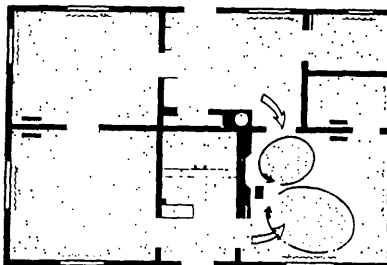
EXHIBIT B

Inefficient Air Filtration Systems

LOCALIZED AREA UNITS (Media Filter)

Only the air caught in the air stream goes through the filter.

Air trapped behind drapes, under furniture, in fabric (upholstery, clothing, carpeting, drapes, etc.) does not get filtered nearly as often, and sometimes not at all.



WHOLE BUILDING UNITS (Media Filter, or Electronic Air Cleaner)

The only air that gets "filtered" is the air which is actually drawn through the unit. "Dirty" air constantly invades the space.

Recirculates the same air—does not get behind drapes or under furniture.

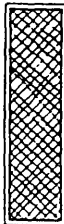
*AIR FILTRATION SYSTEMS ARE NOT THAT EFFICIENT. . .
Much of the air is unaffected, and remains polluted!*

EXHIBIT B

Media Filters and Electronic Air Cleaners

TYPICAL GLASS FIBER FILTER

Traps larger particulates with better efficiency than small matter. To permit air-flow, it must permit some pollutants to pass through. Fiber Filters typically only stop about HALF of the smoke, dust and bacteria in the air. (HEPA filters boast over 90% efficiency, and still leave about 1/5 of the smoke and dust particulates in the air that goes through it.)



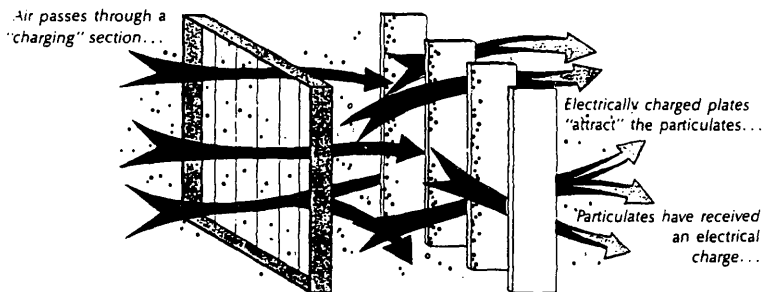
ACTIVATED CARBON FILTER

Designed to trap smaller particulates and some gasses—the higher density the filter, the slower the air-flow, manufacturers compromise on filtering efficiency. Many gasses and odors, and 1/3 to 1/2 of the smoke and dust particulates still get through.



Both types of filters get clogged, reduce efficiency and air flow, and must be replaced often.

ELECTRONIC AIR CLEANERS

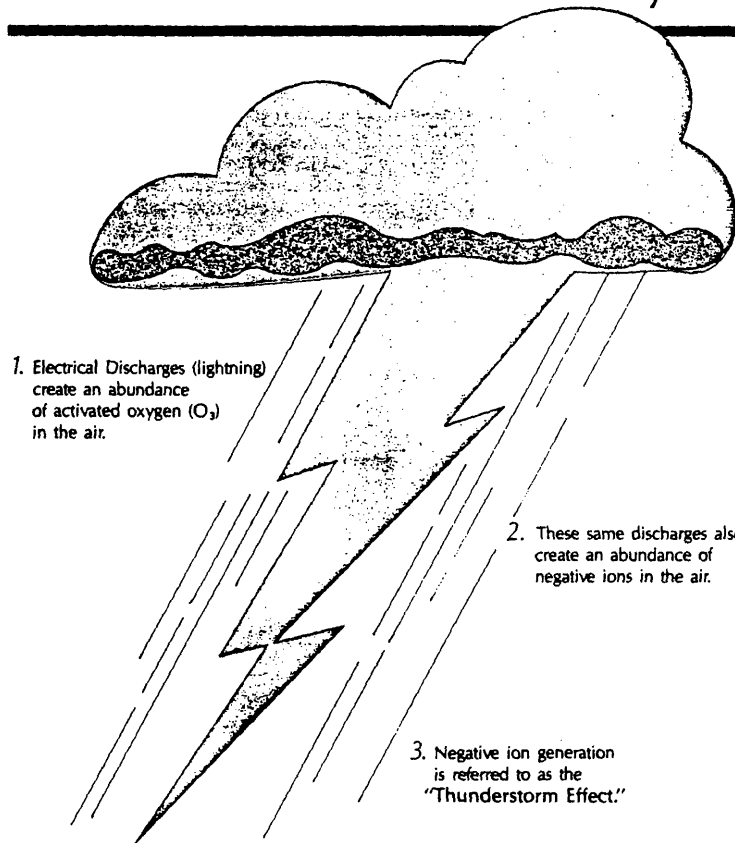


BOTH TYPES HAVE THE SAME MAJOR DRAWBACKS.

1. Air filtration systems only affect the air that passes through them. Much of the air in your building does not get to the filter on a regular basis.
2. Filters have to be CLEANED or REPLACED regularly. They get clogged, reduce air flow, lose efficiency and make the blower motor work harder.

EXHIBIT B

AIR PURIFICATION— The Natural Way

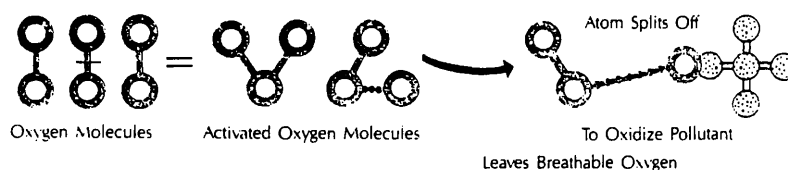


*Together, activated oxygen and negative ions
both clean and purify the air—naturally!*

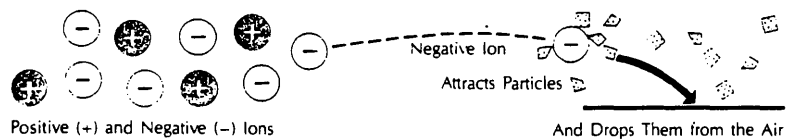
EXHIBIT B

LIVING AIR PURIFICATION— How Does It Work?

What is Activated Oxygen—How it Works



Negative Ions—Indoor Space Travelers



NO HARSH AND HAZARDOUS CHEMICALS
NO HEAVY PERFUME ODORS • NO CLEANING
PRODUCT ODORS • NO POLLUTANTS • NO MILDEW
NO MOLDS • NO FUNGI • NO BACTERIA

Complaint

120 F.T.C.

EXHIBIT B

A QUIZ . . .

How would you answer?



	YES	NO
Does anyone in your family suffer from allergies?	<input type="checkbox"/>	<input type="checkbox"/>
Would you like to relieve their suffering?	<input type="checkbox"/>	<input type="checkbox"/>
Do you worry about bacteria in the air?	<input type="checkbox"/>	<input type="checkbox"/>
Would you feel more comfortable knowing that bacteria in the air was being killed by nature?	<input type="checkbox"/>	<input type="checkbox"/>
Does the thought of breathing in dust and the accompanying dust mites bother you?	<input type="checkbox"/>	<input type="checkbox"/>
Would you be more comfortable if you didn't have to worry about them?	<input type="checkbox"/>	<input type="checkbox"/>
Do you find yourself spraying "air fresheners" or "air deodorizer" around the house before company arrives?	<input type="checkbox"/>	<input type="checkbox"/>
Would it be nice not to worry about it?	<input type="checkbox"/>	<input type="checkbox"/>
Does tobacco smoke bother or irritate anyone?	<input type="checkbox"/>	<input type="checkbox"/>
Would you like to reduce or eliminate that irritation?	<input type="checkbox"/>	<input type="checkbox"/>
Are there ever cooking odors which linger?	<input type="checkbox"/>	<input type="checkbox"/>
Would you like to be able to control them?	<input type="checkbox"/>	<input type="checkbox"/>
Do animal odors ever build up?	<input type="checkbox"/>	<input type="checkbox"/>
Would you like it if that didn't happen?	<input type="checkbox"/>	<input type="checkbox"/>
Would you like to try the LIVING AIR PURIFIER in your home for a couple of days at no cost or obligation?	<input type="checkbox"/>	<input type="checkbox"/>
After you have tried it, if the LIVING AIR PURIFIER has significantly improved your indoor air quality, would it be worth between \$ _____ and \$ _____ (plus tax and shipping) to keep it in your home forever?	<input type="checkbox"/>	<input type="checkbox"/>

Complaint

EXHIBIT B

TO OUR CUSTOMERS

You can help. News of our products is spread by word-of-mouth, and by referrals. Please help by referring me to some people you know who would enjoy the benefits of a LIVING AIR PURIFICATION SYSTEM in their home or place of business.

Think of: Friends, relatives, business associates, neighbors, merchants—and others you know well.

And, who do you know out of town? In other parts of the country?

NAME	ADDRESS		
ADDRESS	RES. PHONE		
CITY	STATE	ZIP	WORK PHONE
WORK	OCCUPATION	HOW LONG	
CHILDREN	AGES	AT HOME	PETS
NEEDS			
NOTES			

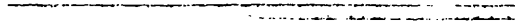
Complaint

120 F.T.C.

EXHIBIT B



*Building a stronger America using the
old fashioned work ethic and the latest
technology helping each other to benefit—
Just the way it should be!*



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, 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 Alpine Industries, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Tennessee, with its office and principal place of business located in the City of Blaine, State of Minnesota.

Respondent Living Air Corp. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Tennessee, with its office and principal place of business located in the City of Coon Rapids, State of Minnesota.

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

and practices of said corporations, and his principal office and place of business is located at Living Air Corp.'s 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 the purposes of this order, the following definitions shall apply:

A. The term "*air cleaning product*" shall mean any product, equipment, or appliance designed or advertised to remove, treat, or reduce the level of any pollutant(s) in the air.

B. The terms "*indoor air pollutant(s)*" or "*pollutant(s)*" shall mean one or more of the following: formaldehyde, sulfur dioxide, ammonia, trichlorethylene, benzene, chloroform, carbon tetrachloride, odors, nitrogen dioxide, mold, mildew, bacteria, dust, cigarette smoke, pollen, and hydrocarbons, or any other gaseous or particulate matter found in indoor air.

C. The term "*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 Alpine Industries, Inc. and Living Air Corp., corporations, their successors and assigns, and their officers; William J. Converse, individually and as an officer of Alpine Industries, Inc. and Living Air Corp.; and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labelling, advertising, promotion, offering for sale, sale, or distribution of any air cleaning 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,

A. Such product's ability to eliminate, remove, clear, or clean any indoor air pollutant from a user's environment; or

B. Such product's ability to eliminate, remove, clear, or clean any quantity of indoor air pollutants from a user's environment;

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

II.

It is further ordered, That respondents Alpine Industries, Inc. and Living Air Corp., corporations, their successors and assigns, and their officers; William J. Converse, individually and as an officer of Alpine Industries, Inc. and Living Air Corp.; and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labelling, advertising, promotion, offering for sale, sale, or distribution of any air cleaning 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. The use of ozone is more effective in cleaning or purifying indoor air than other air cleaning methods;

B. The product does not create harmful by-products; or

C. When used as directed, the product prevents or provides relief from any medical or health-related condition;

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

III.

It is further ordered, That respondents Alpine Industries, Inc. and Living Air Corp., corporations, their successors and assigns, and their officers; William J. Converse, individually and as an officer of Alpine Industries, Inc. and Living Air Corp.; and respondents' agents,

representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labelling, advertising, promotion, offering for sale, sale, or distribution of any air cleaning 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, performance, or health-related benefit of any 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 the 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 notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondents 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 corporations 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 him, promptly notify the Commission, in writing, of his discontinuance of his present business or employment and of his 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 respondents shall, within ten (10) days from the date of service of this order upon them, distribute a copy of this order to each of their officers, agents, representatives, independent contractors, and employees involved in the preparation and placement of advertisements or promotional materials, or who is in communication with customers or prospective customers, or who has any responsibilities with respect to the subject matter of this order; 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 respondents' future such officers, agents, representatives, independent contractors, and employees.

VIII.

It is further ordered, That the corporate respondents shall, within ten (10) days from the date of service of this order upon them, deliver by first class mail or in person a copy of this order or Attachment A to each of their present distributors or retailers of their ozone generators.

IX.

This order will terminate on September 22, 2015, or twenty years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying

consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

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

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

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

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

X.

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.

ATTACHMENT A

[To Be Printed on company letterhead]

[date]

Dear [distributor]:

Alpine Industries, Inc. and Living Air Corp. recently settled a civil dispute with the Federal Trade Commission ("FTC") regarding certain claims for our product, the Living Air Model XL15 ozone generator. As a part of the settlement, we are required to make sure that our distributors and wholesalers stop using or distributing advertisements or promotional materials containing those claims.

We have entered into this agreement to resolve a dispute with the FTC on certain claims it contends are not substantiated. The agreement entered into is not an admission that we have violated the law. However, as part of the agreement, we will not be making certain claims unless they are supported by competent and reliable scientific evidence.

Your assistance will be greatly appreciated in fulfilling the terms of the agreement. We have agreed not to make the following claims unless we have competent and reliable scientific evidence: 1) that the product eliminates or clears indoor air pollutants; 2) that the product creates no harmful by-products; 3) that the product provides relief from specific medical or health-related conditions; and 4) that the use of ozone is more effective in cleaning or purifying indoor air than other air cleaning products such as filters.

We ask each of our dealers, distributors, and sales managers to cooperate with us to ensure that no current advertising or promotional material makes these claims. Again, your assistance in this regard will be greatly appreciated.

Sincerely,

William J. Converse
President
Alpine Industries, Inc., and
Living Air Corp.

Complaint

120 F.T.C.

IN THE MATTER OF

QUANTUM ELECTRONICS CORPORATION, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3615. Complaint, Sept. 22, 1995--Decision, Sept. 22, 1995*

This consent order prohibits, among other things, the Rhode Island-based company and its principal officers from making unsubstantiated claim about the ability of any air cleaning product to eliminate, remove, clear or clean any indoor air pollutant -- or any quantity of indoor air pollutants -- from a user's environment.

Appearances

For the Commission: *Kerry O'Brien, Linda Badger, Jeffrey Klurfeld and Joan Bernstein.*

For the respondents: *Kevin Brill, Corrente, Brill & Kusinitz, Ltd., Providence, R.I.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Quantum Electronics Corporation, a corporation, and Albert O. Coates, Maurice Lepenven, and Jacqueline J. Maynard, individually and as officers 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 Quantum Electronics Corporation is a Rhode Island corporation, with its principal office or place of business at 110 Jefferson Blvd., Warwick, Rhode Island.

Respondent Albert O. Coates 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.

Respondent Maurice Lepenven 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.

Respondent Jacqueline J. Maynard 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, labelled, offered for sale, sold, and distributed ozone generators, including the "Panda 200," as air cleaning products for use in homes, offices, other commercial establishments, and boats.

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 their Panda 200 ozone generator, including but not necessarily limited to the attached Exhibits A-F. These advertisements contain the following statements:

A. Odors, Bacteria [sic] and gasses are all molecular in size. Because of this, no filtration device can remove them from your home. However, they are effectively eliminated when in contact with an ozone molecule, such as those generated by the Panda unit....The cleansing action of ozone is the result of oxidation, i.e., the breaking down of the molecular structure of noxious and toxic gases as well as bacterial and organic matter, the source of mold, mildew and most odors. The process is one of elimination, NOT filtration or scenting. While the effects are permanent, when fostering conditions persist, periodic treatment will prevent future growth.

Why Use the QUANTUM AIR PURIFIER?: ... No Harmful By-Products....

Your home can have a cleaner, healthier environment, free of pollutants. The following is a list of specific contaminants generally found in the home. [formaldehyde, nitrogen dioxide, sulfur dioxide, carbon dioxide, ammonia, volatile organic compounds, dust, molds, mildew, hydrogen sulfide, methane, trichlorethylene, chlorine]....

"It has really helped to relieve Kristie's (daughter) allergic reaction to dust mites." We run it 24 hours a day." Linda A. Brown/Huntington, MD....

"I have recommended it to my patients with allergy and breathing problems and they have used it with great alleviation of their symptoms. I think this is a

wonderful product and I feel everyone should own one." Dr. William F. Welles/San Diego, CA

"The effectiveness of ozone as a bactericide is well documented and it is a comforting aid in maintaining sterile conditions in my surgeries." Nomate T. Kpea, D.O., M.P.H./Medical Director

The LaserDermatology Centers of Rhode Island

"After using a Quantum ozone generator for three months, PRACTICAL SAILOR is convinced that the machine completely eliminates odors, and kills mildew." PRACTICAL SAILOR MAGAZINE, December 1990.

(Exhibit A: promotional material)

B. Quantum ozone generators are self-contained portable air purification devices for the purpose of neutralizing a variety of annoying odors and pollutants from room atmosphere and contents. These devices clean and purify by oxidizing, (breaking down) the molecular structure of noxious or toxic gases. Quantum ozone generators are proven effective against mold and mildew, viruses, fungi and bacteria, both airborne and settled....

PANDA SERIES 200: ... This is the smallest unit, designed for home use. Can be regulated downward for totally safe and quiet use in small bedrooms or upward for whole-house purification.... Eliminates all odors, mold and mildew problems and generally enhances indoor air quality. (Exhibit B: promotional material)

C. As we move further into the 90's, there will no doubt be more and more companys [sic] entering the air filtration business, taking advantage of the growing health consciousness of the American population, making health claims in an effort to solicit interest in their products. In February, 1989, Consumer Reports conducted a test of 27 air filtration devices then on the market.... "No clear evidence exists to establish the usefulness of purifiers in preventing or treating allergic respiratory disease." Why did all 27 of the models tested fail? Because all they did was filter airborne particles.... Because it did nothing about filtering the harmful gasses in the air. The noxious and toxic gasses -- the molecules -- passed right on through. There was nothing in those units to stop the mold and mildew, the viruses and fungi and the bacteria in the air There are about 600,000,000 molecules in .1 microns and the air filtration devices missed every one of them. For a moment, think of a micron as being the size of a barn. Now think of .1 microns as being the size of that barn door. A Quantum ozone generator will eliminate the fly that wants to go through that barn door! ...

Let's say the family pet makes a bad mistake on the living room carpet.... Now, place a little 7 1/2 pound Panda ozone generator in the same room for about 4 hours.... You will have neutralized it all safely, inexpensively and, most importantly, permanently.

(Exhibit C: promotional material)

D. Another group of three patients noted marked improvement in extrinsic asthma/reactive airway disease triggered by mold incitants.... Dramatic improvement was noted after several weeks of diligent use of the Quantum Panda to the point where they had minimal symptoms and required almost no bronchodilator medication. (Exhibit D: promotional material)

E. We wanted to let you know that we absolutely love our Quantum air machine.... best of all, my asthma has improved 100%. (Exhibit E: promotional material)

F. Before you provided me with an Air Purification Unit for my home, my three children: ... had major problems with asthma on a recurring basis I am so happy to tell you that not one of my children have required the first bit of medical attention for respiratory problems since your Unit arrived. (Exhibit F: promotional material)

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-F, respondents have represented, directly or by implication, that:

A. When used as directed, the Panda 200 eliminates, removes, clears, or cleans formaldehyde, sulfur dioxide, ammonia, trichlorethylene, carbon dioxide, hydrogen sulfide, methane, odors, nitrogen dioxide, mold, mildew, bacteria, dust, chlorine, fungi, volatile organic compounds, viruses, and noxious or toxic gases from a user's environment.

B. The use of ozone is more effective in cleaning or purifying indoor air than air cleaning products that use filters.

C. The Panda 200 does not create harmful by-products.

D. When used as directed, the Panda 200 prevents or provides relief from allergies, asthma, and viruses.

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-F, 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. 7. 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 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.

Complaint

EXHIBIT A

120 F.T.C.

7/92 - Panda

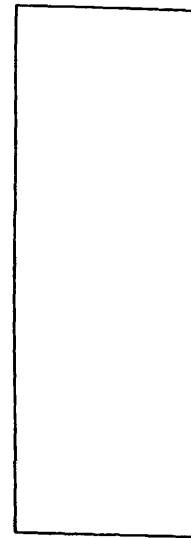


Panda
AIR PURIFIER

EXHIBIT A



QUANTUM ELECTRONICS CORPORATION
 31 GRANSTONE ST. WARREN, NJ 07066 • 401-732-6770 • FAX 401-732-6772



For each "PANDA" purchased a donation is made to:



Quotes and Comments

"It has really helped to relieve Kristie's (daughter) allergic reaction to dust mites." We run it 24 hours a day."
 Linda A. Brown / Huntington, MD

"Since I purchased the Quantum unit I can breath easily all year round. The unit is wonderful."
 Dina DiFore / R. I. Teen Institute

"I have recommended it to my patients with allergy and breathing problems and they have used it with great alleviation of their symptoms. I think this is a wonderful product and I feel everyone should own one."
 Dr. William F. Welles / San Diego, CA

"The effectiveness of ozone as a bactericide is well documented and it is a comforting aid in maintaining sterile conditions in my surgeries."
 Nomate T. Kpea, D.O., M.P.H. / Medical Director
 The LaserDermatology Centers of Rhode Island

"After using a Quantum ozone generator for three months, PRACTICAL SAILOR is convinced that the machine completely eliminates odors, and kills mildew."
 PRACTICAL SAILOR MAGAZINE, December 1990

What is a QUANTUM AIR PURIFIER?

IT IS AN OZONE GENERATOR

Odors, Bacteria and gasses are all molecular in size. Because of this, no filtration device can remove them from your home. However, they are effectively eliminated when in contact with an ozone molecule, such as those generated by the Panda unit.

How Does Ozone Work?

Ozone, sometimes called triatomic oxygen, is a normal trace element in the earth's atmosphere. It is nature's second most powerful sterilant (florine is the most powerful) and the fastest oxidizing agent. The cleansing action of ozone is the result of oxidation, i.e., the breaking down of the molecular structure of noxious and toxic gases as well as bacterial and organic matter, the source of mold, mildew and most odors. The process is one of elimination, NOT filtration or scenting. While the effects are permanent, when fostering conditions persist, periodic treatment will prevent future growth.

Why Use the QUANTUM AIR PURIFIER?

- Energy Efficient
- User Friendly
- Portable
- Lightweight
- Self Cleaning
- Totally Maintenance Free
- No Harmful By-Products



All QUANTUM AIR PURIFIERS come with a 30-day, money-back guarantee as well as a one-year warranty against defects and malfunction.

Your home can have a cleaner, healthier environment, free of pollutants.

The following is a list of specific contaminants generally found in the home.

- Formaldehyde 0.1ppm
(some individuals are sensitive below 0.01)
Sources: Wood cabinets, carpeting, drapes, insulation, pressed board
- Nitrogen dioxide 0.05ppm
Sources: Gas stoves, space heaters, other combustion sources
- Sulfur dioxide 0.05ppm
Sources: (same as nitrogen dioxide)
- Carbon dioxide 700ppm
Sources: Occupant exhalation, combustion sources
- Ammonia 10ppm
Sources: Cleaning materials, bathrooms, soiled diapers
- Volatile organic compounds (variable)
Sources: Plastics, water, dry cleaned clothes
- Dust (variable)
Sources: Nonspecific
- Molds, Mildew (variable)
Sources: Inadequate ventilation, humidity, water seepage
- Hydrogen Sulfide (no acceptable level)
Sources: Septic gases
- Methane (no acceptable level)
Sources: Septic gases
- Trichloroethylene 20ppm
Sources: Cleaning solvents, thinners
- Chlorine 10ppm
Sources: Bleaches, cleaning materials

*Compiled by the state of Rhode Island Department of Health

EXHIBIT A-1

Complaint

120 F.T.C.

EXHIBIT B

7/92 - 7226.

SPECIFICATIONS

QUANTUM LINE OF OZONE GENERATORS		
<p>Quantum ozone generators are self-contained portable air purification devices for the purpose of neutralizing a variety of annoying odors and pollutants from room atmosphere and contents. These devices clean and purify by oxidizing, (breaking down) the molecular structure of noxious or toxic gases. Quantum ozone generators are proven effective against mold and mildew, viruses, fungi and bacteria, both airborne and settled. ALL QUANTUM DEVICES CONFORM TO UL STANDARD 867</p>		
PANDA SERIES	EFFECTIVE RANGE*	DESCRIPTION
200	7,200 Cubic Feet	This is the smallest unit, designed for home use. Can be regulated downward for totally safe and quiet use in small bedrooms or upward for whole-house purification. Good for small offices, conference rooms and employee lounges. Eliminates all odors, mold and mildew problems and generally enhances indoor air quality.
300	12,000 Cubic Feet	This is designed for slightly larger and or more contaminated areas, severe mold and mildew problems, larger office areas with some smokers or stuffy conditions.
400	16,800 Cubic Feet	The smallest commercial strength generator for pet shops, beauty shops, garages, restaurants and some chemically saturated areas.
600	26,000 Cubic Feet	Most powerful commercial production model. Good in bars and lounges, highly saturated chemical areas, fish markets, meat, fish and produce sections of super-markets, or large areas such as dining halls. Excellent for smoke damage restoration and rapid purification when time is a factor.
DIMENSIONS: 11 3/16" x 5 3/4" x 9 3/2"		FAN: Adjustable fan output, low of 30 CFM @ 23 dB to high of 112 CFM @ 41 dB. ELECTRICAL: 120 Volts - 60 Hz Maximum consumption: 30 watts Minimum Consumption: 16 watts
WEIGHT: 9 - 12 lbs.		
CABINET: High impact-resistant ABS cover. UL rated 94 MB, designer "haircell" finish. Black. Carrying handle. Aluminum base. FACE PANEL: Separate fan speed and ozone output controls. Directional air-flow grid. Operational mode indicator lights.		
<p>* The ideal operating range for ozone is between .03 to .05 parts per million which is the world-wide outdoor ambient average. A minimum of .03 ppm can be achieved in the effective range as indicated. Consult the owner's manual for a complete breakdown of ozone in ppm/Area in cubic feet ratio.</p>		

EXHIBIT B

EXHIBIT C

AS WE MOVE FURTHER INTO THE 90'S, THERE WILL NO DOUBT BE MORE AND MORE COMPANIES ENTERING THE AIR FILTRATION BUSINESS, TAKING ADVANTAGE OF THE GROWING HEALTH CONSCIOUSNESS OF THE AMERICAN POPULATION, MAKING HEALTH CLAIMS IN AN EFFORT TO SOLICIT INTEREST IN THEIR PRODUCTS.

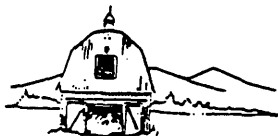
IN FEBRUARY, 1989, CONSUMER REPORTS CONDUCTED A TEST OF 27 AIR FILTRATION DEVICES THEN ON THE MARKET. SOME OF THE UNITS TESTED HAD HEPA FILTERS (HIGH EFFICIENCY PARTICULATE ARRESTING), SOME WERE OF THE ELECTROSTATIC PRECIPITATOR VARIETY, SOME ION GENERATORS, AND OTHERS EVEN LESS SOPHISTICATED THAN THESE.

THE MODELS TESTED EACH REMOVED PARTICULATE MATTER (AIRBORNE PARTICLES) TO VARYING DEGREES BUT, AS TO THE OVERALL HEALTH BENEFITS OF ALL 27 UNITS TESTED:

"NO CLEAR EVIDENCE EXISTS TO ESTABLISH THE USEFULNESS OF PURIFIERS IN PREVENTING OR TREATING ALLERGIC RESPIRATORY DISEASE."

WHY DID ALL 27 OF THE MODELS TESTED FAIL?

BECAUSE ALL THEY DID WAS FILTER AIRBORNE PARTICLES.



THE BEST OF THE UNITS TESTED FILTERED PARTICLES IN THE AIR AS SMALL AS .1 MICRONS, BUT WHAT DOES THAT MEAN? HOW SMALL IS A MICRON?

A MICRON IS ABOUT 39 MILLIONTHS OF AN INCH. THE PERIOD AT THE END OF THIS SENTENCE IS APPROXIMATELY 1000 MICRONS WIDE. A HUMAN HAIR IS 100 MICRONS WIDE. THE BEST TESTED MODEL MENTIONED ABOVE FILTERED .1 MICRONS WHICH IS 1/1000 THE THICKNESS OF A HUMAN HAIR!

SO WHY DID IT FAIL?

BECAUSE IT DID NOTHING ABOUT FILTERING THE HARMFUL GASSES IN THE AIR. THE NOXIOUS AND TOXIC GASSES -- THE MOLECULES -- PASSED RIGHT ON THROUGH. THERE WAS NOTHING IN THOSE UNITS TO STOP THE MOLD AND MILDEW, THE VIRUSES AND FUNGI, AND THE BACTERIA IN THE AIR. TO SAY NOTHING ABOUT THE BACTERIA THAT WAS NOT IN THE AIR, THAT HAD ALREADY SETTLED ON THE FURNITURE, AND ON THE CARPET, AND ON YOU!

QUANTUM ELECTRONICS CORPORATION MAKES ABSOLUTELY NO HEALTH CLAIMS IN REGARD TO OUR OZONE GENERATORS BUT, AS FOR CLEANING THE AIR, WE ASK YOU TO CONSIDER THIS...

THERE ARE ABOUT 600,000,000 MOLECULES IN .1 MICRONS AND THE AIR FILTRATION DEVICES MISSED EVERY ONE OF THEM.

FOR A MOMENT, THINK OF A MICRON AS BEING THE SIZE OF A BARN. NOW THINK OF .1 MICRONS AS BEING THE SIZE OF THAT BARN DOOR.

A QUANTUM OZONE GENERATOR WILL ELIMINATE THE FLY THAT WANTS TO GO THROUGH THAT BARN DOOR:

WE INVITE YOU TO PUT ONE OF OUR UNITS TO THE TEST.

LET'S SAY THE FAMILY PET MAKES A BAD MISTAKE ON THE LIVING ROOM CARPET. TAKE ANY ONE OF THE 100 OR MORE AIR FILTRATION DEVICES PRESENTLY ON THE MARKET. PUT IT IN THE LIVING ROOM AND LET IT RUN FOR 24 HOURS BEFORE REMOVING IT. THEN, WHEN YOU RETURN TO THE ROOM, WHAT DO YOU THINK YOU WILL SMELL?



NOW, PLACE A LITTLE 7 1/2 POUND PARDA OZONE GENERATOR IN THE SAME ROOM FOR ABOUT 4 HOURS. WHEN YOU RETURN, THE ODOR WILL BE GONE, THE BACTERIA CAUSING THE ODOR WILL BE DESTROYED AND FIDO WILL BE ONCE AGAIN OUT OF THE DOGHOUSE.

YOU WILL NOT HAVE FILTERED OUT THE ODORS AND THE BACTERIA. NOR WILL YOU HAVE COVERED THEM OVER WITH A SMELLY PERFUME WHICH IN ITSELF MAY BE HARMFUL TO YOUR HEALTH.

YOU WILL HAVE NEUTRALIZED IT ALL SAFELY, IRREVERSIBLY AND, MOST IMPORTANTLY, PERMANENTLY.

WE GUARANTEE IT.

EXHIBIT C

Complaint

120 F.T.C.

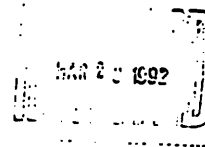
EXHIBIT D

JEFFRY L. ANDERSON, M.D.
45 San Clemente Dr., Suite B-100, B-110
Corona, CA 94925
(415) 922-7140

5/42 - Pres.

March 4, 1992

Moe Lepenven
Quantum Electronics Corp.
31 Graystone Street
Warwick, RI 02886



Dear Moe:

I am writing concerning the Quantum Panda ozone generator. I have been using Quantum Panda in my clinical work for the last year and have found it be extremely valuable in treating specific clinical conditions related to indoor air contamination. It has been particularly valuable in addressing mold allergy-hypersensitivity problems, especially in the category of patients that exhibit a very toxic type of hypersensitivity responses to mold inhalants. There is an increasingly recognized neurotoxic aspect to mold hypersensitivity and I have a number of patients who exhibit major neurological dysfunction varying between vascular type headaches and vestibular labyrinthine disorders to frank partial complex seizures as well as multiple other neuropsychological syndromes.

Inflammatory immune complex connective tissue disease is also a very common feature of this type of mold hypersensitivity and what is often misdiagnosed as a fibromyalgia syndrome by other physicians is really immune complex connective tissue disease triggered by chronic mold exposure. I have at least four patients with this condition who live in the Bay Area in residential structures which were structurally contaminated with molds to the point where the patient either continued to experience disabling and progressive dysfunction if they remained there, or would have to relocate. In these four cases, the proper and ongoing use of the Quantum Panda ozone generator produced dramatic improvements in their clinical conditions allowing them to remain in their current residence and avoid the stress and expense of relocating. Two of the patients clearly rated the Quantum Panda as having "changed their lives."

Another group of three patients noted marked improvement in extrinsic asthma/reactive airway disease triggered by mold incitants. Their pattern was classic nocturnal and early morning bronchospasm related to indoor mold. Dramatic improvement was noted after several weeks of diligent use of the Quantum Panda to the point where they had minimal symptoms and required almost no bronchodilator medication.

At least one patient has had improvements in symptomatology related to chemical hypersensitivity. This is a woman who had major neurological, particularly cognitive dysfunction, respiratory distress and other problems due to reactivity to particle board cabinets with sealers and lacquer newly installed

EXHIBIT D

EXHIBIT D

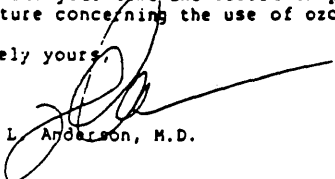
March 4, 1992
Page Two

in her kitchen. She got to the point where she had to basically isolate herself to her bedroom as any other rooms close to the kitchen let alone the kitchen itself would produce disabling symptoms. After the use of the Quantum Panda ozone generator for about a week she began experiencing diminishing symptomatology, increased intolerance to the ambient air in rooms adjacent to the kitchen and eventually could tolerate brief periods in the kitchen itself. It is clear that the ozone did activate enough of the outgassing VOCs and formaldehyde from the cabinets to markedly alleviate her reactivity.

In summary, I have found the Quantum Panda to be very valuable tool in treating environmental-related illnesses, particularly mold allergy-hypersensitivity and to some degree chemical hypersensitivity. Combining the Quantum Panda with a state-of-the-art air filtration/purification system with either HEPA or other mechanical as well as carbon block filter has added even more benefit. I have found that at the lowest setting most patients can tolerate the ambient ozone levels on a 24-hour per day basis. However, I am recommending that people avoid exposure to ambient air in rooms where the ozone generator runs above 3; above this setting some respiratory irritation can occur with relatively brief exposures to higher levels. I simply require them to close up and isolate the specific room being treated for six to eight hours while the generator is running on high, then to open doors and windows and let the room outgas for 30 to 45 minutes before returning to the room for any significant length of time. This has avoided any irritant effects as far as I can see.

I intend to use the Quantum Panda increasingly in my medical practice and anticipate ongoing benefits to my patients. I appreciate your time and effort in providing clinical data and literature concerning the use of ozone in environmental control.

Sincerely yours,

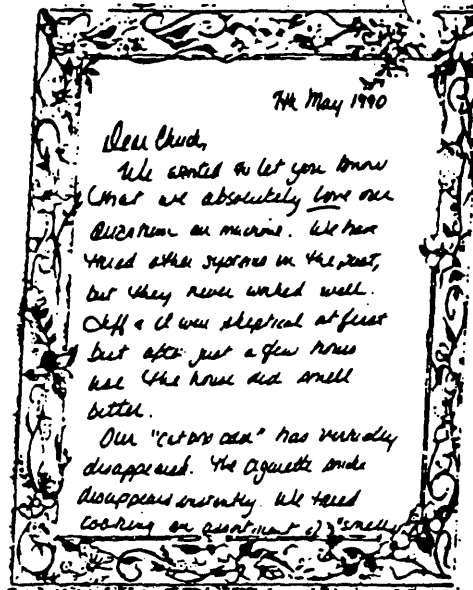

Jeffrey L. Anderson, M.D.

JLA:MJ

Complaint

120 F.T.C.

EXHIBIT E



5/10/1990.

foods - broccoli, cauliflower, cajun rice, garlic spaghetti sauce, you name it. You could smell the food cooking but after dinner, the air was gone!!

Best, best of all, my asthma has improved 80%. I've been off bronchodilators and steroids for one whole month. I don't wake up in the middle of the night feeling as if I'm suffocating. Never late night trips to the E.R. Before the Quorum machine, I had to take 150 mg of prednisone twice a day and use my inhaler every 2 hours. That's a lot of medication just to be able to breathe with a wheeze + chest pain.

I'd saved \$500 on medication, doctor visits and emergency room fees in 1 month.

I finally feel like a human being rather than a walking dry stone. Yep! Getting me sleep now that I'm not waking him up because I'm turning blue.

T.C. The Yabby cat thinks it's his personal breeze machine. After he spends an hour running around the house, he sits in front of the machine for a few minutes & purrs. It takes a lot to make T.C. purr, he does so many things, but he loves his ozone!

This is a mess that I can fix anyone with pets, asthma or wood burning stoves!

Thanks again!!

Debbie Jeff Okland

EXHIBIT E

678

Complaint

EXHIBIT F

June 20, 1991

d41-Pras.

Mrs. Judy Carter
3430 Malvern Drive
Norfolk, VA 23518

Mr. Paul Smoot
Descal-A-Matic Corporation
4855 Brookside Court, Suite A
Norfolk, VA 23502

Dear Mr. Smoot:

Before you provided me with an Air Purification Unit for my home, my three children: Christian-16, Ryan-8 and Kendall-5, had major problems with asthma on a recurring basis and had to be taken to the hospital emergency room for emergency treatment and also on office visits to the doctor. Medical costs for aspirators, inhalers and other therapy was a hardship on a working, single parent. When the attacks came in the middle of the night, it meant loss of proper rest for all of us.

In past years, during the months of February, March, April and May, the medical costs for the children were very high and that does not count the time involved to and from

I put your Air Purifier in my house in February of this year and have had it on ever since. As you know, this year the pollen count reached and maintained record levels for weeks on end, still no problems!

I am so happy to tell you that not one of my children have required the first bit of medical attention for respiratory problems since your Unit arrived.

I recently reviewed the medical records of the kids and was reminded of the agony we all went through before your Air Purifier.

Please let me know if this will be of any help.

Thank you very much.

Judy Carter

Judy Carter

EXHIBIT F

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, 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 Quantum Electronics Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Rhode Island, with its office and principal place of business located in the City of Warwick, State of Rhode Island.

Respondents Albert O. Coates, Maurice Lepenven, and Jacqueline J. Maynard are officers of said corporation. They formulate, direct, and control the policies, acts, and practices of said corporation, and their 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 the purposes of this order, the following definitions shall apply:

A. The term "*air cleaning product*" shall mean any product, equipment, or appliance designed or advertised to remove, treat, or reduce the level of any pollutant(s) in the air.

B. The terms "*indoor air pollutant(s)*" or "*pollutant(s)*" shall mean one or more of the following: odors, nitrogen dioxide, formaldehyde, sulfur dioxide, ammonia, trichlorethylene, carbon dioxide, hydrogen sulfide, methane, mold, mildew, bacteria, dust, chlorine, fungi, volatile organic compounds, viruses, or any other gaseous or particulate matter found in indoor air.

C. The term "*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 Quantum Electronics Corporation, a corporation, its successors and assigns, and its officers, and Albert O. Coates, Maurice Lepenven, and Jacqueline J. Maynard, individually and as officers of said corporation, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labelling, advertising, promotion, offering for sale, sale, or distribution of any air cleaning 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,

A. Such product's ability to eliminate, remove, clear, or clean any indoor air pollutant from a user's environment; or

B. Such product's ability to eliminate, remove, clear, or clean any quantity of indoor air pollutants from a user's environment;

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

II.

It is further ordered, That respondents, Quantum Electronics Corporation, a corporation, its successors and assigns, and its officers, and Albert O. Coates, Maurice Lepenven, and Jacqueline J. Maynard, individually and as officers of said corporation, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labelling, advertising, promotion, offering for sale, sale, or distribution of any air cleaning 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. The use of ozone is more effective in cleaning or purifying indoor air than other air cleaning methods;
- B. The product does not create harmful by-products; or
- C. When used as directed, the product prevents or provides relief from allergies, asthma, and viruses;

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

III.

It is further ordered, That respondents, Quantum Electronics Corporation, a corporation, its successors and assigns, and its officers, and Albert O. Coates, Maurice Lepenven, and Jacqueline J. Maynard, individually and as officers of said corporation, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labelling, advertising, promotion, offering for sale, sale, or distribution of any air cleaning 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, performance, or health-related benefit of any 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 the 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 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 each individual respondent shall, for a period of five (5) years after the date of service of this order upon him/her, promptly notify the Commission, in writing, of his/her discontinuance of his/her present business or employment and of his/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 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, or who is in communication with customers or prospective customers, or who has any responsibilities with respect to the subject matter of this order; 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.

VIII.

It is further ordered, That the corporate respondent shall, within ten (10) days from the date of service of this order upon it, deliver by first class mail or in person a copy of this order to each of its present distributors or retailers of its ozone generators.

IX.

This order will terminate on September 22, 2015, or twenty years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

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

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

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

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

X.

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.

Complaint

120 F.T.C.

IN THE MATTER OF

ARIZONA INSTITUTE OF REPRODUCTIVE MEDICINE, LTD.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3616. Complaint, Sept. 25, 1995--Decision, Sept. 25, 1995*

This consent order prohibits, among other things, an Arizona institute and its president from misrepresenting the success rate of their in vitro fertilization program or any other infertility treatment services. In addition, the consent order stipulates that any comparison with other success rates be based upon the same calculating methodology. Finally, the order requires the respondents to possess competent and reliable scientific evidence for any future comparative success-rate claims for fertility services.

Appearances

For the Commission: *Matthew Daynard, Michael Katz, Richard Kelly and Joan Bernstein.*

For the respondents: *Thomas R. Lofy, Scottsdale, AZ.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Arizona Institute of Reproductive Medicine, Ltd., a limited corporation, and Robert H. Tamis, individually and as president of Arizona Institute of Reproductive Medicine, Ltd., ("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 Arizona Institute of Reproductive Medicine, Ltd. is a limited corporation formed under the laws of the state of Arizona, with its principal place of business located at 2850 North 24th Street, Phoenix, Arizona.

Respondent Robert H. Tamis, M.D. is president 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 are engaged in offering for sale and the sale of services in connection with the treatment of infertility in the human reproductive system.

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 promotional materials, including but not necessarily limited to the attached Exhibit A. Exhibit A contains the following statements:

"The success rate of most IVF programs are [sic] quoted as the percentage of embryo transfer procedures that result in clinical pregnancies....However, this figure may not accurately reflect the success rate that most patients are interested in (ie; the percentage of couples entering the IVF program who achieve a "take home baby":). Because IVF success rates can be calculated in a variety of ways, one must exercise caution when comparing success rates of different programs. To avoid confusion, the best way to express the success of IVF programs is to list the percent success of each step of the IVF procedure during the most recent 6-12 month period. The chart below compares the success rate of the Arizona Institute of Reproductive Medicine to the average success rate of other IVF programs in the United States.

IVF PROGRAM	Nat'l Av. %		AIRM Av %	
	1991	1992	1991	1992
Couples entering IVF program	100	100%	92%	
Successful ovarian stimulation	72	100%	93%	
Successful egg capture	---	100%	99%	
CLINICAL PREGNANCIES/EMBRYO TRANSFER	16	15%	20%	
Chemical Pregnancies/embryo transfer	--	20%	8%	
DELIVERY RATE/EMBRYO TRANSFER	14	17%	16%	
				(1-92 to 6-92)"

(Exhibit A)

PAR. 5. Through the use of the statements contained in the promotional materials referred to in paragraph four, including but not necessarily limited to the promotional material attached as Exhibit A, respondents have represented, directly or by implication, that during each of the time periods specified in the promotional material set forth in paragraph four, patients in respondents' in vitro fertilization program achieved live births (delivery rate) per embryo transfer at

rates higher than the national average for in vitro fertilization programs.

PAR. 6. Through the use of the statements contained in the promotional materials referred to in paragraph four, including but not necessarily limited to the promotional material attached as Exhibit A, respondents have represented, directly or by implication, that at the time they made the representation set forth in paragraph five, respondents possessed and relied upon a reasonable basis that substantiated such a representation.

PAR. 7. In truth and in fact, at the time they made the representation set forth in paragraph five, respondents did not possess and rely upon a reasonable basis that substantiated such a representation. Respondents calculated the success statistics in their promotional materials counting multiple births (*i.e.*, twins, triplets, etc.) as multiple deliveries. The national percentages were based on data published by The Society for Assisted Reproductive Technology (SART), a national organization whose members, including respondents, are providers of assisted reproductive technologies. SART publishes annually national averages for live births achieved through its members' services. National averages for live births are based on a protocol which requires members to report multiple births as single deliveries. The published report counts a multiple birth as a single delivery. According to SART data for the year 1991, the national average for live births per embryo transfer was approximately 17 percent rather than respondents' cited 14 percent. Had respondents likewise counted multiple births as a single delivery, respondents' success statistics for deliveries would have been lower than both the actual national average or the national average cited in Exhibit A. Therefore, the representation set forth in paragraph six was, and is, 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.

EXHIBIT A

SUCCESS RATES

There is an enormous variation in the success rates of IVF (and GIFT) programs in the United States. About 90% of all IVF pregnancies are achieved by only 15% of IVF programs, and one half of all IVF programs started will close down within one or two years because no pregnancies are achieved.

The Arizona Institute of Reproductive Medicine has one of the most successful IVF programs in the country. Over 111 pregnancies have been achieved with IVF, with 75 babies delivered to date, including 17 sets of twins and 3 sets of triplets since the IVF program was begun in 1984. Since 1988, over 60 pregnancies have been achieved with the Frozen Embryo program, with 42 deliveries to date, including 7 sets of twins. Part of the reason for the success of the Arizona Institute of Reproductive Medicine program is tight quality control and a commitment to medical research related to IVF.

The success rate of most IVF programs are quoted as the percentage of embryo laboratory procedure efficiencies. However, this figure may not accurately reflect the success rate that most patients are interested in (ie; the percentage of couples entering the IVF program who achieve a "take home baby";). Because IVF success rates can be calculated in a variety of ways, one must exercise caution when comparing success rates of different programs. To avoid confusion, the best way to express the success of IVF programs is to list the percent success of each step of the IVF procedure during the most recent 6-12 month period. The chart below compares the success rate of the Arizona Institute of Reproductive Medicine program to the average success rate of the other IVF programs in the United States.

IVF PROGRAM	Nat'l Av. %		AIRM Av %
	1991	1992	
Couples entering IVF program	100	100%	92%
Successful ovarian stimulation	72	100%	93%
Successful egg capture	---	100%	99%
CLINICAL PREGNANCIES/EMBRYO TRANSFER	16	15%	20%
Chemical Pregnancies/embryo transfer	--	20%	8%
DELIVERY RATE/EMBRYO TRANSFER	14	17%	16%

(1-92 to 6-92)

The above success rates of the Arizona Institute of Reproductive Medicine's IVF program are updated every three months and reflect the statistics from the most recent twelve month period. The "success rate" quoted by most other programs (clinical pregnancies per embryo transfer) is highlighted in the chart for comparison.

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, 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, 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 Arizona Institute of Reproductive Medicine, Ltd., is a limited corporation existing and doing business under and by virtue of the laws of the State of Arizona, with its office and principal place of business located at 2850 North 24th Street, Suite 500-A, Phoenix, Arizona.

Respondent Robert H. Tamis, M.D., is president of respondent Arizona Institute of Reproductive Medicine. His principal office or place of business is the same as that of the corporate respondent. Dr. Tamis formulates, directs and controls the acts and practices 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

"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.

I.

It is ordered, That respondents Arizona Institute of Reproductive Medicine, Ltd., a limited corporation, and Robert H. Tamis, M.D., individually and as president of said corporation, their successors and assigns, officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, promotion, sale or offering for sale of services relating to the treatment of infertility, do forthwith cease and desist from representing, directly or by implication, that respondents' success rates in terms of achieving deliveries is higher than or compares favorably with the success rates of any single provider or group of providers of these services, unless at the time of making such a representation, respondents possess and rely upon competent and reliable scientific evidence for making such a comparison which shall, at a minimum, consist of results for its own patients that are based upon the same criteria for determining the calculation of delivery rates that were used to produce the results with which the comparison is made, or otherwise misrepresenting the past or present success of respondents in achieving live births or pregnancies or the past or present success of any single provider or group of providers of these services in achieving live births or pregnancies.

II.

It is further ordered, That respondents, shall forthwith distribute a copy of this order to each of their officers, agents, representatives, and employees, who are engaged in the preparation and placement of

advertisements or promotional materials, who communicated with patients or prospective patients, or who have any responsibilities with respect to the subject matter of this order; and for a period of ten (10) years from the date of entry of this order, distribute same to all of respondents' future officers, agents, representatives, and employees having said responsibilities.

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:

(1) Respondent Arizona Institute of Reproductive Medicine, Ltd. shall 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 respondent which may affect compliance obligations arising out of this order; and

(2) Respondent Robert H. Tamis, M.D. 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 an infertility 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 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 this order will terminate on September 25, 2015, or twenty years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

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

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

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

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

VI.

It is further ordered, That respondents shall, within (60) days after 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 all requirements of this order.

Complaint

120 F.T.C.

IN THE MATTER OF

BODY WISE INTERNATIONAL, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3617. Complaint, Sept. 25, 1995--Decision, Sept. 25, 1995*

This consent order prohibits, among other things, a California-based company from falsely representing that any nutritional supplement, food or drug contains any ingredient that can cause or contribute to achieving or maintaining weight loss without diet or exercise, and bars unsubstantiated weight-loss, weight-loss maintenance, cholesterol reduction, or other health benefit claims for such products. In addition, the consent order prohibits the deceptive use of consumer testimonials or professional endorsements, and requires clear disclosures of any financial connection between endorsers and the respondent or its products.

Appearances

For the Commission: *David M. Newman and Jeffrey A. Klurfeld.*
For the respondent: *Robert Armstrong, Chicago, IL.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Body Wise International, Inc., a Nevada corporation (hereinafter "Body Wise"), 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 Body Wise is a Nevada corporation with its principal office and place of business located at 6350 Palomar Oaks Court, Suite A, Carlsbad, California.

PAR. 2. Respondent has advertised or otherwise promoted, offered for sale, sold and distributed nutritional supplements, including but not limited to Future Perfect, Right Choice AM, Right Choice PM and The Reshape Formula (hereinafter "weight loss products"), as weight loss products, through a multi-level network of distributors. Respondent has also advertised or otherwise promoted,

offered for sale, sold and distributed Cardio-Wise, a nutritional supplement, as a product that reduces serum cholesterol. Each of respondent's nutritional supplements is a "food" or "drug," within the meaning of Sections 12 and 15 of the Federal Trade Commission Act, 15 U.S.C. 52, 55.

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, 15 U.S.C. 44.

PAR. 4. Respondent has disseminated or caused to be disseminated advertisements and promotional materials for its weight loss products, including but not necessarily limited to, the attached Exhibits A-H. Respondent has disseminated these advertisements and promotional materials directly to consumers and has provided these advertisements and promotional materials to its distributors for dissemination to consumers. These advertisements and promotional materials contain the following statements:

1. "Diets Don't Work, Body Wise Does" (Exhibit A)
 "Diets don't work . . . *Body Wise Does!*" (Exhibit C)
 "DIETS DON'T WORK *BODY WISE DOES!*" (Exhibit D)
2. "The Body Wise Weight Management System has been designed to assist you to lose fat and create lean body mass -- all without drugs, deprivation or denial..." (Exhibit A)
 "The Body Wise Weight Management System is designed to assist you in losing fat and creating lean body mass -- all without drugs, deprivation or denial." (Exhibit B)
 "The Body Wise Weight Management System has been designed to assist you to lose fat and create lean body mass -- all without drugs, deprivation, or denial ..."
 (Exhibit C)
3. "Results That Can Last a Lifetime" (Exhibit C)
4. "Whether based on drugs, deprivation or denial, [diets] almost always result in on-again, off-again cycle of weight bounce . . . Body Wise can help provide a long-term solution." (Exhibit A)
5. "LOSE FAT -- FOR LIFE!" (Exhibit B)
6. "I have lost 39 pounds, four inches in the waist, lowered my cholesterol 42 points and reduced my body fat by 14 percent." (Exhibit A)
 "I lost 39 pounds, 4 inches in my waist, lowered my cholesterol 42 points and reduced my body fat 4%." (Exhibit C)
 "I've lost 39 pounds, four inches in the waist, lowered my cholesterol 42 points and reduced my body fat by 14%." (Exhibit D)
 "I've lost 39 pounds, lowered my cholesterol 42 points and reduced my body fat by 14 percent." (Exhibit F)

"I have lost 39 pounds, 4 inches in the waist, lowered my cholesterol 42 points, and reduced my body fat by 4%." (Exhibit H-2)

7. "As an Orthopedic Surgeon, Body Wise has my endorsement. In six weeks I lowered my cholesterol 60 points, triglycerides over 100 points and lost 12 pounds!" (Exhibit A)

8. "My patients on the program are losing fat and feeling great. I personally lost 17 pounds and five percent body fat!" (Exhibit A)

9. "My patients are doing exceptionally well on this program. My staff and I marvel at their lab results, weight loss and improved overall well-being. Personally, I have lost 15 pounds and lowered my cholesterol 45%." (Exhibit E)

"My patients are doing exceptionally well on this program. My staff and I marvel at their lab results, weight loss and improved overall being. Personally, I have lost 15 pounds and lowered my cholesterol 45 points." (Exhibit G)

10. "I LOST 58 POUNDS! My waist went from an extended 40 inches to a comfortable 34." (Exhibit B)

"In just three months I lost 58 pounds and lowered my cholesterol level 104 points. The inches fell off!" Exhibit C)

"I lowered my cholesterol level 104 points and lost 58 pounds in scale weight! My waist went from an extended 40 inches to a comfortable 34." (Exhibit F-2)

11. "In 30 days I lost 3½ inches from my waist, 4 inches from my hips and my body fat dropped 11%." (Exhibit D)

"My body fat dropped 11 percent while my cholesterol level was lowered 26 points! I lost 3½ inches from my waist and four inches from my hips!" (Exhibit F-2)

12. "In seven weeks, I lost 27 pounds, 24 inches of body fat and lowered my cholesterol 43 points!" (Exhibit G)

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-H, respondent has represented, directly or by implication, that the use of respondent's weight loss products will enable consumers to lose weight without dieting.

PAR. 6. In truth and in fact, the use of respondent's weight loss products will not enable consumers to lose weight without dieting. Therefore, respondent's representation as set forth in paragraph five was and is false and misleading.

PAR. 7. 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-H, respondent has represented, directly or by implication, that the use of respondent's weight loss products will enable consumers to maintain significant long-term or permanent weight loss.

PAR. 8. Through the use of the statements contained in the advertisements and promotional material referred to in paragraph four, including but not necessarily limited to the advertisements and promotional materials attached as Exhibits A-H, 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 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. Respondent has disseminated or caused to be disseminated advertisements and promotional materials for Cardio-Wise, including but not necessarily limited to, the attached Exhibits C-D and G. Respondent has disseminated these advertisements and promotional materials directly to consumers and has provided these advertisements and promotional materials to its distributors for dissemination to consumers. These advertisements and promotional materials contain the following statements:

1. "Formulated for a cholesterol conscious America, Cardio Wise offers extra nutritional insurance where additional lipid management is indicated."

Highlight Ingredients: "Niacin"

"This crystalline ingredient has been clinically demonstrated to lower serum cholesterol." (Exhibit D)

2. "Cardio Wise® is one of the miracles in nutrition offered by Body Wise for a cholesterol conscious America. It focuses on the use of Niacin . . . because it expands the blood capillaries . . . [and] has been found effective in . . . lowering the level of cholesterol in the blood." (Exhibit C-3)

3. "FOR OPTIMUM HEALTH . . .

Special emphasis is on nutrients for . . . cholesterol management through use of niacin . . ." (Exhibit H)

4. "In rigorous studies, biologically active chromium has been shown to:

* * *

"Lower both total cholesterol and LDL cholesterol." (Exhibit C-2)

5. "Grapefruit Pectin Cellulose -- Which has been demonstrated clinically to be the preferred form of fiber for cholesterol reduction." (Exhibit C-3)

6. "I reduced my cholesterol over 100 points! I began taking Cardio Wise shortly after major surgery. My cholesterol dropped 113 points in six weeks." (Exhibit D)

PAR. 11. Through the use of the statements contained in the advertisements and promotional materials referred to in paragraph ten, including but not necessarily limited to the advertisements and promotional literature attached as Exhibits C-D and G, respondent has represented, directly or by implication, that:

- (a) Cardio Wise significantly reduces serum cholesterol levels; and
- (b) Scientific studies on the ingredients in Cardio Wise demonstrate that Cardio Wise significantly reduces serum cholesterol levels.

PAR. 12. Through the use of the statements contained in the advertisements and promotional material referred to in paragraph ten, including but not necessarily limited to the advertisements and promotional literature attached as Exhibits C-D and G, respondent has represented, directly or by implication, that at the time respondent made the representations set forth in paragraph eleven, it possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 13. In truth and in fact, at the time respondent made the representations set forth in paragraph eleven, it 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 the statements contained in the advertisements and promotional materials referred to in paragraphs four and ten, including, but not necessarily limited to, the attached Exhibits A-H, respondent has represented, directly or by implication, that testimonials from consumers appearing in advertisements for respondent's weight loss products and for Cardio Wise reflect the typical or ordinary experience of members of the public who have used the products.

PAR. 15. In truth and in fact, the testimonials from consumers appearing in advertisements for respondent's weight loss products and for Cardio Wise do not reflect the typical or ordinary experience of members of the public who have used the products. Therefore, the representation set forth in paragraph fourteen was and is false and misleading.

PAR. 16. Through the use of the statements contained in the advertisements and promotional materials referred to in paragraph four and ten, including, but not necessarily limited to, the attached Exhibits A-H, respondent has represented, directly or by implication, that at the time it made the representation set forth in paragraph fourteen, respondent possessed and relied upon a reasonable basis that substantiated such representation.

PAR. 17. In truth and in fact, at the time it made the representation set forth in paragraph fourteen, respondent did not possess and rely upon a reasonable basis that substantiated such representation. Therefore, respondent's representation as set forth in paragraph sixteen was and is false and misleading.

PAR. 18. The advertisements and promotional materials referred to in paragraph four, including but not necessarily limited to the attached Exhibits A-H, contain endorsements of respondent's products by physicians, other health care professionals, and lay persons who are distributors of Body Wise products and who derive income from the sale of Body Wise products. Respondent has failed to disclose, either in its advertising and promotional materials or otherwise, that the physicians, other health care professionals and lay persons whose endorsements of respondent's products are contained in respondent's advertising and promotional materials are distributors of Body Wise products and may have a financial interest in promoting the sale of Body Wise products. This fact would be material to consumers in their purchase decision regarding respondent's products. The failure to disclose this fact, in light of the representations made, was and is a deceptive practice.

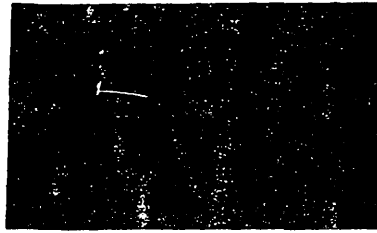
PAR. 19. In the course and conduct of its business, respondent actively recruits physicians and other health-care professionals as Body Wise distributors. Respondent directs such physicians and other health-care professionals to endorse the use of Body Wise products to individual consumers on behalf of other Body Wise distributors. The physicians and other health-care professionals are affiliated with these other Body Wise distributors and derive income from their sale of Body Wise products. Respondent has failed to disclose, in its advertising or promotional materials or otherwise, that the physicians and other health-care professionals who endorse respondent's products to individual consumers, on behalf of other distributors, have a material connection to respondent, in that they are also Body Wise distributors with a direct financial interest in

promoting the other distributors' sale of Body Wise products. This fact would be material to consumers in their purchase and use decisions regarding respondent's products. In light of respondent's practice of directing such physicians and other health-care professionals to endorse respondent's products, the failure to disclose this fact was and is a deceptive act or practice.

PAR. 20. 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, 15 U.S.C. 45(a) and 52.

EXHIBIT A

Spectacular Weight Loss!



Reshape Your Future

YOUR BODY WISE INTERNATIONAL INDEPENDENT CONSULTANT IS:

SP2 © 1993. Future Perfect, The Reshape Formula, Right Choice and Reshape America are trademarks of Body Wise International, Inc. All Rights Reserved. All statements regarding individual health and medical claims are reflections of individual experience and opinion of Body Wise International Independent Consultants and do not constitute claims by Body Wise International, Inc. CODE #244

The Body Wise Weight Management System is Reshaping America!

Diets Don't Work, Body Wise Does

Most Americans are at nutritional risk. Over 34 million people are afflicted with potentially life-threatening obesity. To complicate matters, according to a USDA Food Consumption Survey, not a single person of more than 21,500 surveyed consumed 100 percent of the Recommended Dietary Allowances for 10 key nutrients. This statistic alone establishes the need for responsible nutritional supplementation. Quite simply, our foods no longer support a condition of optimum health.

Part of the Problem is Lack of Knowledge

Despite what we now know about weight loss and weight gain, people still resort to dieting to lose weight. Yet, the evidence is clear: Diets Don't Work! Whether based on drugs, deprivation or denial, they almost always result in an on-again, off-again cycle of weight bounce. Nothing is more frustrating than gaining back more than you lost. Body Wise can help provide a long-term solution.

If Diets Don't Work, Then What Does?

Scientists now emphasize nutritional supplementation and proper exercise as keys to optimum health. Add to this the U.S. Surgeon General's recommendations on how to eat right, which are: reduce consumption of fat, achieve and maintain a desirable body weight; increase consumption of complex carbohydrates and fiber; and reduce intake of sodium and alcohol.

Body Wise Results

The Body Wise Weight Management System has been designed to assist you to lose fat and create lean body mass — all without drugs, deprivation or denial which result in the on-again, off-again cycle of weight bounce so often experienced with conventional weight-loss programs.

"As an Orthopedic Surgeon, Body Wise has my endorsement. In six weeks I lowered my cholesterol 60 points, triglycerides over 100 points and lost 12 pounds!"
Richard Slatney, M.D.
Mansfield, OH

"Over the past sixteen weeks, I have lost 39 pounds, four inches in the waist, lowered my cholesterol 43 points and reduced my body fat by 14 percent. I am very pleased to offer my patients this quality nutrition management program."
R. Stephen Jennings, M.D.
Huntington Beach, CA

"I started taking the Body Wise Products and something beautiful happened to me. I lost 35 pounds and six inches off my waist. I had more energy than I had ever had in my whole lifetime!"
Alice Verfurth
Springfield, MO

"I lost 43 pounds, dropped four dress sizes and reduced my cholesterol 60 points. The increased vitality and energy was noticeable right away, creating a tremendous effect on my productivity and overall sense of well-being."
Jan Anderson
San Diego, CA

"My patients on the program are losing fat and feeling great. I personally lost 17 pounds and five percent body fat!"
Michael F. Draymondo, D.C.
Huntington Beach, CA

"I lost 25 pounds with the Body Wise Weight Management System. The program is easy and it works! I feel fantastic and ten years younger. Good-bye fat!"

Exhibit A

Complaint

120 F.T.C.

EXHIBIT B

Body Wise is Reshaping America™!



"I LOST 58 POUNDS!"

"My waist size went from an extended 40 inches to a comfortable 34. My results are proof of this dynamic health and nutrition program!"

Jeff Gordon
Henderson, NV



LOSE FAT — FOR LIFE!

The Body Wise Weight Management System is designed to assist you in losing fat and creating lean body mass — all without drugs, deprivation or denial. Through the dynamic and powerful Body Wise educational video and nutritional supplements you will experience the techniques of personal empowerment and with the use of the Body Wise nutritional supplements you will restore and maintain your body's vitality. Body Wise is your passport to freedom from fat!

- ◆ Fat Reduction
- ◆ Hunger Control
- ◆ Muscle Definition



The Body Wise Weight Management System

- ◆ **Future Perfect Drink**
- ◆ **Right Choice AM /PM Multi Formula Caplets**
- ◆ **The Reshape Formula**
- ◆ **Weight Management System Video**
- ◆ **Fat Gram Counter**

★ *The Networking Company that's Reshaping America!*

Body Wise
INTERNATIONAL, INC.

Exhibit B

EXHIBIT B-2


Body Wise Benefits Every Body!

Body Wise Scientific Advantages




"The Body Wise Weight Management System and associated exercise video series has helped me lose 100 pounds and keep it off!"
James C. Lindberg, M.D.
 University of Colorado
 First School of Medicine

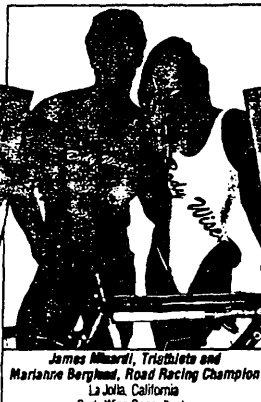
On Their Own Success Documents Facts




"As an Orthopedic Surgeon, the Body Wise Weight Management System has my cholesterol at 67 points, 87 points over 100 points and lost 12 pounds!"
Richard Shultz, M.D.
 Beverly Hills, CA




Bruce Mathison, Omaha, Nebraska
 NFL Quarterback 1983-1988
 Body Wise Consultant




James Mizner, Triathlete and Marianne Berglund, Road Racing Champion
 La Jolla, California
 Body Wise Consultants



Mark Matheson, Kansas City, Missouri
 Mr. Missouri, 1990
 Body Wise Consultant



Lowered Cholesterol!
 "In one month with Body Wise, I lost 25 pounds and dropped 7% body fat. I lowered my cholesterol 50 points. kept my strength and maintained the intensity of my workouts. I'll use Body Wise the rest of my life!"
Craig Chambers
 Co-Director Health & Fitness Club
 Kansas City, Missouri




Fantastic Results!
 "The results are fantastic! In 30 days, I lost 3 1/2 inches from my waist, 4 inches from my hips and my body fat dropped 11%. With all this extra energy, I can't help but share the excitement about Body Wise."
Christine Padgett
 Body Wise Consultant
 San Diego, California



Body Wise Works!
 "In my first 30 days on Body Wise, I lost 15 unwanted pounds of fat. The products are outstanding. I feel the difference every day!"
Gary DeWitt
 Body Wise Consultant
 Fountain Valley, California

To make a *Body Wise* decision for your future, call me:

- ★ Health Enhancement
- ★ Weight Management
- ★ Cholesterol Concern
- ★ Athletic Performance



Body Wise
 INTERNATIONAL, INC.

Exhibit B-2

Carlsbad California 92009

Complaint

120 F.T.C.

EXHIBIT C

Diets don't work...

Body Wise* Does!*SPECTACULAR WEIGHT LOSS****Results That Can Last A Lifetime™**

The *Body Wise* Weight Management System has been designed to assist you to lose fat and create lean body mass – all without drugs, deprivation, or denial which result in the on-again, off-again cycle of weight bounce so often experienced with conventional weight-loss programs.

In 16 weeks I lost 39 pounds, 4 inches in my waist, lowered my cholesterol 42 points, and reduced my body fat 4%. I am now recommending the *Body Wise* program to my patients.
R. Stephen Jennings, M.D.
Huntington Beach, CA

In four months time I lost 43 pounds and reduced my body fat 5%. My wife Marilyn lost 12 pounds of fat, 3 inches in her waist, 2 inches in her thighs, and reduced her body fat 8%.
Marc & Marilyn Wilson
Berkley, IL

I dropped 6 inches from my waist, lost 55½ pounds, lowered my cholesterol 64 points. I feel 20 years younger. It's great to be 70 and feel 50 again!

Paul Williams
Lincoln, NE

I lost 20 pounds on the *Body Wise* Weight Management System. I lost 3½ inches off my waist and lowered my cholesterol 49 points. Now people tell me I look like a different person!

Bernice Bryant
Lincoln, NE

In just three months I lost 58 pounds and lowered my cholesterol 104 points. The inches fell off! It was an easy and amazing life changing process.

Jeff Gordon
Henderson, NV

*Thank You, Body Wise!*Your *Body Wise* Consultant is:

HEALTH SCIENCES, INC.
13301 WATERFORD RUN DRIVE
RIVERVIEW, FLORIDA 33569

Exhibit C

EXHIBIT C-2

The Body Wise™ Products

The Body Wise products form a system for optimal health and fitness that combines advanced nutritional technology with educational understanding and incorporates the latest breakthroughs in research in the fields of nutrition, human physiology and medicine.

Body Wise products focus on sound science and deliver personal results.

Body Wise™ Right Choice® AM/PM Formula

1. *Right Choice®* is the nutritional foundation upon which all Body Wise Nutrition systems are built—it provides the equivalent of daily nutritional insurance.
2. *Right Choice®* AM & PM are team players that help meet the body's very different needs for daytime and nighttime activity. There are certain nutritional factors that tend to empower our systems to give us energy for daytime activity, and other nutrients that tend to replenish our bone matrix and cell structure—which is particularly important for nighttime.
 - A. AM—The AM (morning) multi-formula is for use soon after we first awake. It furnishes the water and fat soluble vitamins with associated cofactors essential for energy empowerment.
 - B. PM—The PM (evening) multi-formula is specially formulated for replenishment of the skeletal matrix and essential cell repair. Sleep is a recreating event. Minerals are vital catalysts during this period. Proper nighttime nutrition, therefore, contributes to a coordination of rest and a feeling of well-being.
3. *Right Choice®* contains two advanced formulas:
 - A. Biopotential Nutrients—This process, unique to Body Wise, encodes the water soluble vitamins with a protein so that our bodies can handle it easier. It makes the vitamins "cell ready" for maximum assimilation (few supplements take advantage of this technology, so much less of the nutritional value is absorbed by the body).
 - B. Krebs Cycle Chelates—This process goes beyond normal methods of chelation to maximize active absorption of minerals at the cellular level.
4. *Right Choice®* contains Krebs Cycle Chromium.

This is one of the spectacular, home-run nutrients in Right Choice. Krebs Cycle Chromium is a patented mineral similar in form to minerals found in mother's milk and exclusive to Body Wise. In rigorous studies, biologically active chromium has been shown to:

 - Increase lean body mass while burning off fat.
 - Lower both total cholesterol and LDL cholesterol.
 - Optimize the entire metabolic system & boost energy.
 - Increase tissue sensitivity to the anabolic hormone insulin.
 - Contribute directly to weight loss.
 - Improve glucose tolerance.
 - Increase glycogen storage.

Body Wise's Krebs Cycle Chromium works to support the proper functioning of insulin—one of the body's primary anabolic hormones. A key role of insulin is to "escort" amino acids out of the blood stream and into cells where they are assembled into enzymes, organ and muscle tissue. Without biologically active chromium, insulin simply doesn't work—and muscles aren't synthesized. With Body Wise's Krebs Cycle Chromium, tests confirm a 34% gain in lean body mass formulation when compared to control group. Additional highlight nutrients include:

 - A. Beta Carotene—A powerful, non-toxic vitamin, which according to government research, is required to prevent cancer in living tissue.
 - B. Esterified Vitamin C—A user-friendly, scientifically buffered Vitamin C which matches the mood of the body in order to prevent acid upset.
 - C. Boron—A unique mineral which research shows aids in calcium retention.

Complaint

120 F.T.C.

EXHIBIT C-3

Page 2

Future Perfect®

Future Perfect® is a delicious carbohydrate meal replacement drink that contains several key nutrient factors to provide sustained energy and help lower body fat and increase lean body mass. Highlight nutrients include:

- A. Inulin — A botanical from the Dahlia root and Jerusalem Artichoke which has been shown to prolong carbohydrate metabolism and thus "stretch the meal."
- B. Cruciferous Vegetables — These nutrients, which are built right into the formula of Future Perfect, were reported in the June 1988 issue of a leading medical journal, the Journal Of Clinical Nutrition, to have a direct relationship between their intake and the potential for reducing cancer risk.
- C. Micro-Encapsulated Fiber — Future Perfect contains four grams of micro-encapsulated soluble fiber, a technical "plus" which assists the body in lowering cholesterol.
- D. Amino Acid Mix — Future Perfect contains a full spectrum of amino acids—including the essential ones—making it a complete meal.
- E. Krebs Cycle Chromium — This ingredient serves the same function as in the Right Choice PM formula, which is to capitalize on study findings that it can increase lean body mass while lowering body fat, total cholesterol and LDL cholesterol.

Cardio Wise®

Cardio Wise® is one of the miracles in nutrition offered by Body Wise for a cholesterol conscious America. It focuses on the use of Niacin, L-Carnitine, Co-Enzyme Q¹⁰, Krebs Cycle Chromium, Silymarin, Grapefruit Pectin and Guar Gum to attack several risk factors associated with premature aging:

- A. Niacin — Functions to produce energy from sugars, fats and protein. It's also said to maintain healthy skin, nerves and digestive systems. More importantly, because it expands the blood capillaries, allowing more throughput and literally not allowing fat to stick to the veins' walls, it has been found effective in improving circulation and lowering the level of cholesterol in the blood.
- B. L-Carnitine — This is a miracle nutrient in its own right, in that it has been demonstrated through research to control weight, prevent heart disease and increase athletic performance.
- C. Krebs Cycle Chromium — The above two nutrients, when used in conjunction with our friend Krebs Cycle Chromium, have a collateral function in cholesterol and fat reduction in the body.
- D. Silymarin — A botanical of European origin (milk thistle), Silymarin is reported to have ten times more anti-oxidant effectiveness than Vitamin E. In addition to being a free radical¹ scavenger, Silymarin creates anti-toxin activity in the liver and causes the body to use oxygen more effectively. In short it prevents premature aging.
- E. Grapefruit Pectin Cellulose — Which has been demonstrated clinically to be the preferred form of fiber for cholesterol reduction. In general, all fiber reduces cholesterol. Grapefruit Pectin Cellulose is among the most effective forms to accomplish this desired effect.
- F. Co-Enzyme B-12 — To build muscle, particularly the heart muscle.

¹Free radicals harm body cells and may even begin the transformation of normal cells into cancer cells. Free radicals are easily generated from food, water and air; tobacco smoke is filled with them. G-Forces: The 34 Global Forces Restructuring Our Future; P-56, Frank Feather; William Morrow & Co.; 1980

Complaint

EXHIBIT D

CARDIO WISE

- Cholesterol Concern
- Fat Reduction
- Heart Health



Formulated for a cholesterol conscious America, Cardio Wise offers extra nutritional insurance where additional lipid management is indicated.

Highlight Ingredients:

Niacin

This crystalline ingredient has been clinically demonstrated to lower serum cholesterol. Ask your physician.

L-Carnitine

L-Carnitine assists in transforming fat into energy.

Silymarin

This anti-aging nutrient also has special properties for detoxification. It's Nature's gift to human life.

WEIGHT MANAGEMENT SYSTEM

Use The Fat,
Increase The Lean!



Each System Contains:

- 1 each of Future Perfect Dutch Chocolate & French Vanilla
- Fight Churne AM & PM Caplets
- The Reshape Formula*
- Product Information Cassette
- Weight Management System Video
- Reshaping America™ Leaflet
- Fat Gram Counter
- Product Sales Brochure

*The Reshape Formula plays a key role in the Weight Management System, as it specifically increases metabolism and assists in fat burning.

DIETS DON'T WORK

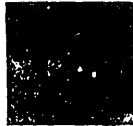
BODY WISE DOES!



"I've lost 39 pounds, 4 inches in the waist, lowered my cholesterol 42 points and reduced my body fat by 14%. This is exciting! Body Wise is a quality nutrition management program."
R. Stephen Jennings, M.D.
Huntington Beach, CA



"The results are fantastic! In 30 days I lost 3 1/2 inches from my waist, 4 inches from my hips and my body fat dropped 11%. With all this extra energy, I can't help share the excitement about Body Wise."
Christine Paddock
San Diego, CA



"I reduced my cholesterol over 100 points! I began taking Cardio Wise shortly after major surgery. My cholesterol dropped 113 points in six weeks. My doctor could not believe it. I feel fantastic!"
Milva Clark
Boy Park, CA



"In one month with Body Wise, I lost 25 pounds and dropped 7% body fat. I lowered my cholesterol 50 points, kept my strength and maintained the intensity of my workouts. I'll use Body Wise the rest of my life."
Crissy Chambers, Co-owner
Health & Fitness Club
Kansas City, MO

Testimonials are personal descriptions of individuals who used Body Wise International, Inc. products. Individual experiences may vary and no intention is made to recommend any product for the treatment, cure or mitigation of disease. If you have a medical condition, we recommend you see a physician.

YOUR BODY WISE CONSULTANT IS:

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RESHAPE YOUR FUTURE

"...your choice of diet can influence your long-term health more than any other action you may take."
U.S. Surgeon General
C. Everett Koop

Body Wise
INTERNATIONAL, INC.

Complaint

120 F.T.C.

EXHIBIT E

**PERFORMANCE NUTRITION
FOR THE 22ND CENTURY**

Body Wise Wins Again!



Bruce Mathison
Former NFL Quarterback

"Thanks to Body Wise, I lowered my body fat, cholesterol and lost inches. My NFL buddies are noticing the difference. I tell them, 'It's Body Wise.'"

Testimonials presented are based on personal experience and the results, if any, will vary from individual to individual.

"I am pleased to offer my patients this quality nutrition management program for treatment of hypertension, hypercholesterolemia, post-partum weight gain, high school sports nutrition and obesity. Patients strive for self-improvement. It is exciting to advise them toward achieving true preventative medicine for a long life with longevity while feeling better than ever with renewed enthusiasm for living."

R. Stephen Jennings, M.D.
Huntington Beach, CA

"As a Family Physician, I have taken on the responsibility for the health of my patients. My patients are doing exceptionally well on this program. My staff and I marvel at their lab results, weight loss and improved overall well-being. Personally, I have lost 15 pounds and lowered my cholesterol 45%. I feel great and must admit the changes in my appearance have been a source of encouragement for my patients."

Robert W. Shreck, M.D.
Las Vegas, NV

"After just six weeks on the Body Wise products, my cholesterol level dropped from 234 to 151, my body fat percentage dropped from 29.6% to 23% and my scale weight went from 212 pounds to 180 pounds. I am now at a cholesterol level of 127 and my body fat is 16%. My energy level has never been as high and I require 1-2 hours less sleep per night and feel great! Body Wise products are tops for one reason: They Work!"

Theodore H. Mortenson, Ph.D.
San Jose, CA

"Many of my patients complain of weight gain during their recovery from injury. I am extremely confident in recommending the Body Wise program for fat loss, cholesterol control, improved athletic function and optimal healing. These products have such serious results that patients continue on the program after their full recovery and return to athletics. The solid science behind the products and the education the system provides makes it a pleasure to share with other health professionals. I suggest that they take a serious look at this program for the future health and well-being of their patients."

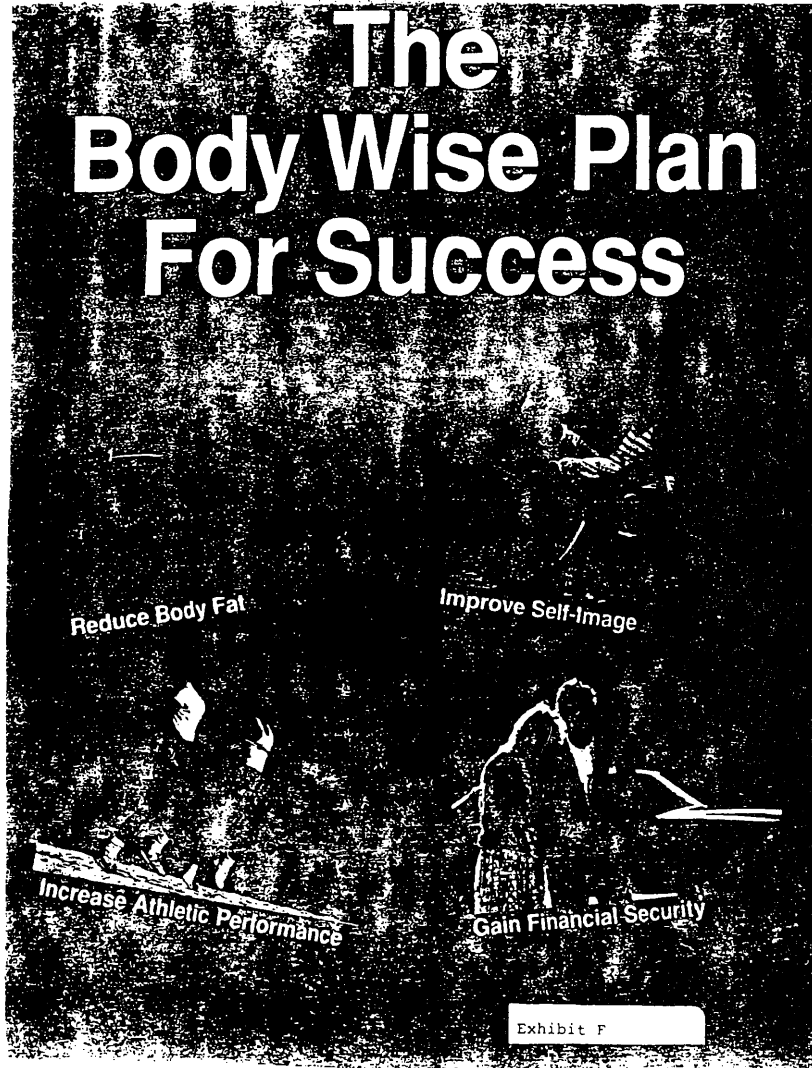
Paul H. Hoesenpiper,
Physical Therapist
Huntington Beach, CA

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Body Wise
INTERNATIONAL, INC.

EXHIBIT F



Complaint

120 F.T.C.

EXHIBIT F-2

SHARE THE DREAM OF SUCCESS

R. Stephen Jennings, M.D.
Huntington Beach, California
I've lost 39 pounds, lowered my cholesterol 42 points and reduced my body fat by 14 percent. I am pleased to offer my patients this quality nutrition management program to achieve true preventive medicine goals.



Dan McCormick
Trabuco Canyon, California
"Body Wise has paid me \$50,000 over the past 90 days. I now have an income potential that I know will create massive financial abundance!"



Susan Louder
Irvine, California
"What an incredible opportunity! Body Wise paid me \$54,000 for one year's part-time effort. This company has started a revolution in preventive health care, and I'm proud and excited to be on its leading edge."



Mary Nealon
Dallas, Texas
"The Body Wise Business Opportunity has proven to be extremely lucrative for me. I've earned over \$26,000 in 90 days! Body Wise has answered my concerns for a healthier life and happier lifestyle."



Brandy Wells
Irvine, California
Former NFL Player
"Body Wise is definitely the Athlete's Choice for better appearance and performance! My energy is up, I've lowered my body fat three percent and dropped 15 lbs three percent and dropped three inches from my waist! After eight months in the business, my checks grew from \$228 to over \$10,000!"



Bruce Mathison
Scottsdale, Arizona
Former NFL Quarterback
As a professional athlete using Body Wise, I experienced better concentration and recovery time, as well as increased energy and entertainment business, but my Body Wise checks continue to grow. I believe I will attain and pass the finances I earned in football!"



Jeff Gordon
Renderson, Nevada
"I lowered my cholesterol level 104 points and lost 58 pounds in scale weight! My waist went from an extended 40 inches to a comfortable 34. I have never felt so strong and vibrant in my life!"



Christine Paddock
San Diego, California
"My body fat dropped 11 percent while my cholesterol level was lowered 26 points! I lost 27 inches from my waist and four inches from my hips! The results are so fantastic, I can't help but share the excitement about Body Wise!"

Success testimonials in Body Wise International's Communications are results of their individual effort and do not reflect performance by Body Wise International, Inc. and its management or staff. Any success one achieves will vary according to one's own effort and one's own business. All statements regarding individual health and financial returns are reflections of individual experiences and opinions of the Body Wise franchisees and consultants and do not constitute the Body Wise International, Inc. If you have a medical condition, it is recommended you seek a health professional. Future Profit, Cash in Your The Body Wise On-G and On-Lines are all trademarks of Body Wise International, Inc. All rights reserved. © 1992 Body Wise International, Inc.

CONTACT YOUR LOCAL CONSULTANT

[Empty box for contact information]

The Networking Company that is Reshaping America!

Body Wise

INDEPENDENT CONSULTANT

Exhibit F-2


EXHIBIT G

Congratulations!!


You have taken the first easy steps for a Healthier Future!




Body Wise
International, Inc.




"I am pleased to offer my patients this quality nutrition management program for treatment of hypertension, hypercholesterolemia, post-partum weight gain, high school sports nutrition and obesity. Patients strive for self-improvement. It's exciting to advise them toward achieving true preventative medicine goals and well-being longevity while feeling better than ever with renewed enthusiasm for living."
R. Stephen Jennings, M.D.
Huntington Beach, CA



"As a Family Physician I have taken on the responsibility for the health of my patients. My patients are doing exceptionally well on this program. My staff and I marvel at their life results. My patients are doing exceptionally well on this program. My staff and I marvel at their life results. Personally, I have lost 15 pounds and lowered my cholesterol 45 points. I feel great and must admit the changes in my appearance have been a source of encouragement for my patients."
Robert W. Shreck, M.D.
Las Vegas, NV



"After just six weeks on the Body Wise products, my cholesterol level dropped from 234 to 151; my body fat percentage dropped from 29.6 percent to 23 percent and my scale weight went from 212 pounds to 180 pounds. I am now at a cholesterol level of 127 and my body fat is 16 percent. My energy level has never been as high and I require one to two hours less sleep per night and feel great! Body Wise products are tops for one reason: They Work!"
Theodore H. Merriam, Ph.D.
San Jose, CA



"Body Wise has changed my whole life! In seven weeks, I lost 27 pounds, 24 inches of body fat and lowered my cholesterol 43 points! My energy level has soared and I feel great!"
Jeff Kitzman
Lompoc, CA

Testimonials presented are based on personal experience and the results, if any, will vary from individual to individual. If you have a medical condition, we recommend you consult with a physician.

Your Body Wise Consultant is:

120 F.T.C.

Complaint

EXHIBIT H



FOR OPTIMUM HEALTH...

The Advanced Nutrition System is designed to provide nutritional compliance through client education and access to Body Wise International chemical solvent-free nutritional supplements. Special emphasis is on nutrients for ATP production and cholesterol management through use of niacin, L-Carnitine, and Krebs Cycle minerals. The daily Future Perfect[®] carbohydrate and protein drink is excellent as a low-fat alternative meal when used with an appropriate total daily caloric uptake and the Right Choice nutritional supplements.

FOR WEIGHT MANAGEMENT...

The Weight Management System is used to support your clinical assessment of client nutrient and caloric needs. Electrolyte uptake (especially potassium) fiber, and lipotropic ingredients are emphasized in formula design. The exclusive Reshape Formula[™] contains ammonia scavengers as well as L-Carnitine and exclusive Krebs Cycle Chromium to optimize beneficial results and establish hunger control. The emphasis on fat reduction rather than weight loss enhances patient compliance.

All statements regarding health testimonials are reflections of individual experiences and opinions of Body Wise International Independent Consultants and do not constitute claims by Body Wise International, Inc. Body Wise International specifically makes no medical claims, or otherwise, for the treatment, prevention, cure, or mitigation of disease. If you are in a medical condition, we recommend you see a health professional.

DIETS DON'T WORK

The Body Wise International Weight Management System & Advanced Nutrition System



Michael F. Nassar, Ph.D.
Body Wise Scientific & Medical Advisory Board

The Body Wise *Advanced Nutrition* and *Weight Management Systems* have been designed to assist your patients to develop and maintain healthy eating habits, lose fat and promote lean body mass -- without drugs, dietary deprivation or denial which results in cyclic weight "bounce" so often experienced with conventional "diet" programs. Your patients will have the opportunity to experience controlled "fat loss" and increased vitality with the use of the Body Wise nutritional supplements. Most importantly, these Body Wise nutrition systems include the most powerful educational video on nutrition ever produced!

For further information about the Body Wise *Advanced Nutrition System*[™] or *Weight Management System*[™] contact:

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NUTRITIONAL TECHNOLOGY

FOR THE 22ND CENTURY

The Professional Choice...



EXHIBIT H

Body Wise[™]
INTERNATIONAL, INC.

Complaint

EXHIBIT H-2

704

...To Better Health For Your Patients

Body Wise nutritional systems are designed to sensibly reduce body fat and excess cholesterol while helping to:

- BUILD LEAN BODY MASS
- ENHANCE ENERGY POTENTIAL
- INCREASE NUTRITIONAL COMPLIANCE
- PROMOTE IMPROVED HEALTH HABITS

Poor dietary habits have been shown to be one of the leading causes of diseases affecting all organ systems including the heart, the peripheral vascular system, stomach and digestive system, kidneys, skin, endocrine and central nervous system.

U.S. government surveys show that very few Americans receive the full RDAs of essential vitamins and minerals in their daily diets.¹

Most Americans eat very little fiber.

Most Americans eat too much fatty food.

Most Americans do not eat enough complex carbohydrates.

Body Wise nutritional systems promote good eating habits, provide excellent nutritional supplementation and help lower cholesterol when used with a balanced low-fat diet.

1. Crocetti, Annemarie P., and Helen A. Guthrie. "Eating behavior and associated nutrient quality of diets." *Nutrition Systems Research Corporation*, New York, New York, 1982.

THE DIET HABIT

THE HEALTH HABIT

- The Diet and Health industries comprise one of the largest segments of our economy today.
- Many physicians have worked diligently with patients to lose weight by counting calories daily, frequently with dismal results.
- Quick weight loss diet programs rarely produce lasting results and can pose a serious health hazard to patients.



Robert W. Shreck, M.D.
Las Vegas, Nevada

"My patients are doing extremely well on the Body Wise program, especially my Type II Diabetics. I personally dropped 15 pounds and 40 points off my total cholesterol."

ROBERT W. SHERCK, M.D.
LAS VEGAS, NEVADA

"I have lost 39 pounds, 4 inches in the waist, lowered my cholesterol 42 points, and reduced my body fat by 4%. This is exciting! Professionally, I am very pleased to offer my patients this quality nutrition management program."

B. STEPHEN JENNINGS, M.D.
HUNTINGTON BEACH, CALIFORNIA

"I strongly endorse the Body Wise International products. I have seen and heard many testimonials from patients who feel new vigor, strength and sense of well-being having shed pound after pound of unnecessary and potentially harmful body fat."

DENNIS B. MANN, D.O.
SEATTLE, WASHINGTON

THE MARKETING PROGRAM

Networking...

The Body Wise International Business Opportunity is based on a method of marketing called Networking or person-to-person marketing. In other words, getting other people involved in the powerful Body Wise nutritional systems. Fellow professionals, associates, friends and even your patients will want to participate in the Body Wise Vision of creating a healthier, more vital America.

Income...

The opportunity for retail sales can assist in building your professional practice. The benefits of this program are enhanced patient compliance and patient referrals.



EXHIBIT H-2

Group Development...

The Body Wise International Consultants that you sponsor become part of your personal organization and you earn monthly rebates and commissions based on their sales efforts and your own.

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 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 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, 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 Body Wise International, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Nevada, with its office, principal place of business and mailing address at 6350 Palomar Oaks Court, Suite A, Carlsbad, 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

DEFINITIONS

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

A. "*Distributor*" means any person, other than direct employees of Body Wise, who has sold nutritional supplements on behalf of Body Wise or who has received any compensation in connection with the sale of nutritional supplements on behalf of Body Wise, whether such person is characterized as a consultant, associate, distributor or otherwise.

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

I.

It is ordered, That Body Wise International, Inc., a corporation, its successors and assigns, and its officers, directors, representatives, agents, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, packaging, labeling, promotion, offering for sale, sale or distribution of nutritional supplements, food or drugs, as "food" and "drug" are defined in Sections 12 and 15 of the Federal Trade Commission Act, 15 U.S.C. 52 and 55, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting or assisting others in misrepresenting, in any manner, directly or by implication, that the nutritional supplement, food or drug:

a. Can cause, aid, facilitate or contribute to achieving or maintaining weight loss without a reduction in total caloric intake or an increase in exercise; or

b. Contains any ingredient that, individually or in connection with other ingredients, can cause, aid, facilitate or contribute to achieving

or maintaining weight loss without a reduction in total caloric intake or an increase in exercise.

II.

It is further ordered, That Body Wise International, Inc., a corporation, its successors and assigns, and its officers, directors, representatives, agents, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, packaging, labeling, promotion, offering for sale, sale or distribution of nutritional supplements, food or drugs, as "food" and "drug" are defined in Sections 12 and 15 of the Federal Trade Commission Act, 15 U.S.C. 52 and 55, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing or assisting others in representing, in any manner, directly or by implication, that the nutritional supplement, food or drug:

- a. Can cause, aid, facilitate or contribute to achieving or maintaining weight loss;
- b. Contains any ingredient that, individually or in connection with other ingredients, can cause, aid, facilitate or contribute to achieving or maintaining weight loss;
- c. Reduces, can reduce or helps reduce serum cholesterol levels;
- d. Contains any ingredient that, individually or in connection with other ingredients, reduces, can reduce or helps reduce serum cholesterol levels; or
- e. Provides, can provide, or helps provide any other health benefit;

unless, at the time of making any such representation, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

III.

It is further ordered, That Body Wise International, Inc., a corporation, its successors and assigns, and its officers, directors, representatives, agents, and employees, directly or through any corporation, subsidiary, division or other device, in connection with

the advertising, packaging, labeling, promotion, offering for sale, sale or distribution of nutritional supplements, food or drugs, as "food" and "drug" are defined in Sections 12 and 15 of the Federal Trade Commission Act, 15 U.S.C. 52 and 55, 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.

IV.

It is further ordered, That Body Wise International, Inc., a corporation, its successors and assigns, and its officers, directors, representatives, agents, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, packaging, labeling, promotion, offering for sale, sale or distribution of nutritional supplements, food or drugs, as "food" and "drug" are defined in Sections 12 and 15 of the Federal Trade Commission Act, 15 U.S.C. 52 and 55, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing or assisting others in representing, in any manner, directly or by implication, that any endorsement (as "endorsement" is defined in 16 CFR 255.0(b)) of such nutritional supplement, food or drug represents the typical or ordinary experience of members of the public who use the nutritional supplement, food or drug, unless such representation is true and, at the time of making such representation, respondent possesses and relies upon competent and reliable scientific evidence that substantiates such representation.

Provided, however, respondent may use such endorsements if the statements or depictions that comprise the endorsements are true and accurate, and if respondent discloses clearly, prominently, and in close proximity to the endorsement:

- a. What the generally expected performance would be in the depicted circumstances; or
- b. The limited applicability of the endorser's experience to what consumers may generally expect to achieve; *i.e.*, that consumers should not expect to experience similar results.

V.

It is further ordered, That Body Wise International, Inc., a corporation, its successors and assigns, and its officers, directors, representatives, agents, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, packaging, labeling, promotion, offering for sale, sale or distribution of nutritional supplements, food or drugs, as "food" and "drug" are defined in Sections 12 and 15 of the Federal Trade Commission Act, 15 U.S.C. 52 and 55, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from failing to disclose, clearly and prominently, a material connection, when one exists, between a person providing an endorsement for any such product, as "endorsement" is defined in 16 CFR 255.0(b), and respondent or any other individual or entity manufacturing, labeling, advertising, promoting, offering for sale, selling, or distributing such product. For purposes of this order, "material connection" shall mean any relationship that might materially affect the weight or credibility of the endorsement and would not reasonably be expected by consumers.

VI.

It is further ordered, That Body Wise International, Inc., a corporation, its successors and assigns, and its officers, directors, representatives, agents, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, packaging, labeling, promotion, offering for sale, sale or distribution of nutritional supplements, food or drugs, as "food" and "drug" are defined in Sections 12 and 15 of the Federal Trade Commission Act, 15 U.S.C. 52 and 55, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from disseminating or assisting others in disseminating any advertisement which contains any reference to physicians or other health care professionals unless respondent discloses clearly and conspicuously that physicians and other health care professionals who endorse Body Wise products may be Body Wise distributors and have a financial interest in promoting the sale of Body Wise products.

VII.

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

VIII.

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.

IX.

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

X.

It is further ordered, That for three (3) years following the 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, copies of:

A. All materials that were relied upon in disseminating such advertisement; 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, including complaints from consumers.

XI.

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

XII.

It is further ordered, respondent shall distribute a copy of this order to each of its current distributors; provided that respondent may satisfy the requirements of this section with respect to current distributors by publishing the full text of this order clearly and prominently in any periodical which is published by respondent and which is distributed to all of its distributors.

XIII.

It is further ordered, That this order will terminate on September 25, 2015, or twenty years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

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

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

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

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

between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

XIV.

It is further ordered, That 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 with this order.

Complaint

120 F.T.C.

IN THE MATTER OF

LOCAL HEALTH SYSTEM, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 7 OF THE CLAYTON ACT*Docket C-3618. Complaint, Oct. 3, 1995--Decision, Oct. 3, 1995*

This consent order, among other things, prohibits the merger of the two largest hospitals in St. Clair County, Michigan, and requires the respondents, for three years, to notify the Commission or obtain Commission approval before acquiring certain hospital assets in the Port Huron area.

Appearances

For the Commission: *Phillip L. Broyles and William Baer.*

For the respondents: *David Ettinger, Honigman, Miller, Schwartz & Cohn, Detroit, MI.*

COMPLAINT

The Federal Trade Commission, having reason to believe that respondent Local Health System, Inc. (hereinafter sometimes referred to as "Local Health"), has entered into an agreement to acquire the assets of Mercy Hospital-Port Huron and Port Huron Hospital; that the proposed acquisition, if consummated, would violate 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, the Commission hereby issues its complaint, pursuant to Section 11 of the Clayton Act, 15 U.S.C. 21, stating its charges as follows:

I. DEFINITION

1. For purposes of this complaint, "*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.

II. THE PARTIES

2. Respondent Local Health is a non-profit corporation organized and existing under the laws of the State of Delaware with its principal place of business at 1001 Kearney Street, Port Huron, Michigan. Local Health was created by St. John Health System and Mercy Health Services for the purpose of acquiring the assets of Port Huron Hospital and Mercy Hospital-Port Huron and operating the acquired entity. Mercy Health and St. John Health jointly exercise ultimate control over the activities of Local Health. St. John Health is responsible for paying the chief executive officer of Local Health.

3. Respondent Mercy Health Services ("Mercy Health") is a non-profit corporation organized and existing under the laws of the State of Michigan with its principal place of business at 34605 Twelve Mile Road, Farmington Hills, Michigan. Mercy Health owns and operates a substantial number of hospitals and other health care providers in Michigan, including Mercy Hospital-Port Huron.

4. Respondent Blue Water Health Services Corp. ("Blue Water Health") is a corporation organized, existing and doing business under and by virtue of the laws of the State of Michigan, with its office and principal place of business located at 1001 Kearney Street, Port Huron, Michigan. Blue Water Health owns and operates Port Huron Hospital.

5. St. John Health System, Inc. ("St. John Health") is a non-profit corporation organized and existing under the laws of the State of Michigan with its principal place of business at 22101 Moross Road, Detroit, Michigan. St. John Health owns and operates a substantial number of hospitals and other health care providers in Michigan, including River District Hospital in St. Clair County.

III. JURISDICTION

6. Local Health, Mercy Health and Blue Water Health are, and at all times relevant herein have been, engaged in or affecting commerce, as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12.

7. Local Health, Mercy Health and Blue Water Health are each persons subject to the jurisdiction of the Federal Trade Commission, pursuant to Section 11 of the Clayton Act, 15 U.S.C. 21.

IV. THE PROPOSED ACQUISITION

8. On or about January 19, 1994, Local Health, Mercy Health and Blue Water Health entered into an agreement pursuant to which Local Health would acquire Mercy Hospital-Port Huron and Port Huron Hospital and affiliate with Mercy Health and St. John Health. The total value of assets and other interests to be acquired by Local Health is in excess of \$110 million.

V. NATURE OF TRADE AND COMMERCE

9. For 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.

10. For purposes of this complaint, the relevant section of the country is Greater Port Huron, Michigan, consisting of the cities of Port Huron, Marysville, Kimball Township, Port Huron Township and Fort Gratiot, Michigan.

VI. MARKET STRUCTURE

11. The relevant market -- *i.e.*, the relevant line of commerce in the relevant section of the country -- is highly concentrated, whether measured by the Herfindahl-Hirschmann Index ("HHI") or by four-firm concentration ratios.

VII. ENTRY CONDITIONS

12. Entry into the relevant market is difficult due to, among other things, certificate-of-need regulation of hospital entry by the State of Michigan and substantial entry lead times.

VIII. COMPETITION

13. Port Huron Hospital and Mercy Hospital-Port Huron are actual and potential competitors in the relevant market.

IX. EFFECTS

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

- (a) By eliminating actual and potential competition between Port Huron Hospital and Mercy Hospital-Port Huron, and others; and
- (b) By significantly increasing the already high levels of concentration.

X. VIOLATIONS CHARGED

15. The acquisition described in paragraph eight, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18.

Commissioner Azcuenaga dissenting.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of the proposed acquisition by respondent Local Health System, Inc. ("Local Health") of certain assets and businesses of respondent Blue Water Health Services Corp. ("Blue Water Health") and respondent Mercy Health Services ("Mercy Health"), and the respondents having been furnished thereafter with a copy of a draft of complaint that the Cleveland Regional Office presented 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, 15 U.S.C. 18; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order; an admission, for the purposes only of that agreement and any proceedings arising out of, or to enforce that agreement and this order, 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 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 Local Health 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 1001 Kearney Street, Port Huron, Michigan.

2. Respondent Mercy Health is a corporation organized, existing and doing business under and by virtue of the laws of the State of Michigan, with its office and principal place of business located at 34605 Twelve Mile Road, Farmington Hills, Michigan.

3. Respondent Blue Water Health is a corporation organized, existing and doing business under and by virtue of the laws of the State of Michigan, with its office and principal place of business located at 1001 Kearney Street, Port Huron, Michigan.

4. 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. "*Local Health*" means Local Health System, Inc., its predecessors, subsidiaries, divisions, and groups and affiliates controlled by Local Health System, Inc.; their directors, officers, employees, agents, and representatives; and their successors and assigns.

B. "*Mercy Health*" means Mercy Health Services, its predecessors, subsidiaries, divisions, and groups and affiliates controlled by Mercy Health Services; their directors, officers, employees, agents, and representatives; and their successors and assigns.

C. "*Blue Water Health*" means Blue Water Health Services Corporation, its predecessors, subsidiaries, divisions, and groups and affiliates controlled by Blue Water Health Services Corporation; their directors, officers, employees, agents, and representatives; and their successors and assigns.

D. "*Respondents*" means Local Health, Mercy Health and Blue Water Health, collectively and individually.

E. The "*Acquisition*" means the proposed acquisition of Port Huron Hospital and Mercy Hospital Port Huron by Local Health pursuant to the Memorandum of Understanding dated January 19, 1994.

F. "*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.

G. 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.

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

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

J. "*Greater Port Huron*" means the area consisting of the cities of Port Huron, Marysville, Kimball Township, Port Huron Township and Fort Gratiot, Michigan.

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

II.

It is further ordered, That, unless they have already done so, respondents shall, no later than seven (7) days after the date this order becomes final: (1) terminate any agreement that provides for or contemplates the Acquisition; (2) return or destroy all documents containing or recording confidential information provided to respondents by any other person in connection with negotiations or agreements relating to the Acquisition; and (3) recover from any other person or have such other person destroy all documents containing or recording confidential information provided by respondents to such other person in connection with negotiations or agreements relating to the Acquisition.

III.

It is further ordered, That, for a period of three (3) 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 majority or other controlling stock, share capital, equity or other interest in any other respondent that operates any acute care hospital facility in Greater Port Huron;

B. Acquire a majority of the assets of any acute care hospital facility operated by any other respondent in Greater Port Huron;

C. Enter into any agreement or other arrangement to obtain direct or indirect ownership, management or control of any acute care hospital facility operated by any other respondent in Greater Port Huron, including but not limited to, a lease of or management contract for any such acute care hospital facility, or an agreement to replace an acute care hospital facility operated by another person with an acute care hospital facility to be operated by any respondent;

D. Acquire or otherwise obtain the right to designate, directly or indirectly, a majority of the directors or trustees of any acute care hospital facility operated by any other respondent in Greater Port Huron; or

E. Permit any acute care hospital it operates in Greater Port Huron to be acquired (by stock acquisition, asset acquisition, lease, management contract, establishment of a replacement facility, right

to designate directors or trustees or otherwise) by any other respondent that operates, or will operate immediately following such acquisition, any other acute care hospital in Greater Port Huron.

IV.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, no respondent shall, 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 person who operates any acute care hospital facility in Greater Port Huron;

B. Acquire any assets of any acute care hospital facility in Greater Port Huron;

C. Enter into any agreement or other arrangement to obtain direct or indirect ownership, management or control of any acute care hospital facility or any part thereof in Greater Port Huron, including but not limited to, a lease of or management contract for any such acute care hospital facility, or an agreement to replace an acute care hospital facility operated by another person with an acute care hospital facility to be operated by any respondent;

D. Acquire or otherwise obtain the right to designate, directly or indirectly, directors or trustees of any acute care hospital facility in Greater Port Huron; or

E. Permit any acute care hospital it operates in Greater Port Huron to be acquired (in whole or in part, by stock acquisition, asset acquisition, lease, management contract, establishment of a replacement facility, right to designate directors or trustees, or otherwise) by any person who operates, or will operate immediately following such acquisition, any other acute care hospital in Greater Port Huron.

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"), 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 respondents and not of any other party to the transaction. Respondents shall provide the Notification to the Commission at least thirty days prior to acquiring any such interest (hereinafter referred to as the "first waiting period"). 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 substantially complying with such request for 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.

Provided, however, that prior notification shall not be required by this paragraph IV of this order for:

1. The establishment by a respondent of a new acute care hospital facility that is a replacement for that respondent's existing acute care hospital facility;
2. The establishment by a respondent of a new acute care hospital that is not a replacement for any other acute care hospital facility in Greater Port Huron;
3. Any transaction otherwise subject to this paragraph IV of this order if the fair market value of (or, in the case of a purchase acquisition, the consideration paid for) the acute care hospital facility or part thereof to be acquired does not exceed one million dollars (\$1,000,000);
4. Any transaction otherwise subject to this paragraph IV of this order if the acquisition is pursuant to a joint venture which is to engage in no activities other than the provision of the following services: laundry; data processing; joint ownership and management of inventory; materials management; billing and collection; dietary; industrial engineering; maintenance; printing; security; records management; laboratory testing; support services for charitable foundations; or personnel education, testing or training; or
5. 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 granted pursuant to paragraph III of this order.

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 Greater Port Huron to be acquired (in whole or in part, by stock acquisition, asset acquisition, lease, management contract, establishment of a replacement facility, right to designate directors or trustees or otherwise) by any other person 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:

A. Within sixty (60) days of the date this order becomes final, each 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 II of this order; and

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, each 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 paragraphs III, IV and V of this order.

VII.

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

VIII.

It is further ordered, That, for the purpose of determining or securing compliance with this order, upon reasonable notice to respondents, respondents shall permit, for a period of ten (10) years from the date this order becomes final, any duly authorized representative of the Commission:

A. Reasonable 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 days' notice to respondents and without restraint or interference from them, to interview officers, directors, or employees of respondents, who may have counsel present.

Commissioner Azcuenaga dissenting.

DISSENTING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

Not having found reason to believe that the proposed merger of Port Huron Hospital and Mercy Hospital would be unlawful, I do not support the complaint and consent order.

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-3619. Complaint, Oct. 3, 1995--Decision, Oct. 3, 1995

This consent order, among other things, permits Columbia/HCA and Healthtrust, Inc. to merge, provided that Columbia/HCA divests seven hospitals within twelve months (nine months for the divestiture of three hospitals in the Salt Lake City area), and requires the respondent to terminate its participation in a joint venture with the Orlando Regional Health System. In a modification of the consent agreement, this consent order replaces a prior-approval requirement with a prior-notice provision that requires the respondent, for ten years, to notify the Commission before acquiring another acute care hospital in any of the six market areas at issue, and before transferring an acute care hospital in any of the areas to another entity that already operates one in that area.

Appearances

For the Commission: *Oscar M. Voss.*

For the respondent: *Ky Ewing, 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 Healthtrust, Inc. - The Hospital Company ("Healthtrust"); 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 care facility, licensed as a hospital, 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, that may also provide 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 at an acute care hospital, 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

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 One Park Plaza, Nashville, Tennessee. Columbia/HCA, and/or its subsidiaries or affiliates, owns and/or operates the following acute care hospitals in the relevant sections of the country described in paragraph seven below:

- (a) Central Florida Regional Hospital, Sanford, Florida;
- (b) Columbia Park Medical Center, Orlando, Florida;
- (c) Osecola Regional Hospital, Kissimmee, Florida;
- (d) Winter Park Memorial Hospital, Winter Park, Florida;
- (e) West Florida Regional Medical Center, Pensacola, Florida;
- (f) Twin Cities Hospital, Niceville, Florida;

- (g) Fort Walton Beach Medical Center, Ft. Walton Beach, Florida;
- (h) Destin Community Hospital, Destin, Florida;
- (i) Denton Community Hospital, Denton, Texas;
- (k) Ville Platte Medical Center, Ville Platte, Louisiana;
- (j) Davis Hospital and Medical Center, Layton, Utah; and
- (l) St. Mark's Hospital, Salt Lake City, Utah.

PAR. 3. 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 or affiliates, owns and/or operates the following acute care hospitals in the relevant sections of the country described in paragraph seven below:

(a) South Seminole Hospital, Longwood, Florida (South Seminole is owned and operated by a partnership of Healthtrust and Orlando Regional Healthcare System, Inc. ("ORHS"). ORHS operates four hospitals in the Orlando area in addition to its partnership interest in South Seminole Hospital);

- (b) Santa Rosa Medical Center, Milton, Florida;
- (c) North Okaloosa Medical Center, Crestview, Florida;
- (d) Savoy Medical Center, Savoy, Louisiana;
- (e) Doctors Hospital of Opelousas, Opelousas, Louisiana;
- (f) Denton Regional Medical Center, Denton, Texas;
- (g) Pioneer Valley Hospital, West Valley City, Utah;
- (h) Jordan Valley Hospital, West Jordan, Utah;
- (i) Lakeview Hospital, Bountiful, Utah; and
- (j) Odgen Regional Medical Center, Odgen, Utah.

JURISDICTION

PAR. 4. Columbia/HCA and Healthtrust 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 Healthtrust 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 October 4, 1994, Columbia/HCA and Healthtrust entered into an agreement whereby Columbia/HCA will acquire all the stock of Healthtrust, a wholly-owned subsidiary of Columbia/HCA will be merged with and into Healthtrust, and Healthtrust will operate as a wholly-owned subsidiary of Columbia/HCA. The total value of the Healthtrust stock to be acquired by Columbia/HCA is approximately \$3 billion.

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 following areas, and any narrower areas contained therein:

(a) The Salt Lake City - Ogden Metropolitan Statistical Area, encompassing three contiguous counties in northern Utah: Weber County, Davis County, and Salt Lake County; and the following areas contained therein:

(i) The Salt Lake City area, encompassing Salt Lake County and southern Davis County in Utah;

(ii) The Ogden area, encompassing Weber County and northern Davis County in Utah;

(b) The Pensacola area, encompassing the Florida counties of Escambia and Santa Rosa;

(c) The Okaloosa area, encompassing the Florida county of Okaloosa;

(d) The Denton area, encompassing the Texas counties of Cooke and Denton (excluding the incorporated city of Lewisville and that portion of Denton County south of Texas highway number 121);

(e) The Ville Platte-Mamou-Opelousas area, encompassing the Louisiana parishes of Evangeline and St. Landry; and

(f) The Orlando area, encompassing the Florida counties of Seminole, Orange, and Osceola.

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-Hirschman Indices ("HHI") or by four-firm concentration ratios.

ENTRY CONDITIONS

PAR. 9. Entry into the relevant markets is difficult, due to state certificate of need regulation of entry into the Florida markets, substantial lead times required to establish a new acute care hospital in all of the relevant markets, and other factors.

COMPETITION

PAR. 10. In the relevant markets, Columbia/HCA and Healthtrust are actual and potential competitors.

EFFECTS

PAR. 11. The effects of the aforesaid acquisition may be substantially to lessen competition in each of the relevant markets (except the Orlando area) in the following ways, among others:

- (a) It would eliminate actual and potential competition between Columbia/HCA's and Healthtrust's acute care hospitals;
- (b) It would significantly increase the already high level of concentration;
- (c) It would eliminate Healthtrust's acute care hospitals as substantial, independent competitive forces;
- (d) It may increase the likelihood of collusion or interdependent coordination by the remaining firms; and
- (e) It may deny patients, physicians, third-party payers, and other consumers of acute care inpatient hospital services the benefits of free and open competition based on price, quality, and service.

PAR. 12. The effects of the aforesaid acquisition may be substantially to lessen competition in the Orlando area in the following ways, among others:

- (a) It may increase the likelihood of collusion or interdependent coordination by the remaining firms, because the South Seminole Hospital would be jointly owned by Columbia/HCA and ORHS; and
- (b) It may deny patients, physicians, third-party payers, and other consumers of acute care inpatient hospital services the benefits of free and open competition based on price, quality, and service.

VIOLETIONS CHARGED

PAR. 13. 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. 14. 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 Columbia/HCA Healthcare Corporation of Healthtrust, Inc. - The Hospital Company, 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, 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/HCA Healthcare Corporation 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 One Park Plaza, Nashville, 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.

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

A. "*Columbia/HCA*" or "*respondent*" means Columbia/HCA Healthcare Corporation, its partnerships, joint ventures, companies, subsidiaries, divisions, and groups and affiliates controlled by Columbia/HCA; their directors, officers, employees, agents, and representatives; and their successors and assigns.

B. "*Healthtrust*" means Healthtrust, Inc. - The Hospital Company, its partnerships, joint ventures, companies, subsidiaries, divisions, and groups and affiliates controlled by Healthtrust; their directors, officers, employees, agents, and representatives; and their successors and assigns.

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

D. The "*Acquisition*" means the transaction contemplated by the October 4, 1994, agreement between Columbia/HCA and Healthtrust,

whereby Columbia/HCA will acquire all the stock of Healthtrust, a wholly-owned subsidiary of Columbia/HCA will be merged with and into Healthtrust, and Healthtrust will operate as a wholly-owned subsidiary of Columbia/HCA.

E. "*Acute care hospital*" means a health care facility, licensed as a hospital, 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, that may also provide 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.

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. To "*acquire*" an acute care hospital means, directly or indirectly, through subsidiaries, partnerships, or otherwise:

1. To acquire the whole or any part of the assets used or previously used within the last two years (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;

2. To acquire the whole or any part of the stock, share capital, equity, or other interest in any person engaged in, or within the two years preceding such acquisition engaged in, operating an acute care hospital;

3. To acquire or otherwise obtain the right to designate, directly or indirectly, directors or trustees of an acute care hospital; or

4. 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.

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

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

J. "*Relevant area(s)*" means:

1. The Salt Lake City - Ogden Metropolitan Statistical Area, encompassing three contiguous counties in northern Utah: Weber County, Davis County, and Salt Lake County;

2. The Pensacola area, encompassing the Florida counties of Escambia and Santa Rosa;

3. The Okaloosa area, encompassing the Florida county of Okaloosa;

4. The Denton area, encompassing the Texas counties of Cooke and Denton (excluding the incorporated city of Lewisville and that portion of Denton County south of Texas highway number 121);

5. The Ville Platte-Mamou-Opelousas area, encompassing the Louisiana parishes of Evangeline and St. Landry; and

6. The Orlando area, encompassing the Florida counties of Seminole, Orange, and Osceola.

K. "*CLHS*" means Central Louisiana Healthcare System Limited Partnership, a Louisiana partnership *in commendam* in which Columbia/HCA currently holds a partnership interest, its partnerships, joint ventures, companies including the Ville Platte Medical Center, subsidiaries, divisions, and groups and affiliates controlled by CLHS; their directors, officers, employees, agents, and representatives; and their successors and assigns.

L. "*ORHS*" means Orlando Regional Healthcare System, Inc., a Florida corporation, its partnerships, joint ventures, companies, subsidiaries, divisions, and groups and affiliates controlled by ORHS; their directors, officers, employees, agents, and representatives; and their successors and assigns.

M. The "*SSH Joint Venture*" means the Florida partnership, in which Healthtrust (through a wholly-owned subsidiary) and ORHS (through a wholly-owned subsidiary) hold partnership interests, which owns and operates the South Seminole Hospital in Longwood, Florida.

N. The "*SSH Joint Venture Interest*" means Healthtrust's interest in the SSH Joint Venture.

O. The "*Schedule A Assets*" means the assets listed on the attached Schedule A.

P. The "*Schedule B Assets*" means the assets listed on the attached Schedule B.

Q. The "*Utah Healthtrust Assets*" means the assets listed on the attached Schedule C.

R. "*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, consigners, 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 (or in the case of the Ville Platte Medical Center shall cause CLHS to divest), absolutely and in good faith, within twelve (12) months of the date this order becomes final, the Schedule A Assets.

B. Respondent shall also divest absolutely and in good faith, within twelve (12) months of the date this order becomes final, the Assets and Business of, including all improvements, additions, and enhancements made to such facilities prior to divestiture, either of the following:

1. Denton Regional Medical Center, 4405 North Interstate 35, Denton, Texas, including the following (collectively "DRMC"):

- a. DRMC Office Building, 4401 North I-35, Denton, Texas;
- b. The medical office building and vacant land at 3353 I-35E South, Denton, Texas;
- c. The satellite offices operated at Denton Regional Medical Center, 1207A North Grand Avenue, Gainesville, Texas;
- d. Flow Rehabilitation Hospital, 1310 Scripture, Denton, Texas;
- e. Denton Regional Medical Center - Little Elm, 420 FM720 West, Suite 9, Little Elm, Texas;
- f. Professional Health Care Services, 621 Londonderry Lane, Denton, Texas; or

2. Denton Community Hospital, 107 N. Bonnie Brae, Denton, Texas, and the Medical Office Building at Scripture/Bonnie Brae (collectively "Denton Community Hospital").

C. Respondent shall also divest such additional Assets and Businesses ancillary to the Schedule A Assets and to either DRMC or Denton Community Hospital, and effect such arrangements as are necessary to assure the marketability, viability, and competitiveness of the Schedule A Assets, DRMC and Denton Community Hospital.

D. Respondent shall divest the Schedule A Assets, and either DRMC or Denton Community Hospital, 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. If respondent proposes to divest Denton Community Hospital, it must provide the Commission with the written consent of the landlord of such facilities to the proposed assignment and divestiture at the time that Commission approval of the divestiture is sought. The purpose of the divestitures of the Schedule A Assets and of either DRMC or Denton Community Hospital, is to ensure the continuation of the Schedule A Assets and of either DRMC or Denton Community Hospital, as ongoing, viable acute care hospitals and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's complaint.

E. With respect to the Schedule A Assets and DRMC, respondent shall comply with all terms of the Agreement to Hold Separate Regarding the Florida, Texas, and Louisiana Assets, attached hereto and made a part hereof as Appendix I. Said Hold Separate shall continue in effect until such time as respondent has fulfilled the divestiture requirements of this order or until such other time as said Hold Separate provides.

F. Pending divestiture of the Schedule A Assets and DRMC or Denton Community Hospital, respondent shall take such actions as are necessary to maintain the present marketability, viability, and competitiveness of the Schedule A Assets, DRMC, and Denton Community Hospital, and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the Schedule A Assets, DRMC, and Denton Community Hospital, except for ordinary wear and tear.

G. A condition of approval by the Commission of each divestiture shall be a written agreement by the acquirer(s) of the Schedule A Assets and of either DRMC or Denton Community Hospital, 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 prior notification to the Commission in the manner prescribed by paragraph VI of this order, any Schedule A Asset, DRMC, or Denton Community Hospital to any person who operates, or will operate immediately following the sale, any other acute care hospital in the same relevant area where the divested acute care hospital is located. Provided, however, that the acquirer is not required to provide prior notification to the Commission for the sale of any of the assets identified in any Part II of Schedule A.

III.

It is further ordered, That:

A. Within six (6) months of the date this order becomes final, respondent shall terminate, absolutely and in good faith, the SSH Joint Venture, by either acquiring ORHS's interest in the SSH Joint Venture or by divesting the SSH Joint Venture Interest. The purpose of the termination of the SSH Joint Venture is to ensure the continuation of the South Seminole Hospital 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.

B. If respondent terminates the SSH Joint Venture by acquiring ORHS's interest in the SSH Joint Venture, such acquisition shall occur only in such a manner that receives the prior approval of the Commission. If respondent terminates the Joint Venture by divesting the SSH Joint Venture Interest, such divestiture shall be made 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.

C. With respect to the SSH Joint Venture Interest, respondent shall comply with all terms of the Agreement to Hold Separate Regarding the Florida, Texas, and Louisiana Assets, attached hereto and made a part hereof as Appendix I. Said Hold Separate shall continue in effect until such time as respondent has fulfilled the divestiture requirements of this order or until such other time as said Hold Separate provides.

D. Pending the divestiture of the SSH Joint Venture Interest, respondent shall take such actions as are necessary to maintain the present marketability, viability, and competitiveness of the South Seminole Hospital, and to prevent the destruction, removal, wasting, deterioration, or impairment of the South Seminole Hospital, except for ordinary wear and tear.

E. A condition of approval by the Commission of the divestiture of the SSH Joint Venture Interest, to any acquirer except ORHS, shall be a written agreement by the acquirer of the SSH Joint Venture Interest 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 prior notification to the

Commission in the manner prescribed by paragraph VI of this order, any interest in South Seminole Hospital to any person who operates, or will operate immediately following the sale, any other acute care hospital in the Orlando area.

IV.

It is further ordered, That:

A. Respondent shall divest, absolutely and in good faith, within nine (9) months of the date the Commission approves the Acquisition pursuant to paragraph IV.E. of the order in Docket No. C-3538, the Schedule B Assets.

B. Respondent shall also divest such additional Assets and Businesses ancillary to the Schedule B Assets and effect such arrangements as are necessary to assure the marketability, viability, and competitiveness of the Schedule B Assets.

C. Respondent shall divest the Schedule B Assets 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 divestitures of the Schedule B Assets is to ensure the continuation of the Schedule B Assets as ongoing, viable acute care hospitals and to remedy the lessening of competition resulting from the acquisition as alleged in the Commission's complaint and as described in the Commission's letter approving the Acquisition.

D. Respondent shall comply with all terms of the Agreement to Hold Separate regarding the Utah Healthtrust Assets listed on Schedule C, and as described in Appendix II which is attached hereto and made a part hereof ("Utah Hold Separate"). Said Utah Hold Separate shall continue in effect until such time as respondent has fulfilled the divestiture requirements of paragraph IV of this order, or until such other time as the Utah Hold Separate provides.

E. Pending divestiture of the Schedule B Assets, respondent shall take such actions as are necessary to maintain the present marketability, viability, and competitiveness of the Schedule B Assets and of the Utah Healthtrust Assets, and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the Schedule B Assets and any of the Utah Healthtrust Assets, except for ordinary wear and tear.

F. A condition of approval by the Commission of each divestiture shall be a written agreement by the acquirer(s) of each Schedule B Asset 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 prior notification to the Commission in the manner prescribed by paragraph VI of this order, any Schedule B Asset to any person who operates, or will operate immediately following the sale, any other acute care hospital in the same relevant area where the divested acute care hospital is located. Provided, however, that the acquirer is not required to provide prior notification to the Commission for the sale of any of the assets identified in any Part II of Schedule B.

V.

It is further ordered, That:

A. If the respondent has not divested (or in the case of the Ville Platte Medical Center has not caused CLHS to divest), absolutely and in good faith and with the Commission's prior approval, each Schedule A Asset and either DRMC or Denton Community Hospital, 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 undivested Schedule A Assets and either DRMC or Denton Community Hospital.

B. If the respondent has not terminated absolutely and in good faith and with the Commission's prior approval, the SSH Joint Venture, 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 SSH Joint Venture Interest.

C. If the respondent has not divested, absolutely and in good faith and with the Commission's prior approval, each Schedule B Asset, in accordance with this order, within nine (9) months of the date the Commission approves the Acquisition pursuant to the order in Docket No. C-3538, the Commission may appoint a trustee to divest the Utah Healthtrust Assets.

D. 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(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 paragraph V.A, V.B, or V.C 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, or the order in Docket No. C-3538.

E. If a trustee is appointed by the Commission or a court pursuant to paragraph V.A, V.B, or V.C 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 any undivested Schedule A Asset, DRMC or Denton Community Hospital, the SSH Joint Venture Interest, or Utah Healthtrust Asset.

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(s) required by this order.

4. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in paragraph V.E.3 to accomplish the divestiture(s), 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, DRMC, Denton Community Hospital, the SSH Joint Venture Interest, the Schedule B Assets, the Utah Healthtrust 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(s). 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(s) shall be made in the manner and to an acquirer(s) as set forth in paragraph II for the Schedule A Assets and DRMC or Denton Community Hospital; paragraph III for the SSH Joint Venture Interest; and paragraph IV and paragraph V.C for the Utah Healthtrust Assets; provided, however, if the trustee receives *bona fide* offers from more than one acquiring entity for any one facility or asset, 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 undivested Schedule A Assets, either DRMC or Denton Community Hospital, the SSH Joint Venture Interest, or the Utah Healthtrust 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 V.A, V.B, or V.C 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(s) required by this order.

11. The trustee shall have no obligation or authority to operate or maintain the Schedule A Assets, DRMC, Denton Community Hospital, the SSH Joint Venture Interest, or the Utah Healthtrust 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.

VI.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, respondent 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 person presently engaged in, or within the two years preceding

such acquisition engaged in, operating an acute care hospital in any relevant area;

B. Acquire any assets used, or previously used, in any relevant 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 any relevant 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 any relevant 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 any relevant area;

E. Permit any acute care hospital it operates in any relevant area to be acquired by any person that operates, or will operate immediately following such acquisition, any other acute care hospital in the same relevant area.

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"), 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 shall provide the Notification to the Commission at least thirty days prior to consummating the transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 CFR 803.20), respondent shall not consummate the transaction until twenty days after submitting such additional information and documentary material. 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.

Provided, however, that such prior notification pursuant to this paragraph VI, or pursuant to paragraphs II.G, III.E, or IV.F of this order, shall not be required for:

1. The establishment by respondent of a new acute care hospital facility in a relevant area: (a) that is a replacement for an existing acute care hospital facility operated by respondent, and not required to be divested by respondent pursuant to this order, in the same relevant area; or (b) that is not a replacement for any acute care hospital facility in any relevant area;

2. Any transaction otherwise subject to this paragraph VI 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);

3. The acquisition of products or services in the ordinary course of business; or

4. Any transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. 18a.

VII.

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 any relevant area to be acquired by any other person (except pursuant to the divestitures required by paragraphs II, III, and IV 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.

VIII.

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 paragraphs II, III, and IV 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 paragraphs II, III, and IV 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 paragraphs II, III, and IV of the order, including a description of all substantive contacts or negotiations for the divestitures or the termination of the SSH joint venture, 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 the divestitures.

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 this order.

IX.

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.

X.

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, who may have counsel present regarding such matters.

SCHEDULE A

The assets to be divested pursuant to paragraph II ("Schedule A Assets") shall consist of, without limitation, all Assets and Businesses (including all improvements, additions and enhancements made to such assets prior to divestiture), of the following:

A. The Pensacola area Schedule A Assets are:

PART I

1. Medical Center of Santa Rosa, Inc.
d.b.a. Santa Rosa Medical Center
1450 Berryhill Road
Milton, Florida

PART II

2. MRI (Magnetic Resonance Imaging) - free-standing modular building attached to hospital by walkway, leased 60 months - originated in 1993.
3. EMS (Emergency Medical Services)
4930 Glover Lane
Milton, Florida
4. Berryhill Medical Park - including undeveloped land Milton, Florida
Master Leased 10 years:
Building 1 - 1540 Berryhill Medical Park
(7,612 sq. ft.)
Building 2 - 1550 Berryhill Medical Park
(5,943 sq. ft.)
Building 3 - 1560 Berryhill Medical Park
(4,427 sq. ft.)

5. Santa Rosa Primary Care Center
Leased Building at 4928 Highway 90
Pace, Florida
6. Office Space Leases (as Tenant):
3,250 sq. ft. from Pace Medical Center Partnership
2874 Highway 90, Building A
Pace, Florida

1,360 sq. ft. from Pace Medical Center Partnership
2874 Highway 90, Building B
Pace, Florida
25,200 sq. ft. from Dave Gilbert
5950 Berryhill Road, Building 1.3
Santa Rosa, Florida

B. The Okaloosa area Schedule A Assets are:

PART I

1. North Okaloosa Medical Center - Hospital
151 Redstone Avenue
Crestview, Florida
(with approximately 34 acres of land)

PART II

2. Crestview Professional Condominium Association
Professional Office Buildings
131 Redstone Avenue
Crestview, Florida
(Suites 101, 103, 104, 105, 107, 108, 109)
3. Lease of North Okaloosa Medical Office Building
131 Redstone Avenue
Crestview, Florida
(Suites 125, 127 and 129)
4. Lease of Medical Office Building
127 Redstone Avenue
Crestview, Florida

5. Rural Health Clinic
LaGrange Medical Clinic Building
Rt. 3, Box 16
Highway 331 North
Freeport, Florida
6. Bluewater Bay Clinic
Market Place Professional Center
1507 Merchants Way
Niceville, Florida
7. Rural Health Clinic
Lease of Access Medical Clinic Building
130 Redstone Avenue
Crestview, Florida

C. The Ville Platte-Mamou-Opelousas area Schedule A Assets are:

PART I

1. Ville Platte Medical Center
800 East Main Street
Ville Platte, Louisiana

PART II

2. Lease (expires October 1995) of the Ardwin Physicians Office Building, Ville Platte, Louisiana

SCHEDULE B

The assets to be divested pursuant to paragraph IV ("Schedule B Assets") shall consist of, without limitation, all Assets and Businesses (including all improvements, additions and enhancements made to such assets prior to divestiture), of the following:

A. The Pioneer Valley Assets are:

PART I

1. Pioneer Valley Hospital
3460 South Pioneer Park
West Valley City, Utah

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Decision and Order

PART II

2. Three (3) Medical Office Buildings (on hospital campus)
3. Lease of 69,382 sq. ft. (on hospital campus)
4. Land (empty lot)
40th West Street
West Jordan, Utah
5. Lease of 11,750 sq. ft.
(corner of 90th South Street and 27th West Street)
West Jordan, Utah
6. Lease of 7,134 sq. ft.
150 Wright Bros. Drive
Suite 540
Salt Lake City, Utah
7. Salt Lake Industrial Clinic
441 S. Redwood Road
Salt Lake City, Utah

B. The Jordan Valley Assets are:

PART I

1. Jordan Valley Hospital
3580 West 9000 South
West Jordan, Utah

PART II

2. Three (3) leases of office space
(on hospital campus)
(12,000 sq. ft.; 3,374 sq. ft; and 4,620 sq. ft)
3. 12% limited liability partnership in South Ridge
Professional Plaza (on campus)
4. Lease of Medical Office Building (Perry Realty)
South Valley Medical Plaza
3590 West 9000 South
West Jordan, Utah

C. The Davis Hospital Assets are:

PART I

1. Davis Hospital and Medical Center
1600 West Antelope Drive
Layton, Utah

PART II

2. Medical Office Building
1660 West Antelope Drive
Layton, Utah
3. Medical Office Building
2132 North 1700 West
Layton, Utah

SCHEDULE C

UTAH HEALTHTRUST ASSETS

The Utah Healthtrust Assets shall consist of, without limitation, all Assets and Businesses (including all improvements, additions and enhancements made to such assets prior to divestiture), of Healthtrust in the State of Utah at the time of the Acquisition, including, without limitation, the following:

1. The following facilities:

- a. Pioneer Valley Hospital, 3460 South Pioneer Park, West Valley City, Utah; three (3) medical office buildings on the campus of the hospital; the lease of 69,382 sq. feet on the hospital campus; land (empty lot) at 40th West Street, West Jordan, Utah; lease of 11,750 sq. ft. (corner of 90th South Street and 27th West Street), West Jordan, Utah 84088; and lease of 7,134 sq. ft., 150 Wright Bros. Drive, Suite 540, Salt Lake City, Utah;

- b. Jordan Valley Hospital, 3580 West 9000 South, West Jordan, Utah; three (3) leases of office space on the campus of the hospital (12,000 sq. ft., 3,374 sq. ft., and 4,620 sq. ft.); a 12 percent limited liability partnership in South Ridge Professional Plaza, and the lease of Medical Office Building (Perry Realty), South Valley Medical Plaza; 3590 West 9000 South, West Jordan, Utah;

- c. Lakeview Hospital, 630 East Medical Drive, Bountiful, Utah;

- d. Brigham City Community Hospital, 950 South 500 West, Brigham City, Utah;
- e. Ogden Regional Medical Center, 5475 South 500 East, Ogden, Utah;
- f. Castleview Hospital, 300 North Hospital Drive, Price, Utah;
- g. Springville Medical Center, 730 East 300 South, Springville, Utah; and
- h. Ashley Valley Medical Center, 151 West 200 North, Vernal, Utah; and

2. HTI of Utah, Inc., its partnerships, joint ventures, companies, subsidiaries, divisions, and groups and affiliates controlled by HTI of Utah or Healthtrust in Utah; their directors, officers, employees, agents, and representatives; and their successors and assigns; and the following corporations and their successors and assigns:

- a. Brigham City Community Hospital, Inc.;
- b. Castleview Hospital, Inc.;
- c. HTI HomeMed of Utah, Inc.;
- d. HTI-Managed Care of Utah, Inc.;
- e. HTI Physician Services of Utah, Inc.;
- f. HTI Utah Data Corporation;
- g. Hospital Corporation of Utah;
- h. Intergroup Healthcare Corporation of Utah;
- i. Medical Services of Salt Lake City, Inc.;
- j. MHHE Corporation;
- k. Mountain View Hospital, Inc.;
- l. Ogden Medical Center, Inc.;
- m. Pioneer Valley Hospital, Inc.; and
- n. West Jordan Hospital Corporation.

APPENDIX I

AGREEMENT TO HOLD SEPARATE REGARDING THE
FLORIDA, TEXAS, AND LOUISIANA ASSETS

This Agreement to Hold Separate Regarding the Florida, Texas, and Louisiana Assets ("Agreement") is by and between Columbia/HCA Healthcare Corporation ("Columbia/HCA" or "respondent"), 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; 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.*

PREMISES

Whereas, on October 4, 1994, Columbia/HCA and Healthtrust Inc. - The Hospital Company ("Healthtrust") entered into an agreement whereby Columbia/HCA will acquire all the stock of Healthtrust, a wholly-owned subsidiary of Columbia/HCA will be merged with and into Healthtrust, and Healthtrust will operate as a wholly-owned subsidiary of Columbia (the "Acquisition"); and

Whereas, Columbia/HCA, with its principal place of business at One Park Plaza, Nashville, Tennessee, owns and operates, among other things, acute care hospitals; 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 paragraph II of the consent order ("Schedule A Assets and DRMC or Denton Community Hospital") and termination of certain interests described in paragraph III of the consent order ("SSI Joint Venture"), 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, DRMC and the SSI Joint Venture Interest (collectively the

"Hold Separate 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), divestitures 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 divestitures of the Schedule A Assets, DRMC or Denton Community Hospital, and the SSI Joint Venture Interest, and the Commission's right to have the Hold Separate Assets continue as viable acute care hospitals independent of Columbia/HCA; and

Whereas, the purposes of this Agreement and the consent order are to:

(i) Preserve the Hold Separate Assets as viable, competitive, and ongoing acute care hospitals, independent of Columbia/HCA, pending the divestitures of the Schedule A Assets and DRMC or Denton Community Hospital, and the termination of the SSI Joint Venture as required under the terms of the consent order;

(ii) Prevent interim harm to competition from the operation of the Hold Separate Assets pending the divestitures as required under the terms of the consent order;

(iii) 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, 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 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 divestitures of the Schedule A Assets and DRMC or Denton Community Hospital, and the termination of the SSI Joint Venture are not accomplished, to appoint a trustee to seek divestitures of said assets pursuant to the consent order, to seek civil penalties, to seek a court appointed trustee, and/or to seek other equitable relief, 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 or 2.b, it will comply with the provisions of paragraph three 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 last of the divestitures of the Schedule A Assets and DRMC or Denton Community Hospital, and the termination of the SSI Joint Venture, as required by the consent order, is completed.

3. To ensure the complete independence and viability of the Hold Separate Assets, and to assure that no competitive information is exchanged between Columbia/HCA and the managers of the Hold Separate Assets, respondent shall hold the Schedule A Assets, DRMC and the SSI Joint Venture Interest, as they are presently constituted, separate and apart on the following terms and conditions:

a. The Hold Separate Assets, as they are presently constituted, shall be held separate and apart and shall be managed and operated independently of respondent (meaning here and hereinafter, Columbia/HCA excluding the Hold Separate Assets), except to the extent that respondent must exercise direction and control over such 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 the Acquisition, 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 (or in the case of the Ville Platte Medical Center, cause the Central Louisiana Healthcare System Limited Partnership ("CLHS") to transfer) all ownership and control of all Hold Separate 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 Board"), shall have three members. Respondent shall elect the members of the New Board. The New Board shall consist of the following three persons: Winfield C. Dunn, Samuel H. Howard, and David C. Colby, provided they agree, or comparable, knowledgeable persons. The Chairman of the New Board shall be: Winfield C. Dunn (provided he agrees), or a comparable, knowledgeable person, who shall remain independent of Columbia/HCA and competent to assure the continued viability and competitiveness of the Hold Separate Assets and the South Seminole Hospital in Longwood, Florida. The New Board shall include no more than one member who is a director, officer, employee, or agent of respondent, who shall be David C. Colby, provided he agrees, or a comparable knowledgeable person ("the respondent's New Board member"). The New Board shall meet monthly during the course of the Hold Separate, and as otherwise necessary. Meetings of the New Board during the term of this Agreement shall be audiographically transcribed and the tapes 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 Hold Separate Assets or South Seminole Hospital, 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, or with all applicable laws. In addition, as to the SSH Joint Venture and South Seminole Hospital, only the following individuals within Columbia/HCA and Healthtrust shall have access to or involvement with termination of the SSI Joint Venture or efforts to divest the SSI Joint Venture Interest: Richard L. Scott, Stephen T.

Braun, Donald P. Fay, Ashby Q. Burks, Joseph D. Moore, Phillip D. Wheeler, and George M. Garrett.

e. Respondent shall maintain the viability, competitiveness, and marketability of the Hold Separate Assets; shall not sell, transfer, or encumber said Assets (other than in the normal course of business); and shall not cause or permit the destruction, removal, wasting, or deterioration, or otherwise impair their viability, competitiveness, or marketability of said Hold Separate Assets.

f. Except for the respondent's New Board member, 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 Hold Separate Assets, which employees shall be selected from the existing employee base of each facility or entity and may also be hired from sources other than these facilities and entities.

h. With the exception of the respondent's New Board Member, respondent shall not change the composition of the New Board unless the independent Chairman consents. The independent Chairman shall have power to remove members of the New Board for cause and to require respondent to appoint replacement members to the New Board as provided in paragraph 3.c. Respondent shall not change the composition of the management of the New Company except that the New 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, obtaining legal advice, 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 hospitals operated by the New Board. Access to Material Confidential Information relating to South Seminole Hospital or the SSH Joint Venture, for these limited, stated purposes shall be restricted within Columbia/HCA and

Healthtrust to those individuals named in paragraph 3.d, above. Nor shall the New Company or the New 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. 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 an entity from sources other than the entity to which the information pertains, 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 Board member shall not, in his or her capacity as a New Board member, 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 Board member shall enter a confidentiality agreement prohibiting disclosure of Material Confidential Information. The respondent's New Board member shall participate in matters that come before the New 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 Board member shall not participate in any matter, or attempt to influence the votes of the other members of the New Board with respect to matters, that would involve a conflict of interest if respondent and the New Company were separate and independent entities.

l. 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 Board; provided that the New Company shall engage in no transaction, material or otherwise, that is precluded by this Agreement.

m. If necessary, respondent shall provide the New Company with sufficient working capital to operate the Hold Separate Assets at their respective current rates of operation, to meet any capital calls anticipated in respect of the SSH Joint Venture, and to carry out any capital improvement plans for the Schedule A Assets, DRMC and the South Seminole Hospital that have already been approved.

n. Columbia/HCA shall continue to provide the same support services to the Hold Separate Assets as are being provided to such assets by Columbia/HCA or Healthtrust as of the date this Agreement is signed. Columbia/HCA may charge the Hold Separate Assets the same fees, if any, charged by Columbia/HCA or Healthtrust for such support services as of the date of this Agreement. Columbia/HCA personnel providing such support services must retain and maintain all Material Confidential Information of the Hold Separate Assets on a confidential basis, and, except as is permitted by this Agreement, such persons shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any such information to or with any person whose employment involves any of respondent's businesses. Such personnel shall also execute confidentiality agreements prohibiting the disclosure of any Material Confidential Information of the Hold Separate Assets.

o. During the period commencing on the date this Agreement is effective and terminating on the earlier of (i) twelve (12) 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 Hold Separate Assets ("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, competitiveness, and marketability of such Assets.

p. Columbia/HCA shall circulate, to its management employees responsible for the operation of acute care hospitals in any of the relevant areas defined in the consent order in this matter, a notice of this Hold Separate and consent order in the form attached as Attachment A.

q. The New Board shall serve at the cost and expense of Columbia/HCA. Columbia/HCA 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.

r. The New Board shall have access to and be informed about all companies who inquire about, seek, or propose to buy any Hold Separate Asset.

s. Within thirty days (30) after the date this Agreement is accepted by the Commission and every thirty (30) days thereafter until this Agreement terminates, the New Board shall report in writing to the Commission concerning the New Board's efforts to accomplish the purposes of this Hold Separate. In addition, within thirty days (30) after the date this Agreement is accepted by the Commission and every thirty (30) thereafter until this Agreement terminates, respondent shall file with the Commission a verified written report, setting forth, among other things that may be required from time to time, a detailed memorialization of all communications, both intra-company and with third parties, relating to the termination of the SSH Joint Venture.

4. Should the Commission seek in any proceeding to compel respondent to divest any of the Hold Separate 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 of 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 purposes of determining or securing compliance with this Agreement, and 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 representatives of the Commission:

a. Access, during office hours of respondent and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and all other records and documents in the possession or under the control of the 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, directors, or employees of respondent, who may have counsel present, regarding such matters.

7. This Agreement shall not be binding until approved by the Commission.

ATTACHMENT A

NOTICE OF DIVESTITURE AND REQUIREMENT FOR CONFIDENTIALITY

Columbia/HCA Healthcare Corporation and Healthtrust Inc. - The Hospital Company have entered into a Consent Agreement and Agreement to Hold Separate with the Federal Trade Commission relating to the divestiture of certain Healthtrust and Columbia/HCA acute care hospitals and the termination of a joint venture agreement ("Assets"). The hospitals to be divested include:

1. Santa Rosa Medical Center, 1450 Berryhill Road, Milton, Florida.
2. North Okaloosa Medical Center, 151 Redstone Avenue Southeast, Crestview, Florida.
3. Denton Regional Medical Center, 4405 North Interstate 35, Denton, Texas or the Denton Community Hospital, 107 N. Bonnie Brae, Denton, Texas.
4. Ville Platte Medical Center, 800 East Main Street, Ville Platte, Louisiana.
5. Davis Hospital and Medical Center, 1600 West Antelope Drive, Layton, Utah.
6. Pioneer Valley Hospital, 3460 South Pioneer Parkway, West Valley City, Utah, including the Salt Lake Industrial Clinic, 441 S. Redwood Road, Salt Lake City, Utah.
7. Jordan Valley Hospital, 3580 West 9000 South, West Jordan, Utah.

The joint venture agreement that must be terminated involves a joint venture that owns South Seminole Hospital in Longwood, Florida. Columbia/HCA and Healthtrust must terminate the joint venture either by selling Healthtrust's interest in the joint venture or by acquiring the other joint venture partner's interest.

Until after the FTC's order becomes final and the Assets are divested, the Assets must be managed and maintained as separate, ongoing businesses, independent of all other Columbia/HCA businesses. All competitive information relating to the Assets must be retained and maintained by the persons involved in the operation of the Assets 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 Columbia/HCA business. Similarly, all such persons involved in Columbia/HCA shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any such information to or with any other person whose employment involves any of the Assets.

Any violation of the Consent Agreement or the Agreement to Hold Separate, incorporated by reference as part of the consent order, may subject Columbia/HCA to civil penalties and other relief as provided by law.

APPENDIX II

AGREEMENT TO HOLD SEPARATE REGARDING
THE UTAH HEALTHTRUST ASSETS

This Agreement to Hold Separate Regarding the Utah Healthtrust Assets ("Agreement") is by and between Columbia/HCA Healthcare Corporation ("Columbia/HCA" or "respondent"), 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; 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.*

PREMISES

Whereas, on October 4, 1994, Columbia/HCA and Healthtrust Inc. - The Hospital Company ("Healthtrust") entered into an agreement whereby Columbia/HCA will acquire all the stock of Healthtrust, a wholly-owned subsidiary of Columbia/HCA will be merged with and into Healthtrust, and Healthtrust will operate as a wholly-owned subsidiary of Columbia (the "Acquisition"); and

Whereas, on October 20, 1994, the Commission, with the consent of Healthtrust, issued its complaint and made final its order to settle charges that the acquisition by Healthtrust of certain assets of Holy Cross Health System Corporation violated 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 (In the Matter of Healthtrust, Inc. - The Hospital Company, Docket No. C-3538); and

Whereas, the order in Docket No. C-3538 provides that for a period of ten (10) years, Healthtrust shall not permit any acute care hospital it operates in the Three-County Area of Utah, as defined in paragraph I.G. of the order in Docket No. C-3538, to be acquired, without the prior approval of the Commission, by any person that operates any other acute care hospital in the Three-County Area; and

Whereas, on February 15, 1995, Healthtrust petitioned the Commission to approve the sale of four Healthtrust acute care hospitals (the "Utah Healthtrust Hospitals") to Columbia/HCA; and

Whereas, Columbia/HCA, with its principal place of business at One Park Plaza, Nashville, Tennessee, owns and operates, among

other things, acute care hospitals in the Three-County Area of Utah, and elsewhere; and

Whereas, the Commission is now investigating the Acquisition to determine whether it would violate any of the statutes enforced by the Commission and whether the Commission should approve the Acquisition pursuant to the order In the Matter of Healthtrust, Inc. - The Hospital Company, Docket No. C-3538); and

Whereas, the Commission has determined to grant Healthtrust the prior approval required for its sale of the Utah Healthtrust Hospitals to Columbia/HCA, conditioned, however, upon Columbia/HCA divesting, as required by the agreement containing consent order ("consent agreement" or "consent order"), to which this Hold Separate is attached and made a part thereof as Appendix II, three Utah hospitals and related assets (the "Schedule B Assets" as defined in paragraph I of the consent order); and

Whereas, if the Commission accepts the consent order, which would require the divestiture of the Schedule B Assets pursuant to paragraph IV of the consent order, 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 Utah Healthtrust Assets, as identified in Schedule C to the consent order, during the period prior to the final acceptance and issuance of the consent order by the Commission (after the 60-day public comment period), divestitures resulting from any proceeding challenging the legality of the Acquisition might not be possible, or might be less than an effective remedy; and

Whereas, if the Commission accepts the consent order, and Columbia/HCA has not divested with the Commission's prior approval, each Schedule B Asset, in accordance with the consent order, within nine (9) months of the date the Commission conditionally approves the Acquisition pursuant to the order in Docket No. C-3538, the Commission may appoint a trustee to divest the Utah Healthtrust Assets, as identified in Schedule C to the consent order; 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 divestitures of the Utah Healthtrust Assets and

the Commission's right to have the Utah Healthtrust Assets continue as viable acute care hospitals independent of Columbia/HCA; and

Whereas, the purposes of this Agreement and the consent order are to:

- (i) Preserve the Utah Healthtrust Assets as viable, competitive, and ongoing acute care hospitals, independent of Columbia/HCA, pending the divestitures of the Schedule B Assets or the Utah Healthtrust Assets as required under the terms of the consent order;
- (ii) Prevent interim harm to competition from the operation of the Utah Healthtrust Assets pending divestitures of the Schedule B Assets or the Utah Healthtrust Assets as required under the terms of the consent order; and
- (iii) 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 conditional approval of the Acquisition and its 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 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 the order in Docket No. C-3538, and in the event the required divestitures of the Schedule B Assets are not accomplished, to appoint a trustee to seek divestitures of the Utah Healthtrust Assets pursuant to the consent order, to seek civil penalties, to seek a court appointed trustee, and/or to seek other equitable relief, 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 three 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 last of the divestitures of the Schedule B Assets or the Utah Healthtrust Assets, as required by the consent order, is completed.

3. To ensure the complete independence and viability of the Utah Healthtrust Assets, and to assure that no competitive information is exchanged between Columbia/HCA and the managers of the Utah Healthtrust Assets, respondent shall hold the Utah Healthtrust Assets, as they are presently constituted, separate and apart on the following terms and conditions:

a. The Utah Healthtrust Assets, as they are presently constituted, shall be held separate and apart and shall be managed and operated independently of respondent (meaning here and hereinafter, Columbia/HCA excluding the Utah Healthtrust Assets), except to the extent that respondent must exercise direction and control over such 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 the Acquisition, respondent shall transfer all ownership and control of all Utah Healthtrust Assets to HTI of Utah, Inc.

c. The board of directors of HTI of Utah, Inc. ("HTI Board"), shall have three members. Respondent shall elect the members of the HTI Board. The HTI Board shall consist of the following three persons: (i) Kent H. Wallace; (ii) Kenneth W. Perry; and (iii) David C. Colby, provided they agree, or comparable, knowledgeable persons. The Chairman of the HTI Board shall be Kent H. Wallace, provided he agrees, or a comparable, knowledgeable person, who shall remain independent of Columbia/HCA and competent to assure the continued viability and competitiveness of the Healthtrust Utah Assets. The HTI Board shall include no more than one member who is a director, officer, employee, or agent of respondent, who shall be

David C. Colby, provided he agrees, or a comparable, knowledgeable person ("the respondent's HTI Board member"). The HTI Board shall meet monthly during the course of the Hold Separate, and as otherwise necessary. Meetings of the HTI Board during the term of this Agreement shall be audiographically transcribed and the tapes 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 Utah Healthtrust Assets, the independent Chairman of the Board of the HTI of Utah Inc., HTI of Utah Inc., or any of its operations or businesses; provided, however, that respondent may exercise only such direction and control over HTI of Utah Inc. as is necessary to assure compliance with this Agreement or the consent order, or with all applicable laws.

e. Respondent shall maintain the viability, competitiveness, and marketability of the Utah Healthtrust Assets; shall not sell, transfer, or encumber said Assets (other than in the normal course of business); and shall not cause or permit the destruction, removal, wasting, or deterioration, or otherwise impair their viability, competitiveness, or marketability of said Assets.

f. Except for the respondent's HTI Board member, respondent shall not permit any director, officer, employee, or agent of respondent to also be a director, officer, or employee of HTI of Utah Inc.

g. HTI of Utah Inc. shall be staffed with sufficient employees to maintain the viability and competitiveness of the Utah Healthtrust Assets, which employees shall be selected from the existing employee base of each facility or entity and may also be hired from sources other than these facilities and entities.

h. With the exception of the respondent's HTI Board Member, respondent shall not change the composition of the HTI Board unless the independent Chairman consents. The independent Chairman shall have power to remove members of the HTI Board for cause and to require respondent to appoint replacement members to the New Board as provided in paragraph 3.c. Respondent shall not change the composition of the management of HTI of Utah Inc., except that the HTI 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, obtaining legal advice, 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 HTI of Utah Inc., or the activities of or the hospitals operated by the HTI Board. Nor shall HTI of Utah Inc. or the HTI 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. Respondent may receive, on a regular basis, aggregate financial information relating to HTI of Utah Inc. 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 an entity from sources other than the entity to which the information pertains, 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 HTI Board member shall not, in his or her capacity as an HTI Board member, 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 HTI Board member shall enter a confidentiality agreement prohibiting disclosure of Material Confidential Information. The respondent's HTI Board member shall participate in matters that come before the HTI 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 HTI Board member shall not participate in any matter, or attempt to influence the votes of the other members of the HTI Board with respect to matters, that would involve a

conflict of interest if respondent and HTI of Utah Inc. were separate and independent entities.

l. Any material transaction of HTI of Utah Inc. that is out of the ordinary course of business must be approved by a majority vote of the HTI Board; provided that HTI of Utah Inc. shall engage in no transaction, material or otherwise, that is precluded by this Agreement.

m. If necessary, respondent shall provide HTI of Utah Inc. with sufficient working capital to operate the Utah Healthtrust Assets at their respective current rates of operation and to carry out any capital improvement plans for the Utah Healthtrust Assets that have already been approved.

n. Columbia/HCA shall continue to provide the same support services to the Utah Healthtrust Assets, as are being provided to such Assets by Healthtrust as of the date this Agreement is signed. Columbia/HCA may charge the HTI of Utah Inc. the same fees, if any, charged by Healthtrust for such support services as of the date of this Agreement. Columbia/HCA personnel providing such support services must retain and maintain all material confidential information of the Utah Healthtrust Assets on a confidential basis, and, except as is permitted by this Agreement, such persons shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any such information to or with any person whose employment involves any of respondent's businesses. Such personnel shall also execute confidentiality agreements prohibiting the disclosure of any Material Confidential Information of the Utah Healthtrust Assets.

o. During the period commencing on the date this Agreement is effective and terminating on the earlier of (i) twelve (12) 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 HTI of Utah Inc. funds sufficient to perform all necessary routine maintenance to, and replacements of, the Utah Healthtrust Assets ("normal repair and replacement"). Provided, however, that in any event, respondent shall provide HTI of Utah Inc. with such funds as are necessary to maintain the viability, competitiveness, and marketability of such Assets.

p. Columbia/HCA shall circulate, to its management employees responsible for the operation of acute care hospitals in any of the relevant areas defined in the consent order in this matter, a notice of

this Hold Separate and consent order in the form attached as Attachment A.

q. The HTI Board shall serve at the cost and expense of Columbia/HCA. Columbia/HCA shall indemnify the HTI 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 HTI Board directors.

r. The HTI Board shall have access to and be informed about all companies who inquire about, seek, or propose to buy any Schedule B Assets or the Utah Healthtrust Assets.

s. Within thirty (30) days after the date this Agreement is accepted by the Commission and every thirty (30) days thereafter until this Agreement terminates, the HTI Board shall report in writing to the Commission concerning the HTI Board's efforts to accomplish the purposes of this Hold Separate.

4. Should the Commission seek in any proceeding to compel respondent to divest any of the Schedule B Assets or the Utah Healthtrust 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 of 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 purposes of determining or securing compliance with this Agreement, and 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 representatives of the Commission:

a. Access, during office hours of respondent and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and all other records and documents in the possession or under the control of the 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, directors, or employees of respondent, who may have counsel present, regarding such matters.

7. This Agreement shall not be binding until approved by the Commission.

ATTACHMENT A

NOTICE OF DIVESTITURE AND REQUIREMENT FOR CONFIDENTIALITY

Columbia/HCA Healthcare Corporation and Healthtrust Inc. - The Hospital Company have entered into a consent agreement and Agreement to Hold Separate with the Federal Trade Commission relating to the divestiture of certain Healthtrust and Columbia/HCA acute care hospitals and the termination of a joint venture agreement ("Assets"). The hospitals to be divested include:

1. Santa Rosa Medical Center, 1450 Berryhill Road, Milton, Florida.

2. North Okaloosa Medical Center, 151 Redstone Avenue Southeast, Crestview, Florida.

3. Denton Regional Medical Center, 4405 North Interstate 35, Denton, Texas or the Denton Community Hospital, 107 N. Bonnie Brae, Denton, Texas.

4. Ville Platte Medical Center, 800 East Main Street, Ville Platte, Louisiana.

5. Davis Hospital and Medical Center, 1600 West Antelope Drive, Layton, Utah.

6. Pioneer Valley Hospital, 3460 South Pioneer Parkway, West Valley City, Utah, including the Salt Lake Industrial Clinic, 441 S. Redwood Road, Salt Lake City, Utah.

7. Jordan Valley Hospital, 3580 West 9000 South, West Jordan, Utah.

The joint venture agreement that must be terminated involves a joint venture that owns South Seminole Hospital in Longwood, Florida. Columbia/HCA and Healthtrust must terminate the joint venture either by selling Healthtrust's interest in the joint venture or by acquiring the other joint venture partner's interest.

Until after the FTC's order becomes final and the Assets are divested, the Assets must be managed and maintained as separate, ongoing businesses, independent of all other Columbia/HCA businesses. All competitive information relating to the Assets must be retained and maintained by the persons involved in the operation of the Assets 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 Columbia/HCA business. Similarly, all such persons involved in Columbia/HCA shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any such information to or with any other person whose employment involves any of the Assets.

Any violation of the consent agreement or the Agreement to Hold Separate, incorporated by reference as part of the consent order, may subject Columbia/HCA to civil penalties and other relief as provided by law.

Set Aside Order

120 F.T.C.

IN THE MATTER OF

WEST POINT-PEPPERELL, INC.

SET ASIDE ORDER IN REGARD TO ALLEGED VIOLATION OF
SEC.7 OF THE CLAYTON ACT AND SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT*Docket C-3244. Consent Order, Dec. 14, 1988--Set Aside Order, Oct. 4, 1995*

This order reopens a 1988 consent order--which required West Point to divest certain towel and sheet manufacturing facilities and prohibited West Point, for 10 years, from making certain acquisitions in the sheet and towel industries without prior Commission approval--and sets aside the consent order pursuant to the Commission's Prior Approval Policy Statement, under which the Commission presumes that the public interest requires setting aside the prior approval requirements in outstanding merger orders and making them consistent with the policy.

ORDER SETTING ASIDE ORDER

On June 28, 1995, WestPoint Stevens, Inc. ("WestPoint"), the successor to West Point-Pepperell, Inc., filed its Petition To Reopen and Vacate or Modify Consent Order ("Petition") in this matter. WestPoint asks that the Commission reopen and modify the 1988 consent order in this matter pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Section 2.51 of the Commission's Rules of Practice and Procedure, 16 CFR 2.51, and consistent with the Statement of Federal Trade Commission Policy Concerning Prior Approval and Prior Notice Provisions, issued June 21, 1995 ("Prior Approval Policy Statement").¹ WestPoint in its Petition requests that the Commission reopen and set aside the order in Docket No. C-3244 or, in the alternative, reopen and modify the order by deleting the requirement in paragraph IX that WestPoint seek prior Commission approval for certain acquisition. The Petition was on the public record for thirty days; no comments were received.

The Commission, in its Prior Approval Policy Statement, "concluded that a general policy of requiring prior approval is no longer needed," citing the availability of the premerger notification and waiting period requirements of Section 7A of the Clayton Act,

¹ 60 Fed. Reg. 39,745-47 (August 3, 1995); 4 Trade Reg. Rep. (CCH) ¶ 13,241. at 20,991 (June 21, 1995).

commonly referred to as the Hart-Scott-Rodino ("HSR") Act, 15 U.S.C. 18a, to protect the public interest in effective merger law enforcement. Prior Approval Policy Statement at 2. The Commission announced that it will "henceforth rely on the HSR process as its principal means of learning about and reviewing mergers by companies as to which the Commission had previously found a reason to believe that the companies had engaged or attempted to engage in an illegal merger." As a general matter, "Commission orders in such cases will not include prior approval or prior notification requirements." *Id.*

Narrow prior approval or prior notification provisions may be necessary to protect the public interest in some circumstances. The Commission said in its Prior Approval Policy Statement that "a narrow prior approval provision may be used where there is a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for the provision, attempt the same or approximately the same merger." The Commission also said that "a narrow prior notification provision may be used where there is a credible risk notification provision may be used where there is a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for an order, engage in an otherwise unreportable anticompetitive merger." *Id.* at 3.

The Commission in its Prior Approval Policy Statement announced its intention "to initiate a process for reviewing the retention or modification of these existing requirements" and invited respondents subject to such requirements "to submit a request to reopen the order." *Id.* at 4. The Commission determined that, "when a petition is filed to reopen and modify an order pursuant to . . . [the Prior Approval Policy Statement], the Commission will apply a rebuttable presumption that the public interest requires reopening of the order and modification of the prior approval requirement consistent with the policy announced" in the Statement. *Id.*

The presumption is that setting aside the prior approval requirement in paragraph IX of the order in Docket No. C-3244 is in the public interest. Nothing to overcome the presumption has been presented, and nothing in the record, including the original complaint and order, suggests that exceptions described in the Prior Approval

Policy Statement are warranted. The Commission has determined to reopen the proceeding in Docket No. C-3244 and set aside the order.²

Accordingly, *It is hereby ordered*, That this matter be, and it hereby is, reopened, and that the Commission's order issued on December 14, 1988, be, and it hereby is, set aside as of the effective date of this order.

² WestPoint completed the divestiture required by the order in 1991, and the only remaining obligation under the order is the prior approval requirement in paragraph IX and the attendant reporting obligations.

IN THE MATTER OF

LIVE-LEE PRODUCTIONS, INC., ET AL.

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

Docket C-3620. Complaint, Oct. 10, 1995--Decision, Oct. 10, 1995

This consent order prohibits, among other things, a California-based corporation and its officer from making any claim that a food, dietary supplement or drug has any effect on the user's health, or on the structure or function of the body, and from making any claim of performance, benefit, efficacy or safety of any smoking cessation product, service or program unless they have competent and reliable scientific evidence to support the claims.

Appearances

For the Commission: *Lisa B. Kopchik.*

For the respondents: *Timothy Kevene, Thorpe & Thorpe, Los Angeles, CA.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Live-Lee Productions, Inc., a corporation, and Ruta Lee, individually and as an officer and director 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 Live-Lee Productions, Inc. ("Live-Lee") is a Texas corporation, with its offices and principal place of business at 2761 Laurel Canyon Blvd., Los Angeles, California. Live-Lee is engaged in the business of providing the services of Ruta Lee in connection with the marketing, advertising, sale and distribution of consumer products.

Respondent Ruta Lee ("Lee") is an officer, director, and sole shareholder of Live-Lee, and her address is 2436 Shirley Avenue, Fort Worth, Texas. Lee has served as the on-air host of "Spotlight on Ruta Lee" ("Spotlight"), an advertisement promoting the sale of

consumer products. Spotlight has appeared on the Home Shopping Club, which consists of advertising in the form of television programming that is disseminated through cable channels, company-owned broadcast stations, and satellite dish receivers. Through this programming, Home Shopping Club, Inc. ("HSC"), a subsidiary of Home Shopping Network, Inc., sells products via direct marketing to viewers.

PAR. 2. The products marketed on Spotlight have included spray vitamin and smoking cessation products sold by HSN Lifeway Health Products, Inc. ("Lifeway"), a wholly-owned second-tier subsidiary of Home Shopping Network, Inc. These products are foods and/or drugs, as the terms "food" and "drug" are defined in Sections 12 and 15 of the Federal Trade Commission Act. Lee performed the functions of an advertising agency by creating and disseminating the representations alleged in this complaint for said products on Spotlight. She received a royalty for each unit of Lifeway's products that was purchased for HSC's inventory.

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 created and disseminated advertisements for Lifeway's spray vitamin and smoking cessation products, including but not necessarily limited to the attached Exhibit A, a transcription of a television advertisement entitled "Spotlight on Ruta Lee" that appeared on the Home Shopping Club. This advertisement contains the following statements:

(a) Ruta Lee: "And you know how much of that vitamin pill I am absorbing? If I'm exceedingly lucky, five percent. The rest of that vitamin pill gets squashed through me and gets flushed down the toilet the first time I go piddle. So, 95% of my money is wasted going down the toilet. 95% of my vitamin is not even getting into my body. . . .

. . . .

. . . Now, let me tell you about the three different two-packs that we have at \$19.95 Instead of flushing that down the toilet, you are getting it into your body. Now, I think that is remarkable. That just by spraying. [She sprays into her mouth.] There I am. I've taken my vitamins . . . I've got my vitamins. Now you do this four times a day. And you have a month's supply in every tube." [Exhibit A, page ii-iii]

(b) Ruta Lee: "Vitamin C and Zinc. Just spray directly on your throat. Spray in your mouth. Kills rhinovirus on contact. You can avoid colds forever. . . . So,

Vitamin C and Zinc. You can avoid colds for the rest of your life." [Exhibit A, pages iii-iv]

(c) Ruta Lee: "I get calls from dentists who say 'tell everybody that's listening, Ruta, if they have a mouth lesion or something' -- Christie, our makeup lady, just had her big molars pulled back here [pointing to the back of her mouth].

....

I gave her some Vitamin C and Zinc to spray directly on the lesion, the whole inner mouth. Zinc is a healer, and we forget how good it is.

....

You get cold sores, spray it directly on. You get cracks in the corners of your mouth, spray it directly on. It's delicious." [Exhibit A, page iv]

(d) Ruta Lee: "But, you know every once in a while--"

Show host: "You need a boost."

Ruta Lee: "Sure. Your butt starts to drag and you say Oh, God, I need a cup of coffee, or, Gee, I think I need a candy bar or I need a coke. You don't need any of that which goes to nothing but stuff on your big, lard butt."

Show host: "Plus you end up with the highs and lows when you're getting your fixes -- "

Ruta Lee: "Yeah. A sugar high is a phony high. It raises you up and then it drops you like a ton of bricks."

Show host: "Right, right."

Ruta Lee: "Vitamin B-12. All you do is spray, and honey, it's like two martinis. Hits you, oh -- happy time. Its absolutely phenomenal." [Exhibit A, pages iv-v]

(e) Ruta Lee: "Alcohol, by the way, depletes B-12 just like that [she snaps her fingers]. If you're going to be sipping during the holidays, and we all are, and I'm not saying you should deny yourself a cocktail or a little Christmas grog, take your Vitamin B-12. Great for hangovers on New Year's Eve.

....

It's the greatest thing for a hangover. It's absolutely fabulous." [Exhibit A, page v]

(f) Ruta Lee: "We've got the magic one of them all. The one you've been hearing about and reading about in every newspaper, in every health periodical, in every beauty periodical. You have been reading about the antioxidants. They are the buzz-words of the 90s when it comes to health and beauty. And believe me, I don't care how much makeup you put on, your beauty starts from inside. The antioxidants are the things that keep your immune system working well. It is firmly believed by most medical authorities, and everybody in research, that Vitamins A, C and E are the key to keeping your immune system working. Why does your immune system have to work? I'll tell you why. Because whether it is a cold or whether it is any of the life-threatening diseases that are all around us -- that's what happens. You pick them up if your immune system isn't working for you. A, C and E are the vitamins that have been shown, and are now widely believed to be the things that keep your immune system working. . . . You want to stay young and gorgeous without 52 facelifts? God promises us in the bible 120 years. Honey, I intend to go into my coffin looking damn good. Why? Because I'm going to spray my fabulous A, C and E. It's going to keep me young. I'm not going to get the lines. I'm going to keep the sparkle in my eyes." [Exhibit A, page vi]

(h) Ruta Lee: "Dear ones, let me tell you about this smoke-less spray. The same process works. All you do is open wide, spray. And it satisfies your need for a cigarette. Somehow a message goes from the brain to the body that says 'stop quivering. You've satisfied a need.' And you haven't done it with a drug. You've done it with vitamins, minerals, herbs and spices that tickle your tongue and tickle your fancy. . . . Now, if you're a smoker, you know here in your mind and in your soul that you should quit smoking. And its very hard to do. I promise you this works. You get our money-back guarantee. It works with just the natural vitamin and mineral and herb and spice ingredients." [Exhibit A, page x]

(i) Ruta Lee: "I've had smokers call to tell me they have been smoking for 20, 30, 40 years and that they are able to quit smoking in five days, able to quit cold-turkey. . . . And you can do it. In an easy, simple way. Let's take a call.

. . . .

. . . Hi, Sally. . . . Are you a smoker?"

Caller: "No. I quit three years ago with your sprays."

Ruta Lee: "Oh! Hallelujah, Sally! Well, Sally, you obviously have been with me right since the beginning, haven't you honey?"

Caller: "Yeah --"

Ruta Lee: "Three years --"

Caller: "I know if you sell anything, it's bound to work."

Ruta Lee: "Oh, bless you. You know -- you're bringing up a good point. You prove a point. I am starting my fifth year on the air with my products. The diet sprays, the vitamin sprays, and the smoke-less spray. Sally can attest to this. I wouldn't have lasted for five minutes, five weeks, if it didn't work. Because we guarantee you your money back. Sally, how much did you smoke?"

Caller: "Three packs a day."

Ruta Lee: "Who!"

Caller: "For thirty years."

Ruta Lee: "Thirty years, three packs a day. And, I don't remember now, how long did it take you to quit?"

Caller: "A month."

Ruta Lee: "A month. Like I said, thirty days. Make a habit, thirty days to break one. And Sally, it was fairly easy, wasn't it?"

Caller: "Yeah -- very easy."

. . . .

Ruta Lee: "Hallelujah! Are you hearing this, ladies and gentlemen? Sally, who three years ago quit smoking in about a month's time, and she had smoked for thirty years, three packs a day." [Exhibit A, pp. xi-xii]

(j) Ruta Lee: "Because you're [the caller is] a source of inspiration to an awful lot of people out there who are sitting back on their rusty-dusty saying 'Oh, I don't know. I tried to quit smoking, but I gained weight.' I've had so many callers tell me that they don't gain weight when they use this spray.

Caller: "Oh, I lost weight when I used yours."

Ruta Lee: "Hooray! You lost weight." [Exhibit A, page xiii]

(k) Ruta Lee: "It's guaranteed to work. It doesn't put chemicals into your body. All natural given, vitamins, minerals, herbs and spices. You won't be shaky with anxiety. Just spray every time you want a cigarette. But, most of all, get to the phone. Call now. Think about this as a Christmas gift for somebody that you want

to stop smoking. . . . Don't wait. Don't wait until the doctor says you're gonna die if you don't stop smoking. Use your brains that God gave you. God gave you one body to last you a lifetime. Don't spit in His eye by smoking. Dear ones, what can I do but say hallelujah for this product. It works. But it won't work unless you get up off your duff, get to the telephone, use your finger to dial, and then use your finger to spray before you put that cigarette in your mouth." [Exhibit A, page xiv]

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) The vitamins in Life Way Spray Vitamins are more fully absorbed by the human body than vitamins taken in pill form;

(b) Life Way Vitamin C and Zinc Spray, sprayed directly in the mouth at the dosages recommended, heals lesions in the mouth, cold sores on the mouth and cracking of the corners of the lips for users generally;

(c) Life Way Vitamin C and Zinc Spray, sprayed directly in the mouth at the dosages recommended, prevents common colds;

(d) Life Way Vitamin B-12 Spray, at the dosages recommended, effectively treats symptoms related to hangovers;

(e) Life Way B-12 Vitamin Spray, at the dosages recommended, increases energy for users generally;

(f) Life Way Anti-oxidant Spray, at the dosages recommended, ensures the proper functioning of the immune system;

(g) Life Way Anti-Oxidant Spray, at the dosages recommended, reduces the risk of contracting infectious diseases;

(h) Life Way Anti-Oxidant Spray, at the dosages recommended, prevents facial lines;

(i) Life Way Smoke-Less Nutrient Spray enables smokers, regardless of how long they have smoked or how much they smoke, to stop smoking easily; and

(j) Life Way Smoke-Less Nutrient Spray satisfies the physiological urge to smoke a cigarette and eliminates the quivering, anxiety and weight gain attendant with quitting smoking.

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 A, respondents have represented, directly or by implication, that at the

time they made the representations set forth in paragraph five, they possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 7. 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 six was, and is, false and misleading.

PAR. 8. Respondents knew or should have known that the representation set forth in paragraph six 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 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

TRANSCRIPT OF SPOTLIGHT ON RUTA LEE

Show host: How are you?
Ruta Lee: Ho Ho Ho!
Show host: That was so original, wasn't it?
Ruta Lee: That was so original, and honey, the whole point is that the Christmas season is here. We've already done ourselves in on Halloween by eating everything that the kids brought home.
Show host: I know.
Ruta Lee: And now we've got the -- whole Christmas season coming up.
Show host: And Thanksgiving.
Ruta Lee: And you know it is such a tension-ridden season.
Show host: Right, right.
Ruta Lee: It's suppose to be jolly and warm and wonderful and mellow.
Show host: Hum hum.
Ruta Lee: And instead it's ahhh! [shaking both hands in the air] It's because you haven't got it put together.
Show host: That's right. We all do this too. And you think you've got a year -- but you know, you still, something --
Ruta Lee: Right. Well, I start shopping. I mean I shop on Home Shopping Network all the time. And when I see the real bargains, I get like twelve of something, or six of something, and then just put them aside, and then whenever a birthday or a holiday comes along, I've got something that I can give.
Show host: You're prepared that way.

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Ruta Lee: Generic gifts. Not very thoughtful, but smart on the pocketbooks.

Show host: That's right.

Ruta Lee: And that's the thing to do here. Now listen. We're talking about stress, dear ones. I live a very stressful life. Lord knows, you live a very stressful life. And you know what, we're not rare. Everybody out there is in stress. Just getting out of your driveway into the traffic is stressful. I've got the answer to your prayers, dear ones. Stress does one thing beyond anything else. And that is it depletes your body of every vitamin and mineral that you've got in it. And you know what you've got in it? Not very much. Because if you really stop and think about how we live such hectic lives, we depend on convenience foods, we depend a lot on fast foods. Even if we're good homemakers, you know that the grains are stored in silos in preservatives so that they shouldn't rot. Then they put them in the grounds that are also filled with chemicals. The little vegetable sticks its little plant root up out of the ground and ssshhh, you hit it with spray to get the bugs off of it. Right? Then you take it to the marketplace, you put it in a preservative. You keep it on a shelf in a preservative and then you get it home and you zap it in the microwave oven, right? What kind of minerals and vitamins are we getting. Absolutely nothing. So, I know a lot of us are smart enough to take our vitamin pills. And if you are taking some that are great, more power to you. I can't swallow pills. I don't know about you, but --

Show host: No, I can't either.

Ruta Lee: I think you're very sensitive about swallowing. And if I get it down, it sort of chokes half way down. And then it gunks and I'm coughing and gagging. If it finally makes it down to my stomach, then it sits there and it stews for a while. And I'm burping that awful taste.

Show host: Right, right.

Ruta Lee: And it repeats on me all day long. It feels like its burning a hole in my stomach. And you know how much of that vitamin pill I am absorbing? If I'm exceedingly lucky, five percent. The rest of that vitamin pill gets squashed through me and gets flushed down the toilet the first time I go piddle. So, 95% of my money is wasted going down the toilet. 95% of my vitamin is not even getting into my body. Sweeties, I've got the greatest vitamin product this world has ever seen. Regis Philbin says it's the only civilized way to take vitamins. Look, all I do is open wide. [She sprays vitamins into her mouth from a tube.] That's it. I've taken my vitamins. Now you're probably thinking, oh, that must taste pukey. It's fabulous. It's mouth-refreshing. It's pleasant. And look what's happened. I've got my vitamins. Now you do this four times a day. And you have a month's supply in every tube. We're bringing them to you in two-packs because that's the way

- you asked for them. And they're \$18.95 which really throws me because they used to me (sic) \$19.95.
- Show host: Exactly.
- Ruta Lee: I think we're being very nice because it's the holiday season coming up or something.
- Show host: Right.
- Ruta Lee: Grab them while you can. This is my last visit for this month. Please, dear ones, think about these for your children and for yourself. Now, let me tell you about the three different two-packs that we have at \$19.95. And just think, instead of flushing \$19.00 -- well, let's see. What would 95% of \$19.95 be? Ahh -- \$17.00 or something or other. Instead of flushing that down the toilet, you are getting it into your body. Now, I think that that is remarkable. That just by spraying. [She sprays into her mouth.] There I am. I've taken my vitamins. Four times a day. You've got a month's supply in every tube. Let me tell you first about the Vitamin C and Zinc. As you're probably noticing, I am a little nasal. I've got a sinus condition. That could very easily develop into a nasty throat infection.
- Show host: Right, the draining. Ah -- it's such a horrible feeling.
- Ruta Lee: You know. When you're dripping the stuff down your throat. The drainage camps there. It creates a beautiful bed of mucous for all the bacteria to sit in. Vitamin C and Zinc. Just spray directly on your throat. Spray in your mouth. Kills rhinovirus on contact. You can avoid colds forever. If you feel one coming on, you'd have to take two bottles of Vitamin C and Zinc and it would burn a hole in your stomach. Especially if have a sensitive stomach. And if you're on any other medication, you don't want to swallow more stuff. This way, it doesn't interfere with any other medication you're taking. So, Vitamin C and Zinc. You can avoid colds for the rest of your life. I get calls from dentists who say "tell everybody that's listening, Ruta, if they have a mouth lesion or something" -- Christie, our makeup lady, just had her big molars pulled back here [pointing to the back of her mouth] --
- Show host: Right, yes.
- Ruta Lee: I gave her some Vitamin C and Zinc to spray directly on the lesion, the whole inner mouth. Zinc is a healer, and we forget how good it is.
- Show host: A healer, right. That is so important.
- Ruta Lee: You get cold sores, spray it directly on. You get cracks in the corners of your mouth, spray it directly on. It's delicious.
- Show host: And immediately it dissolves. It's different from some of the product creams.
- Ruta Lee: That's it. That's it. Its right there and its doing its magic. So, that is enough about Vitamin C and Zinc except that we live in closed-in environments. You know? You can't open a hotel room window. Through the office, you can't open a window. If

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anybody's got a cold, it gets passed around through the ventilation system.

Show host:

Right.

Ruta Lee:

Have this on hand all the time. [Holding up a tube of Vitamin C and Zinc.] Carry it with you and spray.

Ruta Lee:

Now, Vitamin B-12. That, to me, is my mother's milk. Its the source of life for me. I'm a high-energy lady. This sweet lady, Bobbi, is even more energetic than I am, if that is possible.

Show host:

No, no, no, no.

Ruta Lee:

But, you know every once in a while --

Show host:

You need a boost.

Ruta Lee:

Sure. Your butt starts to drag and you say Oh, God, I need a cup of coffee, or, Gee, I think I need a candy bar or I need a coke. You don't need any of that which goes to nothing but stuff on your big, lard butt.

Show host:

Plus you end up with the highs and lows when you're getting your fixes --

Ruta Lee:

Yeah. A sugar high is a phony high. It raises you up and then it drops you like a ton of bricks.

Show host:

Right, right.

Ruta Lee:

Vitamin B-12. All you do is spray, and honey, it's like two martinis. Hits you, oh -- happy time. Its absolutely phenomenal. And you're not doing yourself in with alcohol and sugars and the sat-fat that are phoney and had for you. Alcohol, by the way, depletes B-12 just like that [she snaps her fingers]. If you're going to be sipping during the holidays, and we all are, and I'm not saying you should deny yourself a cocktail or a little Christmas grog, take your Vitamin B-12. Great for hangovers on New Year's Eve.

Show host:

I never thought of that.

Ruta Lee:

It's the greatest thing for a hangover. It's absolutely fabulous. Now look, this is also a great way to get vitamins into your kids. Our -- Terri Toner, our --

Show host:

Jonelle loves them too.

Ruta Lee:

You know, I know she does. Terri Toner's pediatrician said this is the greatest thing that came down the pike for kids because we are a pill-popping society. We take pills for vitamins. We have a headache, we take a pill. We're feeling blue, we take a pill. We're feeling too up and we can't sleep, we take a pill. And we get our kids so used to taking pills, especially with vitamins, that when someone comes along in the school yard and says 'Hey, kid. You want a blue? Hey, kid. You want a yellow?' He says that this is a great way to get vitamins into your kids and get them out of the pill-popping mode.

Show host:

Away from the pills. Exactly. A terrific way.

Ruta Lee:

Exactly. Now, last but not least, and girls you can listen while you are on the phone. We are going to be running out of time so shortly. It's my last visit until next month. Do not kick yourself

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in your behind for the rest of the month saying 'why didn't I listen? Why didn't I do it?' We've got the magic one of them all. The one you've been hearing about and reading about in every newspaper, in every health periodical, in every beauty periodical. You have been reading about the antioxidants. They are the buzz-words of the 90s when it comes to health and beauty. And believe me, I don't care how much makeup you put on, your beauty starts from inside. The antioxidants are the things that keep your immune system working well. It is firmly believed by most medical authorities, and everybody in research, that Vitamins A, C and E are the key to keeping your immune system working. Why does your immune system have to work? I'll tell you why. Because whether it is a cold or whether it is any of the life-threatening diseases that are all around us -- that's what happens. You pick them up if your immune system isn't working for you. A, C and E are the vitamins that have been shown, and are now widely believed to be the things that keep your immune system working. What happens with oxidants is that they attack the oxygen-free radicals that our own bodies create because of the air we breath, because of the pollutants we take in, like tobacco and alcohol and etc. They naturally metabolize and they are nasty little things like termites that romp through your body randomly and attack healthy, live cells that keep you young and keep you healthy. And when they bite into one cell, it attacks another one like a domino theory. The oxygen-free radicals are put out of your body by the oxygenators. The A, C and E are just like a fire hose coming in and putting out the fire. Its a miracle. You want to stay young and gorgeous without 52 facelifts? God promises us in the bible 120 years. Honey, I intend to go into my coffin looking damn good. Why? Because I'm going to spray my fabulous A, C and E. It's going to keep me young. I'm not going to get the lines. I'm going to keep the sparkle in my eyes. Let's take a call.

Show host: Get to the phone calls, ladies and gentlemen, We have only a very short period of time. Hi, you're on the air, with Ruta. And what is your name please?

Caller: Sally.

Ruta Lee: Valerie, did you say?

Caller: Sally.

Show host: Sally.

Ruta Lee: Oh. Sally. I'm sorry. I've got to turn up my speaker back here. I'm reaching back here. I'm not scratching. I'm turning you up. Sally, where are you calling from?

Caller: I'm calling from Noridge, New York. I used the Vitamin C last year, and I worked all winter long and I didn't have a cold.

Ruta Lee: Whoo! [clapping loudly] You hear that? Isn't it a miracle? You know, I think our body tells us when we are starting to feel a little puny. And if we will just pay attention to it and give it

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what it needs. And a blast of Vitamin C and Zinc can surely prevent a lot of troubles. And you used it all winter?

Caller: Yes. And I didn't have any colds at all. I've started using it again this winter.

Ruta Lee: Good for you, sweetheart. I hope you're trying these marvelous antioxidants as well.

Caller: Yeah. I have them too.

Ruta Lee: Now, I want you to tell everybody how these vitamins taste?

Caller: Tastes almost like mint.

Ruta Lee: They are nice, aren't they?

Caller: Very nice.

Ruta Lee: 'Cause I'm sure people think, 'Ooh'. I know how nasty vitamins taste when you swallow them, and how they repeat on you. And these are like a mouth freshener, aren't they?

Caller: Um hum.

Ruta Lee: Well, Sally, honey, I'm so glad that you're going into this cold and flu season taking good care of yourself.

Caller: Yes, and that's another thing. My doctor knows that I have an awful reaction to the flu shots.

Ruta Lee: Oh, yes.

Caller: And she lets me use Vitamin C and Zinc all winter instead.

Ruta Lee: That's fabulous. So, you showed this to your doctor and she said 'spray away,' didn't she?

Caller: Yeah.

Ruta Lee: You know, that's another thing you brought up, Sally, that I want to mention. You can't overdose. We suggest -- the label says spray four times for the daily requirements. I think that sometimes our bodies need more than the daily requirement, so I spray more. Now, I don't want this to get into my throat, so I'm spraying all the time directly onto my throat. And, it's going to do the job. Thank you for calling, sweetheart. Have a wonderful Thanksgiving.

Caller: You too.

Ruta Lee: And I urge everybody out there to listen to our darling sister Sally. Get on the phone. Order now. If you're a new buyer, hang on. Don't get discouraged because you have to hold on. The lines are so busy. This is the time. Now look, I also want to mention something else. I have gotten calls from the nursing staff and professions and the people who work in the medical service industry. And the nurses in the nursing homes for the aged say, Ruta, you don't know what a boom this is for our senior citizens. Because as they get older, they seem to lose their appetite. Nothing tastes as good, and if they are not feeling well or if they are on medication of some kind, all I do is say 'Open wide' and spray this. It tastes good and it gives them a pickup. It puts a sparkle back in their life. The nurses down at HMS Anderson that take care of the little babies who have leukemia and who are on radiation and chemotherapy called to say 'you

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don't know how -- when you are on radiation and chemotherapy' -- and we have so many people out there who are, thank God, getting rid of cancer. But they have to go through the process. You get nauseous and pukey and puny and you don't want to eat. But you have got to keep your strength up. This is the way to do it. Just spray this in. Get it into your system and not flush 95% of it down the toilet.

Show host: So, please. Just stay on the phone lines, ladies and gentlemen. We are going to continue to take the calls coming through on the vitamins. But, we have to offer you the chance to have, yes, your holder. But more important than that, as we talk about the impact of the holidays, a lot of people are going to be grabbing the cigarette and smoking more than they normally do due to stress. So, for people out there -- and this is Ruta's last day here. I mean this is the time to make the call. If you were with us yesterday, or the day before and you've heard about it, make the call today. Let's take a look right now, in a two-pack, which allows you the chance to either have two for yourself or use one for a friend, the smoke-less spray. Two packs today at only \$18.95. And the holder. I can't believe we have any left. A few hundred left of this incredible holder.

Ruta Lee: Very --

Show host: A constant reminder of the importance of using these products.

Ruta Lee: And you know its also such a beautiful gift.

Show host: That's a great idea.

Ruta Lee: You know it comes in this wonderful, little velvet pouch. And, come over here so I can show you. Can you see -- oops -- here is -- there it is --

Show host: There you go.

Ruta Lee: It comes in a beautiful little drawstring velvet pouch. The point is, don't keep it in the pouch. Put it around your neck like this. And one of the girls called me -- I've got to share this with you. She said 'Ruta, you've changed my life. Not only am I happy and healthy. But I was spraying my vitamins as I was going down in the elevator one day because my butt was dragging and I thought, gee, I'm tired. I need some of my vitamins.' And she said a cute guy was standing next to me and he said 'what are you doing?' And she said, 'well, I'm spraying my vitamins.' And they got to talking and, to cut a long story short, he took her out for drinks and they are now married. So you see, it's a great conversation starter as well. Dear ones, let me tell you about this smoke-less spray. The same process works. All you do is open wide, spray. And it satisfies your need for a cigarette. Somehow a message goes from the brain to the body that says 'stop quivering. You've satisfied a need.' And you haven't done it with a drug. You've done it with vitamins, minerals, herbs and spices that tickle your tongue and tickle your fancy. Now, I promise you, these things used to be available in a fancy

catalogue for about \$28.00, \$29.00 a piece. I'm not talking about the holder. I'm talking about just the spray itself. We bring you two of them, because I made a pledge that I would never bring you anything that I didn't believe it, down to the tips of my toes and what is the best available at the very lowest price. Sweeties, there they are. Two for \$18.95 and the holder for \$14.95. What a treat. Either for yourself or maybe a smoker in your family. Now, listen to me. You know you've got to quit smoking. But this is a very stressful season and you're going to be reaching for a cigarette all the time. Somehow smoking and drinking seem to go together. Its cocktail time. Its Christmas party time. Its celebration time. And they seem to go together. It would be quite wonderful if you could carry this with you the way I do with this beautiful piece of jewelry and spray every time you think you want a cigarette. Now, if you're a smoker, you know here in your mind and in your soul that you should quit smoking. And its very hard to do. I promise you this works. You get our money-back guarantee. It works with just the natural vitamin and mineral and herb and spice ingredients. Money-back guarantee. Does any other product promise you a money-back guarantee? Does the patch, which just feeds you more nicotine? Does the nicorette gum, which feeds just more nicotine? Do you know that all of the products out there on the marketplace that you might go to out of panic all say if you are on heart medication do not use. If you are pregnant, do not use. If you are on high blood pressure medicine, do not use. If you overdose, go to your nearest poison center. I don't want you to put that crap in your body. I want you to spray natural, God-given vitamins and minerals. And you know what happens? A message goes to your body that says quit shaking. You can make it for another ten minutes without a cigarette. You can make it for another ½ hour without a cigarette.

I've had smokers call to tell me they have been smoking for 20, 30, 40 years and that they are able to quit smoking in five days, able to quit cold-turkey. I always say it takes a month to make a habit, it takes a month to break one. So, think about doing this as a Christmas gift to your family. Open this up in front of your family and say 'Family, as a Christmas gift to all of you because you love me, I'm going to quit smoking. I promise you.' And you can do it. In an easy, simple way. Let's take a call.

Show host: Hi, you're on the air with Ruta. And what is your name, please?
Caller: Sally.
Ruta Lee: Sally?
Caller: Yes. She just talked to me.
Ruta Lee: Yes. Hi, Sally. Are you back again? Are you a smoker?
Caller: No. I quit three years ago with your sprays.
Ruta Lee: Oh! Hallelujah, Sally! Well, Sally, you obviously have been with me right since the beginning, haven't you honey?

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Caller: Yeah --
Ruta Lee: Three years --
Caller: I know if you sell anything, it's bound to work.
Ruta Lee: Oh, bless you. You know -- you're bringing up a good point. You prove a point. I am starting my fifth year on the air with my products. The diet sprays, the vitamin sprays, and the smokeless spray. Sally can attest to this. I wouldn't have lasted for five minutes, five weeks, if it didn't work. Because we guarantee you your money back. Sally, how much did you smoke?
Caller: Three packs a day.
Ruta Lee: Whoo!
Caller: For thirty years.
Ruta Lee: Thirty years, three packs a day. And, I don't remember now, how long did it take you to quit?
Caller: A month.
Ruta Lee: A month. Like I said, thirty days. Make a habit, thirty days to break one. And Sally, it was fairly easy, wasn't it?
Caller: Yeah -- very easy.
Ruta Lee: It didn't kill you.
Caller: Yeah. You just had to put that with your cigarettes. And instead of using your cigarettes, you --
Ruta Lee: When you got it, we didn't even have the holder then. You know how easy it is now to have this thing because every time it hits you between your boobies, it reminds you. But I always say if you don't get the holder, it doesn't matter. Take the spray, put it in your car -- pack of cigarettes, wrap a rubber band around it, and then just before you reach for a cigarette, spray. Course, I like having a holder because then I can say, put your cigarettes upstairs, and when you're downstairs you don't want to run up the stairs. And, Sally, you know better than anybody that \$18.95 is about what a carton of cigarettes cost. And --
Caller: I don't know what they are now.
Ruta Lee: Well now with Mr. Clinton's sin tax --
Caller: I just go by the counter and look down at them and say 'I'm so glad I don't have to buy them.'
Ruta Lee: Hallelujah! Are you hearing this, ladies and gentlemen? Sally, who three years ago quit smoking in about a month's time, and she had smoked for thirty years, three packs a day. Do you know, Sally, that in thirty years -- how much money did you burn up? I mean, we're talking probably about \$50,000. That you burned up. And now, you are saving -- if -- if two pack a day is -- what is it honey, we figured it out. Three packs a day. You've got to do it. Two packs is \$150.00 a month. Three packs would be about \$2 -- a little more -- \$225.00 a month. That you're saving.
Caller: Yeah.

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Ruta Lee: Think about that. And not only are you saving that. But, you know what? You're not gonna have to spend money on a fancy funeral because you're gonna outlive everybody.

Caller: But I feel a lot better than I have in years.

Ruta Lee: God bless you for being my friend, Sally. I once again wish you a very, very, happy, happy Thanksgiving Day. A very blessed Christmas. Call me during the Christmas holidays. You know? When I get back here in the middle of December, and let me know how you're doing, okay?

Caller: Okay.

Ruta Lee: Because you're a source of inspiration to an awful lot of people out there who are sitting back on their rusty-dusty saying 'Oh, I don't know. I tried to quit smoking, but I gained weight.' I've had so many callers tell me that they don't gain weight when they use this spray.

Caller: Oh, I lost weight when I used yours.

Ruta Lee: Hooray! You lost weight.

Caller: And I got my girlfriend started on it this summer, so I'm hoping she's stopped. She's in Florida, so I haven't heard yet.

Ruta Lee: Well, God love you. And let me know what she says, okay?

Caller: Okay.

Ruta Lee: A great big hug and kiss, Sally. Bye, bye, angel.

Caller: Bye, bye.

Show host: Now, we have only one minute and 42 seconds left. This is the time to make the call. As Ruta has said, this is her last time here --

Ruta Lee: That's right.

Show host: And the next time will be after Thanksgiving.

Ruta Lee: Now look. This is for you. If you're not a smoker, isn't there somebody in your life that you love dearly who smokes? And if you are the smoker, remember this, that you're not just killing yourself. You're killing everybody around you with your secondary smoke. You're killing your children, your grandchildren, You're killing your pets, dear ones. It makes me crazy when I see young families out in restaurants. And the mother and father are smoking and they're saying 'eat your broccoli, dear, it's good for you. Eat your carrots, dear, it's good for you.' Children, you're killing your children. Not only are you killing them, you smell like a compost heap on fire. You know the grand kids come in and say 'I don't want to kiss grandma. She stinks.' It's guaranteed to work. It doesn't put chemicals into your body. All natural given, vitamins, minerals, herbs and spices. You won't be shaky with anxiety. Just spray every time you want a cigarette. But, most of all, get to the phone. Call now. Think about this as a Christmas gift for somebody that you want to stop smoking. Maybe young college people. Maybe someone that has suddenly starting smoking because they think it is chic. I got a call from a lady last month. And she said

'Ruta,' and she had called me a year or two ago and she said 'Ruta, we worked so hard, my husband and I, to save our money, put our kids through school. We thought we would go into our golden retirement years traveling and enjoying the money that we earned.' Do you know what she said? 'Do you know where I'm traveling? To the nursing home where my husband is strapped to a machine that does his breathing for him.' She called me last month to say 'Darling Ruta. I wish this had been around five years ago and ten years ago when it would have made a difference in his lungs. My husband died.' She said 'Thank God, I have stopped. But, I could have had a lovely, long life with my husband thanks to your product. If it had just been around a few years before.' Don't wait. Don't wait until the doctor says you're gonna die if you don't stop smoking. Use your brains that God gave you. God gave you one body to last you a lifetime. Don't spit in His eye by smoking. Dear ones, what can I do but say hallelujah for this product. It works. But it won't work unless you get up off your duff, get to the telephone, use your finger to dial, and then use your finger to spray before you put that cigarette in your mouth. Just promise me that you'll do it. Try it. You have nothing to lose but a rotten, crappy habit that is not just killing you, but everybody around you. And, if you're not the smoker, get it for somebody you love who does smoke.

Show host: Ruta, thank you so much for being here.
Ruta Lee: You're an angel.
Show host: It's always great. Wonderful health.
Ruta Lee: Thank you for sharing your time.
Ruta Lee: Dear ones, hang on the phone. We'll take the call, but hang on the phone. Get in there and do it now.
Show host: So, do not hang up. Stay there. We'll continue to take all the calls coming through.

DECISION AND ORDER

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

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by 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 Live-Lee Productions, Inc. ("Live-Lee") is a corporation organized, existing and doing business under and by virtue of the laws of the state of Texas, with its offices and principal place of business at 2761 Laurel Canyon Blvd., Los Angeles, California.

2. Ruta Lee is an officer and director of Live-Lee. 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. She resides at 2436 Shirley Avenue, Fort Worth, Texas.

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 respondents Live-Lee Productions, Inc., a corporation, its successors and assigns, and its officers; and Ruta Lee, individually and as an officer and director of said corporation; and respondents' agents, representatives and employees, directly or through any partnership, corporation, subsidiary, division or other device, in connection with the manufacturing, advertising, packaging, labeling, promotion, offering for sale, sale or distribution of Life Way

Vitamin C and Zinc Spray, Life Way Antioxidant Spray, Life Way Vitamin B-12 Spray, or any other food, food or dietary supplement, or drug, as "food" and "drug" are defined in Section 15 of the Federal Trade Commission Act, 15 U.S.C. 55, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from making any representation, in any manner, directly or by implication:

A. That such product:

1. Is more fully absorbed by the human body than any other product;
2. Heals lesions in the mouth, cold sores on the mouth, or cracking of the corners of the lips;
3. Prevents common colds;
4. Effectively treats symptoms related to hangovers;
5. Increases energy;
6. Ensures the proper functioning of the immune system;
7. Reduces the risk of contracting infectious diseases;
8. Prevents facial lines; or

B. That use of the product can or will have any effect on the user's health, or on the structure or function of the human body,

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

Provided, that it shall be a defense hereunder that the respondents neither knew nor had reason to know of the inadequacy of substantiation for the representation.

II.

It is further ordered, That respondents Live-Lee Productions, Inc., a corporation, its successors and assigns, and its officers; and Ruta Lee, individually and as an officer and director of said corporation; and respondents' agents, representatives and employees, directly or through any partnership, corporation, subsidiary, division or other device, in connection with the manufacturing, advertising, packaging, labeling, promotion, offering for sale, sale or distribution of Life Way Smoke-Less Nutrient Spray or any other smoking cessation product, program, or service, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from making any representation, in any manner, directly or by implication:

A. That such product, program, or service enables smokers, regardless of how long they have smoked or how much they smoke, to stop smoking easily;

B. That such product, program, or service satisfies the physiological urge to smoke a cigarette, or eliminates the quivering, anxiety and weight gain attendant with quitting smoking; or

C. Regarding the performance, benefits, efficacy or safety of any such product, program, or service,

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

Provided, that it shall be a defense hereunder that the respondents neither knew nor had reason to know of the inadequacy of substantiation for the representation.

III.

It is further ordered, That, for five (5) years after the last date of dissemination of any representation covered by this order, respondents Live-Lee Productions, Inc., a corporation, its successors and assigns, and its officers; and Ruta Lee, individually and as an officer and director of said corporation, 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 respondent Live-Lee Productions, Inc. shall, 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.

V.

It is further ordered, That respondent Live-Lee Productions, 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, 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.

VI.

It is further ordered, That respondent Ruta Lee shall, for a period of five (5) years from the date of issuance of this order, notify the Commission within thirty (30) days of the discontinuance of her present business or employment and of her 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 the respondent's new business address and telephone number, current home address, and a statement describing the nature of the business or employment and her duties and responsibilities.

VII.

It is further ordered, That respondents Live-Lee Productions, Inc., a corporation, its successors and assigns, and its officers; and Ruta Lee, individually and as an officer and director of said corporation, 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.

Set Aside Order

120 F.T.C.

IN THE MATTER OF

MANNESMANN, A.G.

SET ASIDE ORDER IN REGARD TO ALLEGED VIOLATION OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT*Docket C-3378. Consent Order, Mar. 24, 1992--Set Aside Order, Oct. 11, 1995*

This order reopens a 1992 consent order--which required Mannesmann to divest the Buschman Co. and to obtain, for 10 years, Commission approval prior to acquiring any business that manufactures and sells certain conveyor systems--and sets aside the consent order pursuant to the Commission's Prior Approval Policy Statement. The order cites the availability of the premerger notification and waiting period requirements, and noted that under the Policy Statement, the Commission presumes that the public interest requires setting aside the prior approval requirement in paragraph V of the order.

ORDER SETTING ASIDE ORDER

On June 29, 1995, Mannesmann, A.G. ("Mannesmann"), filed its Petition To Reopen and Vacate or Modify Consent Order ("Petition") in this matter. Mannesmann asks that the Commission reopen and modify the 1992 consent order in this matter pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Section 2.51 of the Commission's Rules of Practice and Procedure, 16 CFR 2.51, and consistent with the Statement of Federal Trade Commission Policy Concerning Prior Approval and Prior Notice Provisions, issued June 21, 1995 ("Prior Approval Policy Statement").¹ Mannesmann in its Petition requests that the Commission reopen and set aside the order in Docket No. C-3378 or, in the alternative, reopen and modify the order by deleting the requirement in paragraph V that Mannesmann seek prior Commission approval for certain acquisitions. The Petition was on the public record for thirty days; no comments were received.

The Commission, in its Prior Approval Policy Statement, "concluded that a general policy of requiring prior approval is no longer needed," citing the availability of premerger notification and waiting period requirements of Section 7A of the Clayton Act, 15

¹ 60 Fed. Reg. 39,745-47 (August 3, 1995); 4 Trade Reg. Rep. (CCH) ¶ 13,241, at 20,991 (June 21, 1995).

U.S.C. 18a, to protect the public interest in effective merger law enforcement. Prior Approval Policy Statement at 2. The Commission announced that it will "henceforth rely on the HSR process as its principal means of learning about and reviewing mergers by companies as to which the Commission had previously found a reason to believe that the companies had engaged or attempted to engage in an illegal merger." As a general matter, the Commission said, "Commission orders in such cases will not include prior approval or prior notification requirements." *Id.*

Narrow prior approval or prior notification provisions may be necessary to protect the public interest in some circumstances. The Commission said in its Prior Approval Policy Statement that "a narrow prior approval provision may be used where there is a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for the provision, attempt the same or approximately the same merger." The Commission also said that "a narrow prior notification provision may be used where there is a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for an order, engage in an otherwise unreportable anticompetitive merger." *Id.* at 3.

The Commission in its Prior Approval Policy Statement announced its intention "to initiate a process for reviewing the retention or modification of these existing requirements" and invited respondents subject to such requirements "to submit a request to reopen the order." *Id.* at 4. The Commission determined that, "when a petition is filed to reopen and modify an order pursuant to . . . [the Prior Approval Policy Statement], the Commission will apply a rebuttable presumption that the public interest requires reopening of the order and modification of the prior approval requirement consistent with the policy announced" in the Statement. *Id.*

The presumption is that setting aside the prior approval requirement in paragraph V of the order in Docket No. C-3378 is in the public interest. Nothing to overcome the presumption has been presented, and nothing in the record, including the original complaint and order, suggests that exceptions described in the Prior Approval Policy Statement are warranted. The Commission has determined to reopen the proceeding in Docket C-3378 and set aside the order.²

² Mannesmann completed the divestiture required by the order in 1992; and the only remaining obligation under the order is the prior approval requirement in paragraph V and the attendant reporting requirements.

Accordingly, It is hereby ordered, That this matter be, and it hereby is, reopened, and that the Commission's order issued on March 24, 1992, be, and it hereby is, set aside as of the effective date of this order.

IN THE MATTER OF

THE COUNCIL OF FASHION DESIGNERS OF AMERICA, ET AL.

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

Docket C-3621. Complaint, Oct. 17, 1995--Decision, Oct. 17, 1995.

This consent order prohibits, among other things, a New York corporation and a trade association of fashion designers from entering into, organizing, implementing or continuing any agreement to fix the price, terms or conditions of compensation for modeling or modeling agency services, and requires the respondents to send a letter, along with the Commission's complaint and order, to all members and officers of the organizations, as well as the specified modeling agencies and designer.

Appearances

For the Commission: *Michael E. Antalics, Karen Mills and William Baer.*

For the respondents: *Jack Hassid, Swerdlin & Hassid, New York, N.Y.*

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 The Council of Fashion Designers of America (hereinafter "CFDA"), a trade association of fashion designers, is a not-for-profit 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 1412

Broadway, New York, New York. CFDA engages in activities in substantial part for the profit of its members.

PAR. 2. Respondent 7th on Sixth, Inc. (hereinafter "7th on Sixth") is a not-for-profit 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 1412 Broadway, New York, New York. 7th on Sixth engages in activities in substantial part for the profit of its members.

PAR. 3. The acts and practices of 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. 4. Except to the extent that competition has been restrained as alleged herein, members of CFDA and the members of 7th on Sixth have been, and are now, in competition among themselves and with others as purchasers of model and modeling agency services.

PAR. 5. On or about February 1, 1991, CFDA met and discussed a proposal of one of its members that CFDA should hire an Executive Director who could, among other things, address on their collective behalf the issue of prices paid for model services. On several occasions from February 1, 1991 to date, respondents discussed their desire to reduce competition among themselves for the services of models in order to achieve a reduction in the rates paid for the services of models.

PAR. 6. On or about July 14, 1993, CFDA met and formed, funded and facilitated 7th on Sixth, Inc. CFDA voted that its Executive Director should act as Executive Director of 7th on Sixth while in the employ of CFDA. A legitimate purpose of 7th on Sixth was to produce centralized fashion shows twice a year in New York City in Bryant Park. 7th on Sixth solicited bids from suppliers of various services necessary for the production of the fashion shows: sites, architectural design, production, tents, runway assembly, lighting design and installation, and security. 7th on Sixth selected suppliers, and contracted with them. 7th on Sixth resold the package of services that it had purchased from suppliers to designers interested in using 7th on Sixth venues for their shows, for a set fee that varied only depending on the particular venue chosen. 7th on Sixth did not solicit bids for the purchase of modeling services, did not purchase modeling services, and did not resell modeling services to designers.

PAR. 7. At the July 14, 1993 CFDA meeting, two members of the Board of Directors stated that they wanted to call a special meeting for designers with the heads of all the major modeling agencies to discuss models' fees in connection with the 7th on Sixth fashion shows.

PAR. 8. On or about September 1, 1993, the Executive Director of 7th on Sixth invited fashion designers interested in participating in the 7th on Sixth fashion shows to a meeting on September 14, 1993 to discuss, among other things, an agreement on modeling fees.

PAR. 9. On or about September 14, 1993, designers who were members of respondent CFDA and were interested in participating in the 7th on Sixth fashion shows and staff and counsel for respondents met to discuss various issues relating to the 7th on Sixth fashion shows, including modeling fees. During this meeting, respondents agreed not to compete for modeling services and agreed to determine modeling fees collectively, rather than allow prices to be determined in a competitive market. The Executive Director of CFDA and 7th on Sixth, on behalf of respondents, then invited the major modeling agencies to meet with representatives of the fashion designers the next day to present their collective position on fees.

PAR. 10. On or about September 15, 1993, respondents and their counsel met with representatives of the major modeling agencies. Respondents: (a) demanded that the modeling agencies agree to prices collectively determined by respondents, and (b) threatened to hire models through a collectively organized "open call" procedure which would have the effect of bypassing the modeling agencies and the models they represented. As a result of this threat, the agencies agreed to consider whether they should accommodate the respondents' collective demands.

PAR. 11. Respondents invited the modeling agencies to meet with respondents again on September 22, 1993, to hear whether the modeling agencies had decided to succumb to respondents' collective demands. On or about September 22, 1993, respondents and their counsel met again with representatives of the major modeling agencies. Upon hearing that the modeling agencies were not prepared to acquiesce to the respondents' collective demands, respondents repeated their collective demand regarding prices, and their threat to proceed with a collectively organized "open call." Confronted by this threat, the agencies agreed to negotiate with respondents.

PAR. 12. Between September 22, 1993 and October 12, 1993, respondents continued to press their demands regarding prices. During this time, respondents and their counsel continued to plan for an industry-wide open call so that designers could collectively refuse to deal with models and modeling agencies that refused to acquiesce to their demand regarding prices.

PAR. 13. In early October, 1993, the modeling agencies capitulated and agreed to the modeling fee proposal for the 7th on Sixth fashion shows made to them by respondents. On October 12, 1993, 7th on Sixth memorialized the final agreement on prices and other terms of compensation for modeling services in a letter sent to fashion designers and modeling agencies. Later in October 1993, 7th on Sixth issued a press release in which it claimed credit for reaching an agreement on prices.

PAR. 14. The respondents' agreement as to prices paid for model and model agency services was not ancillary to the legitimate purposes of creating centralized fashion shows, and respondents did not purchase modeling services jointly.

PAR. 15. By engaging in the acts and practices described in paragraph five and paragraphs seven through fourteen, respondents have acted as a combination of their members or conspiracy among their members to eliminate competition among themselves in order to fix prices.

PAR. 16. The acts and practices of the 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. Restraining competition among purchasers of modeling and modeling agency services;
- B. Fixing or stabilizing the prices that are paid to models and modeling agencies; and
- C. Depriving consumers of access to a competitively determined price and quality of modeling and modeling agency services.

PAR. 17. The combination or conspiracy and the acts and practices of 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 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 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, 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 The Council of Fashion Designers of America (hereinafter "CFDA"), a trade association of fashion designers, is a not-for-profit 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 1412 Broadway, New York, New York. CFDA engages in activities in substantial part for the profit of its members.

2. Respondent 7th on Sixth, Inc. (hereinafter "7th on Sixth") is a not-for-profit 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 1412 Broadway, New York, New York. 7th on Sixth engages in activities in substantial part for the profit of its members.

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. "*Respondents*" means the Council of Fashion Designers of America and 7th on Sixth, Inc.;

B. "*Person*" means any individual, partnership, association, company, or corporation;

C. "*CFDA*" means the Council of Fashion Designers of America, its directors, trustees, officers, members, representatives, committees, subcommittees, boards, divisions, agents, employees, successors and assigns;

D. "*7th on Sixth*" means 7th on Sixth, Inc., its directors, trustees, officers, members, representatives, committees, subcommittees, boards, divisions, agents, employees, successors and assigns.

II.

It is further ordered, That respondents CFDA and 7th on Sixth, directly or indirectly, or through any corporate or other device, 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. Raising, lowering, fixing, maintaining or stabilizing the price, terms or other forms or conditions of compensation paid for modeling or modeling agency services; or

B. Encouraging, advising, pressuring, assisting, inducing, or attempting to induce any person to engage in any action prohibited by this order.

Provided, however, that it shall not be deemed a violation of this order for more than one member of CFDA and/or 7th on Sixth to employ or use the services of the same person where such employment or use is not otherwise in furtherance of any action prohibited by this order.

III.

It is further ordered, That respondents CFDA and 7th on Sixth each shall:

A. Within thirty (30) days after the date on which this order becomes final, distribute by certified U.S. first-class mail a copy of this order and the accompanying complaint, and the notice attached in Appendix A hereto, to:

1. Each of its members, officers, directors, and employees, and each fashion designer who has shown in the fashion shows organized by 7th on Sixth;

2. Each person to whom it has, at any time prior to the effective date of this order, communicated the benefits of membership in 7th on Sixth, or whom it has invited to join 7th on Sixth, as identified in Appendix B hereto;

3. The International Model Managers Association c/o David Blasband, Esq., Deutsch, Klagsbrun & Blasband, 800 Third Avenue, New York, New York;

4. Each of the modeling agencies listed in Appendix C attached hereto; and

B. 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, its committees and subcommittees. Such minutes shall (i) identify all persons attending

such meeting, (ii) include a certification, signed by the presiding officer and secretary under penalty of perjury, that states whether prices, terms, or other forms or conditions of compensation paid for modeling or modeling agency services were discussed at the meeting, and (iii) summarize what was discussed at the meeting. If prices, terms, or other forms or conditions of compensation paid for modeling or modeling agency services were discussed at any business meeting subject to this order, then the minutes of such meeting shall identify the participants in the discussion and state in detail the substance of the discussion(s). Minutes and the required certifications shall be retained for a period of five (5) years from the date the minutes were created. Such minutes shall be provided to the Commission upon request.

C. Within sixty (60) days after the date on which this order becomes final, and annually thereafter for five (5) years, on or before the anniversary date of this order,

1. Communicate either orally or in writing to its officers, directors, employees and members concerning their obligations under this order;

2. Obtain from each of its officers, directors, and employees an annual written certification, that he or she (a) has read, understands and agrees to abide by the terms of this order, (b) is not aware of any violation of this order, and (c) has been advised and understands that failure of CFDA or 7th on Sixth, as defined in the order, to comply with this order may subject either or both of the respondents to penalties for violation of the order; and

3. Retain the certifications required by Section III.C.2. Such certifications shall be provided to the Commission upon request.

IV.

It is further ordered, That each respondent shall:

A. 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, bankruptcy, or any other change in the respondent which may affect compliance obligations under this order; and

B. File a written report with the Commission within sixty (60) days after the date the order becomes final, and annually thereafter for five (5) 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 respondent has complied and is complying with the order.

V.

It is further ordered, That, for the purpose of determining or securing compliance with this order, each respondent shall permit any duly authorized representative of the Commission:

A. Upon reasonable notice to respondent 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 each 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, employees, or agents of respondent, who may have counsel present.

VI.

It is further ordered, That this order shall terminate on October 17, 2015.

APPENDIX A

Dear :

[Respondent] has agreed, without admitting any violation of the law, to the entry of a consent order by the Federal Trade Commission prohibiting certain conduct. A copy of the order is enclosed.

The order spells out [respondent]'s obligations in greater detail, but we want you to know and understand the following:

The Council of Fashion Designers of America and 7th on Sixth, Inc. may not negotiate on behalf of fashion designers collectively with models or modeling agencies for modeling or modeling agency services, and may not enter into or continue any agreement or understanding, express or implied, for the purpose or with the effect of affecting the prices paid for modeling or modeling agency services.

Non-compliance with this order may subject [respondent] to penalties for violation of the order, and may be reported to the Federal Trade Commission.

Sincerely,

[respondent]

Enclosure

THE COUNCIL OF FASHION DESIGNERS OF AMERICA, ET AL. 827

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Decision and Order

APPENDIX B

Mr. Victor Alfaro
130 Barrow Street, Suite 105
New York, N.Y. 10014

Mr. Robert Danes
488 Seventh Avenue
New York, N.Y. 10018

Ms. Gemma Kahng
550 Seventh Avenue
New York, N.Y. 10018

Ghost
c/o Showroom Seven
498 Seventh Avenue
New York, N.Y. 10018

Mr. Mark Eisen
214 West 39th Street
New York, N.Y. 10018

Mr. Byron Lars
29 West 57th Street
New York, N.Y. 10019

Ms. Mary McFadden
240 West 35th Street
New York, N.Y. 10001

Magaschioni, Inc.
499 Seventh Avenue
New York, N.Y. 10018

The Next Generation
242 West 38th Street
New York, N.Y. 10018

Mr. Mark Badgley
Badgley Mischka
525 Seventh Avenue
New York, N.Y. 10018

Mr. James Mischka
Badgley Mischka
525 Seventh Avenue
New York, N.Y. 10018

Ms. Jennifer George
Jennifer George, Inc.
530 Seventh Avenue
New York, N.Y. 10018

Mr. Fernando Sanchez
Fernando Sanchez Ltd.
5 West 19th Street
New York, N.Y. 10011

Ms. Joan Vass
Joan Vass NY
117 East 29th Street
New York, N.Y. 10016

Ms. Adrienne Vittadini
1441 Broadway
New York, N.Y. 10018

Mr. Byron Lars
29 West 57th Street
New York, N.Y. 10019

Decision and Order

120 F.T.C.

APPENDIX C

Ms. Bethann Hardison
Bethann Management Co.
36 North Moore Street
New York, NY 10013

Boss Models
317 West Thirteenth Street
New York, NY 10014

Ms. Frances Grill, President
Click Model Management
881 7th Ave., Suite 1013
New York, NY 10019

Mr. Michael Flutie, President
Company Ltd.
270 Lafayette St., Suite 1400
New York, NY 10012

Ms. Monique Pillard, President
Elite Model Management
111 East 22nd Street
New York, NY 10010

Ms. Ellen Harth
Elite Runway
149 Madison Avenue
New York, NY 10016

Joseph Hunter, President
Ford Models, Inc.
344 East 59th Street
New York, NY 10022

Mr. Charles Bennett,
Senior Vice President
International Management Group
170 Fifth Avenue, 10th Floor
New York, NY 10010

Ms. Irene Marie, President
I'M New York
120 Wooster St.
New York, NY 10012

Ms. Irene Marie, President
Irene Marie, Inc.
728 Ocean Drive
Miami Beach, FL 33139

Ms. Milie Pellet, President
Next Management
23 Watts Street, 5th Floor
New York, NY 10013

Now Model Management
568 Broadway, Suite 504-A
New York, New York 10012

Pauline Bernatchez, President
Pauline's
379 West Broadway, 5th Floor
New York, NY 10012

Ms. Natasha Esch, President
Wilhelmina Models, Inc.
300 Park Avenue South, 2nd Floor
New York, NY 10010

Women Model Management
107 Greene Street
New York, NY 10012

Ms. Barbara Lantz, President
Zoli Management
3 West 18th Street
New York, NY 10011

IN THE MATTER OF

J. WALTER THOMPSON USA, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3622. Complaint, Oct. 20, 1995--Decision, Oct. 20, 1995*

This consent order prohibits, among other things, a New York-based advertising agency, which prepared advertisements for Jenny Craig, Inc., from claiming that any weight-loss program is recommended, approved, or endorsed by any person, group, or other entity, unless it possesses and relies upon competent and reliable scientific evidence to substantiate the representation. In addition, the consent agreement prohibits the respondent from misrepresenting the existence, results, or interpretations of any test, study, or survey.

*Appearances*For the Commission: *David M. Newman.*For the respondent: *Stuart Fridel, Davis & Gilbert, New York, N.Y.*

COMPLAINT

The Federal Trade Commission, having reason to believe that J. Walter Thompson USA, Inc., a corporation ("JWT" or "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. JWT is a corporation, organized, existing and doing business under and by virtue of the laws of Delaware, with its principal office or place of business at 466 Lexington Avenue, New York, New York.

PAR. 2. JWT is now, and at all times relevant to this complaint has been the advertising agency of Jenny Craig, Inc., and Jenny Craig International, Inc. ("Jenny Craig"). JWT has prepared and disseminated advertising material to promote the sale of the Jenny Craig Weight Loss Program.

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. JWT has prepared and disseminated or has caused to be disseminated advertisements for the Jenny Craig Weight Loss Program, including but not necessarily limited to the attached Exhibits A-E. These advertisements contain the following statements:

(a) "9 out of 10 Clients Would Recommend Jenny Craig.... When we asked our clients if they would recommend our program to their friends they gave us a resounding 'Yes!' And we think that's the best advertising we could ever hope for. You probably know someone who's been successful on the Jenny Craig program. Call now and find out just how they did it." (Exhibit A)

(b) "86% liked the counseling ... 89% liked the program ... And 94% would recommend us to a friend. National Survey of Jenny Craig Clients Oct-Dec 1991. Now. What could be more impressive than that?" (Exhibit B)

(c) "The other day I saw a commercial that said nine out of ten Jenny Craig clients would recommend Jenny Craig to their friends. Nine out of ten. Which got me to thinking ... " (Exhibit C)

(d) "National Survey of Jenny Craig Clients
Oct-Dec 1991

Percentage of Jenny Craig clients responding
'completely satisfied' or 'very satisfied':

* With the overall Jenny Craig program	89%
* With the weekly personal counseling sessions	87%
* With the friendliness of the Jenny Craig staff	91%
* That would recommend the program to a friend	94%

YOU'RE PROBABLY WONDERING WHAT ELSE WE COULD
POSSIBLY DO TO IMPRESS YOU." (Exhibit D)

(e) "In fact, 9 out of 10 Jenny Craig clients would recommend Jenny Craig to their friends." (Exhibit E)

PAR. 5. Through the use of the statements contained in the advertisements referred to in paragraph four, including but not necessarily limited to the statements in the advertisements attached as Exhibits A-E, respondent has represented, directly or by implication, that competent and reliable studies or surveys show that ninety percent or more of Jenny Craig customers would recommend the Jenny Craig Weight Loss Program.

PAR. 6. In truth and in fact, competent and reliable studies or surveys do not show that ninety percent or more of Jenny Craig customers would recommend the Jenny Craig Weight Loss Program.

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 advertisements referred to in paragraph four, including but not necessarily limited to the statements in the advertisements attached as Exhibits A-E, respondent has represented, directly or by implication, that ninety percent or more of Jenny Craig customers would recommend the Jenny Craig Weight Loss Program.

PAR. 8. Through the use of the statements contained in the advertisements referred to in paragraph four, including but not necessarily limited to the statements in the advertisements attached as Exhibits A-E, respondent has represented, directly or by implication, that at the time it made the representations set forth in paragraphs five 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 and seven, respondent 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. Respondent knew or should have known that the representations set forth in paragraphs five and eight were, and are, false and misleading.

PAR. 11. 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.

Chairman Pitofsky recused.


EXHIBIT A

9 Out Of 10 Clients Would Recommend Jenny Craig. Who Did They Tell?

		
<small>"I told my hairdresser." Nancy Ruffalo lost 25 lbs.</small>	<small>"I told my coach." Gwen Ockers lost 100 lbs.</small>	<small>"I told my parents." Laurie Sackman lost 20 lbs.</small>
		
<small>"I told my secretary." Kelly Allagrett lost 33 lbs.</small>	<small>"I told my best friend." Cynthia West lost 47 lbs.</small>	<small>"I told my twin sister." Holly Rodriguez lost 26 lbs.</small>
		
<small>"I told my doctor." Joni Lovitch lost 53 lbs.</small>	<small>"I told everyone I know." Carol Pickett lost 100 lbs.</small>	<small>"I told my best friend." Nolan Harvey lost 25 lbs.</small>

When we asked our clients if they would recommend our program to their friends they gave us a resounding "Yes!" And we think that's the best advertising we could ever hope for. You probably know someone who's been successful on the Jenny Craig program. Call now and find out just how they did it.

CALL NOW 1-800-97-JENNY



Pay As You Go

\$6

A Week Program Fee

Jenny Craig® is a registered trademark of Jenny Craig International, Inc. © 1991 Jenny Craig International

Issaquah Press (Seattle)
9 Out of 10
Ad # 132095, 3 col x 8"
3/17 Insertion

EXHIBIT A

EXHIBIT B



T E L E V I S I O N

SAN FRANCISCO CREATIVE DEPARTMENT

Job No.	JCI-GEN-422062	Title	Statistics/L5
Client	JENNY CRAIG	Status	AS PRODUCED
Product		Length	:30
ISCI No	YJCJ 0527	Date	4/16/92
	CORPORATE		

<p>VIDEO TITLE: WHAT TO YOU LIKE ABOUT LOSING WEIGHT WITH JENNY CRAIG? CUT TO MARIA GENOVESE CUT TO LAURA BECK TITLE: 86% LIKED THE COUNSELING NATIONAL SURVEY OF JENNY CRAIG CLIENTS OCT-DEC 1991 CUT TO MARIA GENOVESE CUT TO PHIL MCDERMOTT CUT TO LAURA BECK TITLE: 89% LIKED THE PROGRAM NATIONAL SURVEY OF JENNY CRAIG CLIENTS OCT-DEC 1991 CUT TO PHIL MCDERMOTT CUT TO MARIA GENOVESE CUT TO PHIL MCDERMOTT TITLE: 94% RECOMMEND TO A FRIEND NATIONAL SURVEY OF JENNY CRAIG CLIENTS OCT-DEC 1991 CUTS OF MARIA, PHIL, AND LAURA TITLE: Lose all you want. \$39 Program Fee (LOGO) Jenn's Cuisine additional. TITLE: Get back a dollar a pound once you reach your goal weight. (LOGO) Some restrictions apply. TITLE: Get back a dollar a pound. 1-800-92-JENNY (LOGO) Some restrictions apply.</p>	<p>AUDIO AYQ: What do Jenny Craig clients like about Jenny Craig? MARIA: My Jenny Craig counselor is wonderful. LAURA: She was always encouraging. AYQ: 86% liked the counseling. MARIA: The Lifestyle classes are so important. PHIL: The food was great. LAURA: The Jenny Craig Program works in real life. AYQ: 89% liked the program. PHIL: If you want to lose weight. MARIA: Go to Jenny Craig. PHIL: Right away. AYQ: And 94% would recommend us to a friend. Now. What could be more impressive than that? Lose all you want for \$39. Then get back a dollar for every pound you lose. Call 1-800-92-JENNY. How much would you like to get back?</p>
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EXHIBIT B

Complaint

120 F.T.C.

EXHIBIT C



 R A D I O
 SAN FRANCISCO CREATIVE DEPARTMENT

Job No.	732011	Title	"9 OUT OF 10/94"	
Client	JENNY CRAIG	Status	AS PRODUCED	
Product		Length	:45:15	
ISCI No.	YJCR2017	Date	3/24/93	2126/am

WOMAN:

The other day I saw a commercial that said nine out of ten Jenny Craig clients would recommend Jenny Craig to their friends. Nine out of ten. Which got me to thinking. If Jenny Craig helped me control my weight -- oh not my usual starve-stuff, give my scale a whiplash kind of control -- but *real* control, who would I tell? Well, not being one to gloat, I'd casually mention it to my mother and a few dear, dear friends. I'd drop a hint about Jenny to my boss. My dry cleaner. My plumber. My therapist. I'd tell my neighbor Fred who mows his lawn without a shirt. Geez! I'd run up forty floors to the top of my office building and shout "hey, you down there, look what Jenny did, I can manage my weight now." But before I hit the talk show circuit, do my book tour, gather awards and acclaim the world over, I better call Jenny Craig first.

LIVE ANNCR:

At Jenny Craig lose all the weight you want for just a \$1 a pound. Call 1-800-947-JENNY. 1-800-947-J-E-N-N-Y. Offer good at participating centres. Jenny's Cuisine additional.

EXHIBIT C

Complaint

EXHIBIT D

National Survey of Jenny Craig Clients
Oct-Dec 1991

Percentage of Jenny Craig clients responding "completely satisfied" or "very satisfied":

- With the overall Jenny Craig program **89%**
- With the weekly personal counseling sessions **87%**
- With the friendliness of the Jenny Craig staff **91%**
- That would recommend the program to a friend **94%**

**YOU'RE PROBABLY WONDERING
WHAT ELSE WE COULD POSSIBLY
DO TO IMPRESS YOU.**

FREE PROGRAM FEE.
We're so sure you'll be satisfied with the Jenny Craig program, that when you bring this coupon in, we'll waive your program fee. Jenny's Cuisine is a required additional purchase.

JENNY CRAIG
Weight Loss Centers
THE REAL LIFE ANSWER

DIAL DIRECT 1-800-92-JENNY

Member of J.W.T. Group. © 1991 Jenny Craig International, Inc.

122081 - 4 col x 15.75"

Stanley
44-122081-4 col x 15.75"

EXHIBIT D

Complaint

120 F.T.C.

EXHIBIT E-1



T E L E V I S I O N

SAN FRANCISCO CREATIVE DEPARTMENT

Job No.	JCI-GEN-432004	Title	"9 OUT OF 10/3"
Client	JENNY CRAIG	Status	
Product	9 OUT OF 10	Length	:30
ISCI No	YJCJ1822	Date	2/16/93
	CORPORATE		2102/ms PAGE 1 OF 2

<u>VIDEO</u>	<u>AUDIO</u>
<u>TITLE:</u> IF YOU DISCOVERED A WAY TO CONTROL YOUR WEIGHT...	<u>ANNCR VO:</u> If you discovered a way to control your weight...
<u>TITLE:</u> WHO WOULD YOU TELL?	Who would you tell?
<u>SUPER:</u> DORI GREEN LOST 24 LBS. IN 6 MONTHS	<u>DORI:</u> My mom and dad.
<u>SUPER:</u> SHELLY BENEDICT LOST 27 LBS. IN 5 MONTHS	<u>SHELLY:</u> My doubles partner.
<u>SUPER:</u> LESLIE BALDWIN LOST 36 LBS. IN 8 MONTHS.	<u>LESLIE:</u> The guy at the doughnut shop.
<u>SUPER:</u> MARK HACKBARTH LOST 66 LBS. IN 13 MONTHS.	<u>SHELLY:</u> Half the girls at the club.
<u>TITLE:</u> THAT'S WHAT THESE SUCCESSFUL JENNY CRAIG CLIENTS DID.	<u>MARK:</u> My mechanic.
<u>SUPER:</u> JOANNE WALTON LOST 32 LBS. IN 10 MONTHS.	<u>DORI:</u> My daycare lady.
	<u>VO:</u> That's what these successful Jenny Craig clients did.
	<u>JOANNE:</u> My dog trainer.
	<u>DORI:</u> My father.
<u>SUPER:</u> NANCI PORTER LOST 31 LBS. IN 4 MONTHS	<u>NANCI:</u> My aunt.

EXHIBIT E-1

Complaint

EXHIBIT E-2

J. Walter Thompson

T E L E V I S I O N

SAN FRANCISCO CREATIVE DEPARTMENT

Job No. JCI-GEN-432004
Client JENNY CRAIG
Product 9 OUT OF 10
ISCI No YJCJ1822
CORPORATE

Title "9 OUT OF 10/3"
Status
Length :30
Date 2/16/93 2102/ms PAGE 2 OF 2

VIDEO
TITLE: 9 OUT OF 10 JENNY CRAIG CLIENTS. INDIVIDUAL WEIGHT LOSS AND MAINTENANCE MAY VARY.
TITLE: WOULD RECOMMEND JENNY CRAIG TO THEIR FRIENDS. INDIVIDUAL WEIGHT LOSS AND MAINTENANCE MAY VARY.
TITLE: NEW PRICING POLICY PAY AS YOU GO
TITLE: \$6 A WEEK PROGRAM FEE JENNY'S CUISINE ADDITIONAL
TITLE: 1-800-92-JENNY (LOGO)

AUDIO
SHELLY: My chiropractor.
YO: In fact, 9 out of 10 Jenny Craig clients would recommend Jenny Craig to their friends.
DORI: There are so many.
COUNSELOR: Get personal weight management at Jenny Craig.
Pay as you go for just \$6 a week.
Call 1-800-92-JENNY.

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, 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 J. Walter Thompson, USA, 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 in the City of New York, State of New York.

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

For purposes of this order, the term "diet-related food" shall mean any food (as that term is defined in 15 U. S. C. 55(b)) whose

labeling or advertising makes any claim regarding its weight loss or weight maintenance benefits.

I.

It is ordered, That respondent, J. Walter Thompson USA, 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 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 representing, directly or by implication, that such program is recommended, approved or endorsed by any person, group or other entity, unless, at the time of making any 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 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 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.

Provided, however, that it shall be a defense hereunder that the respondent neither knew nor had reason to know of an inadequacy of substantiation for the representation.

II.

It is further ordered, That respondent, J. Walter Thompson USA, 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 advertising, promotion, offering for sale, or sale of any weight loss or weight control program, weight loss product, health or fitness program, exercise equipment, or diet-related food, 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, study, or survey.

Provided, however, that it shall be a defense hereunder that the respondent neither knew nor had reason to know that the test, study or survey did not prove, demonstrate or confirm the representation.

III.

It is further ordered, That for five (5) years after the date of the last dissemination of the representation to which they pertain, respondent, or its successors and assigns, shall maintain and upon request make available to the Federal Trade Commission or its staff for inspection and copying:

A. All materials relied upon to substantiate any claim or representation covered by this order; 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 corporation that may affect compliance obligations under this order, including but not limited to any change in corporate name or address, dissolution, assignment or sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries.

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 operating divisions, to each of its managerial employees, and to each of its officers, agents, representatives or employees engaged in 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 this order will terminate twenty years from the date of its issuance, or twenty years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

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

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

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

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

VII.

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.

Chairman Pitofsky recused.

Concurring Statement

120 F.T.C.

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

I dissent from Part II of the consent order because the product coverage is too narrow. Part II would prohibit J. Walter Thompson from making deceptive establishment claims for any weight loss or weight control program, weight loss product, health or fitness program, exercise equipment, or diet-related food. Although the product coverage in this provision does go beyond the product with respect to which a violation has been alleged, given the particular facts of this case, I would impose even broader product coverage. In my view, J. Walter Thompson relied on a clearly flawed study in making its deceptive claims, and it continued to make claims based on this flawed study even after it had received contradictory results from a more reliable study that it had commissioned. J. Walter Thompson also readily could transfer deceptive test result claims to other products, as demonstrated by the fact that J. Walter Thompson has entered into three other consent agreements to settle allegations that it made deceptive claims concerning survey or test results for three disparate products.¹ Given that J. Walter Thompson's deception appears to have been deliberate and that its deception readily could be transferred to other products, *see* *Stouffer Foods Corp.*, D. 9250, slip op. at 17 (Sept. 26, 1994), broader product coverage is appropriate.

CONCURRING STATEMENT OF COMMISSIONERS
ROSCOE B. STAREK, III AND CHRISTINE A. VARNEY

Although we have voted to accord final approval to the consent order negotiated with J. Walter Thompson USA, Inc. ("JWT") in this matter, we write to comment on the scope of the product coverage in Part II of the order. Part II addresses the false "establishment" claim challenged in paragraphs five and six of the complaint, *i.e.*, the claim that a valid study or survey showed that ninety percent or more of Jenny Craig Weight Loss Program customers would recommend the program to their friends. Part II of the order prohibits misrepresentations regarding the existence, contents, validity, results,

¹ *J. Walter Thompson Co.*, 97 FTC 323 (1981) (dental cleaning device); *J. Walter Thompson Co.*, 94 FTC 331 (1979) (dishwashers); *J. Walter Thompson Co.*, 84 FTC 736 (1974) (automobiles). Assuming the allegations in this and the previous cases to be true, it would appear that J. Walter Thompson has had difficulty comprehending that making deceptive establishment claims is conduct about which the Commission is concerned.

conclusions, or interpretations of any test, study, or survey, in connection with the promotion of any weight loss or weight control program, weight loss product, health or fitness program, exercise equipment, or diet-related food.

On three previous occasions JWT has signed consent orders settling allegations that it misrepresented the results of surveys or tests.¹ Because of the narrow scope of the product coverage applicable to the relevant order provisions, the Commission, on each occasion, had to pursue a new Section 5 case against the company, rather than being able to seek civil penalties for an order violation. Thus, the Commission's history with JWT raises the question of whether broader product coverage is warranted in this case.²

Extension of an order's product coverage beyond the product or service at issue in a complaint may be justified so long as the order bears a reasonable relationship to the unlawful practices alleged. *See Stouffer Foods Corp.*, D. 9250, slip op. at 17 (Sept. 26, 1994) (citing *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 612-13 (1946)). The Commission generally considers three criteria to determine whether an order bears a reasonable relationship to a particular Section 5 violation: (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. *Stouffer*, slip op. at 17 (citing cases). All three elements need not be present to warrant fencing-in. *Sears, Roebuck & Co. v. FTC*, 676 F.2d 385, 392 (9th Cir. 1982) ("In the final analysis, we look to the circumstances as a whole and not to the presence or absence of any single factor.").

Although we do not have the benefit of a litigated record, from the evidence presented so far, it appears that in this case, the first two, and arguably the third, elements weigh in favor of broad fencing-in.

¹ *J. Walter Thompson Co.*, 97 FTC 333 (1981) (complaint alleged that JWT misrepresented that "4 out of 5 dentists recommend" the Water Pik; consent order prohibits claims regarding surveys of professional groups unless the surveys were designed, executed, and analyzed in a competent and reliable manner); *J. Walter Thompson Co.*, 94 FTC 331 (1979) (complaint alleged that JWT misrepresented the results of tests of the cleaning effectiveness of Sears dishwashers; consent order prohibits, in advertising for major home appliances, misrepresenting the results of tests, studies, surveys, etc.); *J. Walter Thompson Co.*, 84 FTC 736 (1974) (complaint alleged that JWT misrepresented the results of studies on the safety of Ford automobiles; consent order prohibits, in advertising for automobiles, presenting the results of tests, experiments, or demonstrations unless competent and reliable to prove the claimed feature).

² It is true that this consent order has broader product coverage than the prior JWT orders and appears to cover the range of diet- and fitness-related products.

First, the alleged violations are both deliberate and serious. The survey from which the "nine out of ten" claim was derived was obviously and severely flawed. JWT, the largest ad agency in the country, surely must be deemed to have expertise in conducting consumer surveys. Any ignorance in this regard must have been cured by the Commission's earlier decision to hold it liable for the dissemination of misrepresentations about the results of surveys.

The evidence also suggests the violations were serious, as measured by the extent of dissemination. The ad campaign in question was a national one that ran for over a year, and the ads were given to franchisees to run in their areas. Furthermore, the great length of the campaigns dissemination schedule indicates the campaign must have been quite costly.

The second element, the ease with which the violative claims may be transferred to other products, also supports fencing-in. The results of surveys or studies are easily misrepresented, regardless of the type of product or service. The fairly obvious transferability of this type of claim is borne out by the prior consent orders, as those cases involved a diverse range of product categories (surveys of professionals, major home appliances, and automobiles).

The final element is the respondent's history of past violations. The question of whether consent orders may be used as evidence of past violations is at best unsettled. Compare *ITT Continental Baking Co. v. FTC*, 532 F.2d 207, 222 n.23 (2d Cir. 1976) (because consent orders do not constitute an admission that the respondent has violated the law, the Commission may not rely on consent orders as evidence of additional illegal conduct when formulating cease and desist orders in other proceedings) with *Thompson Medical Co.*, 104 FTC 648, 833 n.78 (1984), aff'd, 791 F.2d 189 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987) (while stating that a single consent order would not be used as a basis for concluding that the respondent has a history of past violations, the Commission expressly took no position on whether a pattern of consent orders would be a sufficient history of past violations to warrant fencing-in). Regardless of whether the prior consent orders may be considered evidence of past violations, they show that JWT was aware of the Commission's concern about this type of claim and of the requirements of the law with respect to claims involving surveys and tests.

Despite these concerns, for several reasons we believe that according final approval to the order is appropriate. For example,

broad product coverage arguably weighs more heavily on an ad agency such as JWT that handles accounts for a diverse assortment of products and services, than on a manufacturer or advertiser offering a limited range of products.³ In addition, litigation inevitably presents resource allocation questions.⁴ We write only to point out that in light of all the circumstances of this case, broad product coverage in Part II could have been justified as reasonably related to the violations alleged.

³ On the other hand, the potential burden of a broad order is partially mitigated by the fact that, as an ad agency, JWT's order contains a safe harbor insulating it from liability unless it knows or should know that the survey or test did not prove, demonstrate, or confirm the representation. In addition, it is not unusual for orders covering establishment claims to have broad product coverage because the type of claim covered -- the results or validity of tests or surveys -- is fairly discrete.

⁴ Even so, a litigated order could be beneficial for several reasons. First, in case of future similar violations by JWT, a litigated order clearly could be used as evidence of prior law violations. Second, while there is no guarantee that the Commission would obtain broader product coverage in litigation than is contained in this consent order, it seems unlikely that the Commission would do any worse, and the potential gain is great, both in terms of having JWT under a broader order and in terms of precedential value for other cases. Third, a litigated opinion might resolve some of the uncertainties concerning the precedential value of prior consent orders.

Complaint

120 F.T.C.

IN THE MATTER OF

SUMMIT COMMUNICATIONS GROUP, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3623. Complaint, Oct. 20, 1995--Decision, Oct. 20, 1995*

This consent order prohibits, among other things, Summit and seven Wometco Cable TV companies from agreeing, attempting to agree or carrying out an agreement with any cable television provider to allocate or divide markets, customers, contracts or territories for cable television service in the incorporated and unincorporated areas of the Georgia counties of Cobb, Bartow, Dekalb, Walton, Gwinnett, Fulton, Douglas, Fayette, Coweta, Clayton, Henry, Rockdale, Newton and Cherokee. In addition, the consent order prohibits agreements to refrain from overbuilding any portion of any cable television system in these counties.

Appearances

For the Commission: *Jill M. Frumin.*

For the respondents: *Neal R. Stoll, Skadden, Arps, Slate, Meagher & Flom, New York, N.Y. and A. Douglas Melamed and Robert A. Hammond, III, Wilmer, Cutler & Pickering, Washington, D.C.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission ("Commission"), having reason to believe that the respondents named in the caption hereof, all corporations subject to the jurisdiction of the Commission, have violated and are violating the provisions of 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 stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Summit Communications Group, Inc. (hereinafter "Summit") 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

115 Perimeter Center Place, Suite 1150, Atlanta, Georgia. Time Warner Inc. (hereinafter "TWI") proposes to acquire Summit, at which time Summit will become a wholly-owned subsidiary of TWI.

PAR. 2. Respondent Wometco Cable TV of Georgia, 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 at 5979 Fairburn Road, Douglasville, Georgia.

Respondent Wometco Cable TV of Cobb County, 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 at 1145 Powder Springs Road, Marietta, Georgia.

Respondent Wometco Cable TV of Clayton County, 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 at 6435 Tara Boulevard, Suite 22, Jonesboro, Georgia.

Respondent Wometco Cable TV of Conyers-Rockdale, 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 at 1361 Iris Drive, Conyers, Georgia.

Respondent Wometco Cable TV of Fayette County, 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 at 107 South Glynn Street, Fayetteville, Georgia.

Respondent Wometco Cable TV of Fulton County, 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 at 6435 Tara Boulevard, Suite 22, Jonesboro, Georgia.

Respondent Wometco Cable TV of Henry County, 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 at 6435 Tara Boulevard, Jonesboro, Georgia.

PAR. 3. Respondents described in paragraph two will hereinafter be collectively referred to as "Wometco." On or about December 6, 1994, U S WEST, Inc. (hereinafter "USW"), through its wholly-owned subsidiary Multimedia Cable, Inc., a Delaware corporation, acquired Wometco.

PAR. 4. The acts and practices of 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. 5. Except to the extent that competition has been restrained as alleged herein, Summit and Wometco have been, and are now, in competition between themselves in parts of unincorporated Cobb County, Georgia as providers of cable television services.

PAR. 6. On or about March 16, 1990, Summit entered into a license agreement with Asbury Village/Summit Limited Partnership (hereinafter "Asbury Village") to provide cable television services to Asbury Village Apartments, an apartment complex in unincorporated Cobb County, Georgia. Asbury Village Apartments is located in an area of unincorporated Cobb County where both Summit and Wometco have franchise authority to provide cable television service (hereinafter "dual franchise area"). Pursuant to the license agreement, sometime after March 16, 1990, Summit began pre-wiring units of the Asbury Village Apartments. At or about the same time period, Wometco, which had cable television facilities nearby, also began pre-wiring units of the Asbury Village Apartments.

PAR. 7. On or about April 26, 1990, officials of Summit and Wometco had telephone conversations concerning which of the two companies would provide service to Asbury Village Apartments. During these conversations, Summit and Wometco agreed that Wometco would provide service to Asbury Village, and Summit would not. On or about May 24, 1990, Summit and Wometco entered into an agreement whereby Summit assigned to Wometco its contract to serve Asbury Village Apartments, and Summit sold to Wometco, at cost, its wires and other equipment that had already been installed in the apartment complex. Sometime thereafter, Wometco and Summit requested that Asbury Village consent to the assignment.

PAR. 8. On or about August 21, 1990, Asbury Village agreed to consent to the assignment of the Summit contract only if Wometco agreed to assume all of Summit's obligations under the contract and to perform faithfully each and every duty and covenant imposed on Summit by the contract.

PAR. 9. During the course of the telephone conversations on or about April 26, 1990, Summit and Wometco officials reached an understanding concerning how the two companies should handle future situations similar to that at Asbury Village Apartments, *i.e.*, where both companies were attempting to serve the same apartment

complex or housing subdivision in the dual franchise area. An understanding was reached concerning which of the two companies would serve apartment complexes and/or housing subdivisions in the dual franchise area. From late April of 1990 until at least March 24, 1993, this understanding between Summit and Wometco was in operation.

PAR. 10. On or about March 24, 1993, Summit wrote a letter to Wometco concerning both companies' efforts to serve a housing subdivision called Manor Oaks, in the dual franchise area. In this March 24, 1993, letter, Summit attempted to persuade Wometco to abandon Wometco's plans to serve Manor Oaks and to sell its equipment at cost to Summit. Summit specifically referenced the Asbury Village situation, stating that from April of 1990 until March 24, 1993, Summit had "honored the understanding" that they had reached at that time. Summit attempted to persuade Wometco not to overbuild Summit's facilities. Despite the letter, Wometco continued to build cable into Manor Oaks, and Summit withdrew from the subdivision.

PAR. 11. Sometime after August 16, 1993, pursuant to the understanding referred to in paragraphs six through nine above, Wometco sold to Summit, at cost, its cable television facilities in two housing subdivisions called Grand Manor and Elan, both in the dual franchise area. On or about August 16, 1993, Wometco sought to sell to Summit its investment in Grand Manor and Elan. In both Grand Manor and Elan, Wometco had installed cable wires before Summit had. Wometco acknowledged that in the Elan subdivision "Summit had plant existing at the entrance and should have the right to be the provider." Subsequently, Wometco sold out to Summit, at cost.

PAR. 12. By engaging in the acts and practices described in paragraphs six through eleven, respondents have agreed not to compete in the dual franchise area.

PAR. 13. The agreement not to compete and acts and practices of the 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. Restraining competition between providers of cable television services in parts of unincorporated Cobb County, Georgia;

B. Depriving cable television subscribers in parts of unincorporated Cobb County, Georgia, of access to a competitively determined price and quality of cable television services.

PAR. 14. The agreement not to compete and the acts and practices of 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.

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 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 respondents with violations of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, 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 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 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 Summit 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 115 Perimeter Center Place, Suite 1150, Atlanta, Georgia.

Respondent Wometco Cable TV of Georgia, 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 at 5979 Fairburn Road, Douglasville, Georgia.

Respondent Wometco Cable TV of Cobb County, 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 at 1145 Powder Springs Road, Marietta, Georgia.

Respondent Wometco Cable TV of Clayton County, 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 at 6435 Tara Boulevard, Suite 22, Jonesboro, Georgia.

Respondent Wometco Cable TV of Conyers-Rockdale, 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 at 1361 Iris Drive, Conyers, Georgia.

Respondent Wometco Cable TV of Fayette County, 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 at 107 South Glynn Street, Fayetteville, Georgia.

Respondent Wometco Cable TV of Fulton County 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 at 6435 Tara Boulevard, Suite 22, Jonesboro, Georgia.

Respondent Wometco Cable TV of Henry County, 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 at 6435 Tara Boulevard, Suite 22, Jonesboro, 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

I.

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

A. "*Summit*" means Summit Communications Group, Inc., its directors, officers, employees, agents and representatives, predecessors, successors and assigns, its subsidiaries, divisions, groups and affiliates controlled by Summit, and the respective directors, officers, employees, agents, representatives, successors and assigns of each;

B. "*Wometco*" means Wometco Cable TV of Georgia, Inc., Wometco Cable TV of Cobb County, Inc., Wometco Cable TV of Clayton County, Inc., Wometco Cable TV of Conyers-Rockdale, Inc., Wometco Cable TV of Fayette County, Inc., Wometco Cable TV of Fulton County, Wometco Cable TV of Henry County, Inc., their directors, officers, employees, agents and representatives, predecessors, successors and assigns, their subsidiaries, divisions, groups and affiliates controlled by Wometco, and the respective directors, officers, employees, agents, representatives, successors and assigns of each;

C. "*TWI*" means Time Warner Inc., its directors, officers, employees, agents and representatives, predecessors, successors and assigns, its subsidiaries, divisions, groups and affiliates controlled by TWI, and the respective directors, officers, employees, agents, representatives, successors and assigns of each;

D. "*USW*" means U S WEST, Inc., its directors, officers, employees, agents and representatives, predecessors, successors and assigns, its subsidiaries, divisions, groups and affiliates controlled by USW, and the respective directors, officers, employees, agents, representatives, successors and assigns of each;

E. "*Commission*" means the Federal Trade Commission;

F. "*Cable operator*" means any partnership, sole proprietorship or corporation, including all of its subsidiaries, affiliates, divisions and joint ventures, that owns, controls or operates one or more cable television systems; "cable operator" includes the partners, directors, officers, employees, and agents of such partnership, sole proprietorship or corporation as well as the directors, officers,

employees, and agents of such partnership's, sole proprietorship's or corporation's subsidiaries, affiliates, divisions and joint ventures. The words "subsidiary," "affiliate," and "joint venture" refer to any firm in which there is partial (10% or more) or total ownership or control between corporations.

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. "*Relevant geographic area*" means the incorporated and unincorporated areas of the counties of Cobb, Bartow, DeKalb, Walton, Gwinnett, Fulton, Douglas, Fayette, Coweta, Clayton, Henry, Rockdale, Newton, and Cherokee, in the State of Georgia.

J. "*Overbuilding*" means instances in which two or more cable operators have the facilities to provide and are capable of providing cable television service to the same subscribers.

II.

It is further ordered, That Summit and Wometco each cease and desist from, directly, indirectly, or through any corporate or other device, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, combining or attempting to combine, entering into or attempting to enter into, organizing or attempting to organize, implementing or attempting to implement, carrying out or attempting to carry out, or soliciting or attempting to solicit, any combination, agreement, or understanding, either express or implied, with any cable operator or other provider or potential provider of cable television service in any part of the relevant geographic area:

A. To allocate or divide markets, customers, contracts, or territories for cable television service in any part of the relevant geographic area. "Customers" includes, but is not limited to, residents of existing, newly-constructed, or future housing developments, subdivisions, apartment complexes, or hotels; and

B. To refrain from overbuilding any portion of any cable television system in any part of the relevant geographic area.

Provided that nothing contained in the foregoing paragraphs of this order shall be construed to prohibit TWI or USW from engaging in any lawful conduct or entering into any lawful agreement.

III.

It is further ordered, That Summit and Wometco shall:

A. Within thirty (30) days after the date this order becomes final, distribute a copy of the complaint and order to each of their directors, officers, and supervisory employees who are in any way involved in cable television service in the relevant geographic area;

B. For a period of three (3) years after the date this order becomes final, furnish a copy of the complaint and order to each of their new directors, officers, and to each of their supervisory employees in any way involved in cable television service in the relevant geographic area, at the time they become a director, officer, or supervisory employee;

C. For a period of three (3) years from the date this order becomes final, and within thirty (30) days after the date any entity becomes a majority-owned subsidiary of Summit or Wometco, provide a copy of the complaint and order to all directors, officers, and supervisory employees of such entity who are in any way involved in cable television service in the relevant geographic area.

IV.

It is further ordered, That Summit and Wometco:

A. Within sixty (60) days after the date this order becomes final, and annually for the next five (5) years on the anniversary of the date this order becomes final, and at other times as the Commission may require, shall each file a verified written report with the Commission

setting forth in detail the manner and form in which each has complied and is complying with this order;

B. For the purpose of determining or securing compliance with this order, shall permit any duly authorized representative of the Commission:

1. 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 Summit or Wometco, relating to any matters contained in this order; and

2. Upon five days' notice to Summit and Wometco, and without restraint or interference from them, to interview officers, directors, or employees of Summit and Wometco, relating to any matters contained in this order. Summit and Wometco, and the officers, directors, and employees, may have counsel present.

C. Shall notify the Commission at least thirty (30) days prior to any proposed change in Summit or Wometco affecting the provision of cable television service in the relevant geographic area, such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change that may affect their compliance obligations arising out of this order.

V.

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

STATEMENT OF THE COMMISSION

In this matter, the Commission has alleged that the respondents, Summit and Wometco, which were competing providers of cable television service, entered into a market allocation agreement. Such an agreement is *per se* illegal and, in this case, deprived cable television subscribers of a competitive marketplace.

The two respondents were Georgia-based firms, each of which offered cable television services in some or all of fourteen Georgia counties. Subsequent to the alleged illegal conduct, Wometco was

acquired by U.S. West, and after commencement of the Commission's investigation, Summit was acquired by Time-Warner. Thus, both Summit and Wometco are under the active control of major cable television firms whose managements were not implicated by the allegations of the Commission's complaint.

The consent order prevents these respondents from engaging in similar conduct in the fourteen counties in Georgia where either of the two firms had operations, a far broader area than the small area in one county where the parties had cable systems capable of competing for business. Under the unique circumstances of this proceeding, the Commission has concluded that relief may be limited in this fashion.

The Commission's policy is that where *per se* illegal conduct is found, it will seek the broadest possible relief, without geographic limitation. Boulder Ridge Cable TV, Docket No. C-3537 (Oct. 19, 1994). Only in extraordinary cases, such as this one, will it be appropriate to limit the scope of relief.

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

I concur in the Commission decision to issue a complaint alleging that the respondents conspired to allocate the market for cable television services. Market allocation agreements, including this one, are *per se* unlawful. *Addyston Pipe and Steel Co. v. United States*, 175 U.S. 211 (1899).

I dissent from the decision to limit the cease and desist order against Summit Communications Group, Inc. (Summit) and the seven named Wometco cable systems to a small geographic area surrounding Atlanta, Georgia. Summit operates cable television systems outside the fourteen Georgia counties that are included in the geographic coverage of the order, and the order does nothing to prevent future violations at those systems. If, after the order is issued, Summit enters an identical market allocation agreement at a cable system outside these fourteen counties, the Commission's only recourse will be to initiate an administrative proceeding to obtain still another order.

Market allocation, like price fixing, has long been deemed *per se* unlawful, and no proof of market power is necessary to condemn the conduct. Nothing about the fourteen Georgia counties renders them uniquely susceptible to market allocation schemes. Since market

allocation is unlawful whenever and wherever it occurs, I see no reason to limit the prohibition in the order to a tiny geographic region.

The complaint and order set forth no rationale for drawing a line around these fourteen counties as the geographic metes and bounds of the order's coverage. The actual agreements alleged in paragraphs six through eleven of the complaint relate to the provision of the cable television service to the Asbury Village apartment complex and specific housing subdivisions. As alleged in paragraph thirteen of the complaint, the restraint of trade had its anticompetitive effect only in these unincorporated areas of Cobb County, Georgia. The absence of any apparent rationale is troubling. In future cases, it opens the door to unguided negotiations regarding the geographic scope of conduct orders.

This is the second consent agreement involving allegations of market allocation in which the Commission has limited the coverage of the order to a narrow geographic area. In *B&J School Bus Service, Inc.*, Docket No. C-3425 (April 22, 1993), I dissented from the limitation on the geographic coverage of the order on the ground that in the rare case in which the Commission uncovers a flagrant *per se* violation such as bid rigging, price fixing or market allocation, it should take strong action to prohibit the participants in conspiracy from repeating the violation. I expressed concern that the Commission was signaling a new leniency toward *per se* antitrust violations. In accepting this second order with such a weak and limited remedy, the Commission appears to eliminate the possibility that the school bus order can be disregarded as an aberration.

Set Aside Order

120 F.T.C.

IN THE MATTER OF

CALIFORNIA MEDICAL ASSOCIATION

SET ASIDE ORDER IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-2967. Consent Order, April 17, 1979--Set Aside Order, Oct. 27, 1995*

This order reopens a 1979 consent order, which prohibited the medical association from participating in the creation or dissemination of fee schedules relating to physician compensation, and sets aside the consent order pursuant to the Commission's determination that the public interest requires reopening and setting aside the order because the order presents an obstacle to the respondent forming and operating a managed care subsidiary.

ORDER GRANTING PETITION TO REOPEN AND MODIFY
OR SET ASIDE CONSENT ORDER

On May 24, 1995, California Medical Association ("CMA"), filed its Petition To Reopen and Modify or Set Aside Consent Order ("Petition") in Docket No. C-2967, pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Section 2.51 of the Commission's Rules of Practice, 16 CFR 2.51. In its Petition, CMA requests that the Commission reopen the order and set aside or, in the alternative, modify provisions of the order that restrict the ability of CMA to develop and distribute a relative value study ("RVS"), as defined in the order.

CMA asserts in its Petition that changed conditions of law or fact warrant reopening the order and setting it aside or modifying it. The Petition was placed on the public record for thirty days; no comments were received. For the reasons described below, the Commission has determined that the order should be reopened and set aside.

I. BACKGROUND

The Commission's complaint alleged, among other things, that the preparation and circulation by CMA of relative value studies had the effect of establishing, maintaining or otherwise influencing the fees which physicians and other health care professionals charge for their professional services. The order, among other things, prohibits CMA from "directly or indirectly initiating, originating, developing,

publishing, or circulating the whole or any part of any proposed or existing relative value study." *In re California Medical Association*, 93 FTC 519 (1979).¹ In 1985, in response to CMA's Request to Reopen Proceeding and Modify Order ("1984 Petition"), the Commission amended the order so that it would not prevent CMA from petitioning state or federal government agencies and participating in federal or state administrative or judicial proceedings and providing information or views to third party payers concerning any issue, including reimbursement. *See* Order Reopening and Modifying Final Order In Docket No. C-2967 (issued April 19, 1985) ("Order Modifying Order"), at 4.

II. THE PETITION

CMA requests that the Commission reopen the order and set it aside or modify it. CMA seeks relief from the order's prohibition against developing and distributing RVSs because CMA would like to participate, with its member physicians, in forming and operating a statewide managed care subsidiary to offer "comprehensive health maintenance services . . . to enrolled individuals in California on a pre-paid basis . . ." Petition at 3.² CMA states that it must be able to develop and distribute a reimbursement schedule to compensate physicians and other health care providers who contract with the managed care subsidiary. In addition, CMA asserts that the order must be modified or set aside so that CMA can transmit price and reimbursement information between physician-members of CMA's network and health care purchasers in connection with a messenger model contracting approach.

CMA also asks the Commission to set aside the order or add two new provisions to the order to resolve perceived uncertainty about

¹ The order defines "relative value study" to mean:

. . . [A]ny list or compilation of medical procedures and/or services which sets forth comparative numerical values for such procedures performed and/or services rendered by physicians and other health care providers, without regard to whether those values are expressed in monetary or non-monetary terms.

Order, ¶ I.A., *Id.* at 522

² CMA states that physicians participating in the managed care organization will share substantial financial risk, except to the extent that CMA is operating a messenger model network, and that the proposed organization will not inhibit new entry. The Petition notes, among other factors, that physician participation will be non-exclusive, so that participants will be free to join other managed care organizations; that CMA anticipates that fewer than 30% of physicians practicing in California will participate in the organization; and that numerous other competing plans with large provider networks currently exist in the market. *Petition* at 24-25.

CMA's ability to collect information and data from and transmit information and data to government agencies, third party payers, and its own members. CMA does not describe specific conduct in which CMA wishes to engage but asserts that "it is unclear" if certain hypothetical conduct might be prohibited by the order.

CMA's Petition is based on alleged changes of fact and law that CMA argues warrant reopening the order under Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and either setting the order aside or modifying it. CMA contends that the order "severely impairs CMA's ability to establish a subsidiary company to sell managed care services in California's highly competitive healthcare market." Petition at 3. If the order is not set aside, CMA proposes the addition of a proviso to the order that specifically authorizes CMA to distribute information regarding fees that CMA will pay to physicians who participate in CMA's managed care network. Petition at 26. CMA also seeks an order modification that would permit CMA to use a messenger model approach to contracting. Letter from Martin J. Thompson of Riordan & McKenzie to Arthur M. Strong, Staff Attorney, Federal Trade Commission (August 15, 1995). Finally, CMA proposes provisions to the order that would address CMA's communications with government agencies, third party payers, and health care purchasers. Petition at 26-27.

III. STANDARD FOR REOPENING A FINAL COMMISSION ORDER

Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), provides that the Commission shall reopen an order to consider whether it should be modified if the respondent "makes a satisfactory showing that changed conditions of law or fact" so require. A satisfactory showing sufficient to require 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 application of it inequitable or harmful to competition. S. Rep. No. 96-500, 96th Cong., 2d Sess. 9 (1979) (significant changes or changes causing unfair disadvantage); Louisiana-Pacific Corp., Docket No. C-2956, Letter to John C. Hart (June 5, 1986), at 4 (unpublished) ("Hart Letter").

Section 5(b) also provides that the Commission may modify an order when, although changed circumstances would not require

reopening, the Commission determines that the public interest so requires. Respondents are therefore invited in petitions to reopen to show how the public interest warrants the requested modification. Hart Letter at 5; 16 CFR 2.51. In such a case, the respondent must demonstrate as a threshold matter some affirmative need to modify the order. Damon Corp., Docket No. C-2916, Letter to Joel E. Hoffman, Esq. (March 29, 1983), at 2 (1979-1983 Transfer Binder) Trade Reg. Rep. (CCH) ¶ 22,207 ("Damon Letter"). For example, it may be in the public interest to modify an order "to relieve any impediment to effective competition that may result from the order." *Damon Corp.*, 101 FTC 689, 692 (1983). Once such a showing of need is made, the Commission will balance the reasons favoring the requested modification against any reasons not to make the modification. Damon Letter at 2. The Commission also will consider whether the particular modification sought is appropriate to remedy the identified harm. Damon Letter at 4.

The language of Section 5(b) plainly anticipates that the burden is on the petitioner to make a "satisfactory showing" of changed conditions to obtain reopening of the order. The legislative history also makes clear that the petitioner has the burden of showing, other than by conclusory statements, why an order should be modified. 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) (requiring affidavits in support of petitions to reopen and modify). If the Commission determines that the petitioner has made the necessary 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 in view of the public interest in repose and the finality of Commission orders. *See Federated Department Stores, Inc. v. Moitie*, 425 U.S. 394 (1981) (strong public interest considerations support repose and finality.)

IV. THE ORDER SHOULD BE REOPENED AND SET ASIDE

CMA has shown that reopening and setting aside the order is warranted in the public interest.³

The order's prohibition against the development or distribution of physician reimbursement schedules or other RVs by CMA presents an obstacle to CMA forming and operating a managed care subsidiary. Without a reimbursement schedule, CMA would be unable to compensate physician-members of its proposed provider network. The order, therefore, inhibits conduct that is necessary for CMA to participate in the managed care market.

CMA's formation of a managed care organization is not inherently illegal, and may be procompetitive. This order was intended to inhibit the distribution of RVs that might facilitate price-fixing by CMA's members. It was not intended to inhibit lawful entry by CMA into managed care markets. Accordingly, the order should be set aside. *See also* American Academy of Orthopaedic Surgeons, Docket No. C-2856, Order Setting Aside Order.

The order's prohibition against distributing RVs and other fee information to physicians is at the heart of the order.⁴ The danger that CMA members will use reimbursement schedules created by the proposed managed care organization as a basis for an unlawful agreement to fix prices has not been eliminated. As the Joint Health Care Policy Statements caution "information exchanges among competing providers may facilitate collusion or otherwise reduce competition on prices."⁵ Although distribution of such reimbursement schedules through the proposed managed care organization may serve the public interest, CMA and its members remain subject to the laws against price fixing. Setting aside the restrictions of the order should not be construed as approval for use by CMA or any of its members of a relative value guide as a basis for an unlawful agreement on

³ Because the order is reopened on public interest grounds, the Commission need not and does not consider whether CMA has met its burden of showing that the order should be reopened on the basis of changed circumstances.

⁴ The order as modified in 1985 already authorizes the distribution of RVs to federal and state government bodies in connection with lobbying or participation in administrative or judicial proceedings and providing information and views to third party payers.

⁵ Department of Justice and FTC Statement of Enforcement Policy and Analytical Principles Relating to Health Care and Antitrust, reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,152 (1994), at 20,784.

price. Likewise, CMA is subject to the antitrust laws in the operation of its managed care subsidiary.⁶

VI. CONCLUSION

Accordingly, *It is hereby ordered*, That this matter be, and it hereby is, reopened, and that the order in Docket C-2967 be, and it hereby is, set aside, as of the effective date of this order.

Commissioner Starek concurring in the result only.

CONCURRING STATEMENT OF COMMISSIONER ROSCOE B. STAREK, III

I concur in the Commission's decision to set aside the order in this case. Respondent California Medical Association ("CMA") has discharged its burden of showing that the order's ban on the development and distribution of relative value studies is likely to impede CMA's formation and operation of a managed care subsidiary and that it is in the public interest to set the order aside. Consistent with the Commission's practice in numerous prior matters -- including Service Corporation International¹ and Tarra Hall Clothes² -- I reach this determination because it is merited under an overall weighing of the benefits and the costs of granting the relief requested by CMA.

As was the case in California and Hawaiian Sugar,³ however, I do not join in the view that respondent "must demonstrate as a threshold matter some affirmative need to modify the order" when a petition to reopen is judged under the public interest rubric.⁴ Neither the

⁶ Statement 8 and 9 of the Department of Justice and FTC Statement of Enforcement Policy and Analytical Principles Relating to Health Care and Antitrust, reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,152 (1994), at 20,787-98, set forth the analysis of the applicability of the antitrust laws to physician network joint ventures.

¹ See Concurring Statement of Commissioner Roscoe B. Starek, III in Service Corporation International, Docket No. 9071 ("SCI") (May 12, 1994).

² Tarra Hall Clothes, Inc. and Abraham Cohen, Docket No. C-2797 (Oct. 27, 1992).

³ See Concurring Statement of Commissioner Roscoe B. Starek, III in California and Hawaiian Sugar Co., Docket No. C-2858 ("C&H") (Jan. 17, 1995).

⁴ Order Granting Petition To Reopen and Modify or Set Aside Consent Order, Docket No. C-2967, at 3 (Oct. 27, 1995) (*italics added*).

statute⁵ nor the Commission rule⁶ governing our consideration of such petitions says anything about "affirmative need." Instead, the concept has insinuated itself into the agency's stock explanation for modifying competition orders⁷ under a public interest standard because of an uncritical fidelity to language that made its first -- and unfortunate -- appearance in a letter issued more than a dozen years ago.⁸

Aside from being superfluous, the "affirmative need threshold" causes genuine mischief. At least on paper, it serves as an obstacle that a petitioner must overcome before the Commission will consider balancing the reasons for and against reopening and modifying (or setting aside) an order under a public interest standard. And, as I have previously noted, the Commission has compounded the confusion in this area by finding the affirmative need requirement satisfied on the basis of a very marginal showing by the petitioner -- that is, establishing a "threshold" and then, in case after case, finding that threshold crossed on the flimsiest evidence.⁹

In the present case, CMA may have made a showing sufficient to satisfy the majority's "affirmative need" standard; it is at least a closer call than in C&H.¹⁰ Under my reading of the governing statute and Commission rule, however, it is not necessary to make that judgment; rather, all that is required is the balancing of overall costs and benefits to which I alluded above. On the basis of that balancing, I agree with my colleagues that the order should be set aside.

⁵ Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b).

⁶ Rule 2.51(b) of the Commission's Rules of Practice, 16 CFR 2.51(b).

⁷ As I pointed out in C&H, that matter was the first order modification in the consumer protection area in which the affirmative need threshold appeared. Concurring Statement at 1.

⁸ In a letter sent to Joel E. Hoffman, Esquire in connection with Damon Corp., Docket No. C-2916 (Mar. 29, 1983), the Commission stated that a petitioner seeking an order modification in the public interest must demonstrate "[a]s a threshold matter . . . some affirmative need to modify the original order." [1979-83 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 22,007 at 22,585. The only support for this affirmative need threshold was a reference to a similar approach followed by the courts in modifying final court orders. *Id.* (citing *Gautreaux v. Pierce*, 535 F. Supp. 423, 426 (N.D. Ill. 1982)). In *Gautreaux*, the court applied a two-step analysis in determining whether modification of a consent decree was appropriate, with the threshold step characterized as whether there were "exceptional circumstances, new, changed or unforeseen at the time the decree was entered," justifying modification of the decree. 535 F. Supp. at 426. The obvious Commission analogue to this exceptional circumstances inquiry would be requests to reopen based on changed conditions of law of fact, not requests to reopen under the public interest standard (under which modification may be justified even absent changed circumstances). The Commission has never explained -- and would be hard-pressed to do so -- why it has chosen to apply the affirmative need threshold when considering modifications based on the public interest.

⁹ See Concurring Statement in SCI at 2.

¹⁰ The evidence proffered by C&H fell far short of demonstrating that the order had caused it competitive harm. See Concurring Statement in C&H at 3.

IN THE MATTER OF

MUSTAD INTERNATIONAL GROUP NV, 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-3624. Complaint, Oct. 30, 1995--Decision, Oct. 30, 1995

This consent order requires, among other things, a Switzerland corporation and its Connecticut subsidiary to either divest all of their Connecticut horseshoe nail manufacturing assets, or to divest four nail machines and to grant a license of technology and know-how to operate them, to a Commission-approved acquirer by May 15, 1996.

Appearances

For the Commission: *Howard Morese, Joseph G. Krauss and William Baer.*

For the respondents: *Peter L. Costas, Pepe & Hazard, Hartford, CT.*

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that respondents Mustad Connecticut, Inc. ("Mustad Connecticut"), a Connecticut corporation, and Mustad International Group NV ("Mustad Group") have acquired all of the assets of Cooper Horseshoe Nail Co., Ltd., a majority interest in Emcoclavos S.A., and the horseshoe nail assets of Sterward Engineering Company, Ltd., and that such acquisitions 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. THE RESPONDENTS AND JURISDICTION

1. Respondent Mustad Connecticut, wholly-owned by Mustad International Group NV, is a corporation organized, existing and

doing business under and by virtue of the laws of the State of Connecticut, with its principal place of business at 1395 Blue Hills Avenue, Bloomfield, Connecticut.

2. Respondent Mustad Group is a corporation organized, existing and doing business under and by virtue of the laws of the Netherlands Antilles with its principal place of business at St. Pierhalsteeg 5, NL-1012 GL Amsterdam.

3. Respondents Mustad Connecticut and Mustad Group (collectively "Mustad") manufacture, distribute, and sell rolled and forged horseshoe nails in the United States and worldwide.

4. Mustad Connecticut and Mustad Group 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 are in or affect 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 July 30, 1985, Mustad Connecticut agreed to acquire and did acquire all of the assets relating to the horseshoe nail business of Capewell Manufacturing Company ("Capewell") (the "Capewell acquisition"). Capewell, which was headquartered in Hartford, Connecticut, manufactured and sold rolled horseshoe nails in the United States prior to its acquisition by Mustad Connecticut.

6. On or about March 5, 1986, Mustad Connecticut agreed to acquire and did acquire all of the assets of the Cooper Horseshoe Nail Co., Ltd. ("Cooper"), a division of Frederick Cooper plc (the "Cooper acquisition"). Cooper, which was headquartered in Wolverhampton, West Midlands, England, manufactured rolled horseshoe nails in England. Cooper exported virtually all of its production of horseshoe nails, prior to its acquisition by Mustad Connecticut, to the United States.

7. In February 1990, Mustad Group acquired a majority interest in Emcoclavos S.A. ("Emcoclavos") (the "Emcoclavos acquisition"). Emcoclavos, which is headquartered in Bogota, Colombia, manufactures and sells horseshoe nails, including rolled horseshoe nails for sale in the United States. Emcoclavos exported rolled horseshoe nails to the United States prior to its acquisition by Mustad Group.

8. On or about January 4, 1993, Mustad Connecticut agreed to acquire and did acquire all of the assets relating to horseshoe nail manufacturing of Sterward Engineering Company, Ltd. ("Sterward"), a British corporation, (the "Sterward acquisition"). Sterward, which was headquartered in Tipton, West Midlands, England, designed and manufactured tooling and equipment used in the production of rolled horseshoe nails. The Sterward assets that were purchased by Mustad Connecticut were designed to produce rolled horseshoe nails for sale in the United States.

9. Concurrent with the Sterward acquisition and the Cooper acquisition, Mustad Connecticut entered into agreements prohibiting Sterward and Cooper from producing horseshoe nails or equipment used or useful in the manufacture of horseshoe nails or otherwise competing directly or indirectly in the manufacture or sale of horseshoe nails for at least 20 years.

10. Mustad undertook the Cooper acquisition, the Emcoclavos acquisition, and the Sterward acquisition with the willful intention and effect of restraining, lessening, or eliminating competition, or creating or maintaining a monopoly in the market for rolled horseshoe nails.

III. THE RELEVANT MARKET

11. One relevant line of commerce within which to analyze the effects of Mustad's acquisitions is the manufacture and sale of rolled horseshoe nails. Rolled horseshoe nails are softer and slimmer than forged nails, which gives them different handling characteristics. Rolled horseshoe nails are preferred by customers in the United States and are not considered to be reasonably interchangeable with forged nails.

12. The relevant section of the country or geographic area within which to analyze the effects of the acquisitions is either the entire United States or the world. Rolled horseshoe nails are used and sold principally in the United States.

IV. MARKET STRUCTURE

13. Prior to the Capewell acquisition, Cooper acquisition, Emcoclavos acquisition, and Sterward acquisition the market for rolled horseshoe nails was extremely concentrated as measured by the Herfindahl-Hirschmann Index ("HHI").

14. Prior to its acquisition in 1985, Capewell had approximately 50% of U.S. sales of horseshoe nails. Prior to its acquisition in 1986, Cooper had approximately 40% of U.S. sales of horseshoe nails. Prior to its acquisition in 1990, Emcoclavos had approximately 10% of U.S. sales of horseshoe nails.

15. Mustad, because of the acquisitions of Capewell, Cooper, Emcoclavos, and Sterward, is the largest producer and seller of rolled horseshoe nails in the world, with more than a 90% share of sales.

16. Mustad possesses monopoly power, or has a dangerous probability of obtaining monopoly power, in the market for rolled horseshoe nails.

V. ENTRY

17. Entry into the production and sale of rolled horseshoe nails would take well in excess of two years and is unlikely, among other reasons, because of the difficulty of designing and building the specialized and complex machinery required to produce such nails, the high capital expenditures relative to market size, substantial sunk costs, static demand, the need for technical expertise, and the need for a brand name and reputation for a quality product.

VI. EFFECTS OF THE ACQUISITIONS

18. The effect of the Cooper acquisition, Emcoclavos acquisition, and Sterward acquisition has been and may be to lessen competition substantially and to tend to create a monopoly in the relevant market in the following ways, among others:

(a) By eliminating Capewell, Cooper, and Emcoclavos as substantial independent competitive forces in the relevant market;

(b) By eliminating actual, direct and substantial competition between and among Capewell, Cooper, and Emcoclavos;

(c) By eliminating actual potential competition between Mustad Connecticut and nails produced by the Steward machinery;

(d) By substantially increasing concentration, as measured by the HHI, in the relevant market;

(e) By substantially raising prices as much as 50-75% on the most popular, large volume sizes of horseshoe nails in the United States since the Cooper acquisition, Emcoclavos acquisition, and Sterward acquisition;

(f) By significantly enhancing the likelihood of coordinated behavior or collusion between Mustad Connecticut and any remaining rolled horseshoe nail manufacturing competitors;

(g) By significantly enhancing the likelihood that Mustad will unilaterally exercise market power; and

(h) By increasing barriers to new entry into the relevant market.

19. The Cooper acquisition, Emcoclavos acquisition, and Sterward acquisition restrained trade and created or maintained a monopoly in the rolled horseshoe nail market.

VII. OTHER ACTS AND PRACTICES

20. Mustad has destroyed saleable rolled horseshoe nail making machinery in order to prevent potential competitors from producing rolled horseshoe nails.

VIII. VIOLATIONS CHARGED

21. The acquisitions of Cooper, Emcoclavos, and Sterward by Mustad Connecticut and Mustad Group constitute 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.

22. The Sterward non-compete agreement constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

23. Mustad Connecticut and Mustad Group, in making the Cooper acquisition, the Emcoclavos acquisition, and the Sterward acquisition, in destroying machinery, and in entering the non-compete agreements, attempted to monopolize and did monopolize the rolled horseshoe nail market 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 having initiated an investigation of certain acquisitions 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 Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. 18; and

The respondents, Mustad International Group NV and Mustad Connecticut, Inc., their 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, 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 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 makes the following jurisdictional findings and enters the following order:

1. Respondent Mustad Group is a corporation organized, existing and doing business under and by virtue of the laws of the Netherlands Antilles with its principal place of business at St. Pierhalsteeg 5, NL-1012 GL Amsterdam.

2. Respondent Mustad Connecticut, wholly owned by Mustad International Group NV, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Connecticut, with its principal place of business at 1395 Blue Hills Avenue, Bloomfield, Connecticut.

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. "*Mustad Connecticut*" means Mustad Connecticut, Inc., a wholly owned subsidiary of Mustad International Group NV, its predecessors, subsidiaries, divisions, and groups and affiliates controlled by Mustad Connecticut, their successors and assigns, and their directors, officers, employees, agents and representatives.

B. "*Mustad Group*" means Mustad International Group NV, its predecessors, subsidiaries, divisions, and groups and affiliates controlled by Mustad Group, their successors and assigns, and their directors, officers, employees, agents and representatives.

C. "*Respondents*" or "*Mustad*" means Mustad Connecticut and Mustad Group.

D. "*Acquisitions*" means the acquisitions by Mustad of the assets of Cooper Horseshoe Nail Co., Ltd.; stock of Emcoclavos S.A.; and assets of Sterward Engineering Company, Ltd.

E. "*Capewell*" means substantially all assets of Capewell Horsenails, Inc., including assets, properties, business and goodwill, tangible and intangible, used in the manufacture and sale of rolled horseshoe nails, including the following:

1. Machinery, fixtures, equipment, vehicles, transportation facilities, furniture, tools and other tangible personal property;
2. Customer lists, vendor lists, catalogs, sales promotion literature, advertising materials, research materials, technical information, management information systems, software, inventions, trade secrets, intellectual property, patents, technology, know-how, specifications, designs, drawings, processes and quality control data;
3. Inventory of nails produced by Capewell;
4. Rights, titles and interests 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. Rights under warranties and guarantees, express or implied;
6. Books, records, files; and
7. Items of prepaid expense.

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

G. "*Rolled horseshoe nails*" means horseshoe nails that are produced by the rolling process of drawing the shank of the nail through a series of dies.

H. "*Functioning nail machine*" means a fully functioning and operational machine that has produced at least 800 pounds per week of city head no. 5 rolled horseshoe nails during the preceding year, or the equivalent production of other types and sizes of nails, including tooling used in the maintenance or operation of such nail machines, and capable of producing rolled horseshoe nails in at least the following sizes: city head 5, city head 6, slim blade 5, regular head 5, and race nail 3½.

I. "*Spare nail machine*" means a functioning or non-functioning machine suitable for use in providing spare and replacement parts for the functioning nail machines.

J. "*Nail machine*" means a functioning nail machine or spare nail machine.

K. "*Technology and know-how*" means all of Mustad's drawings, blueprints, patents, specifications, tests, and other documentation, and all information contained therein or available to Mustad personnel relating to the design, and the production methods, processes and systems used in the production of rolled horseshoe nails.

II.

It is further ordered, That:

A. Mustad shall divest, absolutely and in good faith, by May 15, 1996, either (i) Capewell as an ongoing business, or (ii) four (4) functioning nail machines and one (1) spare nail machine and shall grant a perpetual non-exclusive license of the technology and know-how to the acquirer.

B. The divestiture and granting of the license shall be made 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 and only in a manner that receives the prior approval of the

Commission. The purpose of the divestiture and licensing is to create an independent competitor in the production and sale of rolled horseshoe nails and to remedy the lessening of competition in the United States resulting from the Acquisitions as alleged in the Commission's complaint. Mustad shall divest such other ancillary assets and effect such other arrangements as are reasonably necessary for the acquirer to be viable, and competitive.

C. If Mustad divests the functioning nail machines and spare nail machine, then upon reasonable notice from the acquirer to respondents, respondents shall provide such assistance to the acquirer as is reasonably necessary to enable the acquirer to produce rolled horseshoe nails in substantially the same manner and quality employed or achieved by the respondent prior to divestiture. Such assistance shall include reasonable consultation with knowledgeable employees and training for a period of time sufficient to satisfy the acquirer's management that its personnel are appropriately trained in the production of rolled horseshoe nails. Respondents shall convey all know-how necessary to produce rolled horseshoe nails in substantially the same manner and quality employed or achieved by respondent prior to divestiture. However, respondents shall not be required to continue providing such assistance for more than one (1) year from the date of the divestiture. Respondents shall charge the acquirer its own direct costs for providing such assistance.

III.

It is further ordered, That, pending divestiture of Capewell or the functioning nail machines and spare nail machine pursuant to paragraph II.A., Mustad shall take such action as is necessary to maintain the viability and marketability of the nail machines to be divested and shall not cause or permit the destruction, removal, wasting, deterioration or impairment of such nail machines, except for ordinary wear and tear that does not affect the viability and marketability of the nail machines.

IV.

It is further ordered, That:

A. If respondents have not completed the divestiture required by paragraph II.A. by May 15, 1996, the Commission may appoint a trustee to divest four (4) functioning nail machines, one (1) spare nail machine, and license the technology and know-how. 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, Mustad 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 Mustad to comply with this order.

B. If a trustee is appointed by the Commission or a court pursuant to paragraph IV.A. of this order, Mustad 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 Mustad, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures. If Mustad has not opposed the selection of a proposed trustee within fifteen (15) days after notice by the Commission's staff to Mustad of the identity of the proposed trustee, Mustad 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 nail machines and grant a license for the technology and know-how and to make any further arrangements that may be reasonably necessary to maintain the viability and competitiveness of the business.

(3) The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in paragraph IV.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 the 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,

provided, however, that the Commission may extend this period only two (2) times and for a total period not to exceed two (2) years.

(4) The trustee shall have full and complete access to the personnel, books, records, and facilities related to the nail machines, or to any other relevant information, as the trustee may reasonably request. Respondents shall provide such financial or other information as such trustee may reasonably request and shall cooperate with the trustee. Mustad shall take no action to interfere with or impede the trustee's accomplishment of the divestiture and licensing. Any delays in divestiture caused by Mustad shall extend the time for divestiture under paragraph IV.B.3 in an amount equal to delay, as determined by the Commission or, for a court-appointed trustee, by the court.

(5) Subject to Mustad's absolute and unconditional obligation to divest and license at no minimum price, and the purpose of the divestiture and licensing 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. The divestiture shall be made in the manner set out in paragraph III 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 Mustad from among those approved by the Commission.

(6) The trustee shall serve, without bond or other security, at the cost and expense of Mustad, on such reasonable and customary terms and conditions as the Commission or, in the case of a court-appointed trustee, the court may set. The trustee shall have authority to employ, at the cost and expense of Mustad, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are reasonably necessary and at reasonable cost to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the divestiture and licensing 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 Mustad and the trustee's power shall be terminated. The trustee's compensation shall be based in significant part on a reasonable

commission arrangement contingent on the trustee's divesting the Nail Machines and licensing the technology and know-how.

(7) Mustad 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 trusteeship, 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, 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, Mustad shall execute a trust agreement that transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestiture and licensing 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 IV.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 and licensing required by this order.

(11) The trustee shall have no obligation or authority to operate or maintain the nail machines.

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

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 Mustad has fully complied with the provisions of paragraphs II or IV of this order, Mustad 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. Mustad 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 IV of the order, including a description of all substantive contacts or negotiations for the divestiture and licensing and the identity of all parties contacted. Mustad 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 year from the date that this order becomes final, annually for the next nine (9) years on the anniversary of the date on which this order becomes final, and at such other times as the Commission may require, Mustad shall file with the Commission a verified written report setting forth in detail the manner and form in which it has complied and is complying with paragraph VI 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, 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, within the two years preceding such acquisition engaged in, or in the process of attempting to engage in producing or selling horseshoe nails in the United States; or

B. Acquire any assets used for, or previously used for (and still suitable for use for) the production of horseshoe nails from any concern, corporate or non-corporate, presently engaged in, within the past two years engaged in, or in the process of attempting to engage in producing or selling horseshoe nails 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"). Respondent 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 respondent's possession or reasonably available to respondent. Such supplemental information shall include a copy of the proposed acquisition agreement; the names of the principal representatives of respondent and of the firm respondent desires 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, respondent 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, for the purposes of determining or securing compliance with this order, and subject to any legally recognized privilege, upon written request, Mustad reasonably 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 Mustad relating to any matters continued in this order; and

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

VIII.

It is further ordered, That Mustad shall notify the Commission at least thirty (30) days prior to any proposed change in Mustad, 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 this order.

IN THE MATTER OF

KKR ASSOCIATES, L.P.

SET ASIDE ORDER IN REGARD TO ALLEGED VIOLATION OF
SEC.7 OF THE CLAYTON ACT AND SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT

Docket C-3253. Consent Order, June 13, 1989--Set Aside Order, Oct. 31, 1995

This order reopens a 1989 consent order--which required KKR Associates to divest, within twelve months, certain assets and businesses associated with RJR Nabisco or Beatrice/Hunt-Wesson, and prohibited them from making certain acquisitions without prior Commission approval--and sets aside the prior approval provisions of the consent order pursuant to the Commission's Prior Approval Policy Statement. Under that Policy Statement, the Commission presumes that the public interest requires reopening the prior approval provisions in outstanding merger orders and making them consistent with the policy.

ORDER SETTING ASIDE ORDER

On July 19, 1995, the respondents, KKR Associates, L.P., et al.,¹ filed their Petition To Reopen Proceedings and To Modify Consent Order ("Petition") in this matter. KKR asks that the Commission reopen and modify the 1989 consent order, as modified in 1993,² pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Section 2.51 of the Commission's Rules of Practice and Procedure, 16 CFR 2.51, and consistent with the Statement of Federal Trade Commission Policy Concerning Prior Approval and Prior Notice Provisions, issued June 21, 1995 ("Prior Approval Policy Statement").³ KKR in its Petition requests that the Commission reopen and set aside the order in Docket No. C-3253 or, in the alternative, reopen and modify the order by deleting the

¹ All respondents in this matter joined in the Petition, and they are: KKR Associates, L.P., a limited partnership; Kohlberg Kravis Roberts & Company, L.P., a limited partnership; RJR Nabisco, Inc. (successor by merger to RJR Acquisition Corporation), a corporation; Whitehall Associates, L.P. (formerly known as RJR Associates, L.P.), a limited partnership; RJR Nabisco Inc. (for itself and as successor to RJR Nabisco Holdings Group, Inc.), a corporation; RJR Nabisco Holdings Corp. (formerly known as RJR Holdings Corp.), a corporation; Henry R. Kravis, a natural person; Robert I. MacDonnell, a natural person; Michael W. Michelson, a natural person; Paul E. Raether, a natural person; and George R. Roberts, a natural person (collectively, "respondents").

² The Commission previously modified the June 13, 1989, consent order in this matter on May 13, 1993.

³ 60 Fed. Reg. 39,745-47 (August 3, 1995); 4 Trade Reg. Rep. (CCH) ¶ 13,241, at 20,991 (June 21, 1995).

requirement in paragraph V that KKR seek prior Commission approval for certain acquisitions.⁴ The Petition was on the public record for thirty days; two comments were received.

The Commission, in its Prior Approval Policy Statement, "concluded that a general policy of requiring prior approval is no longer needed," citing the availability of the premerger notification and waiting period requirements of Section 7A of the Clayton Act, commonly referred to as the Hart-Scott-Rodino ("HSR") Act, 15 U.S.C. 18a, to protect the public interest in effective merger law enforcement. Prior Approval Policy Statement, at 2. The Commission announced that it will "henceforth rely on the HSR process as its principal means of learning about and reviewing mergers by companies as to which the Commission had previously found a reason to believe that the companies had engaged or attempted to engage in an illegal merger." As a general matter, "Commission orders in such cases will not include prior approval or prior notification requirements." *Id.*

Narrow prior approval or prior notification provisions may be necessary to protect the public interest in some circumstances. The Commission said in its Prior Approval Policy Statement that "a narrow prior approval provision may be used where there is a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for the provision, attempt the same or approximately the same merger." The Commission also said that "a narrow prior notification provision may be used where there is a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for an order, engage in an otherwise unreportable anticompetitive merger." *Id.*, at 3.

The Commission in its Prior Approval Policy Statement announced its intention "to initiate a process for reviewing the retention or modification of these existing requirements" and invited respondents subject to such requirements "to submit a request to reopen the order." *Id.*, at 4. The Commission determined that, "when a petition is filed to reopen and modify an order pursuant to . . . [the

⁴ KKR's Petition incorrectly characterizes the notice obligation of paragraph V.B. of the modified order, *i.e.*, that respondents give the Commission notice of re-entry into a relevant product market within 10 days of such an acquisition, as a "prior notice" requirement. Petition, at 4. The Petition also incorrectly states that by the 1993 modification, the Commission substituted a prior notification provision in the place of a prior approval provision for oriental foods and catsup, but not for packaged nuts. In fact, the 1993 modification excepted from the prior approval obligation an acquisition of any relevant product so long as no respondent owns any interest in a company selling such relevant product (including packaged nuts). In such instance, all that is needed is 10 days' notice of re-entry.

Prior Approval Policy Statement], the Commission will apply a rebuttable presumption that the public interest requires reopening of the order and modification of the prior approval requirement consistent with the policy announced" in the Statement. *Id.*

The presumption is that setting aside the prior approval requirement in paragraph V of the order in Docket No. C-3253 is in the public interest. Nothing to overcome the presumption has been presented, and nothing in the record, including the original complaint and order, and the two public comments, suggests that the exceptions described in the Prior Approval Policy Statement are warranted. Based on the record in this matter, there is no evidence that a prior notification provision is needed. At this time, KKR Associates and its related entities do not own any interest in the relevant products identified in the order, and thus there is no credible risk that in the future KKR Associates or its related entities will engage in anticompetitive acquisitions in the relevant markets. RJR Nabisco remains in the packaged nut market, but based on the record it appears that an acquisition by RJR of any of the competitively significant firms in the packaged nut market likely would be reportable under the HSR Act. Thus, the Commission has determined to reopen the proceeding in Docket No. C-3253 and set aside the order.⁵

Accordingly, *It is hereby ordered*, That this matter be, and it hereby is, reopened, and that the Commission's order issued on June 13, 1989, and modified on May 13, 1993, be, and it hereby is, set aside as of the effective date of this order.

⁵ KKR completed the divestitures required by the order in 1989; the only remaining obligation under the order is the prior approval requirement in paragraph V and the attendant reporting obligations.

Complaint

120 F.T.C.

IN THE MATTER OF

PORT WASHINGTON REAL ESTATE BOARD, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3625. Complaint, Nov. 6, 1995--Decision, Nov. 6, 1995*

This consent order prohibits, among other things, a New York brokerage service from restricting the use of exclusive agency listings, fixing commission splits between listing and selling brokers, restricting or prohibiting members from holding open houses or using "For Sale" signs, restricting brokers from advertising free services to property owners, and excluding from membership brokers who do not operate a full-time office in the territory served by the Board's multiple listing service.

Appearances

For the Commission: *Alan B. Loughnan, Michael J. Bloom and William Baer.*

For the respondent: *Stephen Limmer, Schiffmacher, Cullen, Farrell & Limmer, Port Washington, N.Y.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act (15 U.S.C. 41 *et seq.*), and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Port Washington Real Estate Board, Inc. (hereinafter "PWREB" or "respondent"), a corporation, has violated the provisions of Section 5 of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint stating its charges as follows:

PARAGRAPH 1. As used in this complaint:

(1) "*Multiple listing service*" means a clearinghouse through which member real estate brokerage firms exchange information on listings of real estate properties and share commissions with other members.

(2) "*PWREB's service area*" means the territory within which PWREB provides its multiple listing service.

(3) "*Broker*" means any person, firm, or corporation that, for another and for a fee or commission, lists for sale, sells, exchanges, or offers or attempts to negotiate a sale, exchange, or purchase of an estate or interest in real estate.

(4) "*Member*" means any real estate broker that is entitled to participate in a multiple listing service offered by PWREB.

(5) "*Applicant*" means any owner or co-owner of a real estate brokerage firm who is duly licensed as a real estate broker within the State of New York, and who has applied individually or on behalf of his or her firm for membership in respondent's multiple listing service.

(6) "*Listing broker*" means any broker who lists a real estate property with a multiple listing service pursuant to a listing agreement with the property owner.

(7) "*Listing agreement*" means any agreement between a real estate broker and a property owner for the provision of real estate brokerage services.

(8) "*Selling broker*" means any broker, other than the listing broker, who locates the purchaser for a listed property.

(9) "*Exclusive agency listing*" means any listing under which a property owner appoints a broker as exclusive agent for the sale of the property at an agreed commission, but reserves the right to sell the property personally to a direct purchaser (one not procured in any way through the efforts of any broker) at an agreed reduction in the commission or with no commission owed.

(10) "*Open house*" means making a particular property available at a designated time for view by the public, potential buyers, or real estate brokers, without prior arrangement or appointment.

PAR. 2. PWREB 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 Port Washington Real Estate Board, Port Washington, NY.

PAR. 3. PWREB is and has been at all times relevant to this complaint a corporation organized for its own profit or for the profit of its members within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

PAR. 4. In the course and conduct of their businesses and through the policies, acts, and practices described in paragraphs twelve through sixteen below, PWREB and its members are in or affect commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. PWREB is, and for some time has been, providing a multiple listing service for member real estate brokerage firms in and around Port Washington, New York.

PAR. 6. PWREB's member firms are owned and operated by real estate brokers who, for a commission, provide the service of bringing together purchasers and sellers of residential real estate located within PWREB's service area, as well as other services designed to facilitate sales of such properties. Each PWREB member agrees to submit all of its exclusive listings pertaining to sales of residential real estate located within PWREB's service area for publication to the entire membership of the multiple listing service, and to share commissions with those member firms that successfully locate purchasers for properties it has listed. Only members may participate in the multiple listing service.

PAR. 7. Membership in PWREB's multiple listing service provides valuable competitive advantages in the brokering of residential real estate sales in PWREB's service area. Membership significantly increases the opportunities of brokerage firms to enter into listing agreements with residential property owners, and significantly reduces the costs of obtaining current and comprehensive information on listings and sales. The realization of these opportunities and efficiencies is important for brokers to compete effectively in the provision of residential real estate brokerage services within PWREB's Service Area.

PAR. 8. Publication of listings on PWREB's multiple listing service generally is considered by sellers and brokers to be the fastest and most effective means of obtaining the broadest market exposure for residential property in PWREB's service area.

PAR. 9. PWREB's multiple listing service is the predominant multiple listing service in its service area. PWREB currently has about 18 member brokers. PWREB's membership includes most of the active residential real estate brokerage firms located in PWREB's service area. Annual sales of real estate listings published on PWREB's multiple listing service approach \$100 million dollars.

PAR. 10. Except to the extent that competition has been restrained as described herein, PWREB members are and have been in competition among themselves in the provision of residential real estate brokerage services within PWREB's service area.

PAR. 11. In adopting the policies and engaging in the practices described in paragraphs twelve through sixteen below, PWREB has been and is acting as a combination of its members, or in conspiracy with some of its members, to restrain trade in the provision of residential real estate brokerage services in PWREB's service area.

PAR. 12. The rules governing PWREB and its multiple listing service have provided that a listing broker may not retain any portion of a commission paid by a property owner on an exclusive agency listing that is sold by a different selling broker.

PAR. 13. The rules governing PWREB and its multiple listing service have prohibited members from holding open houses.

PAR. 14. The rules governing PWREB and its multiple listing service have prohibited members from using permanently affixed real estate signs on residential properties or using signs for house inspections attended by brokers and salespeople, and homeowners. Such rules have also prohibited display of a member's name or telephone number on permanent signs placed by homeowners.

PAR. 15. The rules governing PWREB and its multiple listing service have prohibited members from offering free services to property owners.

PAR. 16. PWREB has required as a condition of membership in PWREB and its multiple listing service that each applicant operate and maintain an office within PWREB's service area staffed and open for at least 40 hours per week.

PAR. 17. The purpose, capacity, tendency or effect of the combination or conspiracy described in paragraphs twelve through sixteen above has been, and continues to be, to restrain competition among brokers and to injure competition by, among other things:

(1) Discouraging or inhibiting brokers from accepting exclusive agency listings or similar contractual terms, such as terms that allow the property owner to pay a reduced commission or no commission if the owner sells the property other than through a broker, thereby restraining competition among brokers based on their willingness to offer or accept different contract terms that may be attractive and beneficial to consumers;

- (2) Substantially reducing the ability of residential property owners to compete with real estate brokers in locating purchasers;
- (3) Depriving property owners of the competitive advantages of negotiating with the listing broker an agreement to hold open houses;
- (4) Depriving property owners of the competitive advantages of negotiating with the listing broker an agreement to hold open houses;
- (5) Depriving property owners of the competitive advantages of negotiating with the listing broker an agreement to provide other services free of charge to the property owner;
- (6) Impeding new membership in PWREB's MLS by part-time or less-than-full-time real estate brokers, thus impeding entry into the residential real estate business in PWREB's service area;
- (7) Restraining competition from brokerage firms located outside the service area of PWREB's MLS.

PAR. 18. The policies, acts, practices, and combinations or conspiracies described above constitute unfair methods of competition or unfair acts or practices in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

The alleged conduct may 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 respondent named in the caption hereof, 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 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, 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, 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 Port Washington Real Estate Board, Inc. 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 at: care of Charles Walker, President of Charles E. Hyde Agency, 277 Main Street, Port Washington, New York.

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

(1) "*PWREB*" means the Port Washington Real Estate Board, In., or any affiliated or successor organization comprised or real estate brokers doing business in PWREB's service area which operates a multiple listing service.

(2) "*Multiple listing service*" means a clearinghouse through which member real estate brokerage firms exchange information on listings of real estate properties and share commissions with other members.

(3) "*PWREB's service area*" means the territory within which PWREB provides its multiple listing service.

(4) "*Broker*" means any person, firm, or corporation that, for another and for a fee or commission, lists for sale, sells, exchanges, or offers or attempts to negotiate a sale, exchange, or purchase of an estate or interest in real estate.

(5) "*Member*" means any real estate broker that is entitled to participate in a multiple listing service offered by PWREB.

(6) "*Applicant*" means any owner or co-owner of a real estate brokerage firm who is duly licensed as a real estate broker by the State of New York, and who has applied individually or on behalf of his or her firm for membership in PWREB's multiple listing service.

(7) "*Listing broker*" means any broker who lists a real estate property with a multiple listing service pursuant to a listing agreement with the property owner.

(8) "*Listing agreement*" means any agreement between a real estate broker and a property owner for the provision of real estate brokerage services.

(9) "*Selling broker*" means any broker, other than the listing broker, who locates the purchaser for a listed property.

(10) "*Exclusive agency listing*" means any listing under which a property owner appoints a broker as exclusive agent for the sale or lease of the property at an agreed commission, but reserves the right to sell the property personally to a direct purchaser (one not procured in any way through the efforts of any broker) at an agreed reduction in the commission or with no commission owed to the agent broker.

(11) "*Exclusive right to sell listing*" means any listing under which a property owner contracts to pay the broker an agreed commission if the property is sold, whether the purchaser is procured by the broker or any other person, including the property owner.

(12) "*Open house*" means making a particular property available at a designated time for view by the public, potential buyers, or real estate brokers, without prior arrangement or appointment.

II.

It is further ordered, That respondent PWREB, its successors and assigns, and its directors, officers, committees, agents, representatives, and employees, directly or indirectly, or through any corporation, subsidiary, division, or other device, in connection with the operation of a multiple listing service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall

forthwith cease and desist from adopting, maintaining, or enforcing any rule, policy, or practice or taking any other action that has the purpose or effect of:

(A) Restricting or interfering with (1) any broker's offering or accepting any exclusive agency listing; or (2) the publication on a PWREB multiple listing service of any exclusive agency listing submitted by a member; provided, however, that nothing contained in this subpart shall preclude respondent from (a) including a simple designation, such as a code or symbol, that a published listing is an exclusive agency listing; or (b) applying reasonable terms and conditions equally applicable to the publication of any listing, whether an exclusive agency listing or an exclusive right to sell listing.

(B) Suggesting or fixing any rate, range, or amount of any division or split of commission or other fees between any listing broker and any selling broker, or restricting any property owner's participation in the determination of the division or split of commission or other fees between any listing broker and any selling broker.

(C) Restricting or interfering with the ability of member brokers or homeowners to hold open houses or to place signs on any property; provided, however, that nothing contained in this subpart shall preclude PWREB from requiring its members to comply with local ordinances governing open houses or use of signs.

(D) Restricting or interfering with the ability of member brokers to advertise free services to property owners.

(E) Conditioning membership in or use of a multiple listing service operated by PWREB on any applicant or member operating or maintaining a full-time office, or on such applicant or member operating or maintaining an office in PWREB's service area; provided, however, that nothing contained in this subpart shall prohibit respondent from adopting or enforcing any reasonable and nondiscriminatory policy to assure that its members are actively engaged in real estate brokerage and that listings published on respondent's multiple listing service are adequately serviced.

III.

It is further ordered, That respondent PWREB shall:

(A) Within thirty (30) days after this order becomes final, furnish an announcement in the form shown in Appendix A to each member of PWREB or a multiple listing service operated by PWREB.

(B) Within sixty (60) days after this order becomes final, amend its by-laws, rules and regulations, and other of its materials to conform to the provisions of this order and provide each member of PWREB or a multiple listing service operated by PWREB with a copy of the amended by-laws, rules and regulations, and other materials.

(C) For a period of three (3) years after this order becomes final, furnish an announcement in the form shown in Appendix A to any new member, applicant, or any person who inquires about possible membership in PWREB or its multiple listing service, within thirty (30) days after such person's initial application or inquiry.

IV.

It is further ordered, That respondent PWREB shall:

(A) Within ninety (90) days after this order becomes final, submit a verified written report to the Federal Trade Commission setting forth in detail the manner and form in which respondent has complied and is complying with this order.

(B) In addition to the report required by paragraph IV(A), annually for a period of three (3) years on or before the anniversary date on which this order becomes final, and at such other times as the Federal Trade Commission or its staff may by written notice to respondent require, file a verified written report with the Federal Trade Commission setting forth in detail the manner and form in which respondent has complied and is complying with this order.

(C) For a period of five (5) years after this order becomes final, maintain and make available to the Commission staff for inspection and copying, upon reasonable notice, all documents that relate to the manner and form in which respondent has complied with this order.

(D) Notify the Federal Trade 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 respondent that may affect compliance obligations arising out of this order.

V.

It is further ordered, That this order shall terminate on November 6, 2015.

APPENDIX A

[Date]

[Respondent's Letterhead]

The Federal Trade Commission has conducted an investigation into certain rules and practices of the multiple listing service ("MLS") operated by the Port Washington Real Estate Board ("PWREB") that have been alleged to be unlawful restraints of trade. To avoid litigation, PWREB has entered into a consent agreement. The agreement is not an admission the PWREB or any of its members has violated any law. For your information, PWREB is prohibited from the following practices in connection with the operation of an MLS.

1. Restricting or interfering with any broker's offering or accepting an exclusive agency listing, or limiting the publication on the MLS of any exclusive agency listing entered into by an MLS member.

2. Requiring or fixing the rate, range or amount of any split or division of a commission or other fees between a listing broker and a selling broker, or restricting any property owner's participation in the determination of the split or division of any commission or other fees between the listing and selling brokers.

3. Restricting or interfering with the ability of member brokers or homeowners to conduct open houses or to place signs on property.

4. Restricting or interfering with the ability of member brokers to advertise free services to homeowners.

5. Requiring as a condition of membership in its MLS that a member or applicant for membership operate an office full-time or engage in real estate brokerage full-time in PWREB's service area.

President
Port Washington Real
Estate Board, Inc.

IN THE MATTER OF

NATIONAL DIETARY RESEARCH, INC., ET AL.

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

Docket 9263. Complaint, Nov. 9, 1993--Decision, Nov. 7, 1995

This consent order prohibits, among other things, two Florida-based corporations and their owner from making claims regarding weight loss, hunger reduction, calorie absorption, cholesterol reduction, effects on cellulite or body measurements, or any other health benefits of any product or program they advertise or sell, unless the respondents possess competent and reliable scientific evidence to substantiate the claims. Also, the consent order prohibits the respondents from misrepresenting test results, from representing that any advertisement is something other than a paid advertisement, and from representing that an endorsement is typical of the experience of consumers who use the product, unless the claim is substantiated. In addition, the consent order requires the respondents to pay \$100,000 to the Commission.

Appearances

For the Commission: *Joel Winston, Richard Cleland, C. Lee Peeler and Joan Bernstein.*

For the respondents: *Roger Furey, Arter & Hadden, Washington, D.C. and Donovan Conwell, Fowler, White, Gillen, Boggs, Villareal & Banker, Tampa, FL.*

COMPLAINT

The Federal Trade Commission, having reason to believe that National Dietary Research, a corporation, The William H. Morris Company, a corporation, and William H. Morris, individually and as the sole officer of said corporations ("respondents"), have violated Sections 5(a) and 12 of the Federal Trade Commission Act (15 U.S.C. 45 (a) 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. (a) Respondent National Dietary Research is a Florida corporation, with its principal office or place of business located at 1377 K Street, N.W., Suite 553, Washington, D.C.

(b) Respondent William H. Morris Company is a Florida corporation, with its principal office or place of business located at 2804 Smither Road, Tampa, Florida.

(c) Respondent William H. Morris is the President of both National Dietary Research and the William H. Morris Company. Mr. Morris owns 100 percent of the capital stock of both corporations. Individually or in concert with others, he formulates, directs, and controls the acts and practices of the corporate respondents, including the acts and practices alleged in this complaint. His principal office or place of business is located at 2804 Smither Road, Tampa, Florida.

PAR. 2. Respondents have advertised, offered for sale, sold and distributed Food Source One, a compressed tablet made largely from plant fiber, as a weight loss product. Respondents have also advertised, offered for sale, sold and distributed Vancol 5000, a compressed tablet made from plant fiber and other substances, as a product that reduces serum cholesterol. Each of these products is a "food" and/or "drug" 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.

PAR. 4. Respondents have disseminated or have caused to be disseminated advertisements and promotional materials for Food Source One, including, but not necessarily limited to, the attached Exhibits A-F and J-L. These advertisements and promotional materials contain the following statements:

1. WEIGHT LOSS SURPRISES RESEARCHERS

WASHINGTON – A nutrition organization was hopeful that a nutritionally complete "hi-tech" food tablet would help erase world hunger problems, until a study revealed that one of the ingredients could cause significant weight loss without dieting! Researchers in Europe found that an ingredient in the aptly named product Food Source One actually caused people to lose weight, even though specifically instructed not to alter normal eating patterns, according to one study published in the prestigious British Journal of Nutrition. Researchers in an earlier study had speculated that the weight loss was due to a decrease in the intestinal absorption of calories.

While the development of Food Source One, a project of National Dietary Research, would not be used to successfully fulfill its original goal, the discovery has been a windfall for overweight people. A Daytona Beach, Florida woman fighting a weight battle for 12 years used the product on the recommendation of her physician and lost 30 pounds. She stated, "Not only have I lost 30 pounds but my

cholesterol has dropped from 232 to 143. I have two closets full of clothes which have not fit me in two years that I can now wear." In a separate report, a telephone interview revealed that a Wilmington, North Carolina pharmacist lost 14 pounds in 15 days on the product and was never hungry. (Exhibits A, J and L).

2. WEIGHT LOSS MYSTERY Baffles Scientists

WASHINGTON -- Scientists are baffled by a natural food ingredient that causes people to lose weight even though they don't change the way they normally eat.

A study published in *The British Journal of Nutrition* says that the ingredient, often used to thicken ice cream, can cause significant weight loss without dieting. Although several explanations for the weight loss are suggested, the most likely according to scientists in a Finnish study, is that the ingredient seems to decrease the intestinal absorption of calories.

National Dietary Research, an organization committed to the research and development of nutritional solutions to world-wide health problems, along with consulting scientists, have successfully isolated and incorporated the ingredient into an improved method that greatly enhances the potential for weight loss over the ingredient alone. Called Food Source One, the significant breakthrough in nutritional weight control provides a three-way scientifically designed method to help prevent calorie absorption.

The mechanism by which Food Source One works to decrease body weight is a complicated process called nutri-bonding. When chewed and swallowed immediately before meals, high calorie fats are replaced with lower calorie nutrients, thereby providing optimum nutrition and a minimum number of fat calories as explained in an instruction sheet that accompanies the tablets. The instruction sheet should be followed for optimum results.

....

Physicians and pharmacists are praising Food Source One as a natural, drug free alternative for the treatment of obesity. (Exhibits B and K).

3. WHAT IS FIBERSPAN?

Fiberspan is the trade name for a special formulation of soluble type fiber shown to be effective for weight loss.

....

HOW DOES SOLUBLE FIBER HELP ONE LOSE WEIGHT?

Studies published in respected scientific journals including the *American Journal of Clinical Nutrition* and *The British Journal of Nutrition* found that soluble fiber caused patients to lose weight. Part of the reason for the weight loss, according to scientists, is probably due to the appetite reduction properties. However, some studies have found that patients consuming soluble fiber lost weight without altering their normal eating patterns. The appetite reducing effects of the fiber cannot justify this phenomenon. Thus, scientists speculate that the fiber reduces intestinal absorption of a portion of the calories you consume leading to weight loss. The calories are trapped when the fiber forms a gel and are eliminated.

IS FS-1 MORE EFFECTIVE FOR WEIGHT LOSS THAN THE FIBER ALONE?

FS-1 provides a three way scientifically designed process for improved weight loss that fiber alone cannot provide. The human appetite is too complex to be tricked for any length of time by the placement of a non-nutritive substance in the stomach. This is why the nutritional portion of FS-1 is so important.

....

WHAT IS FOOD SOURCE ONE WITH FIBERSPAN?

Food Source One with Fiberspan, commonly referred to as FS-1, is a nutritionally concentrated food tablet with a high fiber content. FS-1 functions just like real food but without all the calories. When chewed, swallowed and followed with water FS-1 expands in the stomach like a sponge as it soaks up water. The nutritional components of the tablet are then released in the stomach so that they are available for absorption.

HOW DOES FS-1 CONTROL THE APPETITE?

The same way eating a six course meal would kill the appetite, with food. First, the fiber creates a temporary full feeling, then the nutritional portion of the tablet gives a gentle rise in blood sugar levels for prolonged appetite suppression, just like a meal. (Exhibit C).

4. Food Source One also contains a unique blend of natural food fiber called Fiberspan. Fiberspan expands in the stomach to many times its own size to help reduce hunger. Furthermore, scientists say that the fiber in Fiberspan helps you lose weight by preventing the absorption of a portion of the calories you consume from food.

.....

THE NO DIET DIET - Chew 3 to 5 FS-1 tablets followed by an 8 oz. glass of water, 30 minutes before each meal. FS-1 will reduce hunger so you will be satisfied with less food. You still enjoy all your favorite foods, but you will eat less. (Exhibit D).

5. ACCIDENTAL DISCOVERY MAY END OBESITY

WASHINGTON - Researchers may have discovered a way to end obesity--by accident!

In a study with a potential cholesterol lowering agent, scientists noted an unusual side effect. Instead of lower cholesterol levels, patients receiving a natural plant colloid lost weight while body weight in a control group remained constant.

The scientists say the mechanism behind the weight loss is not clear, but suggest it is partially due to a decrease in the intestinal absorption of calories. Scientists in another study published in the British Journal of Nutrition, found that patients consuming the same colloid lost weight in spite of being instructed not to alter normal eating patterns. Despite this evidence, other scientists may not agree on the weight loss benefits of colloids. Someday, pending further study, there could be universal agreement that colloids are helpful in confronting the problem of obesity. (Exhibit E).

6. WEIGHT LOSS SURPRISES RESEARCHERS

WASHINGTON -- A nutrition organization was hopeful that a nutritionally complete "hi-tech" food tablet would help erase world hunger problems, until a study revealed that one of the ingredients could cause significant weight loss.

Although other studies and scientists may not agree, researchers in Europe found that the ingredient, a natural plant colloid, actually caused people to lose weight, even though specifically instructed not to alter normal eating patterns, according to one study published in the prestigious British Journal of Nutrition. Researchers in an earlier study had speculated that the weight loss was due to a decrease in the intestinal absorption of calories.

While the development of the product called Food Source One, a project of National Dietary Research, would not be used to successfully fulfill its original goal, the formula which has since been improved with other natural colloids has

been a windfall for overweight people. A Daytona Beach, Florida woman fighting a weight battle for 12 years used the product on the recommendation of her physician and lost 30 pounds. She stated, "Not only have I lost 30 pounds but my cholesterol dropped from 232 to 143. I have two closets full of clothes which have not fit me in two years that I can now wear." In a separate report a telephone interview with a Wilmington, North Carolina pharmacist lost 14 pounds in 3 weeks on the product and was never hungry A variety of nutritionally sound diet plans are specially prepared by NDR, accompany each bottle and provide a natural, drug free alternative for confronting the problem of obesity. (Exhibit F)

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-F, and J-L, respondents have represented, directly or by implication, that:

- (a) Food Source One causes significant weight loss.
- (b) Food Source One causes significant weight loss without dieting or otherwise changing normal eating patterns.
- (c) Food Source One is an effective treatment for obesity.
- (d) Food Source One reduces hunger and is an effective appetite suppressant.
- (e) Food Source One decreases the intestinal absorption of calories.
- (f) Food Source One may significantly reduce serum cholesterol.

PAR. 6. 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-F, and J-L, 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. 7. 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 six was, and is, false and misleading.

PAR. 8. Through the use of the statements contained in the advertisements and promotional materials set forth in paragraph four, including but not necessarily limited to the advertisements and

promotional materials attached as Exhibits A-F, and J-L, respondents have represented, directly or by implication, that:

(a) Scientific studies of certain ingredients contained in Food Source One, including studies published in the British Journal of Nutrition and the American Journal of Clinical Nutrition, demonstrate that Food Source One causes significant weight loss.

(b) Scientific studies of certain ingredients contained in Food Source One, including a study published in the British Journal of Nutrition, demonstrate that Food Source One causes significant weight loss without dieting.

(c) Food Source One has a high fiber content.

(d) National Dietary Research is a *bona fide*, independent research organization that has conducted research seeking nutritional solutions to world-wide health problems.

PAR. 9. In truth and in fact:

(a) Scientific studies of certain ingredients contained in Food Source One, including studies published in the British Journal of Nutrition and the American Journal of Clinical Nutrition, do not demonstrate that Food Source One causes significant weight loss.

(b) Scientific studies of certain ingredients contained in Food Source One, including a study published in the British Journal of Nutrition, do not demonstrate that Food Source One causes significant weight loss without dieting.

(c) Food Source One does not have a high fiber content.

(d) National Dietary Research is not a *bona fide*, independent research organization and has not conducted research seeking nutritional solutions to world wide health problems.

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

PAR. 10. Respondents have represented, directly or by implication, that certain of its advertisements for Food Source One, including, but not necessarily limited to, Exhibits B, J, K and L, are independent newspaper stories and not paid advertisements.

PAR. 11. In truth and in fact, the advertisements for Food Source One referred to in paragraph ten are paid commercial advertisements

and not independent newspaper stories. Therefore, the representation set forth in paragraph ten was, and is, false and misleading.

PAR. 12. Respondents have disseminated or have caused to be disseminated advertisements and promotional materials for Vancol 5000, including, but not necessarily limited to, the attached Exhibits G-I. These advertisements and promotional materials contain the following statements:

1. CHOLESTEROL DISCOVERY PASSES MOM'S TEST

WASHINGTON - The mother of a research scientist recently lowered her cholesterol more than 20% without changing her eating habits.

After a visit to her doctor, a Florida woman learned that her cholesterol level was an elevated 308 and she was encouraged to change her eating habits. When she returned 10 weeks later, the doctor was astounded that her cholesterol level has dropped to 243. Asked if she achieved the amazing results just by dieting she replied, "No I didn't diet at all, in fact I ate the things I shouldn't eat like bacon, sausage and ice cream. The only thing I did different was take some tablets my son gave me."

The woman's son is Dr. William Morris, director of research and development [at] National Dietary Research, an Organization dedicated to finding nutritional solutions to health problems.

....

Vancol 5000 is a chewable food tablet that contains extracts from foods known to lower cholesterol. According to the exclusive distributor for Vancol 5000, inquiries about the new product are being received from all over the country and has peaked [sic] the interest of doctors used to prescribing expensive cholesterol lowering drugs. (Exhibit G).

2. THE VANCOL 5000 CHOLESTEROL LOWERING PLAN GUARANTEE

A blood cholesterol level over 270 puts you at a high risk for heart disease. Have your cholesterol checked. If you need to lower your cholesterol, use Vancol 5000 as directed for 30 days. After 30 days, have it checked again. If your cholesterol has not been lowered significantly, bring your test results and empty bottle back for a FULL REFUND! LOWER YOUR CHOLESTEROL IN 30 DAYS OR YOUR MONEY BACK!

National Dietary Research - Washington, D.C. (Exhibit H).

3. Recent Scientific data suggests that the ingredients contained in Vancol 5000 have a beneficial effect on lowering total blood cholesterol levels, LDL cholesterol and may even increase HDL cholesterol. The Vancol 5000 Plan and the nutrients contained in the Vancol 5000 tablet were developed to lower cholesterol levels, improve overall health status and an individuals [sic] quality of life.

....

Beta Sitosterol has been shown experimentally to decrease elevated plasma cholesterol by interfering with the intestinal absorption [sic] of cholesterol.

....

Chromium picolinate supplementation has been shown to decrease LDL and total cholesterol levels and is effective in the treatment of hyperlipidemia.

....

Psyllium decreases absorption of cholesterol and lipids in the small intestines and causes the formation of short chain fatty acids, which are rapidly absorbed and may inhibit cholesterol synthesis.

.....

Calcium carbonate and magnesium stearate have been found to decrease cholesterol as explained in further detail on the following page.

.....

VANCOL 5000

Elevated Cholesterol Levels and Dietary Supplementation Chromium Picolinate
Experimental study: Supplementation with 50-200 mcg of chromium daily, improved blood cholesterol and triglyceride levels. The decrease was due to chromiums [sic] function in fat metabolism and sugar metabolism. (Anderson, Richard A. Agricultural Research, 10:14-16, 1990)

Experimental Double-blind Crossover Study: During a 42 day period, 28 subjects were given chromium tripicolinate (200 mcg) or a placebo daily. The subjects ingesting chromium had a significant decrease in total cholesterol, LDL cholesterol (10.5% decrease) and serum apolipoprotein B, (the principal protein of LDL cholesterol fraction) decreased. HDL cholesterol and apolipoprotein A increased. Subjects ingesting the placebo had elevated apolipoprotein B levels. (Press RI et al. The effect of chromium picolinate on serum cholesterol and apolipoprotein fractions in human subjects. West J. Med. 1990 Jan; 152:41-45)

Psyllium

Double-blind Placebo Controlled Study: 26 hypercholesterolemic men were treated with psyllium or a placebo for 8 weeks. The psyllium group showed a 14% decrease in total cholesterol, 14.8% decrease in LDL/HDL cholesterol ratio and 20% decrease in LDL cholesterol. The placebo group showed no significant changes. (Anderson, J.W. et al. Cholesterol lowering effect of psyllium for hypercholesterolemic men. Arch Intern Med. 148:292-296)

Double-blind Study: 96 subjects with hypercholesterolemia were given 5.1 gms of psyllium or a placebo twice daily for 16 weeks, while following a prudent diet. Psyllium decreased total cholesterol by 5.6% and LDL cholesterol by 8.6%. The levels in the placebo group were unchanged. (Levin, E.G. et al. Comparison of psyllium and cellulose as adjuncts to a prudent diet in the treatment of hypercholesterolemia. Arch Intern Med. 150: 1822-1827, 1990)

BETA SITOSTEROL

Experimental Study: A diet containing .5% cholesterol plus .5% sitosterol, resulted in a significant decrease of liver cholesterol, showing the inhibitory effect of sitosterol on cholesterol absorption [sic]. (Ikeda, I. et al. J. Nutr. Sci. Vitaminol 35:361-369, 1989)

QUINONES

Quinones are natural antioxidants that help control and minimize free radical reactions to help lower cholesterol.

Calcium Carbonate

Although the mechanism of action is unknown, calcium has been shown to decrease cholesterol. One physician, a former medical editor for a national magazine, has advanced his "hard water" theory as a possible answer. CaCO_3 is the most common substance in hard water. According to the doctor, just as body oils and detergents mix with CaCO_3 to form an insoluble "bathtub ring", it can also inhibit the intestinal absorption of fat and cholesterol.

Magnesium Stearate

Magnesium stearate is a by product of stearic acid. Scientific data has shown, that when stearic acid is used in place of other fats in the diet, there is a significant reduction of plasma levels of cholesterol and LDL cholesterol (total cholesterol decreased by an average of 14%).

NOTE: No statement contained in this publication shall be construed as a claim or representation that any product is intended for use in the diagnosis, cure, mitigation, treatment, or prevention of any disease. This report is intended for professional use only. Certain persons considered experts may disagree with one or more of the statements and/or conclusions found in this report. Notwithstanding the above, this information is of current nutritional interest and is based upon sound and reliable authority. (Exhibit I).

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

- (a) Vancol 5000 significantly reduces serum cholesterol.
- (b) Vancol 5000 significantly reduces serum cholesterol without changes in diet or eating habits.

PAR. 14. Through the use of the statements contained in the advertisements and promotional materials referred to in paragraph twelve, including but not necessarily limited to the advertisements and promotional materials attached as Exhibits G-I, respondents have represented, directly or by implication, that at the time they made the representations set forth in paragraph 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 paragraph 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.

PAR. 16. Through the use of the statements contained in the advertisements and promotional materials set forth in paragraph twelve, including but not necessarily limited to the promotional materials attached as Exhibit I, respondents have represented, directly or by implication, that scientific studies of certain ingredients

contained in Vancol 5000 demonstrate that Vancol 5000 significantly reduces serum cholesterol.

PAR. 17. In truth and in fact, scientific studies of certain ingredients contained in Vancol 5000 do not demonstrate that Vancol 5000 significantly reduces serum cholesterol. Therefore, the representation set forth in paragraph sixteen was, and is, false and misleading.

PAR. 18. Through the use of the statements contained in the advertisements set forth in paragraphs four and twelve, including but not necessarily limited to the advertisements attached as Exhibits A, F, G, J and L, respondents have represented, directly or by implication, that testimonials from consumers appearing in advertisements for Food Source One and Vancol 5000 reflect the typical or ordinary experience of members of the public who have used the products.

PAR. 19. Through the use of the statements contained in the advertisements set forth in paragraphs four and twelve, including but not necessarily limited to the advertisements attached as Exhibits A, F, G, J and L, respondents have represented, directly or by implication, that at the time they made the representation set forth in paragraph eighteen, respondents possessed and relied upon a reasonable basis that substantiated such representation.

PAR. 20. In truth and in fact, at the time they made the representation set forth in paragraph eighteen, respondents 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 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.

Complaint

EXHIBIT A

November 14, 1990

EXHIBIT A

Weight Loss Surprises Researchers

WASHINGTON — A nutrition organization was hopeful that a nutritionally complete "nutraceutical" would help erase world hunger problems, until a study revealed that one of the ingredients could cause significant weight loss without dieting. Researchers in Europe found that an ingredient in the aptly named product Food Source One actually caused people to lose weight even though specifically instructed not to alter normal eating patterns according to one study published in the prestigious British Journal of Nutrition. Researchers in an earlier study had speculated that the weight loss was due to a decrease in the intestinal absorption of calories. While the development of Food Source One, a project of National Dietary Research, would not be used to successfully fulfill its original goal, the discovery has been a windfall for

overweight people. A Daytona Beach, Florida woman fighting a weight battle for 12 years used the product on the recommendation of her physician and lost 20 pounds in six weeks. "I've never had 20 pounds drop off my cholesterol has dropped from 232 to 143. I have two closets full of clothes which have not fit me in two years that I can now wear." In a separate report, a telephone interview revealed that a Wilmington, North Carolina pharmacist lost 14 pounds in 15 days on the product and was never hungry. Food Source One is available through physicians and pharmacies without a prescription because it is not a drug and contains only natural ingredients already known to be safe. Copies of the referenced study are available free from National Dietary Research, Suite 533, 1377 K St., Washington, DC 20008, however please include \$2 postage & handling for each request.

ASK YOUR PHARMACIST

Food Source One is available at a pharmacy near you:

- | | | |
|--|---|---|
| Bridley Drug Co.
604 Hwy. 100
357-1122 | Bradshaw Drugs
4041 Hillsboro Rd.
385-3828 | Brooks Pharmacy
6701 Transdale Dr.
833-1647 |
| Drug Mart
2614 Old Lebanon Rd.
833-8515 | Health Care Plus
1613 Hillsboro Rd.
385-3861 | Hickory Park Pharmacy
3634 Old Lebanon Road
833-8813 |
| Mayfield Drug Co.
3302 Nolanville Rd. + Antioch Pike
833-1793 | Malone Drug Co.
2762 Lebanon Rd.
833-3298 | Marshallburg Rd.
2618 Marshallburg Rd.
385-4487 |
| Green Hills Prescription Shoppes
3900 Hillsboro Rd.
297-0066 | The Medicine Shoppes
1910 Church St.
329-2211 | Todd's Drug Store
2319 Dickerson Rd.
262-1911 |
| J.P. Brown Drug Store | | |
| 601 Gallean Rd.
1113 Murfreesboro Rd.
Sewards Ferry Pike | 227-1101
361-5700
843-0131 | 3109 Dickerson Rd.
3637 Dickerson Rd.
865-0287 |
| Elders Pharmacy
210 Goodlettsville Plaza
856-1331 | McGee's Prescription Shoppes
642 Union Street
684-7936 | Portland Prescription Shoppes
105 Broadway
225-4141 |
| F&F Drugs
811 W. Main St.
824-1215 | Esquiville Drug Center
Highway 41-A
274-4868 | Woodbury Drug Center
223 W. Main St.
343-2332 |
| Martin Retail Drugs
On The Square
973-7266 | Murfreesboro Drug Center | |
| | 1703 Bradyville Rd.
1004 N. Highland
1115 Memorial Blvd. | 893-6023
893-7413
896-9161 |
| Pugh's Pharmacy Inc.
511 Gallean Rd. #2
846-3432 | The Medicine Shoppes
222 S. A. Ave. N.
794-3070 | Springfield Drug
N. West Ave.
483-3434 |

Complaint

120 F.T.C.

EXHIBIT B

WEIGHT LOSS MYSTERY BAFFLES SCIENTISTS

WASHINGTON—Scientists are baffled by a natural food ingredient that causes people to lose weight even though they don't change the way they normally eat.

A study published in *The British Journal of Nutrition* says that the ingredient, often used to thicken ice cream, can cause significant weight loss without dieting. Although several explanations for the weight loss are suggested, the most likely according to scientists in a Finnish study, is that the ingredient seems to decrease the intestinal absorption of calories.

National Dietary Research, an organization committed to the research and development of nutritional solutions to world-wide health problems, along with consulting scientists, have successfully isolated and incorporated the ingredient into an improved method that greatly enhances the potential for weight loss over the ingredient alone. Called Food Source One, the significant breakthrough in nutritional weight control provides a new, scientifically designed method to help prevent calorie absorption.

The mechanism by which Food Source One works to decrease body weight is a complicated process called nutri-bonding. When chewed and swallowed immediately before meals, high calorie fats are replaced with lower calorie nutrients, thereby providing optimum nutrition and a minimum number of fat calories as explained in an instruction sheet that accompanies the tablets. The instruction sheet should be followed for optimum results.

Food Source One is unlike any other product on the market and is available immediately because it is not a drug and only contains natural ingredients already known to be safe. Physicians and pharmacists are praising Food Source One as a natural, drug free alternative for the treatment of obesity.

©1990 Omnicron International
Food Source One is available at:

MM Prescription Pharmacy

23 12th Avenue NW 223-0671

(Advertisement)

Ardmore, Inc.
Ardmore, OK
December 9, 1990

19087

DOES FS-1 HAVE SIDE EFFECTS?

FS-1 is food and not a drug, so side effects are limited to those that might be experienced when one overeats. For example, some people become full after consuming a small amount of food whereas others require more food to become full. Therefore, some people will be satisfied with fewer FS-1 tablets while others will require more tablets to become full. If one becomes "bloating" or experiences an upset stomach when taking FS-1, reducing the number of tablets for the first few days will alleviate this feeling.

HOW MUCH DOES FS-1 COST?

The price of FS-1 is about 75 cents per serving which is easily offset by the reduction in food one would ordinarily consume. On a serving per serving basis, FS-1 is about the same price as the leading liquid weight loss formula.

CAN I EAT EVERYTHING I WANT WHEN TAKING FS-1?

Dieters often get discouraged when they are deprived of their favorite foods. Moderation is the key. FS-1 will help you feel satisfied with less, but don't ruin a good thing.

FOOD SOURCE ONE with FIBERSPAN

Research and development by:
NATIONAL DIETARY RESEARCH
 SUITE 553, 1377 K STREET
 WASHINGTON, DC 20005

Distributed world wide by
OMICRON INTERNATIONAL
 P O Box 270465
 Tampa, FL 33688

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QUESTIONS & ANSWERS ABOUT**FOOD
SOURCE
ONE**

with

*Fiberspan™***Concentrated Food Tablets****WHAT IS A FOOD TABLET?**

A food tablet is not just a vitamin tablet, because it packs the balanced nutrition of a meal into a compact tablet. Just as we get our required calories from food, a food tablet can provide the calories your body needs to function without the excess calories you would get from an average meal.

The concept for a food tablet probably began about the time space travel became a reality. The need for nutrition in outer space, yet in a convenient compact form led scientists in search of a solution. A food tablet packs optimum nutrition into the smallest possible form.

WHAT IS FOOD SOURCE ONE WITH FIBERSPAN?

Food Source One with Fiberspan, commonly referred to as FS-1, is a nutritionally concentrated food tablet with a high fiber content. FS-1 functions just like real food but without all the calories. When chewed, swallowed and followed with water FS-1 expands in the stomach like a sponge as it soaks up water. The nutritional components of the tablet are then released in the stomach so that they are available for absorption.

HOW DOES FS-1 CONTROL THE APPETITE?

The same way eating a six course meal would kill the appetite, with food. First, the fiber creates a temporary full feeling, then the nutritional portion of the tablet gives a gentle rise in blood sugar levels for prolonged appetite suppression, just like a meal.

Complaint

120 F.T.C.

EXHIBIT C

EXHIBIT C Page Two

HOW DOES THIS HELP ONE LOSE WEIGHT?

Unlike a six course meal which would contain many calories, FS-1 only contains a few calories per tablet. FS-1 satisfies your desire to eat, but with a minimum number of calories.

WHAT IS FIBERSPAN?

Fiberspan is the trade name for a special formulation of soluble type fiber shown to be effective for weight loss.

WHAT IS SOLUBLE FIBER?

Fiber is the residue from plants that resists digestion in the gastrointestinal tract. Fiber is not absorbed and does not supply calories in the diet. Although there are five types of dietary fiber, generally fiber is classified as either soluble or insoluble. Soluble fiber is derived from various plant sources and when ingested takes on water to form a gel. Insoluble fiber is found mostly in cereal grains and bran and does not take on water.

IS INSOLUBLE FIBER HELPFUL FOR WEIGHT LOSS?

No, only soluble type fiber has been shown to help in weight loss. Insoluble fiber's effect is generally limited to its ability to act as a laxative by increasing fecal bulk. Bran and grain fibers are being promoted by some companies for weight loss, however one should be cautioned that these fibers are virtually useless for weight loss.

HOW DOES SOLUBLE FIBER HELP ONE LOSE WEIGHT?

Studies published in respected scientific journals including the American Journal of Clinical Nutrition and the British Journal of Nutrition found that soluble fiber caused patients to lose weight. Part of the reason for weight loss, according to scientists, is probably due to the appetite reduction properties. However, some studies have found that patients consuming soluble fiber lost weight without altering their normal eating

patterns. The appetite reducing effects of the fiber cannot justify this phenomenon. Thus, scientists speculate that the fiber reduces the intestinal absorption of a portion of the calories you consume leading to weight loss. The calories are trapped when the fiber forms a gel and are eliminated.

IS FS-1 MORE EFFECTIVE FOR WEIGHT LOSS THAN THE FIBER ALONE?

FS-1 provides a three way scientifically designed process for improved weight loss that fiber alone cannot provide. The human appetite is too complex to be tricked for any length of time by the placement of a non-nutritive substance in the stomach. This is why the nutritional portion of FS-1 is so important.

WHAT IS NUTRI-BONDING?

Nutri-bonding is the process that makes the FS-1 tablet so unique. The nutritional portion of the tablet is bound to the fiber portion. When the tablet is consumed, the nutrients are released from the fiber so they can be absorbed into the body. Without nutri-bonding the nutrients would be absorbed by the fiber and eliminated from the body without being absorbed.

IS CHEWING THE TABLETS IMPORTANT?

Yes, chewing the tablets is important but not absolutely essential. First, chewing retards the rate of caloric ingestion and secondly, chewing satisfies a psychological need for chewing often absent or decreased in persons on a weight reduction program. National Dietary Research, however, has formulated several delicious milk shake recipes using FS-1 as a base. These milk shakes are also effective in weight reduction. A powder form of FS-1 used with skim milk is also available. The powder form of FS-1 is also very popular.

IS FS-1 A DRUG?

No! FS-1 is a natural food substance with all ingredients previously recognized as safe by the FDA. Just as regular supermarket food is inspected, FS-1 is federally inspected by the FDA.

NEW IMPROVED FORMULA - LESS FAT - FEWER CALORIES

NATURAL NUTRITIONAL

★ ★ ★ ★ WEIGHT LOSS ★ ★ ★ ★

with

FOOD
SOURCE
ONE

With

*Fiberspan*TM

Concentrated Food Tablets

Food Source One with Fiberspan is a wholesome and nutritionally balanced dietary regimen in a pleasant tasting compact chewable tablet. Food Source One has the proper balance of the essential vitamins, minerals, protein, carbohydrates, fatty acids, and fiber that would be contained in a well balanced meal, but with a minimum number of fat calories. Food Source One also contains a unique blend of natural food fiber called Fiberspan. Fiberspan expands in the stomach to many times its own size to help reduce hunger. Furthermore, scientists say that the fiber in Fiberspan helps you lose weight by preventing the absorption of a portion of the calories you consume from food.

The Food Source One program is truly a nutritional breakthrough for weight control. Scientifically designed, Food Source One nutritionally satisfies you while decreasing fat calories and cholesterol.

THE NO DIET DIET - Chew 3 to 5 ES-1 tablets followed by an 8 oz. glass of water, 30 minutes before each meal. ES-1 will reduce hunger so you will be satisfied with less food. You still enjoy all your favorite foods, but you will eat less.

BUSINESSMAN'S DIET OR SALESMAN'S DELIGHT - This plan is designed for those people who must entertain clients for lunch. Substitute an ES-1 milkshake in place of breakfast and dinner. For lunch, chew 2 or 3 ES-1 tablets followed by 8 oz. of water 30 minutes before you eat, then enjoy your usual meal.

SNACKER'S DELIGHT - This plan is the answer for those individuals who don't eat a lot at mealtimes, but are continually hungry and satisfy that hunger by nibbling. In place of candy bars, potato chips and other snack food, substitute 2 or 3 ES-1 tablets followed by an 8 oz. glass of water to satisfy hunger.

FASTING - For one or two days each week, eliminate all regular food and drink one ES-1 milkshake 3 times a day.

FAST START - For the first 3 days of your diet, eliminate all regular food. In place of food, substitute one ES-1 milkshake 3 times a day. At the end of 3 days, continue by selecting one of the plans above.

Remember, when dieting be sure to drink 8 glasses of water or fluid daily. Restrictive diets containing less than 1,000 calories per day should not be continued for more than 6 consecutive weeks without a 2 week rest period. Food Source One is not intended to be the sole source of nutrition for more than 3 consecutive days or 3 days per week.

Research and development by:
NATIONAL DIETARY RESEARCH
Suite 553, 1377 K Street
Washington, DC 20005

Distributed world-wide by:
OMNIRON INTERNATIONAL
P.O. Box 270465 Tampa, FL 33688

EXHIBIT D

DINNER TIME - Substitute an FS-1 milk shake twice daily in place of breakfast and lunch. In the evening, chew 2 to 3 FS-1 tablets followed by an 8 oz. glass of water 30 minutes before enjoying your usual dinner meal.

DINNER TIME (MODIFIED) - Same as above, but in place of your usual evening meal create your dinner by selecting one item from each column. For dessert you may have one serving of flavored low caloric gelatin. You may also have diet sodas, coffee, tea, and artificial sweetener. Steak sauce, ketchup, lemon juice, vinegar and mustard should be used sparingly.

1	2	3	4	5
1 med tossed salad with 2 tbsp. low cal dressing	8 oz skim milk	3 1/2 oz. broiled or baked fish	1 cup of any of the following: green beans, broccoli, cabbage, brussel sprouts, beets, onions, spinach, squash	1 roll or biscuit with 1 pat diet margarine
1 sliced tomato with 1 tbsp. low cal dressing	8 oz low fat yogurt	3 1/2 oz. broiled ground round or chuck	brussel sprouts	1 slice whole wheat bread with 1 pat low caloric margarine
2 raw carrots	4 oz low fat fruit yogurt	3 1/2 oz chicken or turkey (skin removed)	2 cups cauliflower	1 small baked potato with 1 pat low caloric margarine
1 R or glass tomato juice		1 1/2 oz shrimp, lobster or crab	12 asparagus spears	
1/2 cup applesauce		3 1/2 oz tuna (packed in water)		1/2 cup cooked pasta
				1 cup veggie table or chicken noodle soup
				1/2 cup cooked rice
				1 small ear of corn with 1 pat low caloric margarine

HOW TO USE FS-1

Here are 8 methods for losing weight naturally and safely with FS-1, however always remember that you should be checked by a physician before starting any weight loss program to make sure you are in otherwise good physical condition. FS-1 food tablets can be taken before meals to reduce hunger and caloric intake or transformed into delicious milk shakes (see separate recipe brochure) as a meal replacement

BREAKFAST CLUB - Studies indicate that individuals who consume two thirds of their daily calories before noon are less likely to be obese. Chew 2 or 3 FS-1 tablets 30 minutes before breakfast, followed by an 8 oz. glass of water. Then create and build your choice of breakfast by selecting one item from each column listed below. Drink an FS-1 milk shake in place of your other two meals. You may also have diet soft drinks, coffee, tea, and artificial sweeteners.

1	2	3	4
1 Medium apple	8 oz skim milk	1/2 oz broiled salmon	2 slices whole wheat toast
1 medium orange	8 oz low fat yogurt	1/2 oz smoked ham (fat removed)	1 small bagel
6 oz orange juice	4 oz low fat fruit yogurt	1/2 oz broiled ground round	1 small English muffin
1 large tangerine		1/2 oz chicken or turkey (skin removed) baked or stewed	2 biscuits
1/2 large grapefruit		1/2 oz broiled or baked fish	2 plain donuts
4 bananas		1/2 cup low fat cottage cheese	1 pancake or waffle with 1 tbsp lite syrup
18 grapes		1 egg scrambled with 2 egg whites (use no oil) and 1/2 serving of one of the items above	1 cup corn flakes
1 wedge cantaloupe			

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Complaint

EXHIBIT E

EXHIBIT E

Oakland Tribune
September 20, 1992

ADVERTISEMENT ADVERTISEMENT

Accidental discovery may end obesity

WASHINGTON—Researchers may have discovered a way to end obesity—by accident.

In a study with a potential cholesterol lowering agent, scientists noted an unusual side effect. Instead of lower cholesterol levels, patients receiving a natural plant colloid lost weight while body weight in a control group remained constant.

The scientists say the mechanism behind the weight loss is not clear, but suggest it is partially due to a decrease in the intestinal absorption of calories. Scientists in another study published in the *British Journal of Nutrition*, found that patients consuming the same colloid lost weight in spite of being instructed not to alter normal eating patterns. Despite this evidence, other scientists may not agree on the weight loss benefits of colloids. Someday, pending further study, there could be universal agreement that colloids are helpful in confronting the problem of obesity.

National Dietary Research, whose research topics have been the subject of articles published in recent medical and nutritional journals, has successfully incorporated a series of colloids into a chewable food tablet called FS-1. When used as directed, FS-1 replaces high calorie fats with lower calorie nutrients, thus providing optimum nutrition with a minimum number of fat calories. According to an article published in the *American Journal of Clinical Nutrition*, consciously limiting the amount of food one consumes is not necessary to lose weight, provided you limit the fat.

A Florida company has obtained exclusive distribution rights to FS-1, which is available through pharmacies and other health care professionals.

©1992 Choline International

Food Source One is available at:
LINCOLN SQUARE PHARMACY
4100 Redwood Road 531-0602
MONTCLAIR PHARMACY
6123 Lasalle Ave 339-9393

EXHIBIT F

EXHIBIT F

Weight Loss Surprises Researchers

WASHINGTON — A Nutrition organization was hopeful that a nutritionally complete "hi-tech" food tablet would help erase world hunger problems, until a study revealed that one of the ingredients could cause significant weight loss.

Although other studies and scientists may not agree, researchers in Europe found that the ingredient, a natural plant colloid, actually caused people to lose weight, even though specifically instructed not to alter normal eating patterns, according to one study published in the prestigious British Journal of Nutrition. Researchers in an earlier study had speculated that weight loss was due to a decrease in the intestinal absorption of calories.

While the development of the product called Food Source One, a project of National Dietary Research, would not be used to successfully fulfill its original goal, the formula which has since been improved with other natural colloids has been a windfall for overweight people. A Daytona Beach, Florida woman, fighting a weight battle for 12 years, used the product on the recommendation of her physician and lost 30 pounds. She stated, "Not only have I lost 30 pounds but my cholesterol dropped from 232 to 143. I have two closets full of clothes which have not fit me in two years that I can't now wear." In a separate telephone interview with a Wilmington, North Carolina pharmacist, she lost 14 pounds in 3 weeks on the product and was never hungry.

Food Source One tablets are part of National Dietary Research's comprehensive plan to bring a rapid end to obesity in this country. A variety of nutritionally sound diet plans are specially prepared by NDR, accompany each bottle and provide a natural, drug free alternative for confronting the problem of obesity.

© 1991 Consumer International

ASK YOUR PHARMACIST
FOOD SOURCE ONE IS AVAILABLE AT:

- | | | |
|---|---|--|
| ALEXANDRIA
Pharmacia
1211 Washington St.
Alexandria, VA 22304
Pharmacia
1211 Washington St.
Alexandria, VA 22304
Pharmacia
1211 Washington St.
Alexandria, VA 22304
Pharmacia
1211 Washington St.
Alexandria, VA 22304 | CHRY CHASE
Pharmacia
1211 Washington St.
Alexandria, VA 22304
Pharmacia
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Alexandria, VA 22304 | FAIRFAX
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| BETHESDA
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Pharmacia
1211 Washington St.
Alexandria, VA 22304
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Alexandria, VA 22304
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1211 Washington St.
Alexandria, VA 22304 | HYATTSVILLE
Pharmacia
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Pharmacia
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Alexandria, VA 22304
Pharmacia
1211 Washington St.
Alexandria, VA 22304 | HYATTSVILLE (Cont.)
Pharmacia
1211 Washington St.
Alexandria, VA 22304
Pharmacia
1211 Washington St.
Alexandria, VA 22304
Pharmacia
1211 Washington St.
Alexandria, VA 22304
Pharmacia
1211 Washington St.
Alexandria, VA 22304 |

Washington Post January 27, 1993

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Complaint

EXHIBIT G

Miami Herald
April/May 1992

ADVERTISING

Cholesterol Breakthrough Passes Mom's Test

WASHINGTON—The mother of a research scientist recently lowered her cholesterol more than 20% without changing her eating habits.

After a visit to her doctor a Florida woman learned that her cholesterol level was an elevated 308 and she was encouraged to change her eating habits. When she returned 10 weeks later, the doctor was astounded that her cholesterol level had dropped to 213. Asked if she achieved the amazing results just by dieting she replied, "No I didn't diet at all, in fact I ate the things I shouldn't eat like bacon, sausage and ice cream. The only thing I did different was take some tablets my son gave me."

The woman's son is Dr. William Morris, director of research and development National Dietary Research, an organization dedicated to finding nutritional solutions to health problems. Dr. Morris admits that the tablets called Vancet 5000 were designed as a dietary supplement to be used with a low-fat diet plan. "She just wanted to put the tablets to the test," says Dr. Morris. "Of course I was pleased with the results she achieved, but now we're working on reducing some of the fat in her diet to lower her cholesterol even further."

Vancet 5000 is a chewable food tablet that contains extracts from foods known to lower cholesterol. According to the exclusive distributor for Vancet 5000, inquiries about the new product are being received from all over the country and has boosted the interest of doctors used to prescribing expensive, cholesterol-lowering drugs. A 30 day supply of the Vancet 5000 Cholesterol Lowering Plan is only \$25.99.

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BAY HARBOR
BAY HARBOR DRUGS
1001 KANE CONCOURSE
369-5745

CAROL CITY
CAROL PHARMACY
470 N.W. 167 STREET
593-2273

LA PRADERIA
LA PRADERIA PHARMACY
481 N.W. 102nd STREET
593-9113

WHELEND'S PHARMACY
3781 N.W. 107th STREET
594-1347

COCONUT GROVE
GIBNEY BEEK PHARMACY
3208 GRAND AVE.
594-0941

CORAL GABLES
CORAL GABLES APOTHECARY
476 SW THURDE WAY
594-1693

MAJORCA DRUGS
180 PORCE DE LEON BLVD.
448-1757

RIVIERA PHARMACY
4739 LE JEUNE RD.
951-6281

SOUTH PALM PHARMACY
1833 MACDONALD AVE.
593-8821

SUPER DRUGS FARMACH
3815 SW 8th ST.
448-8889

CORAL REEF
SPT PHARMACY
1894 S. DIXIE HWY.
329-9474

FLORIDA CITY
VIRAGE PHARMACY & BROSCH
280 WEST PALM DRIVE
340-8394

MALDEN
MALDEN PHARMACY
3000 W. 14th AVE.
593-8881

HOMESTEAD
ROYAL PALM DRUGS
608 N. USHORE AVE.
347-8948

KEY BISCAYNE
KEY PHARMACY
700 CAMDON BLVD.
371-8489

LEESBURG CITY
LEESBURG CITY PHARMACY
3030 S.W. 13th AVE.
349-0484

MIAMI
ART MEDICINE PHARMACY
200 S.E. FIRST ST.
371-1887

ALLEN'S KEY PHARMACY
4000 RED RD. W. 89th RD.
593-2917

ALTO BROSCHET PHARMACY
1873 S.W. 27th AVE.
369-7988

CANELLA PHARMACY
1530 N.W. 17th AVE.
529-4793

CARDENAS PHARMACY
2888 CORAL WAY
593-6442

CONTINENTAL PHARMACY
209 S.W. 26th ST.
593-2171

CORAL WAY PHARMACY
6820 S.W. 26th ST.
359-5177

MARLAN BERCA BROSCHET
7455 N. HENDALL DR.
593-1188

DOCTOR'S PHARMACY
1993 S.W. 26th ST.
644-4899

GRACE'S PHARMACY
8841 S.W. 40th ST. SW RD.
625-7791

HAAS BROSCHET PHARMACY
8336 S.W. 36th ST.
364-8889

JORGE PHARMACY
1701 CORAL WAY
593-1389

LEO'S PHARMACY
3880 OLD CUTLER RD.
329-9128

LITTLE HAVANA DRUGS
1286 S.W. 28th ST.
624-1289

MARCO DRUGS AND GIFTS
8942 S. Dixie Hwy.
695-4111

MARCO DRUGS AND GIFTS
1788 S. DIXIE HWY.
329-7972

CHARGEA PHARMACY
6837 S.W. 72nd ST.
274-9888

PARKVIEW PHARMACY
1389 S.W. 22nd ST.
654-4882

REKORD PHARMACY BROSCHET
1800 N.W. 57th AVE.
624-4882

RIJSE PHARMACY
182 S.W. 57th AVE.
624-4882

RIJSE PHARMACY
3878 CORAL WAY
597-8889

BENTLEY DRUGS
12077 N. HENDALL DR.
359-8888

BENTLEY DRUGS
8007 S.W. 11th ST.
371-8888

STONE'S PHARMACY
11488 N.E. 24th AVE.
752-8888

SUPER BEE BROSCHET
14976 N.W. 7th AVE.
625-7791

SUPER BROSCHET PHARMACY
1288 S. DIXIE HWY.
369-7977

THE BEE BROSCHET
898 S.W. 40th ST.
329-4294

WESTGATE PHARMACY
7253 CORAL WAY
357-7291

YOLA BROSCHET PHARMACY
269 S.W. 26th ST.
753-8888

MIAMI BROSCHET
LEO JANI PHARMACY
688 SW 68th ST. AVE.
594-8887

MOTOWN PHARMACY
321 APERLA BROSCHET RD.
593-8887

OLIVER BROSCHET PHARMACY
1674 MORGAN AVE.
691-8888

MOTEL PHARMACY
1758 COLLINS AVE.
627-8881

STY BRICA STY PHARMACY
1523 HAWTHORNE AVE.
638-8887

SHOPPER'S PHARMACY
844 9th ST.
593-8887

SUNNY CUT BROSCHET
1708 COLLINS AVE.
624-8887

NORTH MIAMI
MEDICAL SHOPPER'S PHARMACY
408 S.W. 22nd ST.
359-8888

RELIABLE SUPER DRUGS
7148 NE 22nd ST.
369-8888

TRILCO DRUGS
1079 N.E. 13th ST.
593-8888

YOUR PHARMACY
624 N.E. 12th ST.
359-8888

NORTH MIAMI BEACH
BROSCHET PHARMACY
300 SE BROSCHET ST.
371-8888

SHINE SUPER DRUGS
1918 N.E. 22nd AVE.
359-8888

SHINE SUPER DRUGS
300 SE BROSCHET ST.
371-8888

SHINE SUPER DRUGS
300 SE BROSCHET ST.
371-8888

Complaint

120 F.T.C.

EXHIBIT H

THE



GUARANTEE

A blood cholesterol level over 270 puts you at a high risk for heart disease. Have your cholesterol checked. If you need to lower your cholesterol, use Vancol 5000 as directed for 30 days. After 30 days, have it checked again. If your cholesterol has not been lowered significantly, bring your test results and empty bottle back for a **FULL REFUND!**

**LOWER YOUR CHOLESTEROL IN 30 DAYS
OR YOUR MONEY BACK!**



893

Complaint

EXHIBIT I

Technical Sheet

Research & Development by
NATIONAL DIETARY RESEARCH
 1377 K Street, Suite 553
 Washington, DC 20005

VANCOL 5000

Mini Flavored Chewable
 Tablets with Cholesterol
 Lowering Power

Cholesterol Lowering Formula

Each Chewable Tablet Supplies:
 Beta Sitosterol 10 mg
 Psyllium 200 mg
 Chromium from picolinate 50 mcg
 with Natural quinone antioxidants in a base of
 Calcium carbonate & Magnesium stearate

VANCOL 5000 is composed of nutrients which research has shown to decrease LDL cholesterol levels. VANCOL 5000 is available in chewable tablet form and intended to be used with a cholesterol lowering diet as a drug free alternative for the problem of elevated blood cholesterol levels.

Recent scientific data suggests that the ingredients contained in Vancol 5000 have a beneficial effect on lowering total blood cholesterol levels, LDL cholesterol and may even increase HDL cholesterol. The Vancol 5000 Plan and the nutrients contained in the Vancol 5000 Tablet were developed to lower cholesterol levels, improve overall health status and an individual's quality of life.

Beta Sitosterol has been shown experimentally to decrease elevated plasma cholesterol by interfering with the intestinal absorption of cholesterol.

Researchers have found that patients with coronary heart disease had lower concentrations of chromium in the blood than healthy patients. Picolinic acid is a natural chelating agent, which aids in trace mineral absorption. Chromium picolinate supplementation has been shown to decrease LDL and total cholesterol levels and is effective in the treat-

ment of hyperlipidemia.

Psyllium has been studied as a cholesterol reducing agent because it binds to bile acids in the gut preventing reabsorption. Psyllium decreases absorption of cholesterol and lipids in the small intestines and causes the formation of short chain fatty acids, which are rapidly absorbed and may inhibit cholesterol synthesis.

Calcium carbonate and magnesium stearate have been found to decrease cholesterol as explained in further detail on the following page. While quinones may lower cholesterol levels, they are natural antioxidants that prevent oxygen from combining with cholesterol to form plaque on arterial walls.

RECOMMENDATIONS: Chew 2 tablets with each meal.

Package Size: 180 tablets

Distributed by:

**OMICRON
 INTERNATIONAL**
P.O. Box 27046, Fairfax, VA 22034

1-800-634-2348

Complaint

120 F.T.C.

EXHIBIT I

EXHIBIT I page two

VANCOL 5000

Elevated Cholesterol Levels and Dietary Supplementation**Chromium picolinate**

Experimental study: Supplementation with 50-200 mcg of chromium daily, improved blood cholesterol and triglyceride levels. The decrease was due to chromiums function in fat metabolism and sugar metabolism. (Anderson, Richard A. Agricultural Research, 10:14-16, 1990)

Experimental Double-blind Crossover Study: During a 42 day period, 28 subjects were given chromium tripicolinate (200 mcg) or a placebo daily. The subjects ingesting chromium had a significant decrease in total cholesterol, LDL cholesterol (10.5% decrease) and serum apolipoprotein B, (the principal protein of LDL cholesterol fraction) decreased. HDL cholesterol and apolipoprotein A increased. Subjects ingesting the placebo had elevated apolipoprotein B levels. (Press R et al. The effect of chromium picolinate on serum cholesterol and apolipoprotein fractions in human subjects. West J. Med. 1990 Jan; 152:41-45)

Psyllium

Double-blind Placebo Controlled Study: 26 hypercholesterolemic men were treated with psyllium or a placebo for 8 weeks. The psyllium group showed a 14% decrease in total cholesterol, 14.8% decrease in LDL/HDL cholesterol ratio and 20% decrease in LDL cholesterol. The placebo group showed no significant changes. (Anderson, JW et al. Cholesterol lowering effect of psyllium for hypercholesterolemic men. Arch Intern Med. 148:292-296)

Double-blind Study: 96 subjects with hypercholesterolemia were given 5.1 gms of psyllium or a placebo twice daily for 16 weeks, while following a prudent diet. Psyllium decreased total cholesterol by 5.6% and LDL cholesterol by 8.6%. The levels in the placebo group were unchanged. (Levin, EG et al. Comparison of psyllium and cellulose as adjuncts to a prudent diet in the treatment of hypercholesterolemia. Arch Intern Med. 150:1822-1827, 1990)

BETA SITOSTEROL

Experimental Study: A diet containing .5% cholesterol plus .5% sitosterol, resulted in a significant decrease of liver cholesterol, showing the inhibitory effect of sitosterol on cholesterol absorption. (Ikeda J et al. J. Nutr. Sci. Vitaminol 35:361-369, 1989)

QUINONES

Quinones are natural antioxidants that help control and minimize free radical reactions to help lower cholesterol.

Calcium Carbonate

Although the mechanism of action is unknown, calcium has been shown to decrease cholesterol. One physician, a former medical editor for a national magazine, has advanced his "hard water" theory as a possible answer. CaCO₃ is the most common substance in hard water. According to the doctor, just as body oils and detergents mix with CaCO₃ to form an insoluble "bathtub ring", it can also inhibit the intestinal absorption of fat and cholesterol.

Magnesium Stearate

Magnesium stearate is a by product of stearic acid. Scientific data has shown, that when stearic acid is used in place of other fats in the diet, there is a significant reduction of plasma levels of cholesterol and LDL cholesterol (total cholesterol decreased by an average of 14%).

NOTE: No statement contained in this publication shall be construed as a claim or representation that any product is intended for use in the diagnosis, cure, mitigation, treatment, or prevention of any disease. This report is intended for professional use only. Certain persons considered experts may disagree with one or more of the statements and/or conclusions found in this report. Notwithstanding the above, this information is of current nutritional interest and is based upon sound and reliable authority.

EXHIBIT J

Santa Cruz Island is slowly returning to the way it was

EDITOR'S NOTE: The return of the island, once again, is a long process. The island is slowly returning to the way it was. The island is slowly returning to the way it was. The island is slowly returning to the way it was.

Information to have regarding death of ve

One of the responsibilities of a government is to provide information to the public regarding the death of a person. This information is necessary for the family and friends of the deceased.

Weight Loss Surprises Researchers

WASHINGTON—Scientists are surprised by the amount of weight loss reported by people who have followed a low-carbohydrate diet. The researchers found that the weight loss was significantly greater than expected.

Fund raising efforts for Willie Nelson fall short

AUSTIN (AP)—It's an embarrassment to say the efforts to raise money for Willie Nelson's fund-raising efforts have fallen short. The fund-raising efforts have fallen short of the goal.

Was the night before Christmas the neighborhood slept, no robberies or burglaries, not one single theft.

I was making my rounds, it's my job, name's McGuff, when a people work together, crooks can't do their stuff.

I see you have deadbolts, and your windows are pinned. You've joined "Neighborhood Watch," and that's how you win.

When your neighbor goes traveling, keep an eye on his house, to keep creatures from stirring, except maybe a mouse.

You locked your car while shopping, and kept packages out of view, you double-checked your charge slips, and tore up the carbon tea.

Well—gotta run. I'm out of time, so Happy Holidays, and thanks for helping me...

TAKE A BITE OUT OF CRIME

Available in Keene at: KEENE PHARMACY, 103 Old Ferry Rd. 602-1554

1992 F

Information to have regarding death of ve

One of the responsibilities of a government is to provide information to the public regarding the death of a person. This information is necessary for the family and friends of the deceased.

To provide for such an unfortunate occurrence, certain steps should be taken, and a certain amount of information must be available to the person's survivors. Here are a few of the most important reasons of information.

The first thing to be done by all families is to have their own access to certain papers and documents. Among these are the following: (1) family insurance policies; (2) birth certificates for all children; (3) the person's birth certificate; (4) the person's service exchange (DD-114); (5) any VA documents, if any, showing the person's VA claim number (a VA number is assigned to every veteran as soon as he files for a VA benefit, and after June 1974 the Social Security number is assigned as a claim number, even after he has been discharged); (6) a request for Social Security number; (7) a copy of all marriage certificates; (8) the person's driver's license; and (9) the location of any safety deposit boxes required by VA.

The next thing the family should know is a social burial plan. Every veteran is entitled to burial in a national cemetery, so long as space is available. Burial in a national cemetery can be made for a veteran who is a member of the National Cemetery Administration.

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Well—gotta run. I'm out of time, so Happy Holidays, and thanks for helping me...

TAKE A BITE OUT OF CRIME

Available in Keene at: KEENE PHARMACY, 103 Old Ferry Rd. 602-1554

1992 F

EXHIBIT J

Christmas, 78, 1992, Keene, New Hampshire, Dec. 23, 1992



Complaint

120 F.T.C.

EXHIBIT K

882-8181
882-1241

Chiropractic has natural healing benefits for your family's health. You must experience the benefits. Believe it!
J.M.

This is the first time I've been relieved of my pain for 34 years!
Thanks
D.B.

People Are Saying Good Things About Their Visit To Snider Chiropractic

Don't put off treating an ailment to a specialist. Snider Chiropractic makes a very and convenient schedule a physical exam, at a reasonable cost. Call us and start taking better care of yourself today!

882-1241
Richard A. Snider, D.C.
Vincennes, Indiana 47791

Genuine Concern from Doctor and Staff
A.H.

Dr. Snider is gentle & takes the time to listen
L.L.

The therapy is helping - and it's better than taking pills
J.K.

INDIANA COUNTY MAPS IN STATE BOOK
A new collection of 100 Indiana county maps is available in a state book. Printed on high quality paper, the book contains 100 color maps of Indiana's counties. Each map shows the county's location, major cities, towns, and villages. The book also includes a list of the counties and their populations. The book is available for \$12.95. Order today! Write: Indiana County Maps, 1000 North State Street, Indianapolis, IN 46202.

WEIGHT LOSS MYSTERY Baffles Scientists
WASHINGTON - Scientists are baffled by a common food ingredient that causes people to lose weight even though they eat less. The mystery is why they normally eat less.
A study published in The British Journal of Nutrition says that the ingredient, often used to thicken soups and dressings, causes people to eat less. The researchers found that people who ate the ingredient lost weight without changing their diet. Although the researchers are not sure why this happens, they believe it may be related to the way the ingredient affects the body's metabolism. The researchers say that the ingredient may be related to the way the body's metabolism works. The researchers say that the ingredient may be related to the way the body's metabolism works. The researchers say that the ingredient may be related to the way the body's metabolism works.

Sirloin Stockade Weekday Specials!

EVERY MONDAY & THURSDAY	Clipped Steak \$2.99	With Salad & French Fries \$4.99
EVERY TUESDAY	Club Steak \$2.99	With Salad & French Fries \$4.99
EVERY WEDNESDAY	Chicken Fried Steak \$2.99	With Salad & French Fries \$4.99

DINNERS INCLUDE:
Baked Potato or French Fries & Stockade Toast

Meat is Free!
Free Cone With Every Meal!
U.S.D.A. Choice Beef
Cut Fresh Daily!

1626 Willow
Vincennes

SIRLOIN STOCKADE

A special workshop November 13, 1995 Vincennes University for farmers and families who are interested in transferring the farm to the spouse and their children in preparing their will.

EXHIBIT K
Vincennes, Indiana - November 13, 1995

Please answer the following questions... YES NO

<input type="checkbox"/>	<input type="checkbox"/>	Do you know the elementary concepts of trust documents effective?
<input type="checkbox"/>	<input type="checkbox"/>	Do you know how to write your own will?
<input type="checkbox"/>	<input type="checkbox"/>	Do you know what steps must be taken to create a trust?
<input type="checkbox"/>	<input type="checkbox"/>	Do you know what the responsibilities of a trustee are?
<input type="checkbox"/>	<input type="checkbox"/>	Do you know what a living trust is?
<input type="checkbox"/>	<input type="checkbox"/>	Do you know if there are pros and cons to trusts?
<input type="checkbox"/>	<input type="checkbox"/>	Do you know what an irrevocable trust agreement is?
<input type="checkbox"/>	<input type="checkbox"/>	Do you know what an irrevocable insurance trust agreement is?
<input type="checkbox"/>	<input type="checkbox"/>	Do you know what a marital deduction trust is?

If you've answered no to any of the above you have an opportunity to gain more insight into how to keep the family farm in the family.

ESTATE PLANNING FOR F NOVEMBER 13, 1995
6:30 p.m. to 9:00
Shake Learning Resource Center - located at 2nd Street and Indianapolis Ave. (V.I.)

COST OF THIS SPECIAL WORKSHOP:
\$25 per couple - space will be limited - Call your reservations in early. 885-4344

AMERICAN NATIONAL BANK
FDIC

Co-sponsored by SBA

Workshop Leader: Susan L. Green, Esq., Attorney at Law, Green Law Firm, 1000 North State Street, Vincennes, Indiana. She will discuss the importance of estate planning and how to keep the family farm in the family. She will also discuss the importance of estate planning and how to keep the family farm in the family.

1988F

EXHIBIT L

...and areas here
 National Weather Service
 and Food warning for all
 the sleep and "boomish"
 light, a bitter rain was
 all in all.

Bowling Co. has declared
 its an "emergency" badge in
 Vinters' water flooding of
 1777. Several Vinters' are
 lined more than 100 feet
 from their homes. Damage
 expected to reach more than
 \$100,000.

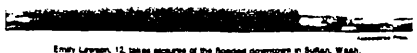
Some 200 residents of Fu
 and a farming community
 at the mouth of the Slaght
 are at least 100 residents
 are in the area of the Slaght
 River. Many would not be
 here before Tuesday.
 can be.

The western half of Fu Island
 is under water and livestock
 is rescued. There was a 200-
 ft break in the island's dike.
 Gardner's proclamation
 with Slaght, Stobomish,
 Watson, Gray Harbor and
 counties and direct state
 money to local governments.
 Property damages in What-
 comby could approach \$10
 million, said Cheryl of the
 state Department of Emer-
 gency Services.

A damage estimate for Slaght
 may not be available until
 next week, said residents
 here, Stewart said.

Red Cross shelters housed
 over 100 people and provided
 over 2,000 free meals over
 a weekend in Slaght and
 Watson counties.

Three houses were destroyed
 in the recent surge of Slaght.



Emery Lawson, 12, takes pictures of the flooded downtown in Bellingham, Wash.

Vinters' ad strikes back at critic

Winemakers toasted by others who resent sour (grapes) reviews

Parler is an East Coast wine guru, who is so powerful that many wine merchants will not stock a new wine release until they find out how he feels about it in his newsletter, Wine Advocate.

The wine that is causing all the fuss is a \$18 Chateau Petric, which Parler spotted as "another letter wine, sweet, lousy, that wine that provides no pleasure, no character, and so on."

He gave it a humiliating "0" on his scale of 100.

Parler's language to infuriated Chateau Petric winery owners Jess and Marietta Fourman that they decided to take on Parler nationally, and commissioned wine lover Edna Schwartz to do the job.

"A heartless review," said Schwartz. "You say the wine doesn't like a wine. But soul? Hmph."

The ad, which appears in the current issue of the nationally circulated Wine Spectator trade journal, recorded positive congressional news from California winemakers who do not exactly admire Robert Parler, who admires French wine above all.

Wine writers are among the most passionate trade commentators anywhere. Their perceived slanted palate can make or break a gross revenue.

DISCOUNT STOCKBROKERS
 Thomas F. White & Co., Inc.
 1000 Market Street
 San Francisco, CA 94102
 (415) 398-6500

Rockport
 BALLS
 In Men's and Ladies' Styles
 FOOTLOOSE
 347-4242

ATTENTION HOME
Free Mortgage Reduction
 In just 19 minutes you'll discover how to save tens of thousands of dollars on your mortgage — with NO CASH DOWN!

Now you can get removal of your financial burden!

ARMED AND DANGEROUS

- Save up to 50% on your mortgage
- No cash down
- No closing costs
- No prepayment penalties
- No refinancing
- No waiting for approval
- No waiting for closing
- No waiting for money
- No waiting for the bank
- No waiting for the lawyer
- No waiting for the title company
- No waiting for the escrow company
- No waiting for the lender
- No waiting for the government
- No waiting for the courts
- No waiting for the IRS
- No waiting for the state
- No waiting for the local government
- No waiting for the neighbors
- No waiting for the community
- No waiting for the world

Learn More Today! **(415) 358-6500**

Weight Loss Surprises Researchers

WASHINGTON — Nutrition researchers were surprised that a naturally occurring "fat-burner" found in a common food could help people lose weight, even though scientific literature on its effects is sparse, according to a new study published in the prestigious *Journal of Nutrition*. Researchers in an earlier study had reported that the weight loss was due to a decrease in the normal absorption of calories.

While the development of Food Source One, a product of National Dietary Research, would not be used to successfully fight its original goal, the discovery has been a vital part of the weight-loss program. A Dietetic Board, Paris, France, issued a weight loss for 12 years used for product on the recommendation of the program and has 20 pounds. She noted, "Not only have I lost 20 pounds but my cholesterol has dropped from 227 to 143. I have no cholesterol but of course which have not done in two years that I can see now." In a separate report, a registered nutritionist revealed that a Washington, North Carolina pharmacist had 10 pounds in 15 days on the product and was more hungry.

Food Source One is available through physicians and alternative medicine practitioners because it is not a drug and contains only natural ingredients already known to be safe. Copies of the referenced study are available free from National Dietary Research, 1000 17th & S., Washington, DC 20003, however, please include \$2 postage & handling for each report.

Available at:
LODGE DRUG COMPANY
 225 E. 14th Street
 Ithaca, NY 14850
CALBION PHARMACEUTICAL
 225 E. 14th Street



THIS WEIGHT LOSS PROGRAM COMES WITH ALL THE TRIMMINGS.

Getting trim and staying that way is no easy feat. Optimal, the nation's most effective weight loss program, offers a proven combination. Weekly supervision by a medical doctor and a comprehensive program to help you lose weight for good.

So if you're ready to get healthy, and don't want the frustration of the usual weight loss roller-coaster, call us today. Or ask about our new Optimal program for smaller weight loss of 20 to 30 pounds. Both come with all the trimmings.

You need to stay trim for life. To get details, call 750-5775.

St. Mary's Hospital and Medical Center
 San Francisco

Carving Commitment is a trademark of St. Mary's Hospital. Established in 1863.

EXHIBIT L

DECISION AND ORDER

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

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

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

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments received, 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 National Dietary Research, 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 1377 K Street, N.W., Suite 553, in the District of Columbia.

2. Respondent The William H. Morris Company 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 2804 Smither Road, in the City of Tampa, State of Florida.

3. Respondent William H. Morris is an officer of said corporations. He formulates, directs, and controls the policies, acts, and practices of said corporations. His home address is at 2906 Smither Road, in the City of Tampa, State of Florida.

4. 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 National Dietary Research, Inc., a corporation, its successors and assigns, and its officers, agents, representatives, and employees, The William H. Morris Company, a corporation, its successors and assigns, and its officers, agents, representatives, and employees, and William H. Morris, individually and as an officer of the corporate respondents, directly or through any partnership, corporation, subsidiary, division or other device, in connection with the advertising, packaging, labeling, promotion, offering for sale, sale or distribution of any product or program in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, in any manner, directly or by implication, that the product or program

- a. Provides any weight loss benefit;
- b. Is an effective treatment for obesity;
- c. Reduces hunger or is an effective appetite suppressant;
- d. Decreases the intestinal absorption of calories;
- e. Reduces, can reduce or helps reduce serum cholesterol;
- f. Provides, can provide or helps provide any other health benefit; or
- g. Has any effect on cellulite or on the user's body measurements,

unless, at the time they make 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 National Dietary Research, Inc., a corporation, its successors and assigns, and its officers, agents, representatives, and employees, The William H. Morris Company, a corporation, its successors and assigns, and its officers, agents, representatives, and employees, and William H. Morris, individually and as an officer of the corporate respondents, directly or through any partnership, corporation, subsidiary, division or other device, in connection with the advertising, packaging, labeling, promotion, offering for sale, sale or distribution of any product or program in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting, in any manner, directly or by implication,

a. The existence, contents, validity, results, conclusions, or interpretations of any test or study;

b. The amount of fiber or any other nutrient or dietary constituent contained in or provided by the product or program, whether described in quantitative or qualitative terms;

c. That the product or program contains or provides a high, rich, excellent or superior source of fiber or any other nutrient or dietary constituent using those words or words of similar meaning; or

d. The research activities or other activities of National Dietary Research or any other organization affiliated with respondents.

III.

It is further ordered, That respondents National Dietary Research, Inc., a corporation, its successors and assigns, and its officers, agents, representatives, and employees, The William H. Morris Company, a corporation, its successors and assigns, and its officers, agents, representatives, and employees, and William H. Morris, individually and as officer of the corporate respondents, directly or through any partnership, corporation, subsidiary, division or other device, in connection with the advertising, packaging, labeling, promotion, offering for sale, sale or distribution of any product or program in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from creating, producing, selling or disseminating any advertisement that

misrepresents, in any manner, directly or by implication, that it is not a paid advertisement.

IV.

It is further ordered, That respondents National Dietary Research, Inc., a corporation, its successors and assigns, and its officers, agents, representatives, and employees, The William H. Morris Company, a corporation, its successors and assigns, and its officers, agents, representatives, and employees, and William H. Morris, individually and as officer of the corporate respondents, directly or through any partnership, corporation, subsidiary, division or other device, in connection with the advertising, packaging, labeling, promotion, offering for sale, sale or distribution of any product or program in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, in any manner, directly or by implication, that any endorsement (as "endorsement" is defined in 16 CFR 255.0(b)) 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 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.

V.

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

VI.

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

VII.

It is further ordered, That no later than the date that this order becomes final, respondents National Dietary Research, Inc., a corporation, its successors and assigns, The William H. Morris Company, a corporation, its successors and assigns, and William H. Morris, individually and as officer of the corporate respondents, shall deposit into an escrow account, to be established by the Commission for the purpose of receiving payment due under this order ("escrow account"), the sum of one hundred thousand dollars (\$100,000).

The funds paid by respondents, together with accrued interest, shall, in the discretion of the Commission, be used by the Commission to provide direct redress to purchasers of Food Source One in connection with the acts or practices alleged in the complaint, and to pay any attendant costs of administration. If the Commission determines, in its sole discretion, that redress to purchasers of this product is wholly or partially impracticable or is otherwise unwarranted, any funds not so used shall be paid to the United States Treasury. Respondents shall be notified as to how the funds are distributed, but shall have no right to contest the manner of distribution chosen by the Commission. No portion of the payment as herein provided shall be deemed a payment of any fine, penalty, or punitive assessment.

At any time after this order becomes final, the Commission may direct the escrow agent to transfer funds from the escrow account, including accrued interest, to the Commission to be distributed as herein provided. The Commission, or its representative, shall, in its sole discretion, select the escrow agent.

Respondents relinquish all dominion, control and title to the funds paid into the escrow account, and all legal and equitable title to the funds vests in the Treasurer of the United States and in the designated consumers. Respondents shall make no claim to or demand for return

of the funds, directly or indirectly, through counsel or otherwise; and in the event of bankruptcy of respondents, respondents acknowledge that the funds are not part of the debtor's estate, nor does the estate have any claim or interest therein.

VIII.

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:

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 their possession or control, or of which they have knowledge, that contradict, qualify, or call into question such representation or the basis upon which respondents relied for such representation, including complaints from consumers.

IX.

It is further ordered, That the corporate respondents shall notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in the corporations 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 corporations which may affect compliance obligations arising under this order.

X.

It is further ordered, That the corporate 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 or placement of advertisements, promotional materials, product labels or other such sales materials covered by this order.

XI.

It is further ordered, That the individual respondent shall, for a period of five (5) years from the date of issuance of this order, notify the Commission within thirty (30) days in the event of the discontinuance of his present business or employment, the activities of which include the advertising, offering for sale, sale, or distribution of consumer products, and of his affiliation with any new business or employment involving such activities. 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.

This order will terminate on November 7, 2015, or twenty years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

- A. Any paragraph in this order that terminates in less than twenty years;
- B. This order's application to any respondent that is not named as a defendant in such complaint; and
- C. This order if such complaint is filed after the order has terminated pursuant to this paragraph.

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

XIII.

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 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 or intend to comply with this order.

Set Aside Order

120 F.T.C.

IN THE MATTER OF

NATIONAL DAIRY PRODUCTS CORP.

SET ASIDE ORDER IN REGARD TO ALLEGED VIOLATION
OF SEC. 2 OF THE CLAYTON ACT*Docket 8548. Consent Order, June 28, 1967--Set Aside Order, Nov. 8, 1995*

This order reopens a 1967 consent order--which prohibited National Dairy Products Corp. and subsequently its successor, Kraft Foods, Inc., from engaging in territorial price discrimination in the sale of its jellies, preserves and other food products--and sets aside the consent order pursuant to the Commission's Sunset Policy Statement, under which the Commission presumes that the public interest requires terminating competition orders that are more than 20 years old.

ORDER REOPENING PROCEEDING
AND SETTING ASIDE ORDER

On July 13, 1995, Kraft Foods, Inc. ("Kraft"), as respondent and successor to National Dairy Product Corp., filed its Petition To Reopen and Set Aside ("Petition") in this matter. Kraft request that the Commission set aside the 1969 order, pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), Rule 2.51 of the Commission's Rules of Practice, 16 CFR 2.51, and the Commission's Statement of Policy With Respect to Duration of Competition Orders and Statement of Intention to Solicit Public Comment With Respect to Duration of Consumer Protection Orders, issued on July 22, 1994, and published at 59 Fed. Reg. 45,286-92 (Sept. 1, 1994) ("Sunset Policy Statement"). In the Petition Kraft affirmatively states that it has complied with the requirements of the order. The Petition was placed on the public record for thirty days, and no comments were received.

The Commission in its Sunset Policy Statement said, in relevant part, that "effective immediately, the Commission will presume, in the context of petitions to reopen and modify existing orders, that the public interest requires setting aside orders in effect for more than twenty years."¹ The Commission's cease and desist order in Docket No. 8548, issued on June 28, 1967, affirmed as modified by the United States Court of Appeals for the Seventh Circuit on June 20,

¹ Sunset Policy Statement, 59 Fed. Reg. at 45,289.

1969, and modified in accordance with the direction of the court on October 2, 1969, has been in effect for more than twenty-five years. Consistent with the Commission's Sunset Policy Statement, the presumption is that the order should be terminated. Nothing to overcome the presumption having been presented, the Commission has determined to reopen the proceeding and set aside the order in Docket No. 8548.

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. 8548 be, and it hereby is, set aside, as of the effective date of this order.

Chairman Pitofsky recused.

Complaint

120 F.T.C.

IN THE MATTER OF

SILICON GRAPHICS, 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-3626. Complaint, Nov. 14, 1995--Decision, Nov. 14, 1995

This consent order, among other things, permits the California-based corporation to acquire two entertainment graphics software firms, and requires the respondent to take certain steps, such as requiring that the respondent enter into a Commission-approved porting agreement with a Commission-approved porting partner in order to ensure that other companies that develop and sell entertainment graphics software and hardware can compete.

Appearances

For the Commission: *Howard Morse, Rhett R. Krulla and Eric D. Rohlck.*

For the respondent: *Wayne D. Collins, Jessica Skapof and Jill Ross, Shearman & Sterling, New York, N.Y.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and of the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission ("Commission"), having reason to believe that respondent Silicon Graphics, Inc., a corporation, has agreed to acquire Alias Research Inc. and Wavefront Technologies, Inc., 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. RESPONDENT

1. Respondent Silicon Graphics, Inc. ("SGI") 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 2011 North Shoreline Boulevard, Mountain View, California. SGI, which had total revenues of approximately \$1.4 billion in 1994, designs and supplies a family of workstation, server and supercomputer systems. SGI develops and markets, among other things, computer hardware incorporating interactive three-dimensional ("3D") graphics, digital media and multiprocessor supercomputing technologies.

II. ACQUIRED PARTIES

2. Alias Research Inc. ("Alias"), which had sales of approximately \$38 million in 1994, is a leading producer of workstation-based 3D and two-dimensional ("2D") computer graphics software for professional entertainment and industrial customers. Users of Alias' products in the entertainment industry create 3D computer graphic special effects, which may be output to a variety of media, including film and video for use in movies, television, interactive computer games, and other forms of presentation. Alias 3D products for the entertainment industry include Animator™ and PowerAnimator™.

3. Wavefront Technologies, Inc. ("Wavefront"), which had sales of approximately \$27.6 million in 1994, is a full-line producer of workstation-based 3D and 2D computer graphics software for professional entertainment and industrial customers. Users of Wavefront's products in the entertainment industry create 3D computer graphic special effects, which may be output to a variety of media, including film and video for use in movies, television, interactive computer games, and other forms of presentation. Wavefront's 3D products for the entertainment industry include, among others, Explore™, Kinemation™, and Dynamation™.

III. JURISDICTION

4. SGI 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 affects commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

IV. THE PROPOSED ACQUISITIONS

5. SGI and Alias, and SGI and Wavefront, entered into agreements on or about February 6, 1995, pursuant to which SGI intends to acquire essentially all of the stock of Alias and Wavefront in exchange for SGI stock. At that time, the value of the Alias acquisition was approximately \$367 million, and the value of the Wavefront acquisition was approximately \$130 million. Each transaction is conditioned upon the closing of the other transaction.

V. THE RELEVANT MARKETS

6. One relevant line of commerce in which to analyze the effects of the proposed acquisitions is the development, production and sale of entertainment graphics workstations. Entertainment graphics workstations generally are UNIX-based computers with high-speed graphic capability and suitable for use with entertainment graphics software. Personal computers, including Intel-based PCs and Apple MacIntosh computers, are not adequate substitutes for entertainment graphics workstations as platforms for running entertainment graphics software.

7. Another relevant line of commerce in which to analyze the effects of the proposed acquisitions is the development, production and sale of entertainment graphics software. Entertainment graphics software consists of compatible modelling, animation, rendering, compositing and painting software tools for use on entertainment graphics workstations in the production of high-resolution, 2D and 3D digital images for film, video, electronic games, interactive programming, or other entertainment or educational, graphic media.

8. Two relevant geographic areas within which to analyze the likely effects of the Alias and Wavefront acquisitions are the United States and the world. There are no significant impediments to the import into the United States, or to the export from the United States, of entertainment graphics software.

VI. MARKET STRUCTURE

9. The entertainment graphics workstation market is extremely concentrated. SGI is the dominant provider of entertainment graphics workstations, with over 90% of the market. Although various other companies manufacture workstations, most entertainment graphics software was developed for use on SGI workstations and is available only for SGI workstations.

10. The entertainment graphics software market is highly concentrated and rapidly growing. Alias and Wavefront are two of the three leading developers and sellers of entertainment graphics software. Alias and Wavefront compete principally with SoftImage Inc., a subsidiary of Microsoft Corp. Other developers and producers of entertainment graphics software produce particular software tools that are used largely as complements rather than substitutes for the product suites offered by Alias, Wavefront and SoftImage, or produce software suites that have found limited customer acceptance relative to the entertainment graphics software offered by Alias, Wavefront and SoftImage.

11. Alias, Wavefront, and SoftImage compete for sales to sophisticated 3D graphics and animation professionals. Although other software developers make entertainment graphics software, Alias, Wavefront and SoftImage are the industry standards, and the ability to run Alias, Wavefront, or SoftImage entertainment graphics software is considered critical for any computer workstation manufacturer to compete successfully in the entertainment graphics workstation market.

12. Prior to the agreements described in paragraph five, Alias negotiated with manufacturers of workstations other than SGI to port its entertainment graphics software products to those manufacturers' workstation platforms. The effect of such agreements, if consummated, would be to enable such workstation manufacturers to compete in the entertainment graphics workstation market.

13. Prior to the acquisitions described in paragraph five, SGI maintained an open software interface for its entertainment graphics workstations, sponsored independent software developer programs, and shared with developers of entertainment graphics software advance information concerning new SGI products to facilitate and promote competitive development of entertainment graphics software.

VII. ENTRY CONDITIONS

14. Entry into the entertainment graphics workstation market would not be timely, likely, or sufficient in its magnitude, character, and scope to deter or counteract anticompetitive effects of the acquisitions in the entertainment graphics workstation market. Other manufacturers of computer workstations have graphic engines for their computers that are technically capable of running entertainment graphics software provided a version of the software is written for use with the workstation and its graphic engine. However, without the possibility of having Alias or Wavefront entertainment graphics software developed for those workstations, entry would be unlikely. Marketing a technically comparable or even an improved combination of non-SGI workstations with entertainment graphics software other than that of Alias or Wavefront would be difficult, time consuming and not likely to occur because of the extensive installed user base of SGI workstations with Alias, Wavefront and SoftImage entertainment graphics software.

15. Entry into the market for the development and sale of entertainment graphics software would not be timely, likely, or sufficient in its magnitude, character, and scope to deter or counteract anticompetitive effects of the acquisitions in the entertainment graphics software market. Developing an entertainment graphics software suite similar to those of Alias and Wavefront is time consuming and unlikely to occur because of extensive installed user bases trained on and using the Alias and Wavefront software programs on SGI entertainment graphics workstations. Combining smaller software developers' niche programs or making smaller producers of entertainment graphics software significant competitors to Alias and Wavefront would be difficult, time consuming and not likely to occur because of the extensive installed user base of SGI workstations with Alias, Wavefront and SoftImage entertainment graphics software.

VIII. COMPETITIVE EFFECTS OF THE PROPOSED ACQUISITIONS

16. The acquisitions described in paragraph five, if consummated, may, individually or in combination, substantially lessen competition and 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 FTC Act, 15 U.S.C. 45, in the following ways, among others:

a. They may foreclose workstation producers other than SGI from significant, independent sources of entertainment graphics software, reducing competition in the manufacture and sale of entertainment graphics workstations;

b. They may increase costs to workstation producers other than SGI for obtaining entertainment graphics software for their workstation platforms, reducing competition in the manufacture and sale of entertainment graphics workstations;

c. They will facilitate SGI's unilateral exercise of market power in entertainment graphics workstations through price discrimination;

d. They may enable SGI to gain proprietary, competitively sensitive information pertaining to other workstation producers if such workstation producers are able to get Alias or Wavefront entertainment graphics software ported to their workstations, reducing competition in the manufacture and sale of entertainment graphics workstations;

e. They will eliminate Alias and Wavefront as substantial independent competitors, eliminate actual, direct and substantial competition between Alias and Wavefront, and increase the level of concentration in the entertainment graphics software market;

f. They will increase barriers to entry into the relevant markets and make two-level entry necessary;

g. They may foreclose, or increase costs to, competitors to Alias and Wavefront in the entertainment graphics software market in developing software for use in connection with future entertainment graphics workstation products developed by SGI, reducing competition in the development, manufacture and sale of entertainment graphics software.

h. They may cause consumers to pay higher prices for entertainment graphics software and for entertainment graphics workstations;

i. They may reduce innovation competition among producers of entertainment graphics software and among producers of entertainment graphics workstations.

IX. VIOLATIONS CHARGED

17. The acquisition agreements described in paragraph five, individually or in combination, constitute a violation of Section 5 of the FTC Act, 15 U.S.C. 45.

18. The acquisitions described in paragraph five, if consummated, would, individually or in combination, constitute a violation of Section 7 of the Clayton Act, 15 U.S.C. 45, and Section 5 of the FTC Act, 15 U.S.C. 45.

Commissioners Azcuenaga and Starek dissenting.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acquisitions 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 violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. 18; and

The respondent, Silicon Graphics, Inc., 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, 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 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, having duly considered the comments received, and having modified paragraph II of the order and paragraph six of the complaint in certain respects, 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 Silicon Graphics, Inc. ("SGI") is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its headquarters and principal place of business located at 2011 North Shoreline Boulevard, Mountain View, 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, as used in this order, the following definitions shall apply:

A. "*SGI*" means Silicon Graphics, Inc., its directors, officers, employees, agents and representatives, predecessors, successors and assigns; its subsidiaries, divisions, groups and affiliates controlled by SGI; and the respective directors, officers, employees, agents, representatives, successors and assigns of each.

B. "*Alias*" means Alias Research Inc.

C. "*Wavefront*" means Wavefront Technologies, Inc.

D. "*Respondent*" means SGI.

E. "*Entertainment products*" means the computer software ALIAS Animator™ and ALIAS PowerAnimator™ products sold as of May 1, 1995, including Additional Fonts and the Advanced Options for ALIAS PowerAnimator™, and any successor products or future versions or general releases of such products, including any additions, modifications, updates, and enhancements thereto released during such period as specified in the Porting Agreement.

F. "*Entertainment software*" means modelling, animation, rendering, compositing and painting software, as individual software programs or in combination, used in the production of two-dimensional or three-dimensional images for film, video, electronic games, interactive programming, or other entertainment or educational uses, that compete with entertainment products or with any component thereof.

G. "*Porting Agreement*" means an agreement between respondent and a Platform Partner, entered in good faith, to work together to port the entertainment products to be compatible with the Platform

Partner's computer systems in their supported configurations and with associated peripherals, which agreement shall provide, among other things, that respondent shall use reasonable best efforts to optimize the operation of the entertainment products in the context of the Platform Partner's computer systems; and which agreement shall provide that the porting shall occur as soon as reasonably practicable after the Porting Agreement is entered and receives the approval of the Commission; and which agreement shall state the method in which the ported entertainment products shall be sold and marketed on terms competitive with those applicable to entertainment products compatible with respondent's computers; and which agreement shall provide for protection from disclosure or improper use of non-public information.

H. "*ISV Programs*" means programs and other arrangements that respondent makes available generally to independent software developers that facilitate the development of software compatible with respondent's computers and operating systems.

I. "*Platform Partner*" means a company with which respondent has entered into a Porting Agreement pursuant to this order.

J. "*Non-public information*" means any information not in the public domain furnished by the Platform Partner to respondent in its capacity as porter of the entertainment products, and (1) if written information, designated in writing by the Platform Partner as proprietary information by an appropriate legend, marking, stamp, or positive written identification on the face thereof, or (2) if oral, visual or other information, identified as proprietary information in writing by the Platform Partner prior to the disclosure or within thirty (30) days after such disclosure. Non-public information shall not include: (1) information already known to respondent, (2) information which is within the public domain through no violation of this order by respondent, or (3) information which is known to respondent from a person other than the Platform Partner not in breach of a confidential disclosure agreement.

K. "*Acquisitions*" means the acquisitions of Alias and Wavefront by SGI.

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

II.

It is further ordered, That,

A. Not later than March 31, 1996, respondent shall enter into a Porting Agreement that receives the prior approval of the Commission with a company that receives the prior approval of the Commission. After such Commission approval, respondent shall port the entertainment products to the Platform Partner's computer systems as provided in the Porting Agreement.

Provided however, nothing in this order shall prohibit respondent from entering into additional porting agreements with one or more platform partners without the prior approval of the Commission.

B. The purpose of the Porting Agreement and the porting of the entertainment products, pursuant to the Porting Agreement, is to ensure that ported entertainment products compatible with the Platform Partner's computer system will be marketed and sold in competition with the entertainment products operating on respondent's computer systems, and to remedy the lessening of competition resulting from the proposed Acquisitions as alleged in the Commission's complaint.

III.

It is further ordered, That, absent the prior written consent of the proprietor of non-public information or unless expressly permitted by any Porting Agreement, (1) respondent shall use any non-public information only in porting the entertainment products pursuant to such porting agreement, and (2) any persons involved in porting the entertainment products shall not provide, disclose, or otherwise make available any non-public information to other employees of respondent.

IV.

It is further ordered, That respondent shall:

A. Establish and maintain an open architecture, and publish the Application Program Interfaces ("APIs"), for respondent's computers and operating systems in such manner that software developers and producers may develop and sell entertainment software, for use on respondent's computers, in competition with entertainment software offered by respondent; and

B. Respondent shall extend to developers of entertainment software the right to participate in ISV Programs on terms no less favorable to such developers than those terms applicable to developers of other software for use on respondent's computers and operating systems.

C. The purpose of this paragraph IV is to allow entertainment software developers and producers to develop and sell entertainment software for use on respondent's computers and operating systems in competition with respondent, and to remedy the lessening of competition resulting from the proposed Acquisitions as alleged in the Commission's complaint.

V.

It is further ordered, That, 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 paragraph II 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, or 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 paragraph II of this order.

VI.

It is further ordered, That, one year from the date this order becomes final, annually thereafter for the next four (4) years, and at other times as the Commission may require, respondent shall file with the Commission verified written reports setting forth in detail the manner and form in which it has complied and is complying with paragraphs II, III and IV of this order.

VII.

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 respondent, respondent 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 respondent relating to any matters contained in this order; and

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 such matters.

VIII.

It is further ordered, That respondent shall notify the Commission at least thirty (30) days prior to any proposed change in 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.

IX.

It is further ordered, That this order shall expire five (5) years from the date it becomes final.

Commissioners Azcuenaga and Starek dissenting.

DISSENTING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

The complaint in this matter alleges that the two companies that Silicon Graphics proposes to acquire, Alias and Wavefront, are two of the three leading developers and sellers of entertainment graphics software in a highly concentrated market in which entry is difficult and time consuming.¹ The Commission alleges, and I agree, that the elimination of competition between Alias and Wavefront will substantially lessen competition in violation of Section 7 of the Clayton Act.² The evidence persuades me that the Commission has

¹ Complaint paragraphs ten, eleven and fifteen.

² Complaint paragraph 16e.

a strong case under Section 7 based on this horizontal combination, and the obvious course of action would be to challenge the acquisitions on this basis. Such a challenge, if successful, would leave either Alias or Wavefront free to contract to produce entertainment graphics software for other hardware manufacturers.

Instead, the Commission chooses to rely on vertical foreclosure theory to impose requirements that fail to preserve existing competition and that ultimately may create inefficiency and reduce competition. A number of legitimate concerns were raised during the public comment period that identified some but not all of the problems in the order. To the extent that any vertical problems should concern us, they would be resolved by stopping the horizontal transaction. The decision and order having failed to achieve straightforward relief for the real competitive problem, the combination of Alias and Waterfront, I dissent.

DISSENTING STATEMENT OF COMMISSIONER ROSCOE B. STAREK, III

I do not agree with the Commission's decision to issue its Final order in this matter. The complaint alleges anticompetitive effects arising from the vertical integration of the leading manufacturer of entertainment graphics workstation, Silicon Graphics, Inc. ("SGI"), with two leading suppliers of entertainment graphics software, Alias Research, Inc., and Wavefront Technologies, Inc.¹ I have not been persuaded that these vertical acquisitions are likely "substantially to lessen competition" in violation of Section 7 of the Clayton Act, 15 U.S.C. 18. Moreover, even if one assumes the validity of the theories of anticompetitive effects, the Commission's order does not appear to prevent the alleged effects and may create inefficiency.

The Commission alleges, *inter alia*, that the acquisitions will reduce competition through two types of foreclosure: (i) nonintegrated software vendors will be excluded from the SGI platform; and (ii) rival hardware manufacturers will be denied access to Alias and Wavefront software, without which they cannot effectively compete against SGI.² Vertical foreclosure theories

¹ The Commission apparently finds that the horizontal combination of Alias and Wavefront is not anticompetitive on net: the order addresses alleged vertical problems only.

² Precedent for this "reciprocal foreclosure" analysis lies uncomfortably in *A.G. Spalding & Bros.*, 56 FTC 1125 (1960), in which the Commission rejected Spalding's acquisition of Rawlings Manufacturing Company. Before the acquisition, Spalding did not manufacture baseball gloves, but instead purchased them for resale; Rawlings manufactured baseball gloves and sold them to other resellers. The Commission found that, "by acquiring Rawlings, Spalding can not only prevent competitors from purchasing [gloves] from Rawlings but can also foreclose manufacturers of [gloves] from access to Spalding as a purchaser thereof." 56 FTC at 1169.

generally provide a weak basis for Section 7 enforcement,³ and this foreclosure scenario has particular problems, both logical and factual.

In general, the two types of foreclosure tend toward mutual exclusion. The very possibility of excluding independent software producers from the SGI platform suggests the means by which competing workstation producers will avoid foreclosure. The nonintegrated software producers surely have incentives to supply the "foreclosed" workstation producers, and each workstation producer has incentives to induce nonintegrated software suppliers to write for its platform. Otherwise, "we are left to imagine eager suppliers and hungry customers, unable to find each other, forever foreclosed and left to languish."⁴ This predicament is improbable in the dynamic markets at issue.

The acquisition does not appear likely to give rise to significant, anticompetitive foreclosure of nonintegrated software producers. Indeed, the description of the pre-merger state of competition in the Commission's complaint tends to exclude this possibility. The complaint alleges that software producers other than Alias, Wavefront, and Microsoft's SoftImage are either competitively insignificant or complementary, and that there is virtually no likelihood of entry by producers of substitutable SGI-compatible software owing to the entrenched positions of Alias and Wavefront. If both propositions are true, then the merger cannot appreciably foreclose software entry or expansion. Silicon Graphics' acquisition of Wavefront and Alias cannot be the cause of substantial post-merger foreclosure of competitively significant alternatives to the software of the two acquired firms if the posited software market was effectively foreclosed before the merger with SGI. In addition, SGI has strong incentives to induce expanded supply of SGI-compatible software: increasing the supply of compatible software (or of any complementary product) increases the demand for SGI's workstations.

It is perhaps more plausible that the transaction could result in reduced supplies of software, or higher costs of obtaining software,

³ For a critical discussion of pre- and post-Chicago theories of foreclosure, see David Reiffen & Michael Vita, "Is There New Thinking on Vertical Mergers? A Comment," 63 *Antitrust L.J.* 917 (1995). See also Roscoe B. Starek, III, "Reinventing Antitrust Enforcement? Antitrust at the FTC in 1995 and Beyond," Remarks at "A New Age of Antitrust Enforcement: Antitrust in 1995" Conference, Marina Del Rey, California (Feb. 24, 1995).

⁴ See Robert H. Bork, "The Antitrust Paradox" 232 (1978) (referring to similar foreclosure reasoning in A.G. Spalding, Bork observed that "the Commission could have cured this aspect of the situation by throwing an industry social mixer").

for SGI's workstation rivals. Even so, this would primarily be a consequence of the horizontal aspects of the transaction -- *i.e.*, the combination of two of the three principal vendors of the relevant software -- rather than its vertical aspects. The Commission eschews an enforcement action based on a horizontal theory, however, because of its cost in forgone efficiencies. If the horizontal software combination of Alias and Wavefront is efficiency-enhancing, the net anticompetitive impact of these transactions comes from SGI's vertical integration with Alias and Wavefront. If this is so, why not seek injunctive relief against the vertical integration, and avoid the costs of the ineffective regulatory remedy presented in the order?

There are at least two reasons for rejecting the alternative of seeking injunctive relief. The first is that there are demonstrable efficiencies associated with exclusive arrangements between hardware and software vendors.⁵ Second, The merger's anticompetitive effects are difficult to establish. More generally, in order to establish SGI's preeminence among producers of entertainment graphics workstations, the complaint alleges that entry into the manufacture of such hardware is extremely unlikely because of the substantial costs of porting SGI-specific software (especially the "high end" variants) to non-SGI platforms. This undermines the contention that the merger would induce a substantial lessening of competition in the entertainment graphics workstation market.⁶

⁵ A software producer's decision to write software exclusively for a specific hardware producer suggests an efficiency rationale for the software producer's subsequent integration with that hardware manufacturer by means of a vertical merger -- namely, to avoid the expropriation by the hardware producer of any software assets that are specialized to that hardware firm. An input supplier's specialized software may become so specialized to a hardware firm. An input supplier's specialized software may become so specialized to a specific hardware producer that the software has no value to other potential customers. This exposes the software supplier to the risk that the hardware manufacturer might behave opportunistically, to the detriment of the "committed" supplier, once the specialized software assets are created. Vertical integration of the buyer and the "committed" supplier eliminated the possibility of such opportunism. This is a well-established procompetitive rationale for vertical mergers. *See, e.g.*, Benjamin Klein, "Vertical Integration as Organizational Ownership: The Fisher Body-General Motors Relationship Revisited," 4 J.L. Econ. & Org. 199 (1988); Kirk Monteverde & David J. Teece, "Supplier Switching Costs and Vertical Integration in the Automobile Industry," 13 Bell J. Econ. 206 (1982); Kirk Monteverde & David J. Teece, "Appropriable Rents and Quasi-Vertical Integration," 25 J.L. & Econ. 321 (1982); Benjamin Klein, Robert G. Crawford & Armen A. Alchian, "Vertical Integration, Appropriable Rents, and the Competitive Contracting Process," 21 J.L. & Econ. 297 (1978).

⁶ The preceding discussion assumes, *arguendo*, the existence of relevant markets that are most favorable to the Commission's theory of competitive harm from vertical integration. Whether these narrowly defined markets are appropriate is questionable, however. To the extent that PCs are becoming closer substitutes for entertainment graphics workstations, for example, it is increasingly unlikely that a prerequisite for anticompetitive effects from a vertical merger -- pre-merger market power in a relevant market -- is satisfied.

Overall, I am unpersuaded that this transaction diminishes competition in any relevant market.⁷ Even had I concluded otherwise, however, I would not endorse the consent order, the terms of which would require SGI to: (1) port its software to a workstation competitor⁸ and (2) maintain an open architecture providing access to software developers on nondiscriminatory terms. The problems with remedies of this sort are substantial.⁹ For example, requiring a firm to sell an input to a rival is an ineffective remedy unless the Commission also regulates the terms of the sale. Absent such regulation (which the Commission does not undertake in the Final Order it has approved), the seller simply raises price and/or diminishes quality to the point where profitable entry is precluded. The burden associated with enforcing an order that regulates the terms of sale -- the Commission would be required to determine the "competitive price" and "competitive quality" for such porting rights -- cannot be overestimated. For this reason, the Commission has prudently shied away from such remedies in the past.

Second, requiring SGI to port entertainment graphics software to a third party will likely create substantial inefficiencies. The evidence suggests that there are one or more efficiencies associated with exclusive arrangements between software and hardware vendors; such arrangements existed well before the current transaction was proposed. Preventing SGI from availing itself of those efficiencies is not likely to benefit consumers.

For the foregoing reasons, I respectfully dissent from the Commission's decision to issue its Final Order in this matter.

⁷ The complaint also alleges that vertical integration of SGI with Alias and Wavefront will foster anticompetitive price discrimination against certain entertainment graphics customers. If the customers are already differentiable according to their demand elasticities for SGI workstations (or for the acquired software products), it is not clear how vertical integration enhances the probability of price discrimination. To the extent that price discrimination possibilities are enhanced, it would appear to be as a result of the horizontal combination of Alias and Wavefront. And if SGI and the combined Alias/Wavefront would have market power in their respective complementary markets, the most likely effect of vertical integration may be lower prices (due to elimination of the "double mark-up" problem). See, e.g., Jean Tirole, "The Theory of Industrial Organization" 174-75 (1988).

⁸ Shortly after the conclusion of the public comment period in this matter, the Commission deleted from the proposed order the mention of four companies in paragraph II.B as possible "platform partners." Although I applaud this modest change for removing the implication that those four firms were somehow "favored" candidates to serve as platform partners, the deletion of the four names does not affect my substantive competition analysis of the Commission's Final Order.

⁹ For a discussion of why nondiscrimination remedies are problematic, see, for example, Timothy Brennan, "Why Regulated Firms Should Be Kept Out of Unregulated Markets: Understanding the Divestiture in *U.S. v. AT&T*," 32 Antitrust Bull. 741 (1987).

Modifying Order

120 F.T.C.

IN THE MATTER OF

OCCIDENTAL PETROLEUM CORPORATION, ET AL.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT*Docket 9205. Modified Final Order, Feb. 3, 1994--Modifying Order, Nov. 16, 1995*

This order reopens a 1994 modified final order that settled allegations that Occidental's acquisition of Tenneco would substantially reduce competition in the U.S. market for mass and suspension PVC and required the Commission's prior approval before acquiring the stock or PVC assets of any PVC producer in the United States. This order modifies the consent order by deleting the prior approval requirements in paragraph VI of the consent order pursuant to the Commission's Prior Approval Policy, under which the Commission presumes that the public interest requires reopening cases and setting aside the prior approval provisions in outstanding merger orders, making them consistent with the policy.

ORDER REOPENING AND MODIFYING ORDER

On August 7, 1995, Occidental Petroleum Corp. and Occidental Chemical Corp (collectively "Occidental"), filed a Petition To Reopen and Modify Order ("Petition") in this matter. Occidental asks that the Commission reopen and modify the 1994 order in this matter pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Section 2.51 of the Commission's Rules of Practice and Procedure, 16 CFR 2.51, and consistent with the Statement of Federal Trade Commission Policy Concerning Prior Approval and Prior Notice Provisions, issued June 21, 1995 ("Prior Approval Policy Statement").¹ Occidental in the Petition requests that the Commission reopen and modify the order in Docket No. 9205 by deleting the requirement in paragraph VI that Occidental seek prior Commission approval for certain acquisitions. The Petition was on the public record for thirty days; no comments were received.

The Commission in its Prior Approval Policy Statement "concluded that a general policy of requiring prior approval is no longer needed," citing the availability of the premerger notification and waiting period requirements of Section 7A of the Clayton Act, 15

¹ 60 Fed. Reg. 39, 745 (Aug. 3, 1995); 4 Trade Reg. Rep. (CCH) ¶ 13,241, at 20,991 (June 22, 1995).

U.S.C. 18a, to protect the public interest in effective merger law enforcement. Prior Approval Policy Statement at 2. The Commission announced that it will "henceforth rely on the HSR process as its principal means of learning about and reviewing mergers by companies as to which the Commission had previously found a reason to believe that the companies had engaged or attempted to engage in an illegal merger." As a general matter, the Commission said, "Commission orders in such cases will not include prior approval or prior notification requirements." *Id.*

Narrow prior approval or prior notification provisions may be necessary to protect the public interest in some circumstances. The Commission said in its Prior Approval Policy Statement that "a narrow prior approval provision may be used where there is a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for the provision, attempt the same or approximately the same merger." The Commission also said that "a narrow prior notification provision may be used where there is a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for an order, engage in an otherwise unreportable anticompetitive merger." *Id.* at 3.

The Commission in the Prior Approval Policy Statement announced its intention "to initiate a process for reviewing the retention or modification of these existing requirements" and invited respondents subject to such requirements "to submit a request to reopen the order." *Id.* at 4. The Commission determined that "when a petition is filed to reopen and modify an order pursuant to . . . [the Prior Approval Policy Statement], the Commission will apply a rebuttable presumption that the public interest requires reopening of the order and modification of the prior approval requirement consistent with the policy announced" in the Statement. *Id.*

The presumption is that setting aside the prior approval requirement in paragraph VI of the order in Docket No. 9205 is in the public interest. Nothing to overcome the presumption has been presented, and nothing in the record, including the complaint and order, suggests that the exceptions described in the Prior Approval

Policy Statement are warranted. The Commission has determined to reopen the proceeding in Docket No. 9205 and modify the order to set aside the prior approval requirement set forth in paragraph VI.²

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

It is further ordered, That the Commission's order issued on February 3, 1994, be, and it hereby is modified, as of the effective date of this order, to set aside paragraph VI of the order.

Chairman Pitofsky recused.

² Occidental completed the divestitures required by the order in 1995. There is one remaining substantive obligation under the order. Paragraph III requires, for one year following the divestiture required by the order, that Occidental provide the acquirer or acquirers of the PVC divestiture assets, if the acquirer(s) so requests, such additional know-how as may reasonably be required to enable the acquirer(s) to manufacture and sell PVC. Occidental must also submit reports of its compliance with the order, if requested to do so by the staff.

IN THE MATTER OF

PAPERMAKERS FELT ASSOCIATION, ET AL.

SET ASIDE ORDER IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-828. Consent Order, Sept. 9, 1964--Set Aside Order, Nov. 22, 1995

This order reopens a 1964 consent order--which prohibited Papermakers Felt Association and its members from combining or conspiring to fix prices or terms of sale, or to enter into specific other agreements to restrain competition in the papermakers felt industry--and sets aside the consent order pursuant to the Commission's Sunset Policy Statement, under which the Commission presumes that the public interest requires terminating competition orders that are more than 20 years old.

ORDER REOPENING PROCEEDING
AND SETTING ASIDE ORDER

On August 1, 1995, Albany International Corp., the successor to respondent Albany Felt Company (collectively "Albany"), filed its Petition To Reopen and Set Aside Consent Order ("Petition") in this matter. Albany requests that the Commission set aside the 1964 order 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, and published at 59 Fed. Reg. 45,286-92 (Sept. 1, 1994) ("Sunset Policy Statement"). In the Petition, Albany affirmatively states that it has not engaged in any conduct violating the terms of the order. The Petition was placed on the public record, and the thirty-day comment period expired on September 11, 1995. 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-828 was issued on September 9, 1964, and has been in effect for approximately thirty-one years. Consistent with the

¹ See Sunset Policy Statement, 59 Fed. Reg. at 45,289.

Commission's Sunset Policy Statement, the presumption is that the order should be terminated. Nothing to overcome the presumption having been presented, the Commission has determined to reopen the proceeding and set aside the order in Docket No. C-828 as to respondent Albany.

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-828 be, and it hereby is, set aside as to respondent Albany, as of the effective date of this order.

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-3627. Complaint, Nov. 24, 1995--Decision, Nov. 24, 1995

This consent order, among other things, permits a Tennessee-based corporation to acquire John Randolph Medical Center in Hopewell, VA., and requires the respondent to divest, within 12 months, Poplar Springs Hospital, in Petersburg, VA., to a Commission-approved entity. In addition, the consent order requires the respondent, for 10 years, to notify the Commission before combining its psychiatric facility with any other psychiatric hospital facility in the Tri-Cities area of south central Virginia.

Appearances

For the Commission: *Oscar M. Voss* and *Mark J. Horoschak*.

For the respondent: *Ky Ewing, Vinson & Elkins*, Washington, D.C. and *Ray Hartwell, Hutton & Williams*, 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 John Randolph Medical Center in Hopewell, Virginia, and certain related assets, from the Hopewell Hospital Authority ("HHA"); that the acquisition agreement violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and 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) "*Psychiatric hospital*" means a health care facility, licensed or certified as a psychiatric hospital (except for a facility limited by its license or certificate to residential treatment or other long-term care), that provides 24-hour inpatient services for the psychiatric diagnosis, treatment, and care of persons suffering from acute mental illness or emotional disturbance, and may also provide treatment for alcohol or drug abuse.

(b) "*Psychiatric unit*" means a department, unit, or other organizational subdivision of a general acute care or other non-psychiatric hospital, licensed or certified as a provider of inpatient psychiatric care (except for a facility limited by its license or certificate to residential treatment or other long-term care), that provides 24-hour inpatient services for the psychiatric diagnosis, treatment, and care of persons suffering from acute mental illness or emotional disturbance, and may also provide treatment for alcohol or drug abuse.

(c) "*Psychiatric hospital services*" mean the provision by psychiatric hospitals or psychiatric units of inpatient services for the psychiatric diagnosis, treatment, and care of persons suffering from acute mental illness or emotional disturbance, or alcohol or drug abuse. "Psychiatric hospital services" do not include the long-term psychiatric treatment provided by residential treatment facilities, other long-term treatment of chronic mental illness, or such treatment and other services provided by federally-owned facilities and state mental hospitals.

THE PARTIES

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 One Park Plaza, Nashville, Tennessee. Columbia/HCA owns and operates, *inter alia*, over 300 hospitals throughout the United States. One of those hospitals is Poplar

Springs Hospital ("Poplar Springs"), a 100-bed psychiatric hospital in Petersburg, Virginia. In 1994, Columbia/HCA had total sales of over \$13.7 billion.

PAR. 3. HHA is a non-profit hospital authority organized, existing, and doing business under and by virtue of the laws of the Commonwealth of Virginia, with its principal place of business at 441 West Randolph Road, Hopewell, Virginia. HHA owns and operates John Randolph Medical Center ("John Randolph"), a 150-bed general acute care hospital including a 34-bed psychiatric unit, in Hopewell, Virginia, which is about ten miles northeast of Petersburg. In 1994, John Randolph had total sales of over \$40 million.

JURISDICTION

PAR. 4. Columbia/HCA and HHA 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 HHA 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 October 31, 1994, Columbia/HCA and HHA entered into an agreement whereby Columbia/HCA will acquire John Randolph Medical Center, and certain related assets, from HHA. The total value of the assets Columbia/HCA is to acquire from HHA is about \$45 million.

NATURE OF TRADE AND COMMERCE

PAR. 6. For purposes of this complaint, the relevant line of commerce in which to analyze the proposed acquisition is the production and sale of psychiatric hospital services and/or any narrower group of services contained therein. Psychiatric hospital services represent a line of commerce distinct and separate from outpatient psychiatric care, as well as from the long-term treatment of chronic mental illness (which is the province of facilities such as residential treatment facilities and state mental hospitals). Psychiatric

hospital services are provided to patients with a compelling clinical need for inpatient, acute psychiatric treatment, whose mental health care needs generally cannot reasonably be met by other, much less expensive forms of psychiatric health care.

PAR. 7. For purposes of this complaint, the relevant section of the country is the "Tri-Cities" area of south central Virginia, encompassing: the independent cities of Colonial Heights, Hopewell, and Petersburg; Dinwiddie and Prince George counties; and southwestern Charles City and southeastern Chesterfield counties.

MARKET STRUCTURE

PAR. 8. Columbia/HCA's acquisition of John Randolph would combine the largest psychiatric hospital facility in the Tri-Cities area with one of the only two other competing providers of psychiatric hospital services in the area. The only other provider of psychiatric hospital services in the Tri-Cities area is Southside Regional Medical Center, a general acute care hospital in Petersburg, Virginia with a 31-bed psychiatric unit.

PAR. 9. The market for psychiatric hospital services in the Tri-Cities area is highly concentrated, whether measured by four-firm concentration ratios or by the Herfindahl-Hirschmann Index ("HHI"). The proposed merger would significantly increase concentration in this market. It would increase Columbia/HCA's market share in the Tri-Cities area from over 50% to over 70%. The HHI would increase more than 2400 points, to a post-acquisition level of over 6400.

ENTRY CONDITIONS

PAR. 10. Entry of new psychiatric hospitals or psychiatric units in the Tri-Cities area would not be likely to deter or counteract anticompetitive effects of the acquisition in the relevant market. In Virginia, certificate of need approval from a state regulatory agency is required for the establishment of new psychiatric hospitals and psychiatric units. Obtaining such approval would be difficult in the Tri-Cities area, because the existing supply of psychiatric hospital beds in the Tri-Cities area substantially exceeds that which is needed (according to state standards) to meet the mental health needs of that area's residents.

COMPETITION

PAR. 11. In the relevant market, Columbia/HCA and HHA are direct, actual, and potential competitors.

EFFECTS

PAR. 12. The acquisition described in paragraph five, if consummated, may substantially lessen competition in the relevant market in the following ways, among others:

(a) It would eliminate actual and potential competition between Columbia/HCA and HHA as providers of psychiatric hospital services;

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

(c) It would eliminate the psychiatric unit at HHA's John Randolph Medical Center as a substantial, independent, and competitive provider of psychiatric hospital services;

(d) It may permit Columbia/HCA to unilaterally raise prices for psychiatric hospital services in the Tri-Cities area;

(e) It may result in less favorable prices and other terms for health plans that contract with providers of psychiatric hospital services in the Tri-Cities area;

(f) It may increase the possibility of collusion or interdependent coordination by the remaining providers of psychiatric hospital services in the Tri-Cities area; and

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

VIOLATIONS CHARGED

PAR. 13. 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. 14. 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 of the proposed acquisition of John Randolph Medical Center in Hopewell, Virginia, and certain related assets, by Columbia/HCA Healthcare Corporation ("Columbia/HCA" or "respondent") from the Hopewell Hospital Authority, 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 Delaware, with its principal place of business at One Park Plaza, Nashville, 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.

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

A. "*Columbia/HCA*" or "*respondent*" means Columbia/HCA Healthcare Corporation, its partnerships, joint ventures, companies, subsidiaries, divisions, and groups and affiliates controlled by Columbia/HCA; their directors, officers, employees, agents, and representatives; and their successors and assigns.

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

C. The "*Acquisition*" means the transaction contemplated by the October 31, 1994, agreement between Columbia/HCA and the Hopewell Hospital Authority, whereby Columbia/HCA will acquire John Randolph Medical Center in Hopewell, Virginia, and certain related assets.

D. "*Psychiatric hospital*" means a health care facility licensed or certified as a psychiatric hospital (except for a facility limited by its license or certificate to residential treatment or other long-term care), that provides 24-hour inpatient services for the psychiatric diagnosis, treatment, and care of persons suffering from acute mental illness or emotional disturbance, and may also provide treatment for alcohol or drug abuse.

E. "*Psychiatric unit*" means a department, unit, or other organizational subdivision of a general acute care or other non-psychiatric hospital, licensed or certified as a provider of inpatient psychiatric care (except for a facility limited by its license or certificate to residential treatment or other long-term care), that provides 24-hour inpatient services for the psychiatric diagnosis, treatment, and care of persons suffering from acute mental illness or emotional disturbance, and may also provide treatment for alcohol or drug abuse.

F. "*Psychiatric hospital facility*" means a psychiatric hospital, a non-psychiatric hospital with a psychiatric unit, or a psychiatric unit.

G. "*Psychiatric hospital services*" mean the provision by psychiatric hospitals or psychiatric units of inpatient services for the psychiatric diagnosis, treatment, and care of persons suffering from acute mental illnesses or emotional disturbance, or alcohol or drug

abuse. "Psychiatric hospital services" do not include the long-term psychiatric treatment provided by residential treatment facilities, other long-term treatment of chronic mental illnesses, or such treatment and other services provided by federally-owned facilities and state mental hospitals.

H. To "*operate*" a psychiatric hospital facility means to own, lease, manage, or otherwise control or direct the operations of a psychiatric hospital facility, directly or indirectly.

I. To "*acquire*" a psychiatric hospital facility means to directly or indirectly, through subsidiaries, partnerships, or otherwise:

1. Acquire the whole or any part of the assets of a psychiatric hospital facility;

2. Acquire the whole or any part of the stock, share capital, equity, or other interest in any person operating a psychiatric hospital facility;

3. Acquire or otherwise obtain the right to designate, directly or indirectly, directors or trustees of a psychiatric hospital facility; or

4. Enter into any other arrangement to obtain direct or indirect ownership, management, or control of a psychiatric hospital facility or any part thereof, including, but not limited to, a lease of or management contract for a psychiatric hospital facility.

J. "*Relevant area*" means the area in Virginia encompassing the independent cities of Colonial Heights, Hopewell, and Petersburg; Dinwiddie and Prince George counties; and those portions of Charles City and Chesterfield counties within a fifteen (15) mile radius of the present site of Poplar Springs Hospital in Petersburg, Virginia.

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

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

M. "*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, all Assets and Businesses, including all improvements, additions, and enhancements made prior to divestiture, of Poplar Springs Hospital in Petersburg, Virginia (the "paragraph II Assets").

B. Respondent shall also divest such additional Assets and Businesses ancillary to the paragraph II Assets and effect such arrangements as are necessary to assure the marketability, viability, and competitiveness of the paragraph II Assets.

C. Respondent shall divest the paragraph II Assets 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 paragraph II Assets is to ensure the continuation of the paragraph II Assets as an ongoing, viable psychiatric hospital and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's complaint.

D. Respondent shall comply with all terms of the Agreement to Hold Separate, attached hereto and made a part hereof as Appendix I. Said Agreement to Hold Separate shall continue in effect until such time as respondent has fulfilled the divestiture requirements of this order or until such other time as said Agreement to Hold Separate provides.

E. Pending divestiture of the paragraph II Assets, respondent shall take such actions as are necessary to maintain the present marketability, viability, and competitiveness of the paragraph II Assets, and to prevent the destruction, removal, wasting, deterioration, or impairment of the paragraph II Assets, except for ordinary wear and tear.

F. A condition of approval by the Commission of the divestiture shall be a written agreement by the acquirer(s) of the paragraph II 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 prior notification to the Commission in the manner prescribed by paragraph IV of this order, any paragraph II Asset to any person who operates, or will operate immediately following the sale, any other psychiatric hospital facility in the relevant area.

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 paragraph II 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 undivested paragraph II Assets.

B. 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 paragraph III.A, 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.

C. 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 paragraph II 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.C.3 to accomplish the divestiture(s), 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 undivested paragraph II 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(s). 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. Subject to Columbia/HCA's absolute and unconditional obligation to divest at no minimum price the paragraph II Assets (and subject to the terms described in paragraph II.A), and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's complaint, 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(s) shall be made in the manner and to the acquirer as set out in paragraph II; 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 undivested paragraph II 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(s) required by this order.

11. The trustee shall have no obligation or authority to operate or maintain the paragraph II 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 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 person operating a psychiatric hospital facility in the relevant area;

B. Acquire any assets of a psychiatric hospital facility in the relevant area;

C. Enter into any agreement or other arrangement to obtain direct or indirect ownership, management, or control of any psychiatric

hospital facility, or any part thereof, in the relevant area, including but not limited to, a lease of or management contract for any such facility;

D. Acquire or otherwise obtain the right to designate, directly or indirectly, directors or trustees of any psychiatric hospital facility in the relevant area;

E. Permit any psychiatric hospital facility it operates in the relevant area to be acquired by any person that operates, or will operate immediately following such acquisition, any other psychiatric hospital facility in the relevant area.

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"), 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 shall provide the Notification to the Commission at least thirty days prior to consummating the transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 CFR 803.20), respondent shall not consummate the transaction until twenty days after submitting such additional information and documentary material. 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.

Provided, however, that prior notification pursuant to this paragraph IV, or pursuant to paragraph II.F. of this order, shall not be required for:

1. The establishment by respondent of a new psychiatric hospital facility in the relevant area: (a) that is a replacement for an existing psychiatric hospital facility, if that facility is operated by respondent and is not required to be divested pursuant to paragraph II of this

order; or (b) that is not a replacement for any psychiatric hospital facility in the relevant area;

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 psychiatric hospital facility or part thereof to be acquired does not exceed one million dollars (\$1,000,000);

3. The acquisition of products or services in the ordinary course of business; or

4. Any transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. 18a.

V.

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 psychiatric hospital facility it operates in the relevant area to be acquired by any other person (except pursuant to the divestiture required by paragraph II), 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.

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 respondent has fully complied with paragraph II 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 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 this order, including a description of all substantive contacts or negotiations for the divestitures 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 the divestitures.

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 this order.

VII.

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, 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, 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, who may have counsel present regarding such matters.

APPENDIX I

AGREEMENT TO HOLD SEPARATE

This Agreement to Hold Separate ("Agreement") is by and between Columbia/HCA Healthcare Corporation ("Columbia/HCA" or "respondent"), 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; 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.*

PREMISES

Whereas, on October 31, 1994, Columbia/HCA and the Hopewell Hospital Authority entered into an agreement whereby Columbia/HCA will acquire John Randolph Medical Center in Hopewell, Virginia, and certain related assets, from the Authority (the "Acquisition"); and

Whereas, Columbia/HCA, with its principal place of business at One Park Plaza, Nashville, Tennessee, owns and operates, among other things, psychiatric hospitals; 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 specified in paragraph II of the consent order ("paragraph II Assets"), 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 paragraph II 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 divestitures of the paragraph II Assets, and the Commission's right to have the paragraph II Assets continue as a viable psychiatric hospital independent of Columbia/HCA; and

Whereas, the purposes of this Agreement and the consent order are to:

- (i) Preserve the paragraph II Assets as a viable, competitive, and ongoing psychiatric hospital, independent of Columbia/HCA, pending the divestitures of the paragraph II Assets as required under the terms of the consent order;
- (ii) Prevent interim harm to competition from the operation of the paragraph II Assets pending divestiture as required under the terms of the consent order; and
- (iii) 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, 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 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 of the paragraph II Assets is not accomplished, to appoint a trustee to seek divestiture of said assets pursuant to the consent order or to seek civil penalties or a court appointed trustee or other equitable relief, 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 three 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 of the paragraph II Assets, as required by the consent order, is completed.

3. To ensure the complete independence and viability of the paragraph II Assets, and to assure that no competitive information is exchanged between Columbia/HCA and the managers of the paragraph II Assets, respondent shall hold the paragraph II Assets, as they are presently constituted, separate and apart on the following terms and conditions:

a. The paragraph II Assets, as they are presently constituted, shall be held separate and apart and shall be managed and operated independently of respondent (meaning here and hereinafter, Columbia/HCA excluding the paragraph II Assets), except to the extent that respondent must exercise direction and control over such 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 the Acquisition, 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; provided, however, that Columbia/HCA may designate as the "New Company" under this agreement, the "New Company" created pursuant to the Agreement to Hold Separate regarding the Florida, Texas, and Louisiana Assets between Columbia/HCA and the Commission in connection with FTC File No. 951-0022. Respondent, shall transfer all ownership and control of all paragraph II 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 Board"), shall have three members. Respondent shall elect the members of the New Board. The New Board shall consist of the following three persons: Winfield C. Dunn; Samuel H. Howard; and David C. Colby. The Chairman of the New Board shall be Winfield C. Dunn (provided he agrees), or a comparable, knowledgeable person, who shall remain independent of

Columbia/HCA and competent to assure the continued viability and competitiveness of the paragraph II Assets. The New Board shall include no more than one member who is a director, officer, employee, or agent of respondent, who shall be David C. Colby, provided he agrees, or a comparable knowledgeable person ("the respondent's New Board member"). The New Board shall meet monthly during the course of the Hold Separate, and as otherwise necessary. Meetings of the New Board during the term of this Agreement shall be audiographically transcribed and the tapes 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 paragraph II 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, or with all applicable laws.

e. Respondent shall maintain the viability, competitiveness, and marketability of the paragraph II Assets; shall not sell, transfer, or encumber said Assets (other than in the normal course of business); and shall not cause or permit the destruction, removal, wasting, or deterioration, or otherwise impair their viability, competitiveness, or marketability of said Assets.

f. Except for the respondent's New Board member, 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 paragraph II Assets, which employees shall be selected from the existing employee base of each facility or entity and may also be hired from sources other than these facilities and entities.

h. With the exception of the respondent's New Board member, respondent shall not change the composition of the New Board unless the independent Chairman consents. The independent Chairman shall have power to remove members of the New Board for cause. Respondent shall not change the composition of the management of the New Company except that the New 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, obtaining legal advice, 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 hospital to be operated by the New Board. Nor shall the New Company or the New 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 hospitals. 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 an entity from sources other than the entity to which the information pertains, 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 Board member shall not, in his or her capacity as a New Board member, 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 Board member shall enter a confidentiality agreement prohibiting disclosure of Material Confidential Information. The respondent's New Board member shall participate in matters that come before the New 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 Board member shall not participate

in any matter, or attempt to influence the votes of the other members of the New Board with respect to matters, that would involve a conflict of interest if respondent and the New Company were separate and independent entities.

l. 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 Board; provided that the New Company shall engage in no transaction, material or otherwise, that is precluded by this Agreement.

m. If necessary, respondent shall provide the New Company with sufficient working capital to operate the paragraph II Assets at their respective current rates of operation, and to carry out any capital improvement plans for the paragraph II Assets which have already been approved.

n. Columbia/HCA shall continue to provide the same support services to the paragraph II Assets, as are being provided to those Assets by Columbia/HCA as of the date this Agreement is signed. Columbia/HCA may charge the paragraph II Assets the same fees, if any, charged by Columbia/HCA for such support services as of the date of this Agreement. Columbia/HCA personnel providing such support services must retain and maintain all Material Confidential Information of the paragraph II Assets on a confidential basis, and, except as is permitted by this Agreement, such persons shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any such information to or with any person whose employment involves any of respondent's businesses. Such personnel shall also execute a confidentiality agreement prohibiting the disclosure of any Material Confidential Information of the paragraph II Assets.

o. During the period commencing on the date this Agreement is effective and terminating on the earlier of (i) twelve (12) 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 paragraph II Assets ("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, competitiveness, and marketability of such Assets.

p. Columbia/HCA shall circulate, to its management employees responsible for the operation of hospitals (including non-psychiatric facilities) either in the relevant area defined in the consent order in this matter, or in the city of Richmond or Henrico or Chesterfield counties in Virginia, a notice of this Hold Separate and consent order in the form attached as Attachment A.

q. The New Board shall serve at the cost and expense of Columbia/HCA. Columbia/HCA 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.

r. The New Board shall have access to and be informed about all companies who inquire about, seek, or propose to buy any paragraph II Assets.

s. 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 Commission seek in any proceeding to compel respondent to divest any of the paragraph II 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 purposes of determining or securing compliance with this Agreement, and 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 representatives of the Commission:

a. Access, during office hours of respondent and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and all other records and documents in the possession or under the control of the 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, directors, or employees of respondent, who may have counsel present, regarding such matters.

7. This Agreement shall not be binding until approved by the Commission.

ATTACHMENT A

NOTICE OF DIVESTITURE AND REQUIREMENT FOR CONFIDENTIALITY

Columbia/HCA Healthcare Corporation has entered into a Consent Agreement and Agreement to Hold Separate with the Federal Trade Commission relating to the divestiture of Poplar Springs Hospital in Petersburg, Virginia and certain related assets and businesses ("Poplar Springs"). Until after the FTC's order becomes final and Poplar Springs is divested, Poplar Springs must be managed and maintained as a separate, ongoing business, independent of all other Columbia/HCA businesses. All competitive information relating to Poplar Springs must be retained and maintained by the persons involved in the operation of Poplar Springs 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 Columbia/HCA business. Similarly, all such persons involved in Columbia/HCA shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any such information to or with any other person whose employment involves Poplar Springs.

Any violation of the Consent Agreement or the Agreement to Hold Separate, incorporated by reference as part of the consent order, may subject Columbia/HCA to civil penalties and other relief as provided by law.

IN THE MATTER OF

THIRD OPTION LABORATORIES, INC., ET AL.

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

Docket C-3628. Complaint, Nov. 29, 1995--Decision, Nov. 29, 1995

This consent order requires, among other things, an Alabama company and its officers to pay \$480,000 to be used either for refunds to consumers or as disgorgement to the U.S. Treasury, and to send a notice to consumers and distributors of the beverage, Jogging in a Jug, advising them of the consent order which requires the respondents to possess competent and reliable scientific evidence to substantiate any representation they make about the performance, safety, benefits, or efficacy of any food, dietary supplement, or drug they market in the future. In addition, the consent order prohibits the deceptive use of testimonials or endorsements and requires the respondents to clearly and prominently include a disclosure statement in future advertisements.

Appearances

For the Commission: *Toby M. Levin* and *Loren G. Thompson*.

For the respondents: *Bruce A. Rawls* and *Ross Forman, Burr & Forman*, Birmingham, AL.

COMPLAINT

The Federal Trade Commission, having reason to believe that Third Option Laboratories, Inc., a corporation; and William J. McWilliams, Danny Bishop McWilliams, and Susan McWilliams Bolton, individually and as officers 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 Third Option Laboratories, Inc., is an Alabama corporation with its principal office or place of business at 2806 Avalon Avenue, Muscle Shoals, Alabama.

Respondent William J. McWilliams is the President, and an owner and director of the corporate respondent. His principal office

or place of business is the same as that 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.

Respondent Danny Bishop McWilliams is the Treasurer, and an owner and director of the corporate respondent. His principal office or place of business is the same as that 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.

Respondent Susan McWilliams Bolton is the Secretary, and an owner and director of the corporate respondent. Her principal office or place of business is the same as that 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.

PAR. 2. Respondents have labeled, advertised, promoted, offered for sale, sold, and distributed "Jogging in a Jug," a liquid made from apple cider vinegar, apple juice, and grape juice, as a preventive or treatment for numerous diseases and symptoms. Jogging in a Jug is a "food" and/or "drug" 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.

PAR. 4. Respondents have disseminated or have caused to be disseminated advertisements and promotional materials for Jogging in a Jug, including but not necessarily limited to the attached Exhibits A through F. These advertisements contain the following statements and depictions:

A. "Jogging in a Jug® has Health Woes on the Run [headline]. TOO OLD to take up running? Maybe you should start drinking instead. . .drinking 'Jogging in a Jug,' that is!

Just ask retired dairy farmer Jack McWilliams, who concocted the tart-tasting tonic 2 years ago. 'I used to be nearly disabled with heart-blockage and arthritis,' says Jack, who's 64. 'But after I started drinking Jogging in a Jug, I noticed a difference right away.'

'In less than a year, my arthritis cleared up, and I stopped suffering the pain and symptoms of heart disease!'

. . . Jack receives hundreds of testimonials from folks who feel that it's lowered their cholesterol, lifted their lethargy and lessened their arthritis.

'Vinegar is nature's own cleansing agent,' Jack insists, 'Vinegar will clean the drain in the kitchen sink, dissolve calcium and mineral deposits in pipes, tenderize meats. . .and remove decals from trucks.'

'I figure if vinegar can breakdown calcium and chemicals outside of the body, it'll do the same inside, leading to a healthier circulatory system and cleaner organs.' . . .

Just a few ounces of his tasty Jogging in a Jug will give you energy and stamina which is what the Jogger is trying to achieve." [Exhibit A]

B. "Jogging in a Jug BULLETIN [headline]. When your body tells you it's 4th down and 50 yards to go with no time outs, get Jogging in a Jug and keep on going.

Jogging in a Jug is a drink that achieves many of the things a jogger wishes to gain from jogging.

Jogging in a Jug is for people of all ages. Its formula, a self cleansing agent for the body, is a revival of a century-old process designed to cleanse the body cells of crystal and solid build up. This helps each system do its individual task more effectively, promoting an atmosphere for a more energetic and healthful you." [Exhibit B]

C. "Jogging in a Jug (USDA Approved) [headline]. JOGGING IN A JUG is a drink that achieves many of the things a jogger wishes to gain from jogging." [Exhibit C]

D. [Announcer] "Were [sic] Here to tell you about a product on the market thats [sic] so popular and so healthy, that people are writing letters from this great country of ours, and their [sic] talking about Jogging In A Jug! And here to tell you more is the inventor of Jogging In A Jug, Jack McWilliams from Cherokee Alabama. Jack, What do all these Letters say health wise about what Jogging In A Jug can do?

[McWilliams] That It lowers Cholesterol, Triglycerides [sic] that swelling in the legs, muscle spasms were going away." [Exhibit D]

E. [Announcer] "Jack McWilliams from Cherokee Alabama, and he's interested in your good health and quality of life, as a matter of fact Jack was so upset about his own declining health in 1985 that he invented an all natural drink, its [sic] called Jogging In A Jug. This new Jogging In A Jug product has become so popular that people from all over the Southeast and other parts of the United States are raving about their improved health and outlook on life. Jack, what exactly do the letters say?

[McWilliams]. . .we have letters that say that those people who are suffering dysentery and constipation when they go on Jogging In A Jug those little 2 ounces a day, both of them seem to clear up." [Exhibit E]

F. 'I developed heart disease about five years ago with 70 percent blockage,' he [Jack McWilliams] said.

'I also have arthritis. . .'

'I started taking a mixture of vinegar and I began to improve. The swelling in my hands and the (arthritic) pain in my shoulder went away and I stopped suffering the pain and symptoms of heart disease.'

McWilliams said his claim may sound strange in a high technology world of nuclear medicine, but he is convinced the addition of a few ounces of vinegar per week to the diet can greatly reduce the risk of heart disease, cancer in the internal organs and some forms of arthritis.

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Vinegar, he said, is like a natural solvent for the body, cleaning crystal deposits that are the base of clogged arteries and arthritis." [Exhibit F, p. 1]

* * *

[Testimonial] "I know it's working for me and my wife. The family doctor even wrote a note on my cholesterol read out, 'Mike continue taking "Jogging in a Jug." . . . My cholesterol had dropped the first time down 44 points and my wife's 22 points. Now this report down to 228.' . . . E.M.G." [Exhibit F, p. 2]

* * *

". . . Mr. McWilliams began drinking his concoction every day. In less than a year his arthritis cleared up, and he stopped suffering the pain and symptoms of heart disease. The retired dairy farmer had developed a new vinegar/juice beverage which he says is as good for you as a jog around the block. In fact he named his new life restorer 'Jogging in a Jug.'

Mr. McWilliams says, 'Vinegar is nature's own cleansing agent. Vinegar will clean the drain in the kitchen sink, dissolve calcium and mineral deposits in pipes, tenderize meats and even remove decals from trucks. I figure if vinegar can break down calcium and chemicals outside of the body, it'll do the same inside, leading to a healthier circulatory system and cleaner organs.'

. . . Jack receives hundreds of testimonials from people every where [sic] who feel that the vinegar/juice beverage has lowered their cholesterol, helped their arthritis and given them a new lease on life. . .

You're never too old to take up jogging. Even if it is in a jug." [Exhibit F, p. 2]

* * *

"Jack McWilliams at this date had received high tech medical treatment for seven years, with an average hospital stay of 30 days per year for a total of about 210 days, at a cost of approximately \$50,000 - \$54,000 to the insurance company plus minor cost to the family.

Convinced the fruit of the vine type of acetic acid is no longer in the diet nor on the market and is needed; McWilliams continued high-tech medication and added acetic acid through 'Jogging in a Jug' at two ounces per day at a cost of \$5.90 per month. Health was restored slowly in twelve to sixteen months."

[Depiction - two photographs of McWilliams, one with the subscript "January 1986 - age 59 atherosclerosis/arthritis (wt 148)" and the second with the subscript "January 1991 - age 64 no health problems (wt 210)"] [Exhibit F, p. 3]

* * *

"Riddled with arteriosclerosis [sic] and arthritis, Alabama dairy farmer Jack McWilliams, now 65, had lost the desire to live in 1985 when he developed 'Jogging in a Jug.'

He was also suspicious about why six people in his community of Cherokee, Alabama, died of heart disease and cancer in just six weeks, and he began to research into what was lacking in the modern diet.

It was acetic acid, he says today, and that is the elixir he mixes into the purple fluid he calls Jogging in a Jug.'

He is careful to note that the Food and Drug Administration will not allow him to make any health claims about his drink, but 'I have the First Amendment right to tell my own personal story.'

'People just don't take in the acetic acid they used to in the old days,' McWilliams said. . .

The credibility of cider vinegar in our diets began to fall into place, according to McWilliams, when he noted all it's [sic] known attributes such as the ability to clean calcium and mineral deposits off plumbing and to make meat tender. . .

He decided that if vinegar could break down calcium and chemicals outside the body, it could break down calcium and chemicals inside the body as well. . .

McWilliams has received many enthusiastic letters from 'Jogging in a Jug' drinkers telling how their cholesterol has gone down, energy has gone up and arthritis has become less painful.

And McWilliams said he was relieved of his heart disease symptoms, most of his arthritis and his shoulder stiffness is gone.

McWilliams attributes these reactions to the acetic acid in the drink which he believes helps cleanse the arteries and cells in the body. . .

This is a 2,000 year old known technology that gives us a third option to slow the rise of cancer, leukemia, heart disease and arthritis." [Exhibit F, p. 3]

[Testimonial] "My husband is an insulin dependent diabetic. . . .

This past year, on a friend's recommendation, he began taking 2 oz. of 'Jogging in a Jug' each morning. His doctor said it wouldn't hurt his control of his disease. Jack's sugar level has always tended to go too low, we were never sure what would trigger this at any time.

After beginning 'Jogging in a Jug' his episodes of low blood sugar have decreased markedly. Then in the summer haying season he ran out of 'Jogging in a Jug'. I kept forgetting to buy more. His blood sugar level began to fluctuate wildly, very high to very low seemingly without cause. We couldn't get it under control. Finally after about a week I remembered to purchase another jug.

Immediately, Jack's blood sugar leveled off to normal levels of 90-120 and stayed there.

We don't allow ourselves to be out of 'Jogging in a Jug' anymore!

I am convinced that this product has leveled his sugar off to manageable levels. Sincerely Mrs. J.A.W. Cherokee, AL" [Exhibit F, p. 4]

* * *

[Testimonial] "On 12 January 1991, my cholesterol count, was 272. I read an article about your product, Joggin [sic] in a Jug. I have been sipping the drink ever since. On 11 March 1991, my cholesterol count was 188, I am now a believer.' R.M. Montgomery, Alabama." [Exhibit F, p.4]

* * *

[Testimonial] "My cholesterol dropped from 330 to 276. My doctor told me to keep doing what I'm doing. . . ' A.H. Rockwood, TN" [Exhibit F, p. 4]

* * *

[Testimonial] "Your juice has helped to lower my mother's cholesterol, thank you.' J.C. Phil Campbell, AL" [Exhibit F, p. 4]

[Testimonial] "My cholesterol count had been hovering around 235, I tried your product for 3 weeks and my doctor was pleased to inform me it had dropped to 200.' P.H. Ft. Lauderdale, FL" [Exhibit F, p. 4]

[Testimonial] "I was stricken by a virus, after 6 weeks I was exhausted and couldn't work. I heard of your drink, after taking it for 6 weeks I am myself again and back to working 8-10 hours a day.' E.L. Hamilton, AL" [Exhibit F, p. 4]

[Testimonial] "After drinking Jogging in a Jug my husband's cholesterol has dropped from 217 to 190 and triglycerides from 419 to 148 and he can close his

hands from arthritis after three months.' F.W.B. Montgomery, AL" [Exhibit F, p. 4]

[Testimonial] "'My mother is 83 years old, and in very good health, except for high cholesterol. It was 448 when she [sic] a check-up in March. We bought her some Jogging in a Jug. I am happy to report her cholesterol is down by 124 points in just five weeks.' J.H.N. Selma, AL" [Exhibit F, p. 4]

[Testimonial] "'Thank you for helping me to reduce my cholesterol count. I took the product for two weeks before I had a cholesterol test. My doctor was so pleased he wrote across my chart, "Call her and congratulate her.'" F.R.W. Canonsburg, PA" [Exhibit F, p. 4]

[Testimonial] "' . . . I had arthritis pain to the point of not being able to do work with my arms over my head. Now I am able to work with my arms over my head in a normal manner.' J.C. Lawrenceville, GA" [Exhibit F, p. 4]

[Testimonial] "'I have lowered my cholesterol from 269 in September to 209 in January. Thanks.' B.Y. St. Cloud, FL" [Exhibit F, p. 4]

[Testimonial] "'For the past 6 years, I have been going to the Rheumatologist with arthritis in my hips. Sometimes [sic] could not get around. Two weeks after starting to drink Jogging in a Jug, I began feeling much better. This was five months ago and I have not been to the doctor since. It is the longest I have ever gone without taking Arthritis medication. I was even taking Cortizone [sic] shots. Thanks to Jogging in a Jug, I feel great.' G.T. Winchester, TN" [Exhibit F, p. 4]

PAR. 5. Through the use of the statements and depictions 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 through F, respondents have represented, directly or by implication, that:

- A. Jogging in a Jug cures or alleviates heart disease and its symptoms, including arterial blockages;
- B. Jogging in a Jug substantially lowers serum cholesterol and triglycerides;
- C. Jogging in a Jug cures or alleviates arthritis and its symptoms;
- D. Jogging in a Jug breaks down or eliminates calcium or other mineral or chemical deposits in the circulatory system;
- E. Jogging in a Jug improves the condition of the circulatory system;
- F. Jogging in a Jug cleans internal organs;
- G. Jogging in a Jug prevents or reduces the risk of cancer, leukemia, heart disease, and arthritis;
- H. Jogging in a Jug provides the same health benefits as a jogging regimen;
- I. Jogging in a Jug cures or alleviates lethargy;

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- J. Jogging in a Jug cures or alleviates dysentery;
- K. Jogging in a Jug cures or alleviates constipation;
- L. Jogging in a Jug stabilizes blood sugar levels in insulin-dependent diabetics;
- M. Jogging in a Jug aids in the recovery from viral diseases;
- N. Jogging in a Jug cures or alleviates swelling of the legs and muscle spasms;
- O. Jogging in a Jug is approved by the United States Department of Agriculture; and
- P. The testimonials or endorsements from consumers contained in the advertisements and promotional materials reflect the typical or ordinary experiences of members of the public who use Jogging in a Jug.

PAR. 6. In truth and in fact:

- A. Jogging in a Jug does not cure or alleviate heart disease or its symptoms, including arterial blockages;
- B. Jogging in a Jug does not substantially lower serum cholesterol or triglycerides;
- C. Jogging in a Jug does not cure or alleviate arthritis or its symptoms;
- D. Jogging in a Jug does not break down or eliminate calcium or other mineral or chemical deposits in the circulatory system;
- E. Jogging in a Jug does not improve the condition of the circulatory system;
- F. Jogging in a Jug does not clean internal organs;
- G. Jogging in a Jug does not prevent or reduce the risk of cancer, leukemia, heart disease, or arthritis;
- H. Jogging in a Jug does not provide the same health benefits as a jogging regimen;
- I. Jogging in a Jug does not cure or alleviate lethargy;
- J. Jogging in a Jug does not cure or alleviate dysentery;
- K. Jogging in a Jug does not cure or alleviate constipation;
- L. Jogging in a Jug does not stabilize blood sugar levels in insulin-dependent diabetics;
- M. Jogging in a Jug does not aid in the recovery from viral diseases;
- N. Jogging in a Jug does not cure or alleviate swelling of the legs or muscle spasms;

O. Jogging in a Jug is not approved by the United States Department of Agriculture; and

P. The testimonials or endorsements by consumers contained in the advertisements and promotional materials do not reflect the typical or ordinary experiences of members of the public who use Jogging in a Jug.

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 and promotional materials referred to in paragraph four, including but not necessarily limited to the advertisements and promotional materials attached as Exhibits A through F, 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 and the making of false advertisements in or affecting commerce in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

Chairman Pitofsky not participating.

EXHIBIT A

Jogging in a Jug[®]
Has Health Woes on the Run

TOO OLD to take up running? Maybe you should start drinking instead... drinking "Jogging in a Jug", that is!

Just ask retired dairy farmer Jack McWilliams, who concocted the tantalizing tonic 2 years ago. "I used to be nearly disabled with heart blockage and arthritis," says Jack, who's 64. "But after I started drinking Jogging in a Jug, I noticed a difference right away.

"In less than a year, my arthritis cleared up, and I stopped suffering the pain and symptoms of heart disease!"

The only symptoms he suffered after that were sore feet from pounding the pavement promoting his new product. Merchants in his hometown of Cherokee, Alabama laughed at first, but Jack - like any farmer - persisted. His persistence paid off. Nowadays, Jogging in a Jug is sold in supermarkets all across the South, and Jack receives hundreds of testimonials from folks who feel that it's lowered their cholesterol, lifted their lethargy and lessened their aches.

Such success may be sweet, but the taste of Jogging in a Jug certainly isn't - it's main ingredient is vinegar.

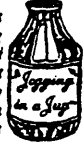
"Vinegar is nature's own cleansing agent," Jack insists. "Vinegar will clean the drain in the kitchen sink, dissolve calcium and mineral deposits in pipes, tenderize meat... and remove decay from trucks.

"I figure if vinegar can break down calcium and elements outside of the body, it'll do the same inside, leading to a healthier circulatory system and cleaner organs."

Healthy skepticism keeps some folks from trying out his treatment, Jack admits. But he points out that vinegar has been valued as a tonic and preservative since Biblical times. "My grandmother was a strong believer in using vinegar for all ailments," he adds. "She raised her family on creek water and vinegar, and her children all lived at least 90 years."

Jack's own family, wife Rebecca, son Danny, and daughter Susan, have a different health regimen these days - they're running to help him keep up with the demand for Jogging in a Jug. If this friendly former farmer has his way, you just might see it in your store!

DRINK UP!
 Just a few ounces of his tasty Jogging in a Jug will give you energy and stamina which is what the Jogger is trying to achieve. Says dairyman Jack McWilliams. Here's to your good health.



Available at your local grocery store.
 For Free Brochure
 call 1-800-262-2598
 Mon.-Fri. 8-5 p.m. Central Time.

DISTRIBUTED BY SERVICE DIST. INC., LORTON, VA.

Exhibit A

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EXHIBIT B

*Jogging in a Jug***BULLETIN**

When your body tells you it's 4th down and 50 yards to go with no time outs, get *Jogging in a Jug* and keep on going.



Jogging in a Jug is a drink that achieves many of the things a jogger wishes to gain from jogging.

Jogging in a Jug is for people of all ages. Its formula, a self cleansing agent for the body, is a revival of a century-old process designed to cleanse the body cells of crystal and solid build up. This helps each system do its individual task more effectively, promoting an atmosphere for a more energetic and healthful you.

Jogging in a Jug contains a blend of fresh and aged products of the orchard and vineyard. It contains no chemicals and no preservatives.

Jogging in a Jug is new, yet centuries old.

Make *Jogging in a Jug* a daily habit by taking a small amount each day as a part of your regular health routine.

2 Ounces per day is all it takes - 32 day supply - 64 oz. unit - \$5.95

At Your Local Grocery Store

DEVELOPED BY

Third Option Laboratories, Inc.

Route 3, Box 430
Cherokee, AL 35616

205-359-6178

Jack McWilliams

Bottled by Southern Specialty Food

Exhibit B

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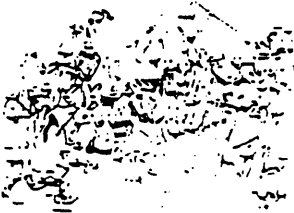
EXHIBIT C

10A The Huntsville Times, Wednesday, February 7, 1990

Jogging in a Jug
(USDA Approved)

JOGGING IN A JUG is a drink that contains more of the things a jogger needs to gain from jogging.

JOGGING IN A JUG is for people of all ages. Its formula, a well-balancing agent for the body, is a revival of a century old formula designed to combat the lower state of stress and mental health. This has been most effective in no conventional way more efficiently, promoting an opportunity for a more energetic and beneficial way.



Make **JOGGING IN A JUG** a daily habit by taking a small amount each day as part of your regular health routine.

JOGGING IN A JUG, it's new yet centuries old! 2 Ounces per day is all it takes—32 day supply—64 oz. unit \$5.95.

At Your Local Grocery Store

Third Option Laboratories
Route 3 Box 438 Cherokee, AL 35616 (205) 359-6178 Jack McWilliams

Exhibit C

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EXHIBIT D

Jogging In A Jug EM-020

Announcer: Were Here to tell you about a product on the market thats so popular and so healthy, that people are writing letters from this great country of ours, and their talking about Jogging In a Jug! And here to tell you more is the inventor of Jogging In A Jug, Jack McWilliams from Cherokee Alabama. Jack, What do all these Letters say health wise about what Jogging In A Jug can do?

Mr. McWilliams: That it lowers Cholesterol, Triglycirides that swelling in the legs, muscle spasms were going away.

Announcer: And Jogging In A Jug will cost you just pennies a day. Jogging In A Jug is healthy and completely natural but Jack, what exactly does Jogging In A Jug taste like?

Mr. McWilliams: Jogging In A Jug if you grew up in a rural community it taste like a home brew, if you grew up in the city, it taste like a fine wine.

Announcer: (Laugh) Now that a health drink for me.

Jingle: Try the healthy choice Jogging In A Jug, Just 2 ounces a day and once you try it when you need more youre gonna buy it Jogging In A Jug.

EXHIBIT E

Jogging In a Jug EM-022

Announcer: Jack McWilliams from Cherokee Alabama, and he's interested in your good health and quality of life, as a matter of fact Jack was so upset about his own declining health in 1985 that he invented an all natural drink, its called Jogging In a Jug. This new Jogging In A Jug product has become so popular that people from all over the Southeast and other parts of the United States are raving about their improved health and outlook on life. Jack, what exactly do the letters say?

Mr. McWilliams: All right we have letters that say that those people who are suffering dysentery and constipation when they go on Jogging In A Jug those little 2 ounces a day, both of them seem to clear up.

Announcer: Sounds Great Jack, but where does this incredible popularity for Jogging In A Jug come from.

Mr. McWilliams: It got around by the word of mouth and people used it, they knew it helped them so their calling their neighbors and friends and tell them about the product.

Announcer: Its the talk of the town, Jogging In A Jug!!

Jingle: Try the healthy choice Jogging In A Jug, just 2 ounces a day and once you try it when you need more your gonna buy it, Jogging In A Jug.

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EXHIBIT F

Third Option Laboratories
P.O. Box 648
Tusculum, AL 35674



The Jogging in a Jug information you requested.

CHECKS MONEY ORDERS: \$04.95 per case 1295
1-800-161-1598

Third Option Laboratories, Inc.
P.O. Box 648
Tusculum, AL 35674

VISA MASTERCARD
1-800-161-1598

Sorry to C.O.D.'s
Shipped only by the case!

"Times Daily" 1/27/90

Drink makes way to grocers' shelves

By Robert Palmer
Special Features Editor

Jack McWilliams doesn't claim to know much about medicine... but he believes a new product he is marketing can contribute to a healthier life for those who use it.

McWilliams, 61, Cherokee, has developed a drink that contains apple juice, grape juice and other vinegar. And he is marketing it as "Jogging in a Jug."

"Vinegar is the element of the product that he says is the key to its success.

"I developed heart disease about five years ago with 70 percent blockage," he said.

"I also have arthritis. Several of my friends have cured of heart disease recently.

"I started re-searching vinegar in the diet and I tried to ensure a hypothesis I have about it, but I could not," he said.

"I started taking a mixture of vinegar and I began to improve. The arthritis in my hands and the 'stitching' pain in my shoulder went away and I stopped suffering the pain and symptoms of heart disease."

McWilliams said his claim may sound strange in a high technology world of nuclear medicine, but he is convinced the addition of a few ounces of vinegar per week to the diet can greatly reduce the risk of heart disease, cancer in internal organs and some forms of arthritis.

"Vinegar, he said, is like a natural solvent for the body, cleanses crystal deposits that are the base of clogged arteries and arteries.

It contains acetic acid, he said, which has been missing from the diets of the industrialized world for 100 years.

"The erosion of acetic acid from the diet in the advanced nations is part of my hypothesis," he said. "There are four things that replaced it in our food: vitamin padding, the use of preservatives, sweetening and things other than vinegar to preserve them."

McWilliams said observation and research led him to pursue the use of vinegar in the diet.

He said he remembers his grandmother and her children using vinegar as a regular part of their diets.

His grandmother and four of her children lived to be 85 years old, he added.

In a gross release, he listed some qualities of vinegar in addition to its use in making pickles. For example, McWilliams

said that many physicians warn often crave pickles, which he believes is the body craving acetic acid.

A 64 ounce bottle of "Jogging in a Jug" sells for \$5.99 and is now stocked in several grocery stores in Colbert and Lauderdale counties, he said.

He recommends that two ounces

per day be taken, which allows one bottle to last for 32 days.

A smaller bottle is on the drug board that could be sold in cafes and restaurants, he said.

McWilliams, a cattle and a farmer, said the medical community is probably aware of the benefits of acetic acid and vinegar, but has attempted to promote it because its pungent taste.

Colbert and Lauderdale were targeted as test markets and he said consumer reaction to its taste has



"Jogging in a Jug" is a product of McWilliams' Third Option Laboratories.

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Jack McWilliams, a Cherokee resident, has developed a beverage he calls "Jogging in a Jug" that is available at some stores in Lauderdale and Colbert counties.

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EXHIBIT F

Mars, Inc. 44-0
May 1, 1992

Dear Mr. McWilliams,

Here is another order from Mars, Inc. (PA that is) keep giving your literature out and bragging about your "Jogging in a Jug". But these people want me to stop ordering. They all love it. I know it's working for me and my wife. The family doctor even wrote a note in my cholesterol read out. "Mike continue taking "Jogging in a Jug". I had even sent samples and you wrote a literature to him and all his nurses. My cholesterol had dropped the first time down 44 points and my wife lost 22 points. Now this report down to 228.

Please send TWO CASES to the above address.

Thanks again.
A friend,
E. M. G.

Read Publications from Tusculum, Ala. 35748-1972

"READ" ALL ABOUT IT

By Pettus Read
Associate Editor



It sure is wonderful what modern medicine can do these days. In no time they can put a new heart in and have a person back in the mainstream of life. There are new ways of seeing into the human body by sound waves and using this same method to do surgery without cutting. Yes, a person can live today a whole lot longer than they use to way back in the old days. But don't sell those old fashion remedies short. Modern medicine is great but grandma has a few tricks up her sleeve too.

Old practices should not be ever looked in the space age. In fact, I'm going to give you an insight into just an old fashion custom that may have saved a man's life. I know it saved his family farm and has given him a total new outlook.

One morning Jack McWilliams of Cherokee, Alabama went up and reared his mays on his farm may be running out. He was aerry plagued with heart trouble and arthritis. Mr. McWilliams's grandmother and her brother and sisters had lived to be over 90 years old. This caused him to think back about what they had done different in these lives than he had done. He remembered an old family beverage his grandmother drank everyday of her life. It's strange ingredients was vinegar.

With vinegar as the main item of a tart tasting beverage Mr. McWilliams began drinking his concoction every day. In less than a year his arthritis cleared up, and he stopped suffering the pain and symptoms of heart disease. The retired dairy farmer had developed a new vinegar juice beverage which he says is as good for you as a jug around the house. In fact he named his new life saver "Jogging In A Jug."

Mr. McWilliams says, "Vinegar is nature's own cleaning agent. Vinegar will clean the grain in the kitchen sink, dissolve calcium and mineral deposits in pipes, remove greasy and even remove decays from trucks. I figure if vinegar can break down calcium and chemicals outside of the body, it'll do the same inside, leading to a healthier circulatory system and cleaner organs."

Neighbors in his hometown first laughed at his new product. On January 7, 1990 he placed three six bottle cases of Jogging In A Jug in three stores. As of this writing his new juice on life beverage can be found in 14 states and his company is producing three to four thousand cases per week. The demand has become so great Mr. McWilliams's son Danny had to give up his trucking job to come back and work full-time with the new business. Both McWilliams children, Danny and Susan, are "younguns" to keep up with dad's discovery.

Jogging In A Jug can be found in stores all across the state of Tennessee and Jack receives hundreds of testimonials from people every where who feel that the vinegar juice beverage has lowered their cholesterol, helped their arthritis and given them a new lease on life. Mr. McWilliams points out that vinegar has been used as a tonic and preservative since Biblical times. He says, "My grandmother was a strong believer in vinegar for what ails you. She raised her family on cress water and vinegar, and her children all lived to be at least 80." Even several members of the Tennessee Farm Bureau will tell you about using this tart drink. Murray Miles, editor of the FB NEWS, has tried it and believes it has helped his shoulder feel a lot better. He has even started on his second jug.

The vinegar, grape and apple juice beverage has even saved a family farm. Danny McWilliams says his father's discovery has saved the family home and restored their 400 acre family farm. Danny had to leave the farm to get work elsewhere during tough times on the McWilliams farm. But due to Jogging In A Jug Danny is home and says that's where he plans to be the rest of his life.

So you may want to check your local grocery or drug store to see if they have any of this life giving beverage. If you are unable to find it or need more information about Jogging In A Jug, just write to Third Open La beverages inc., P.O. Box 948, Tusculum, Alabama 35748 or call toll-free 1-800-282-2288.

This is another example of the persistence of a farmer and the teachings of a grandmother. Just goes to show you, you're never too old to take up jogging. Even if it is in a jug.

AGRICULTURE'S
LEADING EDGE
TTA

Complaint

EXHIBIT F

Jogging in a Jug



January 1986 - age 59
subacute arthritis (wt 148)



January 1991 - age 64
no health problems (wt 210)

Jack McWilliams at this date had received high level medical treatment for seven years, with an average hospital stay of 70 days per year for a total of about 210 days at a cost of approximately \$50,000 - \$52,000 to the insurance company plus minor cost to the family.

Convinced the fruit of the vine type of acetic acid was the answer in the diet not on the market and is needed, McWilliams contacted high-tech researchers and added acetic acid through "Jogging in a Jug" at two ounces per day at a cost of \$5.99 per month. Health was restored slowly in twelve to sixteen months.

Herald - Citizen

Cookeville, Tennessee, Tuesday, September 24, 1991

Vinegar is essential to health, says tonic maker

BY JENNIFER RIDEOUT

Riddled with arteriosclerosis and arthritis, Alabama dairy farmer Jack McWilliams, now 64, had lost the desire to live in 1985 when he developed "Jogging in a Jug."

He was also suspicious about why so many people in his community of Cherokee, Alabama, died of heart disease and cancer in just a few weeks, and he began to research into what was lacking in the modern diet.

It was acetic acid, he says today, and that is the elixir he mixes into the purple fluid he calls "Jogging in a Jug."

He is careful to note that the Food and Drug Administration will not allow him to make any health claims about his drink, but "I have the First Amendment right to tell my own personal story."

"People just don't take in the acetic acid they used to in the old days," McWilliams said.

"My family is noted for its longevity, and I just couldn't figure out why I was dying so young."

"I remembered that my grandmother used to take cider vinegar daily and used it for everything, it was always on the table," McWilliams said.

The credibility of cider vinegar in our diets began to fall some 100 years ago, according to McWilliams, when he noted all its known attributes such as the ability to clean calcium and mineral deposits off plumbing and to make meat tender.

Cider vinegar is also a living bacterial acid made from juices, and it is the only known acid that will break down mineral, chemical and oil crystals and not harm growing, living tissue, according to McWilliams.

He decided that if vinegar could break down calcium and chemicals outside the body, it could break down calcium and chemicals inside the body as well.

So, McWilliams began combining various juices to achieve a combination that would produce the beautiful results of cider vinegar with a taste more appealing to the

palate. The final combination was an apple juice, grape juice and apple cider vinegar drink called "Jogging in a Jug."

"Jogging in a Jug" was named by McWilliams's son-in-law who teased him about his enthusiasm for the beverage, saying the energy-boosting mixture was "like putting jogging into a jug."

McWilliams has received many enthusiastic letters from "Jogging in a Jug" drinkers telling how their cholesterol has gone down, energy has gone up and arthritis has become less painful.

And McWilliams said he was relieved of his heart disease symptoms, most of his arthritis and his shoulder stiffness is gone.

McWilliams attributes these reactions to the acetic acid in the drink which he believes helps cleanse the arteries and cells in the body.

Further evidence, McWilliams cited concerned church history. He said Last Supper services contained acetic acid until commercial grape juice came into use in the 1850's.

He added about the time we lost acetic acid in the religious ritual, pressure canning and preserving came into use. That was followed by freezing foods for preservation.

Therefore, diets of people of affluent nations have been eroded of acetic acid over the years, McWilliams said.

Today, we eat a diet of refined foods containing no vinegar. We then go to the doctors who mechanically open our chests and clean out our arteries of crystals and solids, McWilliams said.

He added that mechanical cleaning this way has become a multi-billion dollar industry. Only 200 years ago it was done chemically.

This is a 2,000 year old known technology that gives us a third option to slow the rise of cancer, leukemia, heart disease and arthritis.

McWilliams's company, Third Option Laboratories, has a 10-state market with 20 distributors for "Jogging in a Jug," which has been available for 20 months with 115,000-120,000 bottles distributed each month.

The distributor for this area is W. R. Whitaker and Company.

Kroger, Red Food and some Mini-Marts carry the product claimed by many to reduce swelling and lower arthritis pain and cholesterol within a month.

W. R. Whitaker is also awaiting the



NEW BREW - Jack McWilliams, a 64-year old Alabama dairy farmer who has been dying five years ago, holds the tonic created that relieved him of heart disease and arthritis symptoms. "Jogging in a Jug" is sold in 10 states in the south and is found in Red Food, Kroger and some Mini-Marts here. M-C Photo: Gail Carr

authorization of "Jogging in a Jug" for sale in the new Food Lion stores here.

"We've been selling more than 1,000 a day and are receiving calls every 15 minutes about the product," McWilliams said.

"I've had investors offer me a lot of money for the product, but I want to stay very endorsed. It's not a money-making venture."

"I recommend taking a two-ounce every morning and starting it at any time from children to the elderly."

"The 64-ounce jug will last about a year if two ounce doses are taken daily," McWilliams said.

According to McWilliams, the shelf life for "Jogging in a Jug" is about five years and it costs \$5.99 per jug.

For information call 1-800-262-2598.



Complaint

120 F.T.C.

EXHIBIT F

Cherokee, Alabama
4 January 92Third Option Laboratories
P. O. Box 648
Tusculumbia, AL 35616

Dear Sirs:

My husband is an insulin dependent diabetic. He works as a construction worker and farms also in Cherokee, Alabama.

Last year, on a friend's recommendation, he began taking 2 oz. of "Jogging in a Jug" each morning. His doctor said it wouldn't hurt his control of his disease. Jack's sugar level has always tended to go too low. We were never sure what would trigger this at any time.

After beginning "Jogging in a Jug" his episodes of low blood sugar have decreased in frequency. Then in the summer of last season he ran out of "Jogging in a Jug". I kept forgetting to buy more. His blood sugar never began to fluctuate wildly, but kept going to very low seemingly without cause. We couldn't get it under control. Finally after about 2 weeks I remembered to purchase another jug.

Immediately, Jack's blood sugar leveled off to normal levels of 90-120 and stayed there.

We don't allow ourselves to be out of "Jogging in a Jug" anymore!

I am convinced that this product has leveled his sugar off to manageable levels.

Sincerely
Mrs. J.A.W.
Cherokee, AL 25516*Jogging in a Jug*
A Juice-Vinegar Beverage
Comments from Customer's Letters

"On 12 January 1991, my cholesterol count was 272. I read an article about your product, Joggin in a Jug. I have been sipping the drink ever since. On 11 March 1991, my cholesterol count was 188. I am now a believer."

R. M. Montgomery, Alabama

"I used to get up in the morning still tired, but now when I get up I'm ready to start my day." V. F., Tusculumbia, AL

"My cholesterol dropped from 330 to 276. My doctor told me to keep doing what I'm doing. My blood pressure is 128/74, which is the best reading I can remember." A.H. Rockwood, TN

"I fell and hurt my arm several years ago and it was hurting me so bad I could not sleep until I began taking your juice. My arm has not bothered me since." V. K., Huntsville, AL

"Your juice has helped to lower my mother's cholesterol, thank you." J. C., Phil Campbell, AL

"My cholesterol count had been hovering around 235. I tried your product for 3 weeks and my doctor was pleased to inform me it had dropped to 200." P. H., Ft. Lauderdale, FL

"I was stricken by a virus, after 6 weeks I was exhausted and couldn't work. I heard of your drink, after taking it for 6 weeks I am myself again and back to working 8 - 10 hours a day." E. L., Hamilton, AL

"After drinking Jogging in a Jug my husband's cholesterol has dropped from 217 to 190 and triglycerides from 412 to 148 and he can close his hands from arthritis after three months." F.W.B. Montgomery, AL

"My mother is 83 years old, and in very good health, except for high cholesterol. It was 448 when she checked up in March. We bought her some Jogging in a Jug. I am happy to report her cholesterol is down by 124 points in just five weeks." J.H.N. Selma, AL

"Thank you for helping me to reduce my cholesterol count. I took the product for two weeks before I had a cholesterol test. My doctor was so pleased he wrote across my chart, "Call her and congratulate her." F.R.W. Canonsburg, PA

"Thanks for shipping me a case. I had arthritis pain to the point of not being able to do work with my arms over my head. Now I am able to work with my arms over my head in a normal manner." J.C. Lawrenceville, GA

"I have lowered my cholesterol from 269 in September to 209 in January. Thanks." B.Y., St. Cloud, NY

"For the past 6 years, I have been going to the Rheumatologist with arthritis in my hips. Sometimes could not get around. Two weeks after starting to drink Jogging in a Jug, I began feeling much better. This was five months ago and I have not been to the doctor since. It is the longest I have ever gone without taking Arthritis medication. I was even taking Cortizone shots. Thanks to Jogging in a Jug, I feel great." G.T. Winchester, TN

*Actual letters on file in corporate office for viewing during business hours. Tusculumbia, Alabama.

Third Option Laboratories, Inc.
P. O. Box 648
Tusculumbia, AL 35674
1-800-262-2598

Ex. F



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, and 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 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 Third Option Laboratories, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Alabama, with its office and principal place of business at 2806 Avalon Avenue, Muscle Shoals, Alabama.

Respondents William J. McWilliams, Danny Bishop McWilliams, and Susan McWilliams Bolton are owners and officers of said corporation. They formulated, directed, and controlled the policies, acts and practices of said corporation and their 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

I.

It is ordered, That respondents, Third Option Laboratories, Inc., a corporation, its successors and assigns, and its officers, and William J. McWilliams, individually and as an officer of said corporation, Danny Bishop McWilliams, individually and as an officer of said corporation, and Susan McWilliams Bolton, 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 Jogging in a Jug, 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 such product:

- A. Cures or alleviates heart disease or its symptoms, including arterial blockages;
- B. Substantially lowers serum cholesterol or triglycerides;
- C. Cures or alleviates arthritis or its symptoms;
- D. Breaks down or eliminates calcium or other mineral or chemical deposits in the circulatory system;
- E. Improves the condition of the circulatory system;
- F. Cleans internal organs;
- G. Prevents or reduces the risk of cancer, leukemia, heart disease, or arthritis;
- H. Provides the same health benefits as a jogging regimen;
- I. Cures or alleviates lethargy;
- J. Cures or alleviates dysentery;
- K. Cures or alleviates constipation;
- L. Stabilizes blood sugar levels in insulin-dependent diabetics;
- M. Aids in the recovery from viral diseases;
- N. Cures or alleviates swelling of the legs or muscle spasms; or
- O. Is approved by the United States Department of Agriculture.

II.

It is further ordered, That respondents, Third Option Laboratories, Inc., a corporation, its successors and assigns, and its officers, and William J. McWilliams, individually and as an officer of said corporation, Danny Bishop McWilliams, individually and as an officer of said corporation, and Susan McWilliams Bolton, 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 food, food or dietary supplement, or drug, as "food" and "drug" are defined in Sections 12 and 15 of the Federal Trade Commission Act, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from making any representation, in any manner, directly or by implication, regarding the performance, safety, benefits, or efficacy of such product, unless such representation is true and, at the time of making such representation, respondents possess and rely upon competent and reliable scientific evidence that substantiates 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.

III.

It is further ordered, That respondents, Third Option Laboratories, Inc., a corporation, its successors and assigns, and its officers, and William J. McWilliams, individually and as an officer of said corporation, Danny Bishop McWilliams, individually and as an officer of said corporation, and Susan McWilliams Bolton, 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 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 such product has been tested, approved, or endorsed by any person, firm, organization, or government agency.

IV.

It is further ordered, That respondents, Third Option Laboratories, Inc., a corporation, its successors and assigns, and its officers, and William J. McWilliams, individually and as an officer of said corporation, Danny Bishop McWilliams, individually and as an officer of said corporation, and Susan McWilliams Bolton, 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 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 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.

V.

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

VI.

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

VII.

It is further ordered, That respondents, Third Option Laboratories, Inc., a corporation, its successors and assigns, and its officers, and William J. McWilliams, individually and as an officer of said corporation, Danny Bishop McWilliams, individually and as an officer of said corporation, and Susan McWilliams Bolton, individually and as an officer of said corporation, and respondents' 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 Jogging in a Jug 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 employing the name "Jogging in a Jug" or any other name that communicates the same or similar meaning for such product; provided, however, that nothing in this order shall prevent the use of such name if the material containing the name clearly and prominently contains the following disclosure:

"THERE IS NO SCIENTIFIC EVIDENCE THAT JOGGING IN A JUG
[OR OTHER NAME] PROVIDES ANY HEALTH BENEFITS."

For the purposes of this order, "clearly and prominently" shall mean as follows:

A. In a television or video advertisement less than fifteen (15) minutes in length, the disclosure shall be presented simultaneously in both the audio and visual portions of the advertisement, accompanying the first presentation of the name. When the first presentation of the name appears in the audio portion of the advertisement, the disclosure shall immediately follow, the name. When the first presentation of the name appears in the visual portion of the advertisement, the disclosure shall appear immediately adjacent to the name. The audio disclosure shall be delivered in a volume and cadence 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;

B. In a video advertisement fifteen (15) minutes in length or longer, the disclosure shall be presented simultaneously in both the audio and visual portions of the advertisement, accompanying the first presentation of the name and immediately before each presentation of ordering instructions for the product. When the name that triggers the disclosure appears in the audio portion of the advertisement, the disclosure shall immediately follow the name. When the name that triggers the disclosure appears in the visual portion of the advertisement, the disclosure shall appear immediately adjacent to the name. The audio disclosure shall be delivered in a volume and cadence 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. Provided that, for the purposes of this provision, the oral or visual presentation of a telephone number or address for viewers to contact to place an order for the product in conjunction with the name shall be deemed a presentation of ordering instructions so as to require the presentation of the disclosure provided herein;

C. In a radio advertisement, the disclosure shall immediately follow the first presentation of the name and shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it;

D. In a print advertisement, the disclosure shall be in close proximity to the largest presentation of the name, in a prominent type thickness and in a type size that is at least one-half that of the largest presentation of the name; provided, however, that the type size of the disclosure shall be no smaller than twelve (12) point type. The disclosure shall be of a color or shade that readily contrasts with the background of the advertisement;

E. On a product label, the disclosure shall be in close proximity to the largest presentation of the name, in a prominent type thickness and in a type size that is at least one-half that of the largest presentation of the name; provided, however, that the type size of the disclosure shall be no smaller than twelve (12) point type. The disclosure shall be of a color or shade that readily contrasts with the background of the label; and

F. On any packaging of the product shipped directly to consumers, the disclosure shall appear on each side of the packaging on which the name appears, in close proximity to the largest

presentation of the name. The total area of the disclosure shall be at least half that of the name that triggers the disclosure. The disclosure shall be of a color or shade that readily contrasts with the background of the packaging.

Nothing contrary to, inconsistent with, or in mitigation of the above-required language shall be used in any advertising or labeling.

Nothing in this Part shall apply to: (1) advertising appearing on items that are sold or given or caused to be sold or given by respondents to consumers for their personal use and that display the name "Jogging in a Jug" or any other name that communicates the same or similar meaning; or (2) the use of such name in a nonpromotional manner and solely for purposes of identification of the respondent corporation, including the use of such name as part of respondents' letterhead, on shipping labels, or on crates provided only to purchasers for resale.

VIII.

It is further ordered, That respondents, Third Option Laboratories, Inc., its successors and assigns, William J. McWilliams, Danny Bishop McWilliams, and Susan McWilliams Bolton, shall pay to the Federal Trade Commission, by cashier's check or certified check made payable to the Federal Trade Commission and delivered to the Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 6th and Pennsylvania Ave., NW, Washington, D.C., the sum of four hundred and eighty thousand dollars (\$480,000). Respondent shall make this payment on or before the tenth day following the date of entry of this order. In the event of any default on any obligation to make payment under this Section, interest, computed pursuant to 28 U.S.C. 1961(a), shall accrue from the date of default to the date of payment. The funds paid by respondents shall, in the discretion of the Federal Trade Commission, be used by the Commission to provide direct redress to purchasers of Jogging in a Jug in connection with the acts or practices alleged in the complaint, and to pay any attendant costs of administration. If the Federal Trade Commission determines, in its sole discretion, that redress to purchasers of this product is wholly or partially impracticable or is otherwise unwarranted, any funds not so used shall be paid to the United States Treasury. Respondent shall be

notified as to how the funds are distributed, but shall have no right to contest the manner of distribution chosen by the Commission. No portion of the payment as herein provided shall be deemed a payment of any fine, penalty, or punitive assessment.

IX.

It is further ordered, That respondents, Third Option Laboratories, Inc., its successors and assigns, William J. McWilliams, Danny Bishop McWilliams, and Susan McWilliams Bolton, shall, within thirty (30) days after the date of service of this order, send by first class mail, postage prepaid and address correction requested, to the last address known to respondents of each consumer who purchased Jogging in a Jug in any manner directly from respondents since January 1, 1993, an exact copy of the notice attached hereto as Attachment A. The mailing shall not include any other documents.

X.

It is further ordered, That respondents, Third Option Laboratories, Inc., its successors and assigns, and William J. McWilliams, Danny Bishop McWilliams, and Susan McWilliams Bolton, shall:

A. Within thirty (30) days after the date of service of this order, send by first class certified mail, return receipt requested, to each purchaser for resale of Jogging in a Jug with which respondents have done business since January 1, 1993 an exact copy of the notice attached hereto as Attachment B. The mailing shall not include any other documents;

B. In the event that respondents receive any information that subsequent to its receipt of Attachment B any purchaser for resale is using or disseminating any advertisement or promotional material that contains any, representation prohibited by this order, respondents shall immediately notify the purchaser for resale that respondents will terminate the use of said purchaser for resale if it continues to use such advertisements or promotional materials; and

C. Terminate the use of any purchaser for resale about whom respondents receive any information that such purchaser for resale has continued to use advertisements or promotional materials that

contain any representation prohibited by this order after receipt of the notice required by subparagraph B of this part.

XI.

It is further ordered, That respondents, Third Option Laboratories, Inc., its successors and assigns, and William J. McWilliams, Danny Bishop McWilliams, and Susan McWilliams Bolton, shall, for five (5) years after the last correspondence to which they pertain, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

- A. Copies of all notification letters sent to consumers pursuant to part IX of this order;
- B. Copies of all notification letters sent to purchasers for resale pursuant to subparagraph A of part X of this order; and
- C. Copies of all communications with purchasers for resale pursuant to subparagraphs B and C of Part X of this order.

XII.

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. Any advertisement making any representation covered by this order;
- B. All materials that were relied upon in disseminating such representation; and
- C. 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.

XIII.

It is further ordered, That respondent Third Option Laboratories, Inc., its successors and assigns, shall:

A. Within thirty (30) days after the date of 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; and

B. For a period of seven (7) years from the date of service 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 within three (3) days after the person assumes his or her position.

XIV.

It is further ordered, That respondents William J. McWilliams, Danny Bishop McWilliams, and Susan McWilliams Bolton shall, for a period of seven (7) years from the date of service of this order, notify the Commission within thirty (30) days of the discontinuance of his or her present business or employment and of his or her affiliation with any new business or employment involving the manufacturing, labeling, advertising, marketing, promotion, offering for sale, sale, or distribution of any food, food or dietary supplement, or drug, as "food" and "drug" are defined in Sections 12 and 15 of the Federal Trade Commission Act. 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 or her duties and responsibilities.

XV.

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

XVI.

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

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

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

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

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

XVII.

It is further ordered, That respondents 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 they have complied with this order.

Chairman Pitofsky not participating.

ATTACHMENT A

BY FIRST CLASS MAIL, POSTAGE PREPAID AND
ADDRESS CORRECTION REQUESTED

[To Be Printed on Third Option Laboratories, Inc. Letterhead]

[date]

Dear Consumer:

Our records indicate that you purchased Jogging in a Jug from Third Option Laboratories, Inc. This letter is to inform you of our settlement of a civil dispute with the Federal Trade Commission ("FTC") regarding certain claims made in our advertising for Jogging in a Jug.

The FTC alleged that advertisements for Jogging in a Jug have made false and unsubstantiated claims that the product can cure, treat, or prevent: (1) heart disease (including arterial blockages); (2) arthritis; (3) cancer; (4) leukemia; (5) dysentery; (6) constipation; (7) lethargy; (8) swelling of the legs; and (9) muscle spasms. The FTC has also alleged that our claims that Jogging in a Jug can "clean" internal organs, break down or eliminate deposits in the circulatory system, aid in the recovery from viral diseases, lower serum cholesterol and triglyceride levels, and stabilize blood sugar levels in diabetics, are false and unsubstantiated. Finally, the FTC has alleged that we have made false and unsubstantiated claims that Jogging in a Jug provides the same health benefits as jogging.

Our settlement with the FTC prohibits us from making these or other claims for Jogging in a Jug or any other food, drug, or supplement in the future unless the claims are supported by competent and reliable scientific evidence. We deny the FTC's allegations, but have agreed to send this letter as a part of our settlement with the FTC.

Sincerely,

William J. McWilliams
President
Third Option Laboratories, Inc.

ATTACHMENT B

BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED
[To Be Printed on Third Option Laboratories, Inc. letterhead]
[date]

Dear [purchaser for resale]:

Third Option Laboratories, Inc. recently settled a civil dispute with the Federal Trade Commission ("FTC") regarding certain claims for our product, Jogging in a Jug. As a part of the settlement, we are required to make sure that our distributors and wholesalers stop using or distributing advertisements or promotional materials containing those claims.

The FTC alleged that the advertisements for Jogging in a Jug have made false and unsubstantiated claims that the product can cure, treat, or prevent: (1) heart disease (including arterial blockages); (2) arthritis; (3) cancer; (4) leukemia; (5) dysentery; (6) constipation; (7) lethargy; (8) swelling of the legs; and (9) muscle spasms. The FTC has also alleged that our claims that Jogging in a Jug can "clean" internal organs, break down or eliminate deposits in the circulatory system, aid in the recovery from viral diseases, lower serum cholesterol and triglyceride levels, and stabilize blood sugar levels in diabetics, are false and unsubstantiated. Finally, the FTC has alleged that we have made false and unsubstantiated claims that Jogging in a Jug provides the same health benefits as jogging.

Our settlement with the FTC prohibits us from making these or other claims for Jogging in a Jug or any other food, drug, or supplement in the future unless the claims are supported by competent and reliable scientific evidence. We deny the FTC's allegations, but have agreed to send this letter as a part of our settlement with the FTC.

We request your assistance by asking you to discontinue using, relying on or distributing any of your current Jogging in a Jug advertising or promotional material. Please also notify any of your retail or wholesale customers who may have such materials to discontinue using them. If you continue to use those materials, we are required by the FTC settlement to stop doing business with you.

Thank you very much for your assistance.

Sincerely,

William J. McWilliams
President
Third Option Laboratories, Inc.

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

Today, the Commission approves and issues a consent agreement to remedy various misrepresentations concerning the purported health benefits of a drink called "Jogging in a Jug." The Commission's investigation shows that the alleged claims are far removed from reality, and there is ample reason to believe they violated Section 5 of the FTC Act. I concur in the complaint on which the order is based except to the extent that it alleges as a violation the content of newspaper articles that are reproduced in the respondents' promotional materials and those materials accurately identify and reproduce such articles in their original format without modification. Complaint ¶ 7 and Exhibit F.

Second, I dissent from Part VII of the order. Although the complaint does not challenge as materially misleading the unadorned use of the product's name, Jogging in a Jug (nor would I, given the absence of evidence), Part VII of the order prohibits, in connection with the advertising and sale of Jogging in a Jug (or any similar product), use of the name Jogging in a Jug, or any other name communicating a similar meaning, unless the name is accompanied clearly and prominently by a disclosure stating: "THERE IS NO SCIENTIFIC EVIDENCE THAT JOGGING IN A JUG [or other name] PROVIDES ANY HEALTH BENEFITS," and which includes six extensive paragraphs minutely detailing what will constitute "clearly and prominently" for purposes of compliance with this requirement.

The Commission in the past has used this form of relief, which can substantially limit potentially lawful conduct, to remedy health claims that seem more credible than those likely to be taken by reasonable consumers here. For example, the Commission imposed a similar requirement to remedy the pain relief claim it found to have been conveyed by the name "Aspercreme" in *Thompson Medical Co.*, 104 FTC 648 (1984). The likelihood that a consumer would expect that a product named Aspercreme would contain aspirin and would rely on that claim to his or her detriment seems to me far greater than the likelihood that a consumer would rely to his or her detriment on an implied message that a product called Jogging in a Jug would provide the health benefits of jogging.

IN THE MATTER OF

FREEMAN HOSPITAL, ET AL.

Docket 9273. Interlocutory Order, Nov. 30, 1995

ORDER DISMISSING COMPLAINT

On November 6, 1995, the respondents moved that this matter be withdrawn from adjudication. Complaint counsel did not oppose the motion. On November 8, 1995, the matter was withdrawn from adjudication pursuant to Section 3.26(c) of the Commission's Rules, 16 CFR 3.26(c), for the purpose of considering whether the public interest warrants further litigation.

The "Statement of Federal Trade Commission Policy Regarding Administrative Merger Litigation Following the Denial of a Preliminary Injunction," issued June 21, 1995, provides that on a case-by-case basis, the Commission will evaluate whether to pursue administrative litigation after denial of a preliminary injunction. The statement indicates that the Commission will consider the following factors in deciding whether to continue administrative litigation:

(i) The factual findings and legal conclusions of the district court or any appellate court, (ii) any new evidence developed during the course of the preliminary injunction proceeding, (iii) whether the transaction raises important issues of fact, law, or merger policy that need resolution in administrative litigation, (iv) an overall assessment of the costs and benefits of further proceeding, and (v) any other matter that bears on whether it would be in the public interest to proceed with the merger challenged.

After consideration of these factors, the Commission concludes that further litigation is not in the public interest.

It is therefore ordered, That the complaint be, and it hereby is, dismissed.

Modifying Order

120 F.T.C.

IN THE MATTER OF

AMERICAN STORES COMPANY, ET AL.

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

Docket C-3238. Consent Order, Aug. 31, 1988--Modifying Order, Dec. 1, 1995

This order reopens a 1988 consent order that required American Stores to divest certain retail grocery stores in parts of California and Nevada and to obtain Commission approval before acquiring certain grocery stores. This order modifies the consent order by deleting the prior-approval requirements in paragraph VIII of the consent order pursuant to the Commission's Prior Approval Policy -- under which the Commission presumes that the public interest requires reopening and setting aside the prior-approval provisions in outstanding merger orders, making them consistent with the policy -- and by replacing that provision with a prior notification provision.

ORDER REOPENING AND MODIFYING ORDER

On November 20, 1995, American Stores Company ("ASC") filed its Petition To Reopen and Vacate or Modify Consent Order ("November Petition") in this matter. Respondent asks that the Commission reopen this 1988 consent order¹ pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), Section 2.51 of the Commission's Rules of Practice and Procedure, 16 CFR 2.51, and the Statement of Federal Trade Commission Policy Concerning Prior Approval and Prior Notice Provisions, issued on June 21, 1995 ("Prior Approval Policy Statement").² The Petition requests that the Commission reopen and vacate the order in Docket No. C-3238, or in the alternative, reopen and modify the order by deleting the prior approval provisions of paragraph VIII.

The November Petition is identical to the Petition to reopen previously filed by ASC on July 28, 1995 ("July Petition"). Since the July Petition was subject to a thirty-day public comment period, which expired on September 8, 1995, and no comments were received, the Commission waived the public comment period for the November Petition.

¹ *American Stores Company, et al.*, 111 FTC 80 (1988) ("American Stores").

² 60 Fed. Reg. 39,745-47 (Aug. 3, 1995); 4 Trade Reg. Rep. (CCH), ¶ 13,241, at 20,991 (June 21, 1995).

The Commission, in its Prior Approval Policy Statement, "concluded that a general policy of requiring prior approval is no longer needed," citing the availability of the premerger notification and waiting period requirements of Section 7A of the Clayton Act, commonly referred to as the Hart-Scott-Rodino ("HSR") Act, 15 U.S.C. 18a, to protect the public interest in effective merger law enforcement. Prior Approval Policy Statement, at 2. The Commission announced that it will "henceforth rely on the HSR process as its principal means of learning about and reviewing mergers by companies as to which the Commission had previously found a reason to believe that the companies had engaged or attempted to engage in an illegal merger." As a general matter, "Commission orders in such cases will not include prior approval or prior notification requirements." *Id.*

Narrow prior approval or prior notification provisions may be necessary to protect the public interest in some circumstances. The Commission said in its Prior Approval Policy Statement that "a narrow prior approval provision may be used where there is a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for the provision, attempt the same or approximately the same merger." The Commission also said that "a narrow prior notification provision may be used where there is a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for an order, engage in an otherwise unreportable anticompetitive merger." *Id.* at 3.

The Commission in its Prior Approval Policy Statement announced its intention "to initiate a process for reviewing the retention or modification of these existing requirements" and invited respondents subject to such requirements "to submit a request to reopen the order." *Id.* at 4. The Commission determined that, "when a petition is filed to reopen and modify an order pursuant to . . . [the Prior Approval Policy Statement], the Commission will apply a rebuttable presumption that the public interest requires reopening of the order and modification of the prior approval requirement consistent with the policy announced" in the Statement. *Id.*

Consistent with the Commission's Prior Approval Policy Statement, the presumption is that the prior approval requirement in paragraph VIII of this order should be reopened. There is nothing in the record to suggest that the respondent would engage in the same acquisition as alleged in the complaint. Accordingly, the

Commission has determined to modify the order in Docket No. C-3238 to set aside the prior approval requirement.

The Commission also stated in the Prior Approval Policy Statement that it would continue to fashion remedies as needed in the public interest, including ordering narrow prior notification requirements in certain limited circumstances. Accordingly, a prior notification provision may be used where there is a credible risk that a company would, but for an order, engage in an anticompetitive merger that would not be subject to the premerger notification and waiting period requirements of the HSR Act. As explained in the Prior Approval Policy Statement, the need for a prior notification requirement will depend on circumstances such as the structural characteristics of the relevant markets, the size and other characteristics of the market participants, and other relevant factors.

The Commission has determined that the record in this case evidences a credible risk that the respondent could engage in future anticompetitive acquisitions that would not be reportable under the HSR Act. The complaint in Docket No. C-3238 charged that respondent's proposed acquisition of Lucky would, if consummated, violate Section 7 of the Clayton Act and Section 5 of the FTC Act by substantially reducing competition in the retail sale and distribution of food and grocery store items in supermarkets in thirteen separate relevant geographic markets consisting of states, cities, areas and towns. Complaint, ¶¶ 8 and 9. Paragraph VIII of the order required respondent to obtain prior Commission approval before certain acquisitions of a retail grocery store or any interest in a retail grocery store in forty towns or areas in California and Nevada.

There has been no showing that the competitive conditions that gave rise to the Commission's complaint and order in Docket No. C-3238 no longer exist. Moreover, the size and localized nature of the relevant markets and the likely size and other characteristics of the market participants and relevant transactions as identified in the complaint and order indicate that future acquisitions that would currently be covered by the provisions of paragraph VIII of the order would probably not be subject to the premerger notification and waiting period requirements of the HSR Act.³ Accordingly, pursuant to the Prior Approval Policy Statement, the Commission has determined to modify paragraph VIII of the order to substitute a prior

³ See Order Reopening and Modifying Order, Supermarket Development Corporation, Docket No. C-3224 (September 5, 1995) (Commission substituted a prior notification provision in an order based on similar complaint allegations).

notification requirement for the prior approval requirement. ASC does not object to the substitution of prior notification for prior approval. *See* Letter of Christopher J. MacAvoy to Donald C. Clark, November 20, 1995.

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

It is further ordered, That paragraph VIII of the order in Docket No. C-3238, issued on August 11, 1988, be, and hereby is, modified, as of the effective date of this order, to read as follows:

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, American shall cease and desist from acquiring, without prior notification to the Commission, directly or indirectly, through subsidiaries or otherwise, (i) five or more retail grocery stores, within any one year period from the date this order becomes final, including any facilities that have been operated as a retail grocery store(s) within six months of the date of the offer to purchase the facilities, or any interest in five or more retail grocery stores or any interest in any individual, firm, partnership, corporation or other legal or business entity that directly or indirectly owns or operates five or more retail grocery stores, in Los Angeles and Orange Counties, California (excluding those cities and towns identified in subsection (iii) of this Part VIII), or (ii) two or more retail grocery stores, within any one year period from the date this order becomes final, including any facilities that have been operated as a retail grocery store(s) within six months of the date of the offer to purchase the facilities, or any interest in any individual, firm, partnership, corporation or other legal or business entity that directly or indirectly owns or operates two or more retail grocery stores, in the Bay Area comprised of the following cities or towns:

Alameda, California
Albany, California
Belmont, California
Benicia, California
Berkeley, California
Burlingame, California
Campbell, California
Castro Valley, California
Cupertino, California

Newark, California
Oakland, California
Pacifica, California
Palo Alto, California
Pinole, California
Redwood City, California
Richmond, California
San Bruno, California
San Carlos, California

Daly City, California	San Francisco, California
El Cerrito, California	San Jose, California
El Sobrante, California	San Leandro, California
Emeryville, California	San Lorenzo, California
Foster City, California	San Mateo, California
Fremont, California	San Pablo, California
Hayward, California	Santa Clara, California
Hercules, California	Saratoga, California
Los Altos, California	South San Francisco,
Los Gatos, California	California
Menlo Park, California	Sunnyvale, California
Millbrae, California	Union City, California
Milpitas, California	Vallejo, California
Mountain View, California	

or (iii) any retail grocery store, including any facility that has been operated as a retail grocery store within six months of the date of the offer to purchase the facility, or any interest in a retail grocery store or any interest in any individual, firm, partnership, corporation or other legal or business entity that directly or indirectly owns or operates a retail grocery store, in the following cities or towns:

Bakersfield, California	Riverside, California
Camarillo, California	Salinas, California
Canyon Country, Newhall,	San Bernardino, California
Saugus or Valencia, California	San Diego County, California
Capitola, California	South of the Miramar
Cathedral City, Coachella, Indio,	Naval Air Station,
Palm Desert, Palm Springs or	San Juan Capistrano or
Rancho Mirage, California	San Clemente, California
Concord, California	San Marcos, California
Danville, California	San Rafael, Mill Valley,
Encinitas, California	Fairfax, Greenbrae, Larkspur,
Escondido, California	San Anselmo, or Sausalito,
Fallbrook, California	Tiburon, California
Fontana, California	San Ramon, California
Las Vegas, Nevada	Santa Barbara, Montecito or
Napa, California	Goleta, California
Novato, California	Santa Maria, California
Ontario, California	Santa Rosa, California

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Oxnard, California	Simi Valley, California
Palmdale or Lancaster, California	Thousand Oaks, California
Petaluma, California	Upland, California
Pleasanton, California	Vacaville, California
Redlands, California	Vista, California
Rialto, California	Walnut Creek, California

The prior notification required by this paragraph 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"), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of American and not of any other party to the transaction. American shall provide the Notification to the Commission at least thirty days prior to consummating any such transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information, American shall not consummate the transaction until twenty days after substantially complying with such request for additional information. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition. Provided, however, that prior notification shall not be required by this paragraph for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. 18a.

Provided further that these prohibitions shall not relate to the construction of new facilities by American or the leasing by American of facilities not presently operated as a retail grocery store in those locations.

One year from the date this order becomes final and annually thereafter for nine (9) more years, American shall file with the Commission a verified written report of its compliance with this paragraph. Such reports shall include a listing of all acquisitions made by American without prior notification to the Commission in any area listed in this Part VIII.

Complaint

120 F.T.C.

IN THE MATTER OF

HOECHST AG

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-3629. Complaint, Dec. 5, 1995--Decision, Dec. 5, 1995*

This consent order settles alleged violations of federal law prohibiting unfair or deceptive acts and practices and unfair methods of competition arising from the \$7.1 billion merger of Hoechst AG and Marion Merrell Dow Inc. The consent order, among other things, requires Hoechst -- a pharmaceutical firm -- to provide Biovail Corporation International with a letter of access to the toxicology data necessary to secure additional FDA approvals for a hypertension and cardiac drug called Tiazac (diltiazem). It also requires Hoechst to return any confidential information obtained from Biovail; to refrain from using the information; to dismiss a patent infringement lawsuit filed by Marion Merrell Dow regarding Tiazac; to withdraw a citizen petition Marion Merrell Dow filed with the Food and Drug Administration relating to Tiazac; and to agree not to file any subsequent litigation against Biovail regarding diltiazem. In addition, the consent order requires Hoechst to divest the rights to either Trental or Beraprost (two drugs intended to treat intermittent claudication, a painful leg cramping condition); to divest the rights to Pentasa (or the generic formulation), which is one of two oral forms of mesalamine used to treat ulcerative colitis and Crohn's Disease; and to divest the rights to Rifadin (or the generic formulation), which is used to treat tuberculosis. The required divestitures have to be made to Commission-approved entities, within nine months of the date of the order.

Appearances

For the Commission: *Laura A. Wilkinson, Elizabeth A. Jex, David L. Inglefield and Pamela L. Taylor.*

For the respondent: *William C. Pelster, Skadden, Arps, Slate, Meagher & Flom and Bruce H. Kublik, Covington & Burling, Washington, D.C.*

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that respondent Hoechst AG ("Hoechst"), a German corporation subject to the jurisdiction of the Commission, has acquired all of the voting securities of Marion Merrell Dow Inc.

("MMD"), a Delaware 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. RESPONDENT

1. Respondent Hoechst is a corporation organized, existing, and doing business under and by virtue of the laws of Germany with its principal executive offices located in Frankfurt am Main, Germany. Respondent Hoechst operates in the United States through its wholly-owned subsidiaries, Hoechst Corporation and Hoechst-Roussel Pharmaceuticals, Inc., with their principal executive offices located at Route 202-206, Somerville, New Jersey. Respondent Hoechst is the majority owner of Copley Pharmaceuticals, Inc., a corporation, with its principal executive offices located in Canton, Massachusetts.

2. MMD is a corporation organized, existing and doing business under and by virtue of the laws of Delaware, with its principal place of business located at 9300 Ward Parkway, Kansas City, Missouri.

II. JURISDICTION

3. Respondent Hoechst 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.

III. THE MERGER

4. Respondent Hoechst has acquired all of the voting securities of MMD for consideration valued at approximately \$7.1 billion ("Merger"). The combined entity is doing business in the United States as Hoechst Marion Roussel, Inc.

IV. THE RELEVANT MARKETS

5. The relevant lines of commerce in which to analyze the effects of the Merger are the research, development, manufacture and sale of:

- (1) Once-a-day diltiazem, which is used to treat hypertension (high blood pressure) and angina (severe chest pains);
- (2) Oral dosage forms of mesalamine, which is used to treat the gastrointestinal diseases of ulcerative colitis and Crohn's Disease;
- (3) Rifampin, which is used to treat tuberculosis (TB); and
- (4) Drugs approved by the Food and Drug Administration ("FDA") for the treatment of intermittent claudication, a severe cramping in the legs caused by inadequate blood flow to the affected muscles due to arteriosclerosis.

6. For purposes of this complaint, the United States is the relevant geographic area in which to analyze the effects of the Merger.

V. STRUCTURE OF THE MARKETS

7. The once-a-day diltiazem market is highly concentrated as measured by the Herfindahl-Hirschmann Index. MMD's Cardizem CD[®] has a dominant share of the once-a-day diltiazem market. Sales of once-a-day diltiazem products in the U.S. amounted to approximately \$1 billion in 1994. Prior to the Merger, Hoechst and Biovail International Corporation ("Biovail") were jointly developing a new once-a-day diltiazem product, Tiazac[®], that would have competed against MMD's Cardizem CD[®].

8. Hoechst devised a plan to "fix-it-first" whereby it returned to Biovail its rights to Tiazac[®] prior to the Merger. The purported fix fails to remedy the anticompetitive effects of the Merger, because it leaves Biovail as a less effective competitor than it would have been absent the Merger.

9. The market for oral dosage forms of mesalamine is highly concentrated as measured by the Herfindahl-Hirschmann Index. MMD's Pentasa[®] has a significant share of the market for oral dosage forms of mesalamine. There is only one other oral dosage form of mesalamine approved by the FDA. Sales of mesalamine amounted to approximately \$70 million in 1994. Prior to the Merger, Hoechst

begun research and development of a generic oral dosage form of mesalamine that would have competed against MMD's Pentasa®.

10. The rifampin market is highly concentrated as measured by the Herfindahl-Hirschmann Index. MMD's Rifadin® has a dominant share of the rifampin market. Sales of rifampin amounted to approximately \$18 million in 1994. Prior to the Merger, Hoechst was one of only a few companies that had begun research and development of a generic rifampin product that would have competed against MMD's Rifadin®.

11. The market for drugs to treat intermittent claudication is highly concentrated as measured by the Herfindahl-Hirschmann Index. Hoechst's Trental® is the only drug approved by the FDA for the treatment of intermittent claudication, and Hoechst is developing improved formulations of Trental®. In 1994, Trental®'s sales were approximately \$180 million. MMD is one of only a few companies engaged in advanced stages of research and development of drugs for use in the treatment of intermittent claudication that would have competed against Hoechst's Trental® franchise.

VI. BARRIERS TO ENTRY

12. Entry into the relevant markets is difficult and time consuming. FDA regulations create long lead times for the introduction of new drugs. Additionally, patents create large and often insurmountable barriers to entry.

VII. EFFECTS OF THE MERGER

13. The effects of the Merger may be substantially to lessen competition or tend to create a monopoly in the once-a-day diltiazem 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 1993, Hoechst and MMD began the negotiations that ultimately resulted in the Merger. At the same time, Hoechst and Biovail were developing Tiazac®, a once-a-day diltiazem product. The pendency of the merger negotiations affected Hoechst's incentives with respect to the development of Tiazac®.

14. Just before finalizing the Merger, Hoechst returned its rights to Tiazac® to Biovail. The purported "fix-it-first" failed to remedy the anticompetitive effects of the Merger, because it leaves Tiazac®

as a less effective competitive product than it would have been absent the Merger.

15. The Merger eliminates actual and perceived potential competition between MMD's Cardizem[®] CD and Tiazac[®]. Effective competition between Tiazac[®] and Cardizem[®] CD will benefit consumers by leading to lower prices for once-a-day diltiazem.

16. The Merger provides the leading competitor in the once-a-day diltiazem market with access to competitively sensitive non-public information relating to Tiazac[®], thereby: (1) reducing innovation in the market for once-a-day diltiazem; and (2) increasing prices in the market for once-a-day diltiazem.

17. The Merger also enhances the likelihood of collusion or interdependent coordination between or among the firms in the market for once-a-day diltiazem.

18. The effects of the Merger may be substantially to lessen competition or tend to create a monopoly in the market for oral dosage forms of mesalamine 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. The Merger (1) eliminates actual potential competition in the market for oral dosage forms of mesalamine and (2) enhances the likelihood of collusion or interdependent coordination between or among the firms in the market for oral dosage forms of mesalamine.

19. The effects of the Merger may be substantially to lessen competition or tend to create a monopoly in the market for rifampin 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. The Merger eliminates actual potential competition in the market for rifampin.

20. The effects of the Merger may be substantially to lessen competition or tend to create a monopoly in the market for drugs for the treatment of intermittent claudication 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. The Merger eliminates actual potential competition in the market for drugs for the treatment of intermittent claudication.

VIII. VIOLATIONS CHARGED

21. The Merger described in paragraph four 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 ("Commission"), having initiated an investigation of the merger of Hoechst AG ("Hoechst"), through its United States subsidiary, Hoechst Corporation, and Marion Merrell Dow Inc. ("MMD"), and Hoechst, hereinafter sometimes referred to as "respondent," having been furnished thereafter with a copy of a draft of the 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

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 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 Hoechst is a corporation organized, existing, and doing business under and by virtue of the laws of Germany, with its principal place of business located at 65926 Frankfurt am Main, Germany.

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 "*Hoechst*" means Hoechst AG, its directors, officers, employees, agents and representatives, successors and assigns; its subsidiaries, divisions, groups and affiliates controlled by Hoechst AG; subsidiaries, divisions, groups and affiliates in which Hoechst AG owns more than 25 percent of the voting securities; and the respective directors, officers, employees, agents and representatives, and the respective successors and assigns of each.

B. "*MMD*" means Marion Merrell Dow Inc., its directors, officers, employees, agents and representatives, successors and assigns; its subsidiaries, divisions, groups and affiliates controlled by Marion Merrell Dow Inc.; and the respective directors, officers, employees, agents and representatives, and the respective successors and assigns of each.

C. "*Merger*" means the merger of Hoechst and MMD through the acquisition by Hoechst of the voting securities of MMD pursuant to a Stock Purchase Agreement and an Agreement and Plan of Merger both dated as of May 3, 1995.

D. "*Commission*" means the United States Federal Trade Commission.

E. "*FDA*" means the United States Food and Drug Administration.

F. "*NDA*" means new drug application.

G. "*ANDA*" means abbreviated new drug application.

H. "*Diltiazem*" means any formulation of the compound diltiazem hydrochloride used in the treatment of hypertension or angina.

I. "*Biovail*" means Biovail Corporation International, organized and existing under the laws of Canada and with its offices and principal place of business at 460 Comstock Road, Scarborough, Ontario, Canada, including its successors, licensees and assigns.

J. "*Biovail diltiazem products*" means the sustained release and/or extended release diltiazem products that Hoechst was developing with Biovail pursuant to the Rights Agreement that Hoechst and Biovail entered into on June 30, 1993.

K. "*Documents*" means all computer files and written, recorded, and graphic materials of every kind. The term "documents" includes electronic correspondence and drafts of documents, originals and all copies of documents, and copies of documents the originals of which are not in the possession, custody or control of the company.

L. "*Non-public information*" means any information or documents not in the public domain furnished by Biovail to Hoechst in connection with the Biovail diltiazem products. Non-public information shall not include information that subsequently becomes public or falls within the public domain through no violation of this order by respondent or nor shall it include information that subsequently becomes known to respondent from a third-party not in breach of a confidential disclosure agreement.

M. "*Beraprost*" means the prostaglandin analog(s) licensed by Toray Industries, Inc. to MMD used for the treatment of peripheral arterial disease, including, but not limited to, intermittent claudication.

N. "*Beraprost assets*" means all of MMD's U.S. assets and rights relating to the research and development, manufacture and sale of Beraprost, that are not part of MMD's physical facilities. "Beraprost assets" include, but are not limited to, all rights to brand or trade name, formulations, patents, trade secrets, technology, know-how, specifications, designs, drawings, processes, production information, manufacturing information, testing and quality control data, research materials, technical information, distribution information, customer lists, information stored on management information systems (and specifications sufficient for the acquirer to use such information), software specific to MMD's Beraprost, inventory sufficient for the acquirer to complete all safety and efficacy studies, clinical trials or bioequivalency studies necessary to obtain FDA approvals, and all data, contractual rights, materials and information relating to

obtaining FDA approvals and other government or regulatory approvals for the United States.

O. "*Trental*[®]" means the compound pentoxifylline marketed by Hoechst for use in the treatment of vascular disease, including, but not limited to, intermittent claudication.

P. "*Trental*[®] assets" means all of Hoechst's U.S. assets and rights relating to the research and development, manufacture and sale of *Trental*[®], including the unique physical assets used by Hoechst to manufacture *Trental*[®] and all of its brand names and trade names. "*Trental*[®] assets" include, but are not limited to, all rights to brand or trade name, formulations, patents, trade secrets, technology, know-how, specifications, designs, drawings, processes, production information, manufacturing information, testing and quality control data, research materials, technical information, distribution information, customer lists, information stored on management information systems (and specifications sufficient for the acquirer to use such information), software specific to Hoechst's *Trental*[®], and all data, contractual rights, materials and information relating to obtaining FDA approvals and other government or regulatory approvals for the United States.

Q. "*Mesalamine*" means the compound mesalamine used for the treatment of ulcerative colitis and Crohn's disease.

R. "*Mesalamine assets*" means either (1) all of Hoechst's U.S. assets and rights relating to the research and development, manufacture and sale of mesalamine by Hoechst that are not part of Hoechst's physical facilities and that were not acquired through the Merger; or (2) all of MMD's U.S. assets and rights relating to the research and development, manufacture and sale of mesalamine by MMD, including the unique physical assets used MMD to manufacture mesalamine and all of its brand names and trade names. "*Mesalamine assets*" include, but are not limited to, all rights to brand or trade names, all formulations, patents, trade secrets, technology, know-how, specifications, designs, drawings, processes, production information, manufacturing information, testing and quality control data, research materials, technical information, distribution information, information stored on management information systems (and specifications sufficient for the acquirer to use such information), inventory sufficient for the acquirer to complete all ongoing safety and efficacy studies, clinical trials or bioequivalency studies necessary to obtain FDA approvals and all data, contractual

rights, materials and information relating to obtaining FDA approvals and other government or regulatory approvals for the United States.

S. "*Rifampin*" means the compound rifampin used for the treatment of tuberculosis.

T. "*Rifampin assets*" means either (1) all of Hoechst's U.S. assets and rights relating to the research and development, manufacture and sale of rifampin by Hoechst that are not part of Hoechst's physical facilities and that were not acquired through the Merger; or (2) MMD's U.S. assets and rights relating to the research and development, manufacture and sale of rifampin by MMD, including the unique physical assets used by MMD to manufacture rifampin and all of its brand names and trade names. "*Rifampin assets*" include, but are not limited to, all rights to brand or trade names, all formulations, patents, trade secrets, technology, know-how, specifications, designs, drawings, processes, production information, manufacturing information, testing and quality control data, research materials, technical information, distribution information, information stored on management information systems (and specifications sufficient for the acquirer to use such information), inventory sufficient for the acquirer to complete all ongoing safety and efficacy studies, clinical trials or bioequivalency studies necessary to obtain FDA approvals and all data, contractual rights, materials and information relating to obtaining FDA approvals and other government or regulatory approvals for the United States.

U. "*Acquirer*" means the entity or entities to whom Hoechst shall divest the assets required to be divested pursuant to this order.

V. "*Contract manufacture*" means the manufacture of Trental[®], mesalamine or rifampin, as applicable, by Hoechst for sale to an acquirer in a form acceptable for commercial sale in the United States, in each form of packaging used by respondent or MMD in the distribution and sale of such product, with information including, but not limited to, the name and identification codes of the acquirer inscribed on the packaging, and packaged in units specified by the acquirer, as permitted by the FDA.

W. "*Cost*" means respondent's or MMD's actual per unit cost of manufacturing the assets to be divested pursuant to this order.

X. "*Formulation*" means any and all information, including patent, trade secret information, technical assistance and advice, relating to the manufacture of the assets to be divested pursuant to this order that meet FDA approved specifications therefor.

II.

It is further ordered, That:

A. Within seven (7) days of the date this order becomes final:

1. Respondent shall grant to Biovail the right of reference to the pharmacology, toxicology and animal reproductive toxicology data contained in MMD's NDA No. 18-602 for diltiazem on file with the FDA. Respondent shall make the necessary filings with the FDA authorizing the FDA to refer to the appropriate section(s) of MMD's NDA No. 18-602 for such data (including, but not limited to, pharmacology and toxicology data) in support of Biovail's NDA No. 20-401 for the Biovail diltiazem products, including any supplemental NDAs or related NDAs. Provided however, the right of reference granted to Biovail pursuant to this paragraph does not constitute a general release of the data contained in MMD's NDA No. 18-602, except as it might appear in labelling.

2. Respondent shall withdraw the Citizen Petition(s) that MMD filed with the FDA relating to NDAs under Section 505(b)(2) of the Food, Drug and Cosmetics Act, 21 U.S.C. 355(b)(2), including the NDA for the Biovail diltiazem products. Respondent shall not file any further Citizen Petition with the FDA relating to the NDA under Section 505(b)(2) of the Food, Drug and Cosmetics Act, 21 U.S.C. 355(b)(2), that could have the effect of delaying the approval of the NDA for the Biovail diltiazem products.

3. Respondent shall file a stipulation of dismissal with prejudice to MMD of all litigation currently pending in the United States between or among MMD, Hoechst, and Biovail, including, but not limited to, *Marion Merrell Dow Inc., Carderm Capital L.P. and Elan plc v. Hoechst-Roussel Pharmaceuticals, Inc.*, No. 93-5074 (D.N.J), and shall not institute or cause any other person to institute any patent infringement action against Biovail relating to the Biovail diltiazem products.

4. Respondent shall return to Biovail all documents relating to the research, development, FDA approval, patenting, manufacture, marketing, or sale of the Biovail diltiazem products.

B. Respondent shall not use any non-public information relating to the Biovail diltiazem products and shall not provide, disclose or

otherwise make available to MMD any non-public information relating to the Biovail diltiazem products.

C. The purpose of this paragraph II is to remedy the lessening of competition resulting from the Merger as alleged in the Commission's complaint.

III.

It is further ordered, That:

A. Respondent shall divest, absolutely and in good faith, within nine (9) months of the date this order becomes final, either the Beraprost assets or Trental[®] assets.

B. Respondent shall divest the Beraprost assets or Trental[®] 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 Beraprost assets or Trental[®] assets is to ensure continued competition between Trental[®] and Beraprost, in the same manner in which Trental[®] and Beraprost would compete absent the Merger, and to remedy the lessening of competition resulting from the Merger as alleged in the Commission's complaint.

C. The time period for divestiture pursuant to this paragraph III of this order shall be tolled if and when respondent:

1. Provides to the Commission objective evidence, including, but not limited to, results of clinical trials, indicating that, based on a compound's medical profile, and through no fault of respondent, the Beraprost assets are not viable or marketable; and

2. Petitions the Commission to modify this order, pursuant to Section 5(b) of the FTC Act and Section 2.51 of the Commission's Rules of Practice, based on the circumstances described in paragraph III.C.1 of this order.

This tolling of the time period for divestiture shall end when the Commission rules on respondent's petition to modify this order.

IV.

It is further ordered, That:

A. Respondent shall divest, absolutely and in good faith, within nine (9) months of the date this order becomes final, the Mesalamine assets.

B. Respondent shall divest the Mesalamine 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 Mesalamine assets is to ensure continued competition between Hoechst's mesalamine and MMD's mesalamine, in the same manner in which these compounds would compete absent the Merger, and to remedy the lessening of competition resulting from the Merger as alleged in the Commission's complaint.

V.

It is further ordered, That:

A. Respondent shall divest, absolutely and in good faith, within nine (9) months of the date this order becomes final, the Rifampin assets.

B. Respondent shall divest the Rifampin 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 Rifampin assets is to ensure continued competition between Hoechst's rifampin and MMD's rifampin, in the same manner in which these compounds would compete absent the Merger, and to remedy the lessening of competition resulting from the Merger as alleged in the Commission's complaint.

VI.

It is further ordered, That:

A. Upon reasonable notice and request from the acquirer(s), to Hoechst, Hoechst shall provide information, technical assistance and advice to the acquirer(s) with respect to any assets divested pursuant to this order such that the acquirer(s) will be capable of continuing all applicable research, development and manufacturing. Such assistance shall include reasonable consultation with knowledgeable employees

of Hoechst and training at the acquirer's facility for a period of time sufficient to satisfy the acquirer's management that its personnel are adequately knowledgeable about the assets divested pursuant to this order. However, respondent shall not be required to continue providing such assistance for more than twelve (12) months after divestiture of such assets. Respondent may require reimbursement from the acquirer(s) for all of its own direct costs incurred in providing the services required by this subparagraph. Direct costs, as used in this subparagraph, means all actual costs incurred exclusive of overhead costs. If an acquirer hires any of respondent's officers, directors, agents, or employees whose work relates to a divested asset being acquired by the acquirer, respondent shall waive any confidentiality or non-competition employment rights relating to assets divested pursuant to this order that respondent has against such employee.

B. Pending divestiture of the assets to be divested pursuant to this order, respondent shall:

1. Take such actions as are necessary to prevent the destruction, removal, wasting, deterioration or impairment of the assets to be divested pursuant to this order, except for ordinary wear and tear; and
2. Maintain research and development of the assets required to be divested by this order, at the levels planned by either Hoechst or MMD for such assets as of June 1, 1995.

C. Hoechst shall maintain the physical assets, if any exist, necessary to manufacture Trental[®], Beraprost, mesalamine and rifampin, until respondent's obligations pursuant to paragraphs III, IV, V, VI and VII of this order have been fulfilled. The maintenance of physical assets described in this subparagraph shall not exceed two (2) years following divestitures pursuant to paragraphs III, IV and V of this order.

D. Respondent shall obtain from each acquirer a certification of the acquirer's good faith intention to obtain in an expeditious manner all necessary FDA approvals to manufacture and sell in the United States the assets to be divested pursuant to this order and a commitment by the acquirer to use reasonable diligence to continue to research and develop the assets to be divested pursuant to this order for sale in the United States.

VII.

It is further ordered, That:

A. If respondent fulfills its obligations pursuant to this order by divesting assets relating to a product for which the FDA has issued either approval of a NDA or an ANDA (hereinafter Divested Product), respondent shall execute an agreement (hereinafter Divestiture Agreement) with the acquirer of such Divested Product.

B. Each Divestiture Agreement shall include the following and respondent shall commit to satisfy the following:

1. Respondent shall contract manufacture and deliver to the acquirer in a timely manner the requirements of the acquirer for the Divested Product at respondent's or MMD's cost for a period not to exceed five (5) years from the date the Divestiture Agreement is approved, or six (6) months after the date the acquirer obtains all necessary FDA approvals to manufacture the Divested Product for sale in the United States, whichever is earlier.

2. Respondent shall commence delivery of the Divested Product to the acquirer within two (2) months from the date the Commission approves the acquirer and the Divestiture Agreement.

3. After respondent commences delivery of the Divested Product to the acquirer pursuant to paragraph VII.B.2 of this order, all inventory of the Divested Product produced by respondent for the U.S. market at the facility that produced such Divested Product, regardless of the date of its production, may be sold by respondent only to the acquirer.

4. Respondent shall make representations and warranties to the acquirer that the Divested Product contract manufactured by respondent for the acquirer meets the FDA approved specifications therefor and is not adulterated or misbranded within the meaning of the Food, Drug and Cosmetic Act, 21 U.S.C. 321, *et seq.* Respondent shall agree to indemnify, defend and hold the acquirer harmless from any and all suits, claims, actions, demands, liabilities, expenses or losses alleged to result from the failure of the Divested Product contract manufactured by respondent to meet FDA specifications. This obligation shall be contingent upon the acquirer giving respondent prompt, adequate notice of such claim, cooperating fully in the defense of such claim, and permitting respondent 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 respondent to be liable for any negligent act or omission of the acquirer or for any representations and warranties, express or implied, made by the acquirer that exceed the representations and warranties made by respondent to the acquirer.

5. During the term of contract manufacturing, upon reasonable request by the acquirer, respondent shall make available to the trustee appointed pursuant to paragraph VIII.A. of this order all records kept in the normal course of business that relate to the cost of manufacturing the Divested Product.

VIII.

It is further ordered, That:

A. Within forty-five (45) days of the date this order becomes final, the Commission shall appoint a trustee to ensure that respondent expeditiously performs its responsibilities required by this order. Respondent shall consent to the following terms and conditions regarding the trustee's powers, duties, authorities, and responsibilities under this paragraph:

1. The Commission shall select the trustee, subject to the consent of respondent, which consent shall not be unreasonably withheld. 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. Within ten (10) days after the appointment of the trustee, respondent shall execute a trust agreement that, subject to the prior approval of the Commission, confers on the trustee all the rights and powers necessary to permit the trustee to assure respondent's compliance with the terms of this order, including the rights and powers necessary to divest assets, if the trustee is so directed by the Commission. As part of the trustee agreement, the trustee shall execute confidentiality agreements with respondent.

3. The trustee shall serve until either (a) the acquirer(s) has filed a complete application with the FDA for approval to manufacture and

sell a product(s) based on the Trental[®] assets or the Beraprost assets, the Rifampin assets and the Mesalamine assets, as applicable; (b) the trustee determines that the acquirer(s) has abandoned its efforts to obtain FDA approval to manufacture and sell a product(s) based upon the Trental[®] assets or the Beraprost assets, the Rifampin assets and the Mesalamine assets, as applicable; or (c) the trustee determines that the acquirer(s) has failed to exercise reasonable diligence in research and development toward obtaining FDA approval to manufacture and sell a product(s) based upon the Trental[®] assets or the Beraprost assets, the Rifampin assets and the Mesalamine assets, as applicable, which lack of diligence will have been certified to and accepted by the Commission, whichever comes first. The trustee's service shall continue for no more than two (2) years following divestiture of the Trental[®] assets or the Beraprost assets, the Rifampin assets and the Mesalamine assets, as applicable.

4. The trustee shall have full and complete access to the personnel, books, records, facilities and technical information related to the Trental[®] assets or the Beraprost assets, the Rifampin assets and the Mesalamine assets, or to any other relevant information, as the trustee may reasonably request, including, but not limited to, all records kept in the normal course of business that relate to the research and development of and the cost of manufacturing Trental[®] or Beraprost, mesalamine and rifampin. Respondent shall develop such financial or other information as the trustee may request and shall cooperate with the trustee. Respondent shall take no action to interfere with or impede the trustee's accomplishment of his or her responsibilities pursuant to this order.

5. 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 may set. The trustee shall have authority to employ, at the cost and expense of respondent, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all expenses incurred. The Commission shall approve the account of the trustee, including fees for his or her services.

6. 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 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.

7. 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 VIII.A. of this order.

8. The Commission 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 requirements of this order.

9. The trustee shall report in writing to respondent and the Commission every one hundred and eighty (180) days concerning the trustee's obligations pursuant to this paragraph VIII.

B. Respondent shall comply with all reasonable directives of the trustee regarding respondent's obligations to comply with this order.

C. The trustee may require respondent to manufacture Beraprost for use by the acquirer in conducting clinical trials or other actions as required by the FDA if:

1. The acquirer has depleted its inventory of Beraprost acquired pursuant to the divestiture;

2. The acquirer has a need to conduct further trials or studies prior to submission of an application to the FDA to manufacture and sell a product based on the Beraprost assets; and

3. Despite good faith efforts to establish its own manufacturing capability for Beraprost, the acquirer has not succeeded in doing so as of the time Beraprost is needed for such clinical trials or other actions as required by the FDA.

The trustee shall determine reasonable compensation for respondent, based upon the costs of manufacture for such production.

IX.

It is further ordered, That:

A. If respondent has not divested, absolutely and in good faith and with the Commission's prior approval, (1) either the Trental[®]

assets or the Beraprost assets; (2) the Mesalamine assets; and (3) the Rifampin assets, within the time required by paragraphs III.A., IV.A., and V.A. of this order, the Commission may direct the trustee appointed pursuant to paragraph VIII of this order to accomplish any divestiture required pursuant to this order. Neither the decision of the Commission to direct the trustee nor the decision of the Commission not to direct the trustee to divest the assets required to be divested 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 respondent to comply with this order. Respondent shall consent to the following terms and conditions regarding the trustee's powers, duties, authorities, and responsibilities under this paragraph.

B. If the trustee is directed under subparagraph A. of this paragraph to divest any assets, respondent shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:

1. The Commission shall extend the authority and responsibilities of the trustee appointed under paragraph VIII of this order to include divesting any assets required to be divested by this order that have not been divested.

2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest any assets required to be divested pursuant to this order that have not been divested.

3. Within ten (10) days after the extension of the trustee's authority and responsibilities, respondent shall amend the existing trust agreement in a manner 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 divestitures required by this order.

4. The trustee shall have twelve (12) months from the date the Commission approves the extension of the trustee's authorities and responsibilities as described in paragraph IX.B.3 to accomplish the divestiture(s), 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(s) or believes that

divestiture(s) 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, facilities and technical information related to the assets to be divested by the trustee, or to any other relevant information, as the trustee may reasonably request, including, but not limited to, all records kept in the normal course of business that relate to the research and development of, and the cost of manufacturing, Trental[®], Beraprost, mesalamine and rifampin. Respondent shall develop such financial or other information as the trustee may 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 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; to assure that respondent enters into Divestiture Agreement(s) that comply with the provisions of paragraph VII; to assure that respondent and the acquirer(s) comply with the remaining provisions of this order. The divestitures and the Divestiture Agreement(s) shall be made in the manner set forth in paragraphs III, IV, V, VI and VII of this order; provided, however, that if the trustee receives *bona fide* offers from more than one acquiring entity for any of the assets to be divested pursuant to this order, and if the Commission determines to approve more than one such acquiring entity for any of the assets to be divested pursuant to this order, 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 respondent, on such reasonable and customary terms and conditions as the Commission may set. The trustee shall have authority to employ, at the cost and expense of respondent, such consultants, accountants, attorneys 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 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. 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, 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.

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 VIII.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 divestitures required by this order.

11. The trustee shall report in writing to respondent and the Commission every sixty (60) days concerning the trustee's efforts to accomplish the divestiture(s) required by this order.

12. If a divestiture application filed pursuant to paragraph III.A. is pending before the Commission, and respondent petitions the Commission to modify this order based on the conditions in paragraph III.C., then the Commission shall not approve the divestiture application until it rules on the petition to modify.

X.

It is further ordered, That, for the purpose of determining or securing compliance with this order, respondent 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 respondent, relating to any matters contained in this order; and

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

XI.

It is further ordered, That, within sixty (60) days after the date this order becomes final and every sixty days (60) days thereafter until respondent has fully complied with the provisions of paragraphs II, III, IV, V, VI and VII 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 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 paragraphs II, III, IV, V, VI and VII of this order, including a description of all substantive contacts or negotiations for accomplishing the divestiture and the identity 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.

XII.

It is further ordered, That respondent shall notify the Commission at least thirty (30) days prior to any proposed change in 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.

Complaint

120 F.T.C.

IN THE MATTER OF

SANTA CLARA COUNTY MOTOR CAR DEALERS ASSOCIATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3630. Complaint, Dec. 13, 1995--Decision, Dec. 13, 1995*

This consent order prohibits, among other things, a California association from carrying out, participating in, inducing or assisting any boycott or concerted refusal to deal with any newspaper, periodical, television or radio station, and requires the association to amend its by-laws to incorporate the stipulated prohibition, and to distribute the amended by-laws and the final Commission order to each of its members.

Appearances

For the Commission: *Ralph E. Stone and Pamela A. Gill.*

For the respondent: *Stephen V. Bomse, Heller, Ehram, White & McAuliffe, San Francisco, CA.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 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 Santa Clara County Motor Car Dealers Association, an unincorporated association, hereinafter sometimes referred to as "the Association" or "respondent," 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 Association is an unincorporated association 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 336 East Hamilton Avenue, Campbell, California.

PAR. 2. The Association is a trade association representing the interests of new automobile and truck dealers in Santa Clara County,

California. The Association's members are generally engaged in the advertising, offering for sale, and sale of new automobiles and trucks at retail. The Association has approximately 47 members, constituting approximately 50% of the new automobile and truck dealers in Santa Clara County. Except to the extent that competition has been restrained as alleged herein, Association members have been and are now in competition among themselves and with other new automobile and truck dealers.

PAR. 3. The Association engages in substantial activities that further its members' pecuniary interests. By virtue of its purposes and activities, the Association is a corporation within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

PAR. 4. The Association'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, as amended, 15 U.S.C. 45.

PAR. 5. The Association has been and is acting in agreement, combination or conspiracy with its members, or in agreement, combination or conspiracy with some of its members, to restrain trade in the advertising, offering for sale, and sale of new automobiles and trucks in Santa Clara County, by canceling advertising in, and thereafter withholding advertising from, the San Jose Mercury News newspaper in retaliation for a San Jose Mercury News article that informed consumers how to analyze a manufacturer's factory invoice as part of the automobile-purchasing process.

PAR. 6. The purposes or effects of the agreement, combination or conspiracy and the Association's acts or practices as described above have been and are to restrain competition unreasonably and to injure consumers in one or more of the following ways, among others:

A. By foreclosing, reducing and restraining competition among new automobile and truck dealers in Santa Clara County;

B. By depriving consumers of truthful information concerning dealers' products and services; and

C. By depriving consumers of the benefits of competition among dealers in the advertising, offering for sale, and sale of new automobiles and trucks.

PAR. 7. The acts and practices herein alleged were and are to the prejudice and injury of the public, and 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 and practices of respondent, as herein alleged, are continuing and will continue 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 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, 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 Santa Clara County Motor Car Dealers Association is an unincorporated association 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 336 East Hamilton Avenue, Campbell, 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

I.

It is ordered, That, for the purposes of this order, "respondent" or "Association" shall mean the Santa Clara County Motor Car Dealers Association, its predecessors, successors and assigns, and its directors, committees, officers, delegates, representatives, agents, and employees.

II.

It is further ordered, That the Association, directly or indirectly, or through any person or any corporate or other device, in or in connection with its activities as a trade association, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist from carrying out, participating in, inducing, suggesting, urging, encouraging, or assisting any boycott of, or concerted refusal to deal with, any newspaper, periodical, television station, or radio station, provide, however, that nothing in this order shall prohibit the Association or any of its members from establishing, participating in, or maintaining joint advertising programs, so long as such joint advertising programs are not a part of any boycott or concerted refusal to deal and do not otherwise violate this order.

III.

It is further ordered, That the Association shall:

A. Within sixty (60) days after the date this order becomes final, amend its by-laws to incorporate by reference paragraph II of this order, and distribute by first-class mail a copy of the amended by-laws to each of its members;

B. Within thirty (30) days after the date this order becomes final, distribute by first-class mail a copy of this order and the complaint to each of its members;

C. For a period of five (5) years after the date this order becomes final, provide each new member with a copy of this order, the complaint, and the amended by-laws within thirty (30) days of the new member's admission to the Association; and

D. Within seventy-five (75) days after the date this order becomes final, and annually thereafter for a period of five (5) years on the anniversary of the date this order became final, file with the Secretary of the Commission a verified written report setting forth in detail the manner and form in which the Association has complied with and is complying with this order.

IV.

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

V.

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. Upon seven (7) days' notice to respondent, to have access, during office hours and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of respondent relating to any matters contained in this order; and

B. Upon seven (7) days' notice to respondent and without restraint or interference from it, to interview officers, directors, or employees of respondent.

VI.

It is further ordered, That this order shall terminate on December 13, 2015.

1037

Complaint

IN THE MATTER OF

FEDERAL NEWS SERVICE GROUP, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3631. Complaint, Dec. 18, 1995--Decision, Dec. 18, 1995*

This consent order prohibits, among other things, a District of Columbia corporation that sells verbatim news transcripts, and its president, from agreeing, or soliciting an agreement, to allocate customers or divide markets with any provider of news transcripts; entering into, continuing, or renewing any agreement that prevents Reuters American from competing with the respondents in the production, marketing or sale of news transcripts; renewing its news transcript supply agreement with Reuters America for five years; agreeing, or soliciting agreements, with competitors to fix or maintain resale prices for news transcripts; and requiring or pressuring any competitor to maintain or adopt any resale price for news transcripts.

Appearances

For the Commission: *Michael E. Antalics, Barry Costilo and William Baer.*

For the respondents: *Katherine Boland, Bayh, Connaughton & Malone, 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 Federal News Service Group, Inc., a corporation, and Cortes W. Randell, an individual (sometimes referred to as "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 as follows:

PARAGRAPH 1. Respondent Federal News Service Group, Inc. ("FNS") is a corporation organized, existing and doing business under and by virtue of the laws of the District of Columbia, with its principal office and place of business at 620 National Press Building, Washington, D.C.

PAR. 2. FNS is engaged in the production and sale of fast turnaround verbatim transcripts covering a variety of news events primarily involving the federal government ("news transcripts"). Examples of the news events transcribed and transmitted by FNS include White House and Departments of Defense and State speeches and press briefings, press conferences by federal agency officials, and Congressional hearings. Under the business name of Federal News Service, FNS sells and transmits these news transcripts over communication networks to customers located through the United States.

PAR. 3. Respondent Cortes W. Randell is an individual who is President of respondent FNS. At all times material to this case, he has formulated, directed, and controlled the acts and practices of respondent FNS. His principal office and place of business is 620 National Press Building, Washington, D.C.

PAR. 4. Reuters American Inc. ("Reuters") 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 at 1700 Broadway, New York, New York.

PAR. 5. Reuters is engaged in the sale of news wires, news transcripts, and other services to the media and others. Reuters transmits these services over communication networks to customers located throughout the United States.

PAR. 6. Respondents' acts and practices, including the acts and practices alleged in this complaint, are in or affect commerce as defined in the Federal Trade Commission Act.

PAR. 7. Before May 1993, Reuters and FNS directly competed with each other for news transcript customers. They were the dominant sellers of news transcripts. Each company had its own source of supply of news transcripts. Reuters relied on News Transcripts Inc. ("NTI") to provide news transcripts exclusively to it. FNS produced its own news transcripts and relied on another company to supply news transcripts to it. FNS and Reuters competed on the basis of the price, speed, accuracy, and breadth of coverage of their respective news transcripts.

PAR. 8. As early as May 1993, the respondents agreed with Reuters, among other things, that Reuters would not sell or attempt to sell news transcripts to FNS's customers; Reuters would sell FNS-produced news transcripts and Reuters would not produce and sell its own news transcripts or purchase and resell any other company's

news transcripts which compete with FNS's news transcripts; and the minimum price for news transcripts sold by Reuters would be at least \$500 per month. These agreements were continued by subsequent agreements between FNS and Reuters. Reuters also acted in concert with FNS to induce NTI to enter into an agreement with FNS in June 1993 under which NTI agreed, among other things, to cease producing news transcripts and not to compete with FNS.

PAR. 9. The purpose and effect of these agreements was to eliminate competition in the production and sale of news transcripts. FNS became the sole producer of news transcripts, and by May 1994, many of FNS's customers had received price increases for news transcripts.

PAR. 10. In August 1993, FNS and Cortes W. Randell, in concert with Reuters, coerced a news transcript reseller to raise the price of its news transcript database. The reseller acquiesced in FNS's request to raise its prices to assure its continued supply of FNS-produced news transcripts. The reseller communicated its acquiescence to FNS and Reuters.

PAR. 11. By engaging in the acts or practices described in paragraphs six through ten of this complaint, respondents have unreasonably restrained competition in the news transcript business in the following ways, among other:

(a) Competition between FNS and Reuters for customers has been restrained;

(b) Price competition between FNS and Reuters has been restrained;

(c) Competition on the basis of product quality between FNS and Reuters has been eliminated; and

(d) Price competition between database resellers of news transcripts has been restrained.

PAR. 12. The acts or practices of respondents alleged herein were and are to the prejudice and injury of the public. The acts or practices constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act. These acts or practices are continuing and will continue, or may recur, in the absence of the relief requested.

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 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 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, 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 Federal News Service Group, Inc. ("FNS") 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 620 National Press Building, Washington, D.C. FNS operates under the business name Federal News Service.

Respondent Cortes W. Randell is an individual who is President 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.

1037

Decision and Order

ORDER

I.

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

A. "*Respondents*" mean Federal News Service Group, Inc., its subsidiaries, divisions, and groups and affiliates controlled by Federal News Service Group, Inc., its successors and assigns, and its directors, officers, employees, agents, and representatives; Federal News Service, its subsidiaries, divisions, and groups and affiliates controlled by Federal News Service, its successors and assigns, and its directors, officers, employees, agents, and representatives; and Cortes W. Randell, an individual, his employees, agents, and representatives, and entities controlled by him.

B. "*Reuters*" means Reuters America Inc., its directors, officers, representatives, delegates, agents, employees, successors, assigns and its subsidiaries and their successors and assigns.

C. "*News transcripts*" mean fast turnaround verbatim transcripts of statements made by governmental officials or others covering a variety of news events or individual news events or parts thereof that are usually but not always produced within three (3) hours of the event and transmitted in any manner to resellers and customers in the United States. The definition of "news transcripts" does not include the "Daybook," a daily calendar of news events not containing news transcripts, which is sold by Reuters to FNS.

D. "*News transcript provider*" means any person or entity which produces news transcripts, by itself or through an arrangement by which a third party produces news transcripts exclusively for that person or entity, and markets and sells such news transcripts as a daily news service on a subscription basis.

II.

It is further ordered, That respondents, directly, indirectly, or through any corporate or other device, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from entering into, attempting to enter into, or continuing or attempting to continue, any combination, agreement

or understanding, either express or implied, with any news transcript provider to allocate or divide markets or customers with respect to news transcripts.

III.

It is further ordered, That respondents, directly, indirectly, or through any corporate or other device, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from entering into, continuing, or renewing any agreement between respondents and Reuters that prevents Reuters from in any way competing with respondents for the production, marketing or sale of news transcripts.

IV.

It is further ordered, That for five (5) years from either the date this order becomes final or July 31, 1995, whichever is later, respondents directly or indirectly, or through any corporate or other device, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do cease and desist from entering into, continuing, or renewing any agreements with Reuters providing for the supply of news transcripts or the purchase or sale of news transcript customer contracts or accounts.

Provided, that nothing in this order shall prohibit respondents from:

- A. Selling a subscription for news transcripts to Reuters for Reuters Internal use; and
- B. Contracting with Reuters for Reuters to supply respondents with Reuters' Daybook.

V.

It is further ordered, That respondents, directly or indirectly, or through any corporate or other device, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Entering into, attempting to enter into, maintaining, enforcing, or attempting to enforce, any agreements or understandings with any competitor in the production, distribution, or sale of news transcripts, or any purchaser or reseller of news transcripts which is directly or indirectly supplied by respondents, that fix, establish, control, or maintain resale prices or resale price levels for news transcripts; or

B. Requiring, coercing, or otherwise pressuring any competitor in the production, distribution or sale of news transcripts, or any purchaser or reseller of news transcripts which is directly or indirectly supplied by respondents, to maintain, adopt, or adhere to any resale price or resale price level for news transcripts.

VI.

It is further ordered, That respondents shall:

A. Within thirty (30) days after the date this order becomes final, distribute a copy of this order and complaint to each of their employees and news transcript resellers.

B. Within ninety (90) days after the date this order becomes final, and annually thereafter for five (5) years on the anniversary of the date this order becomes final, and at such other times as the Commission may, by written notice to the respondents require, file a verified written report with the commission setting forth in detail the manner and form in which the respondents have complied and are complying with this order.

C. Maintain and make available to Commission staff for inspection and copying upon reasonable notice, records adequate to describe in detail any action taken in connection with the activities covered by this order.

D. 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, or the creation or dissolution of subsidiaries, or any other change in respondents which may affect compliance obligations arising out of this order.

VII.

It is further ordered, That this order shall terminate as follows:

A. With respect to Federal News Service Group, Inc., this order shall terminate on December 18, 2015.

B. With respect to Cortes W. Randell, this order shall terminate on December 18, 2015 unless Cortes W. Randell totally ceases and does not resume his participation in the news transcript business in any capacity, in which case this order shall terminate five (5) years from the date he ceased participating in the business.

IN THE MATTER OF

REUTERS AMERICA INC.

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

Docket C-3632. Complaint, Dec. 18, 1995--Decision, Dec. 18, 1995

This consent order prohibits, among other things, a New York-based distributor of fast-turnaround verbatim news transcripts from agreeing to or attempting to agree to allocate customers or divide markets with any provider of news transcripts.

Appearances

For the Commission: *Michael E. Antalics, Barry Costilo and William Baer.*

For the respondent: *Salem Katsh, Weil, Gotshal & Manges, New York, N.Y.*

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 Reuters America Inc., a corporation (sometimes referred to as "respondent"), 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 as follows:

PARAGRAPH 1. Respondent Reuters America Inc. ("Reuters") 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 at 1700 Broadway, New York, New York.

PAR. 2. Reuters has been engaged in the sale of news transcripts and other services to the media and others. The "news transcripts" are fast turnaround verbatim transcripts covering a variety of news events primarily involving the federal government. Examples of the news events covered include White House and Departments of Defense and State speeches and press briefings, press conferences by

federal agency officials, and Congressional hearings. Reuters transmitted these services over communication networks to customers located throughout the United States.

PAR. 3. Federal News Service Group, Inc. ("FNS") is a corporation organized, existing and doing business under and by virtue of the laws of the District of Columbia, with its principal office and place of business at 620 National Press Building, Washington, D.C.

PAR. 4. Under the business name of Federal News Service, FNS sells and transmits news transcripts over communication networks to customers located throughout the United States.

PAR. 5. Respondent's acts and practices, including the acts and practices alleged in this complaint, are in or affect commerce as defined in the Federal Trade Commission Act.

PAR. 6. From 1988, when Reuters entered the news transcript business, until May 1993, Reuters and FNS directly competed with each other for news transcript customers. They were the dominant sellers of news transcripts. Each company had its own source of supply of news transcripts. Reuters relied on News Transcripts Inc. ("NTI") to provide news transcripts exclusively to it. FNS produced its own news transcripts and relied on another company to supply news transcripts to it. FNS and Reuters competed on the basis of the price, speed, accuracy, and breadth of coverage of their respective news transcripts.

PAR. 7. Soon after Reuters entered the news transcript business, FNS solicited an agreement with Reuters that would eliminate the competition that existed between FNS and Reuters. Reuters rejected the solicitation.

PAR. 8. During the period between 1989 and 1993, Reuters learned of and had concerns related to a potential tax liability of its news transcript supplier. Reuters subsequently entered into the agreements described below.

PAR. 9. As early as May 1993, FNS and Reuters agreed, among other things, that Reuters would not sell or attempt to sell news transcripts to FNS's customers; Reuters would sell FNS produced news transcripts; Reuters would not produce and sell its own news transcripts or purchase and resell any other company's news transcripts which compete with FNS's news transcripts for the term of their supply agreement plus at least five years; and the minimum price for news transcripts sold by Reuters would be at least \$500 per

month. These agreements were continued by subsequent agreements between FNS and Reuters. Reuters also acted in concert with FNS to induce NTI to enter into an agreement with FNS in June 1993 under which NTI agreed, among other things, to cease producing news transcripts and not to compete with FNS.

PAR. 10. The effect of these agreements was to unreasonably restrain competition in the production and sale of news transcripts. FNS became the sole producer of news transcripts, and by May 1994, many of FNS's customers had received price increases for news transcripts.

PAR. 11. In August 1993, Reuters was under contract to supply a database reseller with news transcripts, and under that contract Reuters could receive as part of its royalty payment a percentage of the database reseller's price. Previously, Reuters had provided this database customer with news transcripts produced by NTI. In August 1993, however, FNS was producing news transcripts for Reuters and threatened to disallow Reuters' sale of transcripts to this database reseller unless the reseller agreed to raise its prices to its database customers. In order to insure that FNS would agree to allow Reuters to continue providing FNS transcripts to this database reseller, Reuters scheduled a meeting and otherwise assisted FNS in obtaining the reseller's agreement to raise the prices of its news transcript database. The reseller acquiesced in FNS's request to raise its prices and communicated its acquiescence to Reuters and FNS.

PAR. 12. By engaging in the acts or practices described in paragraphs nine through eleven of this complaint, Reuters unreasonably restrained competition in the news transcript business in the following ways, among others:

- (a) Competition between FNS and Reuters for customers was restrained;
- (b) Price competition between FNS and Reuters was restrained;
- (c) Competition on the basis of product quality between FNS and Reuters was eliminated; and
- (d) Price competition between database resellers of news transcripts was restrained.

PAR. 13. The acts or practices of Reuters alleged herein were and are to the prejudice and injury of the public. The acts or practices constitute unfair methods of competition in or affecting commerce in

violation of Section 5 of the Federal Trade Commission Act. These acts or practices are continuing and will continue, or may recur, in the absence of the relief requested.

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 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 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 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 Reuters America Inc. ("Reuters") is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its offices and principal place of business located at 1700 Broadway, New York, New York.

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*" means Reuters America Inc., its subsidiaries, divisions, and groups and affiliates controlled by Reuters America Inc., its successors and assigns, and its directors, officers, employees, agents, and representatives.

B. "*FNS*" means Federal News Service Group, In., its directors, officers, representatives, delegates, agents, employees, successors, assigns and its subsidiaries and their successors and assigns; and Federal News Service, its directors, officers, representatives, delegates, agents, employees, successors, assigns and its subsidiaries and their successors and assigns.

C. "*News transcripts*" mean full-text fast turnaround verbatim transcripts of government-related events that are usually but not always produced within three (3) hours of the event and transmitted in any manner to resellers and customers in the United States. The definition of "news transcripts" refers to the type of full-text verbatim news transcript service formerly marketed by respondent under the name "the Federal News Reuter Transcript Service." News transcripts do not include news, information or data of the type generally included in respondent's other news services which may incorporate some quotations or partial excerpts from government-related events.

D. "*News transcript provider*" means any person or entity which produces news transcripts, by itself or through an arrangement by which a third party produces news transcripts exclusively for that person or entity, and markets and sells such news transcripts as a daily service on a subscription basis.

II.

It is further order, That respondent, directly, indirectly, or through any corporate or other device, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, does forthwith cease and desist from entering into, attempting to enter into,

or continuing or attempting to continue, any combination, agreement or understanding, either express or implied, with any news transcript provider to allocate or divide markets or customers with respect to news transcripts.

III.

It is further ordered, That respondent, directly, indirectly, or through any corporate or other device, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from entering into, continuing, or renewing any agreement between respondent and FNS that prevents respondent from in any way competing with FNS for the production, marketing or sale of news transcripts.

IV.

It is further ordered, That, for five (5) years from either the date this order becomes final or July 31, 1995, whichever is later, respondent directly or indirectly, or through any corporate or other device, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do cease and desist from entering into, continuing, or renewing any agreements with FNS providing for the supply of news transcripts or the purchase or sale of news transcript customer contracts or accounts.

Provided that nothing in this order shall prohibit respondent from:

A. Purchasing a subscription for news transcripts from FNS for respondent's own use but not for resale; and

B. Contracting with FNS for supplying FNS with respondent's Daybook.

V.

It is further ordered, That respondent, directly or indirectly, or through any corporate or other device, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from entering into, attempting to enter into, maintaining, enforcing, or attempting to enforce, any agreements or understandings (1) with any competitor in the production,

distribution, or sale of news transcripts, that fix, establish, control, or maintain resale price levels for news transcripts, or (2) with any purchaser or reseller of news transcripts which is directly or indirectly supplied by respondent, that fix, establish, control, or maintain resale prices or resale price levels that such purchaser or reseller charges for news transcripts.

VI.

It is further ordered, That respondent shall:

A. Within thirty (30) days after the date this order becomes final, distribute a copy of this order and complaint to each of its officers and to each of its employees engaged in the production or sale of news transcripts.

B. Within ninety (90) days after the date this order becomes final, and annually thereafter for five (5) years on the anniversary of the date this order becomes final, and at such other times as the Commission may, by written notice to the respondent require, file a verified written report with the Commission setting forth in detail the manner and form in which the respondent has complied and is complying with this order.

C. Maintain and make available to Commission staff for inspection and copying upon reasonable notice, records adequate to describe in detail any action taken in connection with the activities covered by this order.

D. Notify the Commission at least thirty (30) days prior to any proposed change in the respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change in respondent which may affect compliance obligations arising out of this order.

VII.

It is further ordered, That this order shall terminate on December 18, 2015.

IN THE MATTER OF

NEW BALANCE ATHLETIC SHOES, INC.

Docket 9268. Interlocutory Order, December 18, 1995

ORDER AMENDING COMPLAINT
AND LIFTING STAY OF PROCEEDINGS

I. INTRODUCTION

By order dated July 10, 1995, the Commission directed the parties to this litigation to show cause why the complaint and notice order should not be amended or dismissed. This order was issued in conjunction with the Commission's announcement that it had rejected a consent agreement in Hyde Athletic Industries, Inc., FTC File No. 922-3236, and would conduct public proceedings to consider whether its current "made in USA" enforcement standard is appropriate in an era of global competition. The ongoing litigation was stayed pending the outcome of this show cause proceeding.

II. BACKGROUND

The complaint issued against New Balance on September 20, 1994 alleges violations of Section 5 of the FTC Act through statements made in advertising and labeling about the origin of New Balance's athletic shoes. Paragraph five alleges that New Balance:

has represented, directly or by implication, that New Balance athletic shoes are made in the United States, *i.e.*, that all, or virtually all, of the component parts of the footwear are made in the United States, and that all, or virtually all, of the labor in assembling the footwear is performed in the United States.

Paragraph six alleges that this claim is false:

In truth and in fact, a substantial amount of respondent's athletic shoes is assembled in foreign countries of foreign component parts, and in many instances respondent's athletic shoes assembled in the United States consist largely of foreign component parts. Therefore, the representation set forth in paragraph five was, and is, false and misleading.

The Commission simultaneously accepted for public comment a complaint with an accompanying consent order raising similar allegations against Hyde Athletic Industries.

Over 150 public comments were filed in response to the Hyde consent agreement after it appeared in the Federal Register on September 23, 1994. Many of these comments took issue with the principle that an unqualified "made in USA" claim implies that all or virtually all of the parts of a product are made in the United States and all or virtually all of the labor used in producing a product is performed in the United States. The comments also raised other concerns, including questions about how such a standard would be calculated and implemented across various products and industries. Because these comments raised complex questions without readily apparent answers, the Commission publicly announced, on July 11, 1995, that it would invite various industry and trade associations, consumer groups and other government entities to participate in an exchange of views on these issues at a public workshop conference.

In light of the decision to review its enforcement standard, the Commission issued an Order to Stay Proceedings and Show Cause in the New Balance proceeding. The order directed the parties to brief the Commission on whether the public interest warrants amendment or dismissal of the complaint and notice order in this matter.¹ The Commission simultaneously rejected a proposed settlement incorporating the "all or virtually all" standard with Hyde Athletic Industries, and directed staff to renegotiate a modified consent order based on a revised complaint, consistent with the proposed amended complaint in New Balance.

III. THE PUBLIC INTEREST WARRANTS AMENDMENT OF THE COMPLAINT AND NOTICE ORDER

As explained in a Federal Register notice announcing the public workshop conference, the Commission will consider whether it should alter its legal standard regarding the use of unqualified "made

¹New Balance asserts that "[i]t is not clear whether the Commission has the authority, *sua sponte*, to amend the complaint." Respondent's Brief in Response to Commission Order of July 11, 1995 at 28. The Commission has the authority to intervene *sua sponte* in an ongoing administrative adjudication to reconsider the public interest in proceeding, notwithstanding the absence of a specific Commission rule authorizing such action. See, e.g., *Hospital Board of Directors of Lee County*, 5 Trade Reg. Rep. (CCH) ¶ 23,860, at 23,619-20 (July 7, 1995); *Exxon Corp.*, 98 FTC 453, 461 (1981). Further, the Commission has the authority to act in a prosecutorial capacity in a pending adjudication to modify a complaint, see, e.g., *Cavanagh Communities Corp.*, 87 FTC 143, 144 (1976) (adding allegations), as well as to dismiss a complaint, see, e.g., *Frozen Food Forum, Inc.*, 84 FTC 1211, 1217 (1982).

in USA" claims for products comprised of domestic and foreign components and labor, and how domestic content should be measured under any future standard. *See* Request for Public Comment in Preparation for Public Workshop Regarding "Made in USA" Claims in Product Advertising and Labeling, 60 Fed. Reg. 53923, 53924 (October 18, 1995). Because the Commission is reviewing its enforcement standard, it concludes that public interest considerations and principles of fairness warrant dismissal of the charges against New Balance as they relate to advertising claims for athletic shoes manufactured in the United States of both foreign and domestic components. The remaining allegations of the complaint, however, remain unaffected by the upcoming policy review.² Moreover, the Commission has carefully considered respondent's arguments that the public interest does not warrant the additional expenditure of public or private resources on this litigation, and has concluded that resolution of these charges through administrative litigation is in the public interest.

Continuing to have reason to believe that New Balance has violated Section 5 of the FTC Act, the Commission has therefore determined not to dismiss the complaint, but to amend it. The attached amended complaint and notice order deletes those portions of the allegations in paragraphs five and six dealing with "made in the United States" claims as they relate to shoes of mixed domestic and foreign content. Paragraph five of the amended complaint alleges that New Balance, through its advertisements,³ "has represented, directly or by implication, that all New Balance athletic shoes are made in the United States," and paragraph six alleges that this claim is false because "[i]n truth and in fact, a substantial amount of New Balance athletic shoes is wholly made in foreign countries." The Commission has also determined to amend Part I of the notice order to prohibit claims that "footwear made wholly abroad is made in the United States," as well as to prohibit misrepresentations about the quantity of footwear that New Balance exports.

Any requests for additional trial preparation or discovery shall be directed to the ALJ, who shall authorize such additional trial preparation and discovery as is appropriate.

² These allegations are: (1) that New Balance represented that all of its athletic shoes are made in the United States when a substantial amount is made entirely abroad; and (2) that New Balance represented that it annually exports to Japan hundreds of thousands of pairs of athletic shoes that are made in the United States when fewer than 10,000 pairs of New Balance shoes are made in the United States and exported to Japan each year.

³ The amended complaint deletes all references to product labels.

Accordingly, *It is hereby ordered*, That the stay of these proceedings is hereby lifted, and the complaint and notice order are amended in accordance with the attached form of complaint.

Commissioner Starek dissenting.

COMPLAINT

The Federal Trade Commission, having reason to believe that New Balance Athletic Shoe, 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 New Balance Athletic Shoe, Inc., is a Massachusetts corporation which manufactures and sells footwear. Its principal office or place of business is located at 38 Everett Street, Boston, Massachusetts.

PAR. 2. Respondent has manufactured, assembled, advertised, labeled, offered for sale, sold, and distributed athletic and other footwear to consumers.

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 print and television advertising, and other promotional materials for footwear including, but not necessarily limited to, the attached Exhibits 1-5.

The "Mr. President" print advertisement (Exhibit 1) states:

"Here's one American-made vehicle that has no problem competing in Japan."
"Not only that, they're made right here in the USA."

The "Competition" print advertisement (Exhibit 2) states:

"If we can make great athletic shoes in America, why can't our competition?"
"New Balance is the only company that makes a full line of athletic shoes here in America."

The "Los Angeles" print advertisement (Exhibit 3) states:

"This American-made transportation system..."

"Mayor Bradley, perhaps you should consider New Balance athletic shoes. Not only are they made here in the USA...."

The "Junk" print advertisement (Exhibit 4) states:

"Who says buying American has to mean buying junk?"
"New Balance athletic shoes are one American-made product that's worth buying."
"The Japanese buy hundreds of thousands of pairs a year."

The "Mr. President" television advertisement (Exhibit 5) states:

"Here's one American made vehicle that has no problem competing in Japan."
"MADE IN USA"

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 1-5, respondent has represented, directly or by implication, that all New Balance athletic shoes are made in the United States.

PAR. 6. In truth and in fact, a substantial amount of New Balance athletic shoes is wholly made in foreign countries. 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 advertisements referred to in paragraph four, including, but not necessarily limited to, the advertisement attached as Exhibit 4, respondent has represented, directly or by implication, that it annually exports to Japan hundreds of thousands of pairs of athletic shoes that are made in the United States.

PAR. 8. In truth and in fact, respondent does not annually export to Japan hundreds of thousands of pairs of athletic shoes that are made in the United States. Fewer than 10,000 pairs of respondent's athletic shoes are made in the United States and exported to Japan each year. 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.

NOTICE

Notice is hereby given to the respondent hereinbefore named that the _____ day of _____, A.D., 19____, at a.m. o'clock is hereby fixed as the time and the Federal Trade Commission Offices, 6th Street & Pennsylvania Avenue, N.W., Washington, D.C. 20580, as the place when and where a hearing will be had before an Administrative Law Judge of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under said Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in the complaint.

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the thirtieth (30th) day after service of it upon you. An answer in which the allegations of the complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific admissions, denial, or explanation of each fact alleged in the complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the complaint not thus answered shall be deemed to have been admitted.

If you elect not to contest these allegations of fact set forth in the complaint, the answer shall consist of a statement that you admit all the material allegations to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint, and together with the complaint provide a record basis on which the Administrative Law Judge shall file an initial decision containing appropriate findings and conclusions and an appropriate order disposing of the proceeding. In such answer you may, however, reserve the right to submit proposed findings and conclusions and the right to appeal the initial decision to the Commission under Section 3.52 of the Commission's Rules of Practice for Adjudicative Proceedings.

Failure to answer within the time above provided shall be deemed to constitute a waiver of your right to appear and contest the allegations of the complaint and shall authorize the Administrative Law Judge, without further notice to you, to find the facts to be as alleged in the complaint and to enter an initial decision containing such findings, appropriate conclusions and order.

The following is the form of order which the Commission has reason to believe should issue if the facts are found to be as alleged in the complaint. If, however, the Commission should conclude from record facts developed in any adjudicative proceeding in this matter that the proposed order provisions as to New Balance Athletic Shoe, Inc., a corporation, might be inadequate to fully protect the consuming public, the Commission may order such relief as it finds necessary or appropriate.

ORDER

I.

It is ordered, That respondent, New Balance Athletic Shoe, 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 footwear 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.

1. That footwear made wholly abroad is made in the United States.
2. The quantity of footwear it exports.

II.

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

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into question such representation, or the basis relied upon for such representation, including complaints from consumers.

III.

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

IV.

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.

V.

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 witness whereof, the Federal Trade Commission has caused this complaint to be signed by its Secretary and its official seal to be hereto affixed at Washington, D.C. this ____ day of _____,

By the Commission.

Donald S. Clark
Secretary

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EXHIBIT 1

Mr. President:
Here's one
American-made vehicle
that has no problem
competing in Japan.



Perhaps while jog-
ging in Tokyo's
Palace Gardens.

Mr. President, you
noticed that an awful lot of Japanese people (over
1,000,000 at last count) wear New Balance athletic shoes.

New Balance shoes come in a full range of widths.
Mr. President, This means they deliver a perfect fit—
no matter how wide or narrow your feet happen to be.
Mr. President, they're made right here in the USA.

It just does improve, Mr. President, that when you
find a product people really, really need, something
amazing happens. People buy it.

new balance **AB**
100 BROAD STREET, BOSTON, MASSACHUSETTS 02108

EXHIBIT 2

Exhibit 2



If we can make
great athletic shoes
in America,
why can't
our competition?

© 1997 New Balance Athletic Shoe, Inc. All rights reserved. New Balance is a registered trademark of New Balance Athletic Shoe, Inc. in the United States and other countries. All other trademarks are the property of their respective owners.

new balance **NB**

Interlocutory Order

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EXHIBIT 3

EXHIBIT 3

Mayor Bradley:
 This American-made
 transportation system
 could reduce smog,
 eliminate traffic, and save
 you \$122,000,000.



Do not spend all that money and new commuter time. Mayor Bradley
 should spend it on a better transportation system.
 New Balance shoes are made in the USA and are available in a wide range of styles
 and colors. They are comfortable, durable and provide excellent support.
 For more information, contact your local New Balance store or call 1-800-955-2600.
 New Balance shoes are available in men's, women's and children's sizes.

new balance **AB**
 100 STATE STREET, MILFORD, MA 01850

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EXHIBIT 4

EXHIBIT 4



New Balance athletic shoes are one American-made product that's worth buying.

The Japanese buy hundreds of thousands of pairs a year. The German consumer newsletter *Markt Intern* ranks New Balance as the top

Who says buying
American has to mean
buying junk?

American brand. And the Made in America Foundation included New Balance in its recent collection of the best American products.

The millions of Americans have been wearing New Balance shoes since 1906. Not just because it shows how they feel about their country, but because it shows how they feel about their feet.

new balance **NB**

Interlocutory Order

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EXHIBIT 5



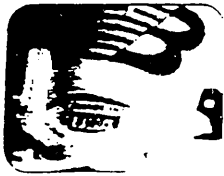
MUSIC/SFX



1st MALE ANNCR: Dear Mr. President:



Here's one American made vehicle that has no problem



COMPUTER GRAPHIC



MUSIC



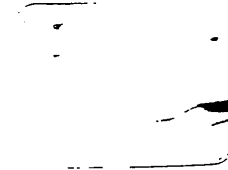
MUSIC/SFX IN & OUT



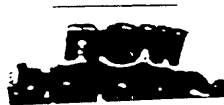
SFX TENNIS:



2nd MALE ANNCR: When you don't play tennis stars



To wear your shoes



CONCURRING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

On September 20, 1994, when the Commission first issued its complaint against New Balance Athletic Shoes, Inc., I dissented. It is traditional (with rare exceptions) for a commissioner who dissents from the issuance of an administrative complaint to withhold an explanation of her views until a later stage of the proceeding. I reserved my views in accordance with that practice.

My views nevertheless were stated in my dissent in a case that settled at the same time. Hyde Athletic Industries, Inc., Matter No. 922-3236 (Sept. 20, 1994) (Commissioner Azcuenaga, dissenting). In Hyde, I questioned the standard for "Made in USA" claims that the Commission incorporated into the complaint, which was the same standard incorporated into the complaint in this case. I also was concerned that the Commission was enforcing a standard for "Made in USA" claims at the same time that it apparently was reconsidering that standard. I was "troubled by the majority's implicit uncertainty about the standard [for Made in USA claims] it has chosen to impose," *id.*, as reflected in the majority's request for public comment concerning the standard. Although I was willing to reexamine the enforcement standard, I was "unwilling to embark on that process while continuing to bring cases to enforce the existing standard." *Id.*

Today, the Commission issues a revised complaint and notice order to remove from this litigation the issue of what enforcement standard should be applied to "Made in USA" claims for products of mixed domestic and foreign origin. The Commission has undertaken formally to review its enforcement standard for such claims, and it will hold a public workshop to obtain information in connection with its review.¹ These actions are consistent with my earlier and continuing views that the Commission should not attempt to enforce a legal standard about which it has reservations and that the Commission should reexamine the standard for "Made in USA" claims. The deletion from this complaint of the allegations based on that standard having been made, I support the amended complaint.

¹ Because the Commission is reviewing its enforcement standard, it has concluded that "public interest considerations and principles of fairness" warrant dismissal of the portions of the complaint and notice order based on that standard.

DISSENTING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

Today, the Commission accepts for public comment a consent agreement settling charges that Hyde Athletic Shoes, Inc. made the false representation that its footwear is "Made in USA." I have reason to believe that this representation is false because some Hyde footwear is assembled in foreign countries of foreign components and because some Hyde footwear consists largely of foreign components even though it is assembled in the United States. Nevertheless, I am unwilling to vote to accept the consent agreement for public comment.

First, the complaint and order interpret the established standard for the claims at issue in a manner that apparently would prohibit certain "Made in USA" representations as false that consumers likely would view as true. Specifically, the complaint and order treat a "Made in USA" representation as containing the implied claim that:

all, or virtually all, of the component parts of the footwear are made in the United States, and that all, or virtually all, of the labor in assembling the footwear is performed in the United States.

Under the interpretation of the majority, this implied claim apparently would be false, for example, if 2% of a product's value is attributable to component parts, 25% of which are foreign, and 98% of its value is attributable to labor, all of which is American. Because I believe that consumers are likely to view such products as American, I am reluctant to support an interpretation of the standard that could prohibit advertisers of such products from using a "Made in USA" claim.

Also, I am troubled by the majority's implicit uncertainty about the standard it has chosen to impose, as reflected in the Analysis to Aid Public Comment. The proposed complaint alleges that Hyde has made a false "Made in USA" representation in its advertising. Yet, by soliciting information on how consumers perceive a "Made in USA" representation in its Analysis to Aid Public Comment, the Commission apparently asks what implied claim consumers take from a "Made in USA" representation. If the Commission has not yet determined what claim Hyde made, surely it is inappropriate to issue a complaint alleging as false a claim that is yet to be definitively identified. The better, indeed, the proper approach is for the Commission to determine before issuing a complaint that it has

reason to believe that a particular claim was made and that this claim is false.

A case can be made that the Commission should reexamine its standard regarding "Made in USA" representations. I would not object to such a reexamination, but I am unwilling to embark on that process while continuing to bring cases to enforce the existing standard.

DISSENTING STATEMENT OF COMMISSIONER ROSCOE B. STAREK, III

I oppose narrowing the complaint and notice order in this matter. As I have stated elsewhere, case-by-case litigation is the appropriate means to evaluate "Made in USA" claims.¹ With the amendment of this complaint, the Commission ratifies the change of course on which it embarked when it rejected the consent order in Hyde and issued its order to show cause in this proceeding.

The record was fully developed and the parties were ready for trial to begin when the Commission stayed the proceedings and issued its order to show cause why the complaint should not be dismissed or amended. The briefs subsequently filed by the parties indicate that significant evidence of consumer perceptions of "Made in USA" claims would have been tested in trial, and the Commission would have had the benefit of a full examination of the evidence in assessing whether New Balance's claims were deceptive. Instead, the Commission has opted to address claims about products containing both foreign and domestic components in a resource-intensive, unnecessarily broad review more typical of a rulemaking.

To remove all issues related to mixed foreign and domestic content, the Commission drops the central allegation of the complaint -- involving the application of unqualified "Made in USA" claims to products assembled in the United States from foreign and domestic components -- and revises the notice order to prohibit New Balance from misrepresenting that "footwear made wholly abroad is made in the United States." Without violating the order, New Balance could advertise as "Made in USA: imported athletic shoes that are assembled in a foreign country from foreign components parts, so long as the shoes also contained any small part of U.S. origin. Such

¹ See Request for Public Comment in Preparation for Public Workshop Regarding "Made in USA" Claims in Product Advertising and Labeling, 60 Fed. Reg. 53923, 53930 (October 18, 1995) (Dissenting Statement of Commissioner Roscoe B. Starek, III); Hyde Athletic Industries, Inc., File No. 922-3236 (Dissenting Statement of Commissioner Roscoe B. Starek, III).

an eviscerated order would have little value and would not justify the resources involved in continuing this litigation.

It also seems likely to be an inefficient use of scarce resources to address in a public workshop whether the Commission's enforcement standard for "Made in USA" claims is appropriate in an era of global competition. If information provided to consumers is deceptive, a market based on consumer choices cannot function properly, whether the market is global or national.

Guidance on the level of substantiation that the Commission will require for unqualified "Made in USA" claims -- including methods of calculating domestic content -- and on how much flexibility the Commission will use in enforcement may prove useful and could reduce the costs of complying with the standard. Further review of these issues, however, by no means justifies drastically narrowing the scope of this adjudication. The Commission frequently undertakes reviews to reduce uncertainties about its enforcement policies, and issues enforcement policy statements or guides, without dropping enforcement efforts against clear violations of law in the interim.

IN THE MATTER OF

GENERAL MOTORS CORPORATION

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

Docket C-2966. Consent Order, May 18, 1979--Modifying Order, Dec. 21, 1995

This order reopens a 1979 consent order that settled allegations that General Motors ("GM") engaged in unfair and deceptive practices by selling cars with engines and other equipment manufactured by a different GM division without informing purchasers. This order modifies the consent order by allowing GM to display division brand nameplates on engines that are not manufactured by that GM division. In addition, the Commission deleted the provision from the modified order that have expired, concluding that elimination of the expired provisions is warranted. The Commission determined that changed conditions of fact justified reopening the proceeding and modifying the order.

ORDER REOPENING THE PROCEEDING AND
MODIFYING CEASE AND DESIST ORDER

On July 7, 1995, General Motors Corporation ("GM") filed a petition pursuant to Section 5(b)(2) of the Federal Trade Commission Act ("FTC Act"), as amended, 15 U.S.C. 45(b)(2), and Rule 2.51 of the Commission's Rules of Practice, 16 CFR 2.51, to reopen the proceeding and modify the cease and desist order entered against it on May 18, 1979, in Docket No. C-2966 (93 FTC 860).¹

The cease and desist order settled allegations that GM, a worldwide manufacturer of passenger vehicles: (1) represented that certain standard and optional equipment was manufactured by the particular division that assembled the passenger vehicle when that equipment was, in fact, manufactured by another division; (2) misrepresented the availability of various standard and optional equipment; and (3) substituted equipment other than that represented as being available, and delivered passenger vehicles that contained standard or optional equipment different from that ordered by retail purchasers.

¹ This order will sunset on May 18, 1999, provided that neither the Department of Justice nor the Commission files a complaint in federal court to enforce the order pursuant to Section 5(l) of the FTC Act prior to that date. See Final Rule Regarding the Duration of Existing Competition and Consumer Protection Orders, 60 Fed. Reg. 58514 (Nov. 28, 1995).

Various parts of the order imposing obligations with respect to certain model year passenger vehicles, *i.e.*, Parts V, VI, VII, X.B, X.C, and XI.B, have expired. The remaining provisions of the order remain in full force and effect. Part I of the order defines certain terms used in the order. Part II prohibits GM from misrepresenting the manufacturing source of any engine option and the availability of an option or item of standard equipment. Part III prohibits GM from displaying the name of any GM car division on any engine unless that engine is manufactured by that particular division. Part IV requires GM to notify dealers if passenger vehicles are being equipped with engines other than those specified in sales literature for that passenger vehicle. Part VIII requires GM to make available replacement parts and repair and maintenance information for passenger vehicles equipped with substituted engines to its dealers. Part IX of the order limits application of the order to the United States and its territories. Part X.A prohibits GM from utilizing a wholesale ordering system that prevents dealers from designating specific optional equipment requested by purchasers.

The petition to reopen the proceeding to modify Part III of the order and to add a definition to Part I was placed on the public record for thirty days on August 4, 1995, for the purpose of receiving public comment. *See* 60 Fed. Reg. 39,958 (1995). No comments were received. GM agreed to an extension of time for Commission action until December 20, 1995, to enable it to develop clarifying information to respond to questions raised by the Commission.

STANDARD FOR REOPENING A FINAL ORDER OF THE COMMISSION

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 altered, modified, or set aside if the respondent makes "a satisfactory showing that changed conditions of law or fact" so require.² A satisfactory showing sufficient to require reopening is made when a

² Section 5(b) provides, in part:

[T]he Commission shall reopen any such order to consider whether such order (including any affirmative relief provision contained in such order) should be altered, modified, or set aside, in whole or in part, if the person, partnership, or corporation involved files a request with the Commission which makes a satisfactory showing that changed conditions of law or fact require such order to be altered, modified, or set aside, in whole or in part.

The 1980 amendment to Section 5(b) did not change the standard for order reopening and modification, but "codifie[d] existing Commission procedure by requiring the Commission to reopen an order if the specified showing is made," S. Rep. 96-500, 96th Cong., 2d Sess. 9-10 (1979), and added the requirement that the Commission act on petitions to reopen within 120 days of filing.

request to reopen identifies significant changes in circumstances and show that the changes eliminate the need for the order or make continued application of the order inequitable or harmful to competition. Louisiana Pacific Corp., Docket No. C-2956, Letter to John C. Hart (June 5, 1986) at 4.³ Reopening may not be required if the changes were reasonably foreseeable at the time of consent negotiations. *Phillips Petroleum Co.*, Docket No. C-1088, 78 FTC 1573, 1575 (1971).

The language of Section 5(b) plainly anticipates that the burden is on the requester to make "a satisfactory showing" of changed conditions to obtain reopening of the order. *See Gautreaux v. Pierce*, 535 F. Supp. 423, 426 (N.D. Ill. 1982) (requester must show "exceptional circumstances, new, changed or unforeseen at the time the decree was entered"). The legislative history also makes clear that the requester has the burden of showing, by means other than conclusory statements, why an order should be modified.⁴

If the Commission determines that the requester has made the necessary showing, the Commission must reopen the order to determine whether the 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 requester fails to meet its burden of making the satisfactory showing of changed conditions required by the statute. The requester's burden is not a light one in view of the public interest in repose and finality of Commission orders.⁵

³ See S. Rep. No. 96-500, 96th Cong., 2d Sess. 9 (1979) (significant change or changes causing unfair disadvantage); *Pay Less Drugstores, Inc.*, Docket No. C-3039, Letter to H.B. Hummelt (Jan. 22, 1982) (changed conditions must be unforeseeable, create severe competitive hardship and eliminate dangers that the order sought to remedy) (unpublished); *See also United States v. Swift & Co.*, 286 U.S. 106, 119 (1932) ("clear showing" of changes that eliminate reasons for order or such that order causes unanticipated hardship).

⁴ The legislative history of amended Section 5(b), S. Rep. No. 96-500, 96th Cong., 2d Sess. 9-10 (1979), states:

Unmeritorious, time-consuming and dilatory requests are not to be condoned. A mere facial demonstration of changed facts or circumstances is not sufficient. . . . The Commission, to reemphasize, 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.

⁵ *See Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394 (1981) (strong public interest considerations support repose and finality); *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 296 (1974) ("sound basis for . . . [not reopening] except in the most extraordinary circumstances"); *RSR Corp. v. FTC*, 656 F.2d 718, 721-22 (D.C. Cir. 1981) (applying *Bowman Transportation* standard to FTC order).

CHANGED CONDITIONS OF FACT WARRANT REOPENING ORDER

In 1979, when the Commission issued its order, the Cadillac, Buick, Oldsmobile, Pontiac, and Chevrolet Divisions ("the nameplate divisions") of GM were organized as semi-autonomous motor car companies under GM's North American Car and Truck Operations with individual design, marketing, and manufacturing responsibilities, including engine production. In 1984, GM consolidated its engine manufacturing operations so that the nameplate divisions that existed in 1979 no longer manufactured engines. GM Petition at 6. In 1990, GM further consolidated all of its engine manufacturing operations into a single unit, except that its Saturn division continues to manufacture its own engines. GM Petition at 2. Because GM's nameplate divisions no longer manufacture engines, GM generally is prevented from branding an engine with a division nameplate since Part III of the 1979 order permits a division nameplate to appear on an engine only if the engine was manufactured by that division.⁶

GM maintains that Part III of the order is inequitable and harmful to competition following its reorganization. GM has submitted a market research report prepared by an independent market research organization that suggests that a substantial number of consumers would place a higher value on GM passenger cars if their engines were branded with their division nameplate. Five of GM's competitors, like GM, have separated their engine production organizations from their marketing organizations.⁷ Unlike GM, however, these competitors are able to brand their engines with their division nameplates rather than their manufacturing source to take advantage of any commercial value associated with the division nameplates. Because Part III of the order has become inequitable and harmful to competition, we conclude that GM has made a sufficient showing to warrant reopening the 1979 order and consideration of its requested modification.

⁶ Because the Saturn division manufactures its own engines, it is permitted under Part III to put the Saturn nameplate on its engines.

⁷ These companies and their marketing organizations are Ford (Ford and Lincoln-Mercury), Chrysler (Chrysler-Plymouth, Dodge, and Jeep-Eagle), Toyota (Toyota and Lexus), Nissan (Nissan and Infiniti), and Honda (Honda and Acura).

THE REQUESTED MODIFICATION

GM requests that the Commission revise Part III of the order and add a definition of "nameplate" (a term that did not appear in the original order) to Part I of the order. The modification GM request would permit it to display division nameplates only on those engines that are materially different from engines in new cars displaying all other division nameplates.⁸ The modification would not permit GM to display different division nameplates on identical engines.

In addition, the requested modification would not affect other protections afforded by the order. Part II.A of the order will continue to prohibit GM from displaying a division nameplate on an engine in a manner that misrepresents the manufacturing source of an engine. Part IV of the order also will continue to require GM to notify dealers of any production plans that would result in replacing one engine with a different engine in makes of cars sold by the dealers.

Finally, several provision of the order have already expired. Although GM did not request that the Commission delete these expired provisions, we conclude that elimination of these expired provisions is warranted. Accordingly, the expired provisions will be deleted from the modified order.

It is therefore ordered, That the proceeding is hereby reopened and the order modified to read:

ORDER

I.

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

A. The term "*GM*" shall mean General Motors Corporation, and all of its divisions, its successors, assigns, officers, representatives, agents, and employees, acting directly or through any subsidiary or other device.

B. The term "*franchised GM passenger car dealer*" shall mean any person, partnership, or corporation which is a party to a franchise

⁸ Because it is possible that consumers would place a higher value on a GM automobile with a division nameplate on the engine because they assume that its engine is materially different from the engines sold by the other GM nameplate divisions, the modification would permit GM to display a division nameplate on an engine only if it is materially different from engines with other nameplates.

agreement with GM to purchase new GM passenger cars for resale to purchasers.

C. The term "*manufacturing source*" shall mean the GM division or entity by which the item referred to was produced.

D. The term "*line*" shall mean each make and model of passenger car manufactured by General Motors Corporation and distributed or sold under the Chevrolet, Pontiac, Buick, Oldsmobile or Cadillac name.

E. The term "*engine option*" shall mean any engine designated by a GM ordering code number (including the standard engine) offered by GM as factory-installed equipment. For purposes of this order, each engine option shall be assigned a single, unique ordering code designation for a given model year which does not vary across division lines.

F. The term "*material difference*" shall mean any difference which results in a significant difference in engine performance, including but not limited to any difference in Environmental Protection Agency ("EPA") fuel economy ratings, mileage intervals in excess of 1,000 miles for recommended engine maintenance, horsepower and displacement, or which results in a difference or regular maintenance replacement parts.

G. The term "*substituted engine*" shall mean an engine option installed in any GM line in any area of the country as a replacement for an engine option offered for that line in the same model year, but which is unavailable in such line or area, if the replacement engine option:

(1) Is produced by a division other than that which produced the engine option to be replaced; or

(2) Has any "material difference" from the engine option to be replaced.

H. The term "*option*" shall mean an item of equipment to be installed in a new GM passenger car for which GM provides purchasers a choice of alternatives.

I. The term "*purchaser*" shall mean a potential buyer, potential lessee, buyer and lessee of any new GM passenger car, but shall not include a franchised GM passenger car dealer.

J. The term "*nameplate*" shall mean the name of the franchise identity through which new passenger cars are sold by GM, such as

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"Cadillac," "Buick," "Oldsmobile," "Pontiac," "Chevrolet," or "Saturn."

II.

It is hereby ordered, That GM is prohibited from misrepresenting as of the time the representation is made by GM:

- A. The manufacturing source of any engine option; and
- B. That an option or item of standard equipment offered for a new GM passenger car is available if in fact it is not.

III.

It is further ordered, That GM is prohibited from displaying a passenger car's nameplate on any engine or visible attachment to the engine unless such engine is materially different from engines in new GM cars sold under all other nameplates.

IV.

It is further ordered, That if:

- A. GM furnishes or has furnished, during or in preparation for any model year, any information to any franchised GM passenger car dealers regarding any engine offered for any GM line for any model year, and
- B. The engine described in the information provided to such dealers is to be or has been replaced by a substitute engine for that model year,

GM shall notify such dealers in writing, with respect to the affected lines handled by them, forthwith after the decision to substitute has been made. Such written notification shall include the lines in which the substituted engine is offered, its manufacturing source, ordering code number, designation used in the vehicle identification number to identify the type of engine option, and any material differences between the substituted engine and the engine to be replaced.

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V.

(Expired)

VI.

(Expired)

VII.

(Expired)

VIII.

It is further ordered, That GM shall make available, subject to *force majeure*, labor disruptions, and other causes outside GM's control, replacement parts and repair and maintenance information to franchised GM passenger car dealers adequate to allow such dealers to provide GM warranty service to purchasers of new GM passenger cars equipped with any substituted engine to the same extent as it does in the case of new GM passenger cars equipped with non-substituted engines.

IX.

It is further ordered, That this order shall be limited in its application to sales of new GM passenger cars in the United States and its territories.

X.

It is further ordered, That:

A. GM is prohibited from utilizing a wholesale ordering system whereby its franchised GM passenger car dealers may not designate the specific options, other than standard equipment, requested by the purchaser. GM shall notify its dealers in writing that purchasers should be given the opportunity to designate the specific options ordered. Provided, that GM shall indicate when an option is required to be paired with another specific option.

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B. (Expired)

C. (Expired)

XI.

It is further ordered, That:

A. GM 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.

B. (Expired)

Complaint

120 F.T.C.

IN THE MATTER OF

BLENHEIM EXPOSITIONS, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3633. Complaint, Dec. 22, 1995--Decision, Dec. 22, 1995*

This consent order prohibits, among other things, a Florida-based company, that produces franchise trade shows and expositions, from misrepresenting the sales, income or profits, or the success rate of franchise owners, unless it possesses and relies upon competent and reliable scientific evidence to support the claims. In addition, the respondent is prohibited from misrepresenting the validity, results, contents, conclusions, or interpretations of any survey, test, poll or study.

Appearances

For the Commission: *Thomas Cohn, Eileen Harrington and Joan Bernstein.*

For the respondent: *Elaine Johnston, White & Case, New York, N.Y.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. 41 *et seq.* ("FTC Act"), and by virtue of the authority vested in it by said Act, the Federal Trade Commission ("FTC" or "Commission"), having reason to believe that Blenheim Expositions, Inc., a corporation, ("respondent"), has violated certain 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 as follows:

PARAGRAPH 1. Respondent Blenheim Expositions, Inc. is a Florida corporation with its office and principal place of business at 1133 Louisiana Avenue, Suite 210, Winter Park, Florida.

PAR. 2. At all times relevant to this complaint, respondent has maintained a substantial course of business, including the acts and practices set forth herein, in or affecting commerce, as "commerce" is defined in Section 4 of the FTC Act, 15 U.S.C. 44.

PAR. 3. Respondent has advertised, promoted, marketed, or conducted franchise shows throughout the United States to promote the sale of franchises and business opportunities to consumers.

PAR. 4. Respondent has disseminated or has caused to be disseminated advertisements for franchise shows, including but not necessarily limited to the advertisements attached as Exhibits A, B and C. These advertisements contain the following statements:

A. "If you buy a franchise business, your chances of success are 94%! That's a fact, according to a recent Gallup Poll, which found that 94% of the 994 franchise owners polled considered their businesses successful." (Exhibit A, ad #1)

B. "The poll also found that the average pre-tax income among franchise owners is \$124,290!" (Exhibit A, ad #1)

C. "[A]ccording to a recent Gallup Poll, 94% of franchise owners are successful, averaging \$124,290 in pre-tax profits . . . !" (Exhibit A, ad #2)

D. "According to a recent Gallup Poll, 94% of franchise owners are successful, averaging \$124,290 in pre-tax income . . . !" (Exhibit A, ad #3)

E. "A recent Gallup Poll revealed that 94% of franchise owners are successful, that average pre-tax income is \$124,290 . . . !" (Exhibit A, ad #4)

F. "If You Go Into Business For Yourself, Your Chances of Success are 94% or 35%! WHICH WILL YOU CHOOSE? If you buy a Franchise Business, your chances of success are 94%! THAT'S A FACT, according to a recent Gallup poll. Conversely, it's estimated that only 35% of independent business start-ups survive 5 years." (Exhibit A, ad #5)

G. "The 1991 Gallup Poll revealed an average pre-tax income among Franchises of \$124,290" (Exhibit A, ad #5)

H. "A recent Gallup Poll showed that 94 percent of franchise owners are successful, with an average pre-tax profit of \$124,290!" (Exhibit A, ad #6)

I. "A recent independent survey showed that franchise owners enjoy an incredible 94 percent success rate and an average income of more than 124 thousand dollars." (Exhibit B; television advertisement)

J. "A recent poll of 994 franchise owners showed a 94% success rate and an average pre-tax income of over a hundred and twenty four thousand dollars." (Exhibit C; radio advertisement)

A copy of the Gallup Poll referred to above is attached hereto and incorporated herein as Exhibit D.

PAR. 5. Through the use of the statements contained in the advertisements for franchise shows referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits A, B and C, respondent has represented, directly or by implication, that:

- A. Franchise owners earn an average income and/or average pre-tax income of more than \$124,000;
- B. Franchise owners earn an average pre-tax income and/or average pre-tax profit of \$124,290;
- C. A prospective franchise owner's chances of success are 94%;
- D. Franchise owners enjoy a 94% success rate;
- E. Representations A through D were proved by a Gallup Poll of franchise owners conducted in 1991.

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-C, respondent has represented, directly or by implication, that at the time it made representations A through D 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 representations A through D 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. In truth and in fact, the Gallup Poll of franchise owners conducted in 1991 does not prove representations A through D in paragraph five, for reasons including but not limited to the following:

- A. The poll participants were asked to report their annual gross income before taxes, and were not asked to deduct business expenses;
- B. The poll participants were drawn exclusively from a list of current franchise owners, and no former franchise owners were polled; and
- C. The poll included a disproportionate number of owners of multiple franchise locations.

Therefore, representation E in paragraph five 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, 15 U.S.C. 45(a).

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Complaint

EXHIBIT A

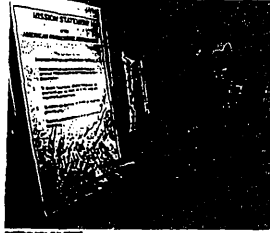
Empire Drive, Florence, Ky. 41042; 1-800-842-3636. Ask for ISBN No. 0538073217.

A book aimed at emerging and existing franchisors is *The Franchising Handbook* (AMACOM), edited by Andrew J.

Services For Veterans
VetFran is a nonprofit group that puts military personnel and veterans in touch with franchisors. Contact Charlie Wood, P.O. Box 3146, Waco, Texas 76707; (817) 753-4555.

Growth Assistance (MEGA) Center and presented by WIF

Spec



Founder Susan Kerios of the new American Franchise Association.

Seminars For Women And Minorities
Women in Franchising (WIF) conducts several seminars aimed at introducing women and minorities to franchising. Scheduled seminars are:

■ April 24: Washington, D.C. This all-day franchise-orientation seminar, presented by WIF and sponsored by the U.S. Minority Business Development Agency, is aimed at minority-group members. It is free and will be held at the Washington, D.C., Convention Center. All participants will receive tickets to the International Franchise Expo (see the list at right). Call 1-800-222-4943.

■ May 15: Chicago. The Illinois Franchise Task Force sponsors a workshop presented by WIF at the O'Hare Holiday Inn; \$45 per person. For more information, call 1-800-222-4943.

■ May 1: Chicago. This is a three-hour introductory seminar on franchising sponsored by the Minority Enterprise

Sherman. Priced at \$75, this resource book is a collaborative effort by leading franchise authorities on a wide range of topics. To order, contact AMACOM, 135 West 50th St., New York, N.Y. 10020.

International Franchise Expo (see the list at right).
■ June 26-27: Philadelphia
■ July 31-Aug. 1: Dallas
■ Aug. 14-15: San Francisco
■ Sept. 11-12: Chicago
■ Oct. 30-31: Atlanta
For more information, contact Blenheim International Franchise Expos, Inc., 1133 Louisiana Ave., Suite 210, Winter Park, Fla. 32789; (407) 647-8521.

A

It's Not A Question of LUCK!

Starting a SUCCESSFUL Business of Your Own Isn't Just A Question of LUCK!

If you buy a franchise business, your chances of success are 94%! That's a fact, according to a recent Gallup Poll, which found that 94% of the 994 franchise owners polled considered their businesses successful. The poll also found that the average pre-tax income among franchise owners is \$124,290! There are almost 3,000 opportunities to choose from in over 60 different industries, and you don't need any prior experience! Start-up costs begin at well below \$10,000, and some can even be run from home!

Think of it as buying the job of your choice, AND being the boss!

So if you'd like to receive free, no-obligation information about franchising, franchise opportunities, and the world's largest franchise expo, call:

1-800-IFE-INFO



AM = Z

EXHIBIT A

Could This Be You? ²



"I never thought about franchising when I came across FLOOR COVERINGS INTERNATIONAL as a tradesman. But one thing led to another and I invested \$13,500 in an FCI franchise. Business is fantastic and the corporate backup is absolutely outstanding. I only wish I'd done it sooner!"
 - Bill Wellings
 Franchisee,
 FLOOR COVERINGS INTERNATIONAL

"Being a single parent, I was excited about making money while helping children at the same time. Now I own my own business with a good income and the opportunity to be home for my children. My investment of time and money has been very profitable - right now I'm preparing to buy my second PRE-FTT franchise with a portion of the profits from my first!"
 - Donna Hendricks
 Franchisee, PRE-FTT

"My orthodontic practice doesn't allow me the time for hands-on involvement with another business. I wanted a quality investment opportunity that wasn't excessively risky, with better returns than 'no-risk' options. Investing in DENNY'S Restaurants franchise has given me the best of both worlds. I couldn't have made a better decision."
 - Dr. Edwin Cranshaw
 Franchisee,
 DENNY'S RESTAURANTS

"John and I shared a consuming desire to own our own business and nurture it into a highly successful operation. TUTOR TIME had developed a unique concept into a complete system, using transferable skills thoroughly taught to their franchisees. Our decision to own a TUTOR TIME franchise was a choice made with confidence."
 - Lori Lacy
 Franchisee,
 TUTOR TIME

"I exercised my IBM early retirement option and my wife insisted that I go to the Franchise Expo. I never intended to buy a franchise. I didn't want to go to the Expo and I didn't want to be in the printing business. Now I'm in business for myself with a FRANKLIN'S PRINTING franchise. It was the best move I could have made!"
 - Joe Brewer
 Franchisee,
 FRANKLIN'S PRINTING

Whatever your reasons for wanting a successful business of your own, take a close look at the franchise option:

- Almost 3,000 separate franchise opportunities to choose from -
- Only a handful require any previous experience -
- 70 different industry sectors -
- Start-up costs from under \$10,000 to \$1 million plus -

Many independent business start-ups fail because of obstacles that could have been avoided. With a franchise, you'll be trained in avoiding those obstacles and in getting maximum potential from your business. AND you'll get ongoing support for as long as you run the business. You'll be in business FOR yourself, but not BY yourself.

And now - according to a recent Gallup Poll, 94% of franchise owners are successful, averaging \$124,290 in pre-tax profits, and 75% would choose the exact same business again!

If you would like to receive a free, no-obligation brochure about franchising and the world's largest franchise expo, featuring over 300 exhibitors and a complete program of free seminars call toll-free (U.S. & Canada Only):

SPONSORED BY

1-800-451-1100

INTERNATIONAL Franchise Expo
 April 27-29, 1998
 Washington, D.C. Convention Center

P.O. Box 1780 - Water Park, PA 17071 - One Stop U.S. Call (412) 682-8895

We're Looking For A Few Good Candidates

Discipline – Leadership – Attitude

The parallels between franchise companies and the military are striking – which is why most veterans are ideal for starting a **SUCCESSFUL** business of their own through franchising.

But don't take our word for it, here are the facts: According to a recent Gallup Poll, 94% of franchise owners are successful, averaging \$124,290 in pre-tax income, and 75% said they'd choose the exact same business again! What's more, there's now financial assistance exclusively for veterans through a new program co-sponsored by the Small Business Administration that makes it possible to start up a franchise with no money down!

With almost 3,000 opportunities to choose from in over 60 different industries, the best career advice may be... **GO INTO BUSINESS FOR YOURSELF, BUT NOT BY YOURSELF.**

To receive a free, no-obligation brochure about franchising and the world's largest franchise expo, featuring over 300 leading franchise chains, call **TOLL-FREE** now:

1-800-IFE-INFO
You're In Demand!

INTERNATIONAL
Franchise
Expo



ILLUSTRATED BY ROBERT FORBES

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EXHIBIT A

Complaint

BLLENHEIM EXPOSITIONS, INC.

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Complaint

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EXHIBIT A

Look at what we'll be telling MILLIONS OF PEOPLE between now and the end of April...

The IFA International Franchise Expo advertising and promotion campaign will impact MILLIONS of people in all 50 states and over 100 countries.

THAT: ... franchise owners are successful that average pre-tax income is \$124,290, and that 75% of franchise owners would choose the exact same franchise again!

THAT: There are almost 3000 franchise opportunities to choose from in almost 70 separate industries!

THAT: Start-up costs range from under \$10,000 to over \$1 million and only a handful require any previous experience!

THAT: There will be more franchise opportunities at the IFA INTERNATIONAL FRANCHISE EXPO in Washington D.C. on April 23-25, 1993 than have ever before been gathered in one place!

THAT: Free information about the Expo is available by calling the International Franchise Expo 800 number hotline!

THE SERIOUS BUYERS WILL BE THERE... WILL YOU?

For a brochure, and up-to-the-minute details on remaining booth space, call: **407/647-8521** ASK FOR: John Jucker, Steven Licking, Richard Brunstman or Tom Porresy

EXHIBIT A

At Kings Island, there are more than 100 coasters, including the fastest, longest, baddest in all coasterdom, the Beast. A suspended roller coaster, Top Gun (based on the hit movie) debuts in April. Not for the faint-of-heart, the roller coaster will feature cars hanging underneath the track rather than riding on top. Her favorite is the monorail ride through Wild Animal Habitat, where lions, tigers, and elephants play and roam freely. More than 54 million visitors have experienced chills and thrill at this park since it opened in 1972.

MORE THRILLS ARE FOUND AT CONEY ISLAND, which features a 200-by-400-foot pool, the world's cleanest, and brightest recirculating swimming facility - plus miniature golf, playgrounds, and children's rides. Kids love Zoom Flume water slide and the ZIPP roller coaster.

Any discussion of Cincinnati is incomplete without a word on food. After all, it is known as the "Eating Capital of the Midwest." A restaurant town, "it's the only stop worth making between New York and San Francisco," says food guru Craig Claiborne. "There's something to suit every whim and every wallet - from the five-star Masonette to five-star chili. Nearly 150 restaurants specialize in the hot stuff, although Gold Star Chili and Skyline are the two big outlets. At Skyline alone, more than 66,000 pounds of beef and 40,000 pounds of mild cheddar cheese a week are used. (And hear the secret mix consists of chocolate and cinnamon.)

Bob Hope's favorite ribs are served at Montgomery Inn's Boathouse on the riverfront and there's also Johnny Bench's Hill of Me Steaks at the Precinct (an old police station). Whatever you do, don't leave without sampling Graeter's ice cream (macaroon, cone, double chocolate dip), which is shipped all over the country.

Savoring Cincinnati... it can become a habit.

Lillie F. Brady is managing editor of Cincinnati Magazine. **A**

**If You Go Into
Business For Yourself
Your Chances of Success
are 94% or 35%!**

WHICH WILL YOU CHOOSE?

If you buy a Franchise Business,
your chances of success are 94%!

THAT'S A FACT according to a recent Gallup Poll.
Conversely, it's estimated that only 35% of
independent business start-ups survive five years.

If you're serious about starting your
own successful business, take a close look
at what owning a Franchise business can offer you.

There are almost 3000 separate opportunities
to choose from, in 70 different industries.

Start-up costs begin as low as \$10,000,
and only a handful require prior experience!

The 1991 Gallup Poll revealed an average
pre-tax income among franchisees of \$124,290,
and that 75% of Franchise owners would
choose the exact same franchise again!

So if you would like to receive a complimentary
no-obligation brochure about Franchise opportunities
and the World's Largest Franchise Expo,

CALL TOLL FREE

1-800-IFE-INFO

Knowledge is Power.

5

Complaint

120 F.T.C.

EXHIBIT A

ADVERTISEMENT

Enclosure C

AD # 6

SUCCESS READER SERVICE

SUCCESS SELECTS SUCCESS SELECTS

LANIER

15. The company with the strongest product guarantee in the industry has now set new standards of excellence with its award-winning copiers. Buviers Laboratory Inc., an independent office products testing firm, has lauded Lanier's comprehensive product line with its "Most Outstanding Copier Line of the Year" award. Lanier has a copier to fit your exact needs. With more than 1,600 locations in 80 countries, Lanier's dedicated service network is

ready to service your business. Call 1-800-832-2679 or circle no. 15.



16. **LifeTrends** – For more information on the half-day diet and/or the LifeTrends opportunity, call 1-800-688-5752 or circle no. 16.

17. **American Leak Detection** – Unique franchise opportunity in electronic leak detection and repair of concealed water and gas leaks. Protected territories still available. Financing available OAC. Circle no. 17.

18. **The Mentor Group Inc.** – Award-winning consultants that specialize in mentoring individuals as well as small corporations. Get the edge! Please call us at 404-936-8060 or circle no. 18.

19. **Styles-on-Video** – Become part of a growing network of independent Styles-on-Video computer imaging consultants/business owners. Proven success, unlimited marketing potential. Circle no. 19.

20. **Computer Associates Textor** – CA – Textor is the friendliest, easiest

word processor you will ever meet. For a limited time, it's just \$99 and *Grammatik* is free! Call 1-800-225-5224 today for a free demo disk or circle no. 20.

SUCCESS SELECTS SUCCESS SELECTS



21. **Blenheim** – The IFA International Franchise Expo ("IFE") is the

world's largest franchise event, featuring hundreds of franchise opportunities. A recent Gallup Poll showed that 94 percent of franchise owners are successful, with an average pre-tax profit of \$124,290! The IFE is a three-day event (Friday to Sunday) April 23 to 25 at the Washington, D.C., Convention Center. Call 1-800-IFE-INFO (407-647-8521 outside U.S. and Canada). Circle no. 21.



FREE CBSI 486 SX Computer

FREE 486 Computer Color Monitor Printer

You can earn \$2,000 to \$10,000 per month from your kitchen table providing needed services for your community. Computer Business Services needs individuals to run a computer from their home. You do not need to own or know how to run a computer. If you purchase our software, we will give you a FREE 486 computer, VGA color monitor, 80 meg hard drive and a printer. If you already have a computer, we will give you a discount. The industrial revolution is over but the service revolution is just starting. Rather than setting up offices all over the U.S., we are showing individuals and couples how to provide our services and letting everyone involved in this service revolution reap the benefits. Our way of training our new service providers and their success rate is the talk of the computer industry. Call or write for a free 3 hour cassette tape and color literature and find out how easy it can be for you to earn money in your spare time and help your community.

Call toll-free: 1-800-343-8014, ext. 48
(in Indiana: 317-758-4415) Fax to: (317) 758-5827 Or Write:

COMPUTER BUSINESS SERVICES, INC., CBSI PLAZA, STE. 48, SHERIDAN, INDIANA 46069

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Complaint

EXHIBIT B

I.F.A. FRANCHISE EXPO SPOT

Taped from CNN Headline News, 3-31-93, 8 o'clock Hour

Audio

Announcer: How would you like to own your own successful business and earn over 124 thousand dollars a year.

Well a recent independent survey showed that franchise owners enjoy an incredible 94 percent success rate and an average income of more than 124 thousand dollars.

There are thousands of franchises to choose from. With start-up costs from less than 10 thousand dollars. And you don't need any previous experience.

If you're serious about running your own business, call this toll free number now to receive a free brochure on franchise opportunities and the world's largest franchise expo.

Video

Super: OWN YOUR OWN BUSINESS? EARN \$124,000+ A YEAR!

Super: Independent Survey 94% Success Rate! Average Income \$124,290! Poll Surveyed 994 Franchise Owners

Super Over Video: Call Now! 1-800-IFE-INFO

Video: People talking to franchisors at booths. Logo's and booths shown of: Subway, Athlete's Foot, Burger King, American Carpet Gallery, Baskin Robbin, Las Vegas Discount Golf and Tennis, Long John Silver

Super: International Franchise Expo (top left screen) IFA Logo (top right screen) APRIL 23, 24, 25, 1993 WASHINGTON, D.C. CONV. CTR. World's Largest Franchise Expo! 1-800-IFE-INFO

Open to the Public

Complaint

120 F.T.C.

EXHIBIT C

Radio ad for International Franchise Expo - 60 secs

ARE YOU READY TO RUN YOUR OWN SUCCESSFUL BUSINESS?
WE'LL GET READY, BECAUSE THE WORLD'S LARGEST FRANCHISE
EXPO IS JUST AROUND THE CORNER.

VISIT THE INTERNATIONAL FRANCHISE EXPO THIS FRIDAY,
SATURDAY AND SUNDAY AT THE WASHINGTON D.C. CONVENTION
CENTER AND FIND OUT HOW THOUSANDS HAVE BECOME
SUCCESSFUL BUSINESS OWNERS, EVEN WITH NO PREVIOUS
EXPERIENCE.

A RECENT POLL OF 994 FRANCHISE OWNERS SHOWED A 94% SUCCESS
RATE AND AN AVERAGE PRE-TAX INCOME OF OVER A HUNDRED AND
TWENTY FOUR THOUSAND DOLLARS.

MCDONALDS, BURGER KING, MINEKE MUFFLERS, DRYCLEN USA AND
HUNDREDS MORE - THIS IS YOUR ONCE-A-YEAR OPPORTUNITY TO
MEET THEM ALL UNDER ONE ROOF AND FIND THE BUSINESS THAT
SUITS YOU.

IF YOU'RE SERIOUS ABOUT BEING IN BUSINESS FOR YOURSELF BUT
NOT BY YOURSELF, CALL ONE, EIGHT HUNDRED, FOUR THREE THREE.
FOUR SIX THREE SIX FOR DETAILS.

THE INTERNATIONAL FRANCHISE EXPO, THIS FRIDAY, SATURDAY
AND SUNDAY AT THE WASHINGTON D.C. CONVENTION CENTER FROM
10AM UNTIL 5PM EACH DAY. CALL ONE EIGHT HUNDRED, FOUR
THREE THREE, FOUR SIX THREE SIX.

DON'T MISS IT - IT MAY HOLD THE KEY TO YOUR FUTURE!

BLENHEIM EXPOSITIONS, INC.

1089

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Complaint

EXHIBIT D

The Gallup Organization, Inc.

PRINCETON, NEW JERSEY

*Association Research Group
300 South 68th Street
Lincoln, Nebraska 68510
(401) 489-8700*

INTERNATIONAL FRANCHISE ASSOCIATION

Washington, D.C.

FRANCHISE BUSINESS OWNER STUDY

January 1992

Prepared by

The Gallup Organization, Inc.
Princeton, New Jersey

Copyright © 1992 International Franchise Association

Complaint

120 F.T.C.

EXHIBIT D

The Gallup Organization, Inc.

PRINCETON, NEW JERSEY

INTERNATIONAL FRANCHISE ASSOCIATION
Washington, D.C.

NATIONAL FRANCHISE OWNER STUDY

Executive Summary

January 1992

Prepared by
The Gallup Organization, Inc.
Princeton, New Jersey**Introduction:**

The Gallup Organization, Inc. of Princeton, New Jersey conducted market research for the International Franchise Association (IFA) of Washington, D.C. The overall purpose of this market research was to determine, among franchise owners, their attitudes and opinions with regard to their franchise-owning experience.

Methodology:

To accomplish the objectives of this study, Gallup interviewed, by telephone, a national sample of 994 franchise owners across the continental United States during November and December 1991.

Stability of Results:

At the 95% level of confidence, the maximum expected error range for a sample of 994 respondents is $\pm 3.1\%$. Stated more simply, if 100 different samples of 994 individuals who were franchise owners in the United States were chosen randomly from a national sample of franchise owners, 95 times out of 100 the results obtained would vary no more than ± 3.1 percentage points from the results that would be obtained if the entire franchise owner population were interviewed.

EXHIBIT D

National Franchise Owner Study

Major Findings:

1. Almost all (94%) of the respondents said that overall, they considered their franchise operation to be either very (47%) or somewhat (47%) successful.
2. More than seven-tenths of the franchise owners said that their franchise operation had either exceeded or met their expectations with regard to both their personal satisfaction in operating the franchise (76%) and their overall satisfaction (73%).
3. The respondents' high ratings of satisfaction and success of their operation did not come without hard work. More than eight-tenths of the owners said their franchise operation had met most of, or exceeded, their expectations with regard to the number of hours they had to work (they had to work more). In fact, a positive correlation existed between the respondents' overall satisfaction with the franchise and their levels of active involvement. The higher the respondents' level of active involvement on a day-to-day basis with the franchise, the higher their level of satisfaction.
4. Three-fourths (75%) of the respondents said that if given the same opportunity (knowing what they know now) they would purchase or invest in this same franchise business again. Respondents who had income of \$50,000 or more were particularly likely to make such a re-investment (81%). Although respondents with higher incomes tended to be more likely to re-invest in the same franchise (if given the same opportunity), it should be noted that the majority of all respondent groups said they

would repeat the investment in the franchise again if given the chance.

5. More than six-tenths (63%) of the owners said they were more satisfied with their franchise than with previous business experiences, while 23% reported the same level of satisfaction.

6. Almost eight-tenths (79%) of the respondents rated their relationship with their franchise or company as being either excellent (39%) or good (40%). Only 6% reported "poor" working relationships.

Gender	
Male	82%
Female	18%
IFA Membership	
Member	71%
Nonmember	29%
Ownership of Franchise Operation	
Sole Owners	63%
Multiple Owners	36%
Years in Business	
Mean	7.4 yrs.
Median	5.0 yrs.
Estimated Gross Income Before Taxes	
Mean	\$124,290.



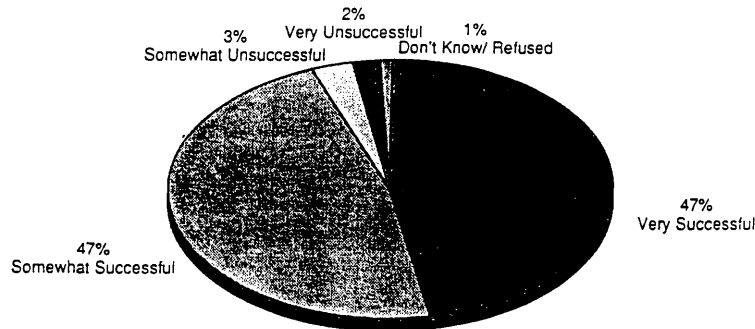
Complaint

120 F.T.C.

EXHIBIT D

Overall Success

"Overall, would you consider your franchise operation to be very successful, somewhat successful, somewhat unsuccessful or very unsuccessful?"
(n=994)



- Almost all (94%) of the respondents said that overall, they considered their franchise operation to be either very (47%) or somewhat (47%) successful. Only one in fifty (2%) said they considered their franchise operation to be very unsuccessful..
- Those respondents who tended to rate their franchise operation overall as being more successful included:
 - respondents with incomes of \$150,000 or more (67%)
 - respondents who had been in business for 11 years or more (57%)

Response	% Total
Less than \$50,000	26%
\$50,000 to less than \$100,000	23%
\$100,000 to less than \$300,000	26%
\$300,000 or more	11%
Don't Know	2%
Refused	12%

• On average, respondents reported their annual gross income, before taxes, as a franchise owner was \$124,290. Approximately one-half of the respondents (48%) reported a gross income under \$100,000, while slightly more than one-third (36%) grossed over \$100,000.

Response	% Total
\$50,000 or less	37%
\$50,001 to \$100,000	19%
\$100,001 to \$300,000	15%
\$300,001 or more	11%
Don't Know	4%
Refused	14%
Mean Cost	\$147,570

• As would be expected, respondents reported a wide variety of amounts of total investment cost that they incurred for their franchise. On average, however, respondents reported investing \$147,570.

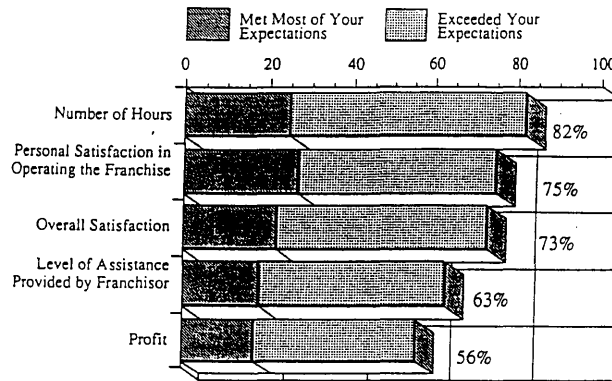


INTERNATIONAL FRANCHISE ASSOCIATION

EXHIBIT D

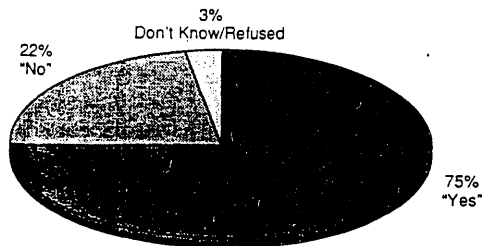
Expectations

Level of Expectations Being Met for Various Aspects of the Franchise



Given Another Chance...

"Knowing what you know now, if given the opportunity, would you purchase or invest in this same franchise business again?"
(n=994)



- Those respondents who tended to be most likely to repeat their franchise investment included:
 - respondents with annual gross incomes of \$50,000 or more (81%)
 - respondents who own two or more franchises (79%)
 - respondents who had been in the business five years or less (77%)



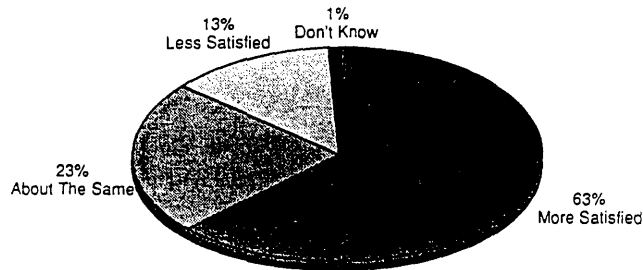
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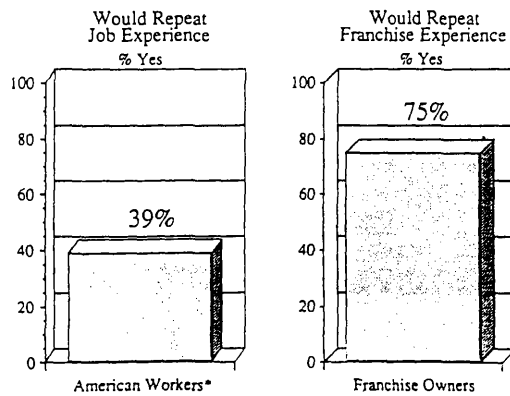
EXHIBIT D

Comparison to Other Businesses/Jobs
 Level of Overall Satisfaction as an Owner of a Franchise
 Compared to Other Businesses Owned/Operated or Jobs Held
 (n=994)



• Relative to other businesses they have owned or operated, or other jobs they have held, a majority of respondents (63%) reported they were more satisfied with the franchise operation. Only slightly more than one-tenth (13%) of the respondents said that previous businesses they had owned or operated or jobs they had held proved to be more satisfying than their current position of owning a franchise.

American Workers/Franchise Owners



* Results are based on a national Gallup poll of n=783 Americans, 18 and older, who held jobs, conducted in July, 1991, with a plus/minus 4% error range.

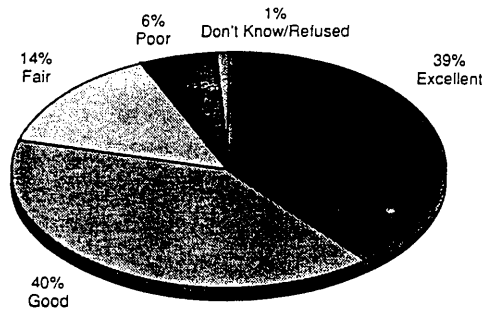


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EXHIBIT D

Relationship With Franchisor

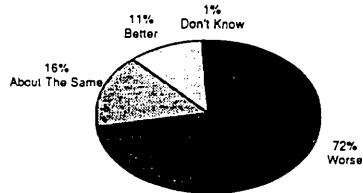
Ratings of Working Relationships with Franchisor Company
(n=994)



Approximately four-fifths (79%) of the respondents rated their relationship with the franchisor company as being either excellent (39%) or good (40%). Only 6% of the respondents rated this relationship as poor.

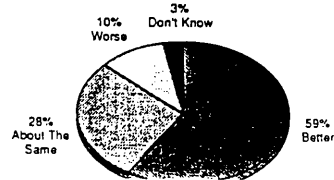
Rating of Economic Conditions

"As a business owner, compared to three years ago, do you think general economic conditions are better, about the same or worse?"
(n=994; % Total)



Looking Ahead

"As a business owner, in the next three years, do you think general economic conditions will be better, about the same or worse?"
(n=994)



For More Information

MPR Department
International Franchise Association
1350 New York Avenue, N.W.
Suite 900
Washington, D.C. 20005-4709
Phone: 202-628-8000
Fax: 202-628-0812

The International Franchise Association, founded in 1960, is the oldest and largest association representing franchisors in the world. IFA serves as a resource center for both current and prospective franchisors and franchisees, as well as government and the media.

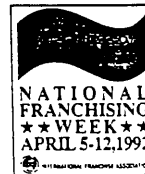


EXHIBIT D

Complete Study

Introduction

The Gallup Organization, Inc. of Princeton, New Jersey conducted market research for the International Franchise Association (IFA) of Washington, D.C. The overall purpose of this market research was to determine franchise owners' attitudes and opinions toward the franchise experience.

Methodology

To accomplish the objectives of this study, Gallup interviewed, by telephone, a national sample of 994 franchise owners across the continental United States during November and December 1991. Gallup utilized a multiple callback methodology in which up to ten callbacks were made in the same telephone number in order to eliminate bias in favor of those franchise owners easy to reach by telephone. Gallup provided experience, professionally trained interviewers under the exclusive employment of Gallup. All interviewers involved in this project were briefed specifically as to the objectives and methodology of the study.

All field work was validated at the 10% level by supervisory callbacks. Telephone interviews were monitored internally as part of the ongoing Gallup process for evaluating interviewers. All completed questionnaires were edited and coded independently as a quality control measure.

Sampling and Weighting Methodologies

The sample of franchise locations used for this survey was based on a two-stage stratified probability design with clustering within units (franchisor systems) drawn at the first stage.

An adequate master list, or "frame" of independent franchise locations did not exist prior to the beginning of this project, at least not in a form that included the relevant business locations and was at the same time practically useful. Available sampling frames were either too inclusive (i.e., Dunn & Bradstreet's business universe of over 7 million U.S. businesses, from which it was impossible to select franchise location directly, and which therefore would have required extensive and costly telephone screening), or incomplete and unacceptably biased from the point of view of representing the universe of franchise locations.

In order to provide a sample of franchise locations that would provide both acceptable coverage of the population and reasonable cost efficiencies, The Gallup Organization hired Documents To Go, a Washington DC-based company to draw the sample for a survey of franchise locations research.

Documents To Go was instructed to draw the sample in two phases. First, Gallup requested a listing of active franchisors, to be as complete and accurate as possible. The completeness and accuracy of this listing was secured, to the degree that it is possible to do so, by the use of cross-checking of whatever sources were available. The requested listing included the names of franchisors and number of active franchise units for each (i.e., a count of the number of active franchise locations that does not include company-owned locations). Documents To Go, in response to that request, compiled a list of 1,723 U.S., franchisors and provided the number of franchise locations in the U.S., according to the sources used for compilation of the list. Gallup divided this list into five size of franchisor system

EXHIBIT D

groupings, or strata, as described in the first column of the table provided below. A random sample of franchisors was selected within each stratum; the sample sizes are provided in the second column of the table.

The second stage of sampling was carried out by Document To Go personnel, who were instructed to draw systematic samples of franchise locations for each of the 500 franchisors selected in stage 1. The number of franchise locations selected within a franchise organization (the "cluster size") was dependent upon the size of the organization; larger samples of franchise locations were drawn from larger organizations, as shown in the table below:

TABLE 1: SAMPLE DESIGN FOR FRANCHISE SURVEY

Size of Franchisor System	Number of Franchisors Selected	Cluster Size
1-2	80	1
3-10	135	2
11-100	150	6
101-1,000	100	20
1,001+	35	50

The sample provided by Documents To Go was used to complete 994 interviews with franchises. The designs used to draw the sample of franchisees requires weighting before it can be used to represent the population of franchisees. The weighting was intended to correct two potential sources of disproportionality; at the franchisor selection stage, and at the franchise location selection stage. First, a weight was appended to each data record to correct for the fact that the probability of selection at the second stage of sampling was not equal across franchisors (i.e., 50 franchise locations were selected whether the franchisor organization contained 1,001 or 3,000 locations). A second, independent adjustment was made to correct for the fact that the probability of selection at the first stage of sampling was not equal across franchisor size strata (i.e., franchisors had the same probability of selection whether their organizations included 101 or 1,000 franchise locations). A final poststratification adjustment was used to ensure conformity between the weighted distribution of franchise locations by size stratum, and the known distribution. The analysis provided in the tabulations and the report are based on the sampling and weighting procedures described above, designed to allow projections to be made from the survey data to the population of franchise owners.

Survey Instrument Development

Items included in the questionnaire were mutually agreed upon by The Gallup Organization and IFA. IFA had responsibility for identifying question areas and information desired. Gallup had responsibility for ensuring that all items that were written were technically correct and without bias.

Stability of Results

At the 95% level of confidence, the maximum expected error range for a sample of 994 respondents is $\pm 3.1\%$. Stated more simply, if 100 different samples

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of 994 individuals who were franchise owners in the United States were chosen randomly from a national sample of franchise owners, 95 times out of 100 the results obtained would vary no more than ± 3.1 percentage points from the results that would be obtained if the entire franchise owner population were interviewed.

Reports Prepared

IFA has been provided a complete set of tabular results by frequency and percentage for each of the major classifications. These tabular result should serve as reference material and be consulted before important decisions are made. This narrative report focuses on what are felt to be the most meaningful findings of this study.

EXHIBIT D

TABLE A
Sample Characteristics
(n=994)

	<u>Percent</u>
<u>Gender</u>	
Male	82%
Female	18
<u>IFA Membership</u>	
Member	71%
Nonmember	29
<u>Ownership of Franchise Operation</u>	
Sole owner	63%
Multiple owners	36

-- The typical franchise owner had the following characteristics:

- male (82%)
- was an IFA member (71%)
- was the sole owner of a franchise (63%)

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EXHIBIT D

"In total, how many years have you been in business as a franchise owner?"

TABLE 1

Number of Years as a Franchise Owner -- in Total

<u>Number of Years</u>	<u>% Total (n=994)</u>	<u>% IFA Membership</u>	
		<u>Member (n=593)</u>	<u>Nonmember (n=401)</u>
Less than 1 year	5%	4%	9%
One	6	6	4
Two	11	10	11
Three	15	17	11
Four	11	9	14
Five	8	9	7
5 years or less (Net)	56%	56%	56%
Six	6	6	7
Seven	3	2	5
Eight	5	5	5
Nine	3	3	4
Ten	3	3	4
6-10 years (Net)	20	18	25
11-15 years (Net)	12	11	13
16-20 years (Net)	6	7	3
21 years or more	6	8	2
Mean (years)	7.4	7.8	6.5
Median (years)	5.0	5.0	5.0

- More than one-half (56%) of the respondents said they had been a franchise owner for five years or less. More than three-fourths (76%) had been in the business as a franchise owner for ten years or less.
- On average, respondents said they had been in the business as a franchise owner for slightly more than seven years (7.4). IFA members (7.8 years) tended to have been members slightly longer than their nonmember (6.5) counterparts.

EXHIBIT D

"In total, how many years have you been in business as a franchise owner for this particular business?"

TABLE 2
Number of Years as a Franchise Owner -
This Particular Business

Number of Years	%	% IFA Membership		
		Total (n=994)	Member (n=593)	Nonmember (n=401)
Less than 1 year	7%			
One	6	6	7	4
Two	12	12	12	12
Three	16	16	17	13
Four	11	11	10	13
Five	8	8	9	7
5 years or less (Net)	60%	60%	60%	59%
Six	6	6	6	7
Seven	4	4	3	6
Eight	4	4	5	4
Nine	3	3	2	4
Ten	3	3	3	4
6-10 years (Net)	21	21	19	26
11-15 years (Net)	10	10	9	13
16-20 years (Net)	4	4	5	2
21 years or more	6	6	8	1
Mean (years)	6.8	6.8	7.1	5.9
Median (years)	4.0	4.0	4.0	4.0

- Six-tenths (60%) of the respondents said they had been franchise owner of a particular business they were being interviewed about for five years or less. Approximately eight-tenths (81%) had been owners of that business for ten years or less.
- On average, respondents had been owners of that particular business for approximately seven (6.8) years.

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EXHIBIT D

"OVERALL, WOULD YOU CONSIDER YOUR FRANCHISE OPERATION
TO BE VERY SUCCESSFUL, SOMEWHAT SUCCESSFUL,
SOMEWHAT UNSUCCESSFUL OR VERY UNSUCCESSFUL?"
(n=994)

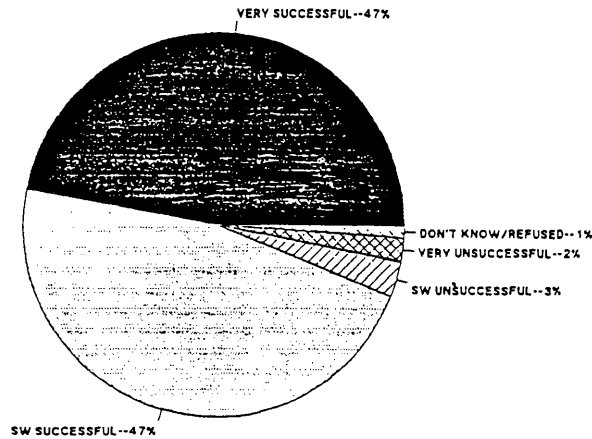


FIGURE 1

-- Almost all (94%) of the respondents said that overall, they considered their franchise operation to be either very (47%) or somewhat (47%) successful. Only one in fifty (2%) said they considered their franchise operation to be very unsuccessful.

EXHIBIT D

"Overall would you consider your franchise operation to be very successful, somewhat successful, somewhat unsuccessful, or very unsuccessful?"

TABLE 3
Overall Success of Franchise -- By respondent Group

	<u>% Very Successful</u>	<u>% Somewhat Successful</u>	<u>% very/Somewhat Successful</u>
Total (n=994)	47%	47%	95%
<u>IFA Membership</u>			
Member (n=593)	50%	44%	95%
Nonmember (n=401)	39	55	94
<u>Years in Business</u>			
5 years or less (n=593)	43%	49%	93%
6-10 years (n=204)	46	51	97
11 years or more (n=197)	57	40	97
<u>Income</u>			
Under \$50,000 (n=271)	21%	52%	88%
\$50,000 to less than \$150,000 (n=347)	52	46	98
\$150,000 or more (n=233)	67	29	96
<u>Number of Franchises Owned</u>			
One only (n=613)	43%	50%	93%
Two or more (n=376)	53	44	97
<u>Number of Owners for this Franchise</u>			
Sole owner (n=662)	49%	46%	96%
Multiple owner (n=329)	44	49	93

-- Those respondents who tended to rate their franchise operation overall as being more successful included:

- respondents with incomes of \$150,000 or more (67%)
- respondents who had been in business for 11 years or more (57%)
- respondents who own two or more franchises (53%)
- IFA member (50% very satisfied)
- respondents who were the sole owner of a franchise (49%)

EXHIBIT D

"How involved are you with your franchise operation? Would you say you are actively involved on a day-to-day basis, moderately involved, but not on a day-to-day basis, rarely involved, or not involved?"

TABLE 4
Level of Involvement in Franchise Operation

Response	% Total (n=994)	Owner satisfaction compared to other jobs, business owned		
		% More Satisfied (n=575)	% Same (n=243)	% Less Satisfied (n=143)
Actively involved	85%	91%	77%	71%
Moderately Involved	11	8	8	15
Rarely involved	3	1	1	7
Not involved	1	0	*	4
Mean**	3.80	3.89	3.69	3.58

* Less than 1% mention

** Actively involved=4, moderately involved=3, rarely involved=2, not involved=1

- Approximately five-sixths (85%) of the respondents said they were actively involved with their franchise on a day-to-day basis. Almost all (96%) of the respondents said they were either actively or moderately involved in their business' day-to-day operations.
- A positive correlation existed between the respondents' overall satisfaction with the franchise and their levels of involvement. The higher the respondents' level of satisfaction with the job the higher their level of involvement on a day-to-day basis.

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EXHIBIT D

"Please tell me if your franchise operation has exceeded your expectations, met most of your expectations, met some of your expectations, or not met your expectations with regard to the following? How about regarding (____)?"

TABLE 5
Level of Expectations Being Met for
Various Aspects of the Franchise
(n=994)

<u>Response</u>	<u>Profit</u>	<u>Number of hours had to work</u>	<u>Level of assistance provided by franchisor</u>	<u>Personal satisfaction in operating the franchise</u>	<u>Overall satis- faction</u>
Exceeded your expectations	17%	25%	18%	27%	22%
Met most of your expectations	39	57	45	48	51
Exceeded/met most of your expectations	55	82	63	76	73
Met some of your expectations	27	12	25	18	20
Did not meet your expectations	16	4	11	6	6
Don't know/refused	2	2	1	1	1
Mean*	2.57	3.06	2.71	2.98	2.90

*5=exceeded your expectations, ... 1=did not meet your expectations

- For all five of the areas tested (profit, number of hours had to work, level of assistance provided by franchisor, personal satisfaction in operating the franchise, overall satisfaction), more than one-half of the respondents said their experiences with their franchise operation had either exceeded or met most of their expectations.
- Respondents particularly felt their expectations had been met or exceeded for the number of hours they had to work (they had to work more than they expected) their personal satisfaction in operating the franchise (76%), and their overall satisfaction with the franchise (73%).

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EXHIBIT D

LEVEL OF EXPECTATIONS BEING MET FOR VARIOUS ASPECTS OF THE FRANCHISE

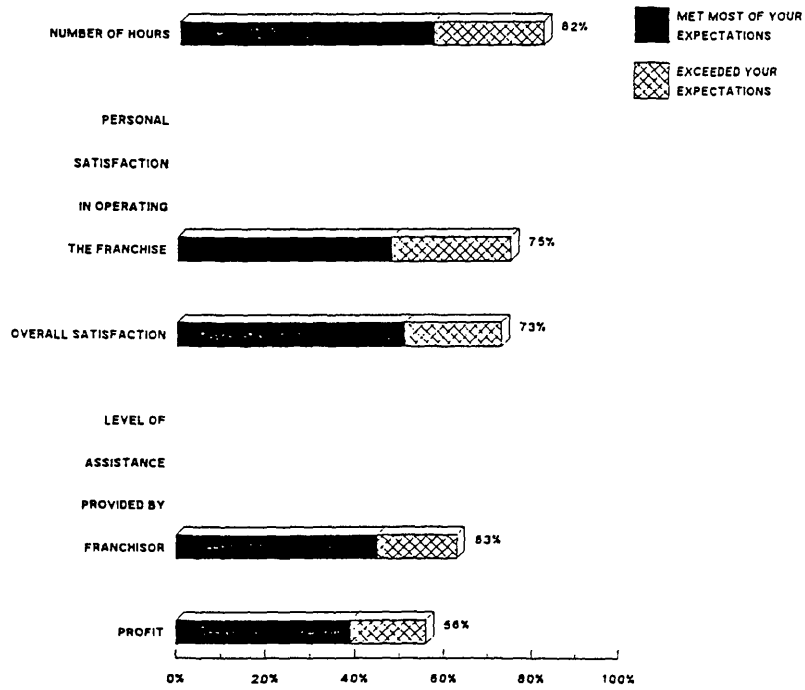


FIGURE 2

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EXHIBIT D

"As the owner of the franchise, would you estimate that your annual gross income, before taxes, is over or under \$100,000?"

TABLE 6
Estimated Annual Gross Income Before Taxes
(n=994)

<u>Response</u>	<u>% Total</u>	<u>% who gave a specific response (excludes don't know/refused)</u>
Less than \$25,000	9%	11%
\$25,000 to less than \$50,000	16	19
Less than \$50,000	26%	30%
\$50,000 to less than \$100,000	23%	27%
\$100,000 to less than \$150,000	12	14
\$150,000 to less than \$200,000	7	9
\$200,000 to less than \$300,000	6	7
\$100,000 to less than \$300,000	26%	30%
\$300,000 or more	11%	13%
Don't know	2	
Refused	12	
Mean	\$124,290	

-- On average, respondents reported their annual gross income, before taxes, as a franchise owner was \$124,290. Approximately one-half of the respondents (48%) reported a gross income under \$100,000, while slightly more than one-third (36%) grossed over \$100,000.

EXHIBIT D

ESTIMATED ANNUAL GROSS INCOME BEFORE TAXES

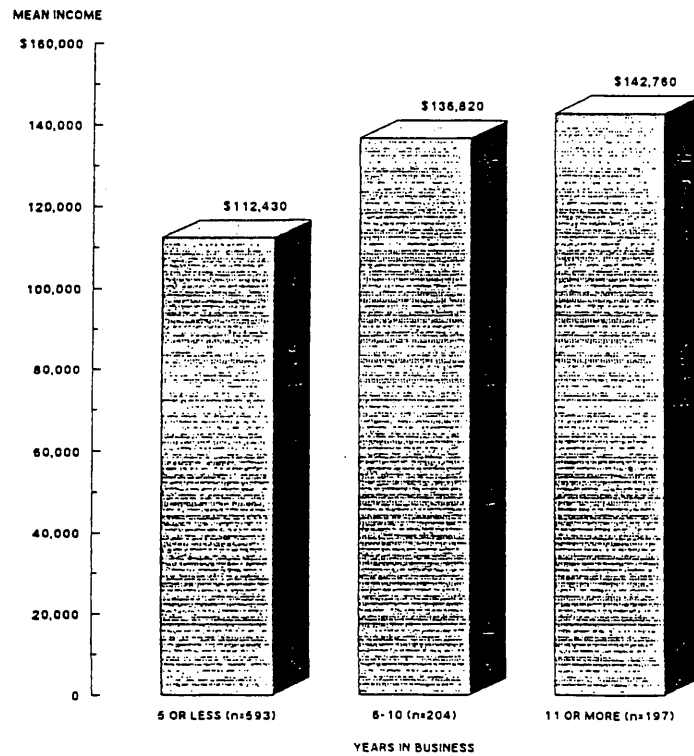


FIGURE 3

- A positive correlation existed between the respondents' number of years in the franchise business and their estimated annual gross income. The longer the respondents had been in business, the higher was their average reported annual gross income. Respondents who owned two or more franchises tended to report higher gross incomes than did their counterparts who owned only a single franchise.

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EXHIBIT D

"KNOWING WHAT YOU KNOW NOW, IF GIVEN THE OPPORTUNITY,
WOULD YOU PURCHASE OR INVEST IN THIS SAME
FRANCHISE BUSINESS AGAIN?"

(n=994)

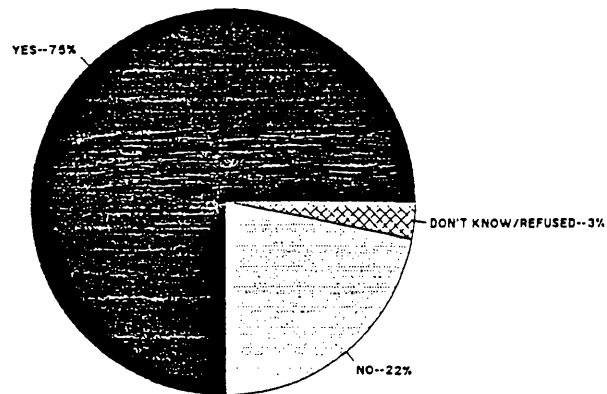


FIGURE 4

- Three-fourths of the respondents (75%) said that knowing what they know now, if given the opportunity, they would purchase or invest in the same franchise business again. Less than one-fourth (22%) indicated they would not repeat such a purchase or investment decision again.

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EXHIBIT D

"Knowing what you know now, if given the opportunity, would you purchase or invest in this same franchise business again?"

TABLE 7
Incidence of Investing in Same Franchise
Business Again -- By Respondent Group

	<u>% Yes</u>
Total (n=994)	75%
<u>IFA Membership</u>	
Member (n=593)	75%
Nonmember (n=401)	76
<u>Years in Business</u>	
5 years or less (n=593)	77%
6-10 years (n=204)	76
11 years or more (n=197)	72
<u>Income</u>	
Under \$50,000 (n=271)	63%
\$50,000 to less than \$150,000 (n=347)	81
\$150,000 or more (n=233)	81
<u>Number of Franchises Owned</u>	
One only (n=613)	72%
Two or more (n=376)	79
<u>Number of Owners for this Franchise</u>	
Sole owner (n=662)	76%
Multiple owners (n=329)	74

-- Those respondents who tended to be most likely to repeat their franchise investment included:

- respondents with annual gross incomes of \$50,000 or more (81%)
- respondents who own two or more franchises (79%)
- respondents who had been in the business five years or less (77%)

-- It should be noted that the majority of all respondents said they would repeat the investment in the franchise again if given the chance.

EXHIBIT D

"When you first purchased or invested in this franchise operation, what was the total investment cost, including franchise fees and any additional expenses that you incurred?"

TABLE 8
Estimated Total Investment Cost, Including
Franchise Fees and any Additional Expenses
That Were Incurred
(n=994)

<u>Response</u>	<u>% Total</u>	<u>% of those who gave a specific answer (excludes don't know/refused)</u>
\$10,000 or less	8%	10%
\$10,001-\$20,000	8	10
\$20,001-\$30,000	7	9
\$30,001-\$40,000	6	7
\$40,001-\$50,000	7	9
\$50,000 or less	37%	45%
\$50,001-\$60,000	2	3
\$60,001-\$70,000	2	2
\$70,001-\$80,000	7	8
\$80,001-\$90,000	2	2
\$90,001-\$100,000	7	8
\$50,001 to \$100,000	19%	23%
\$100,001-\$200,000	9	12
\$200,001-\$300,000	5	6
\$100,001-\$300,000	15%	18%
\$300,001-\$400,000	3	4
\$400,001-\$500,000	1	2
\$500,001 or more	6	7
300,001 or more	11%	13%
Don't know	4	-
Refused	14	-
Mean		\$147,570

-- As would be expected, respondents reported a wide variety of amounts of total investment cost that they incurred for their franchise. On average, however, respondents reported investing \$147,570.

EXHIBIT D

"Considering other businesses that you have owned and operated, or other jobs that you have held, would you say that you have worked more hours, about the same amount of hours, or less hours as the owner of this franchise?"

TABLE 9
 Number of Hours Worked as Owner of
 Franchise Compared to Other Businesses
 Owned/Operated or Jobs Held

	% Total (n=994)	% IFA Membership	
		Member (n=593)	Nonmember (n=401)
More hours	51%	51%	52%
About the same	30	31	28
Less hours	15	15	13
Not applicable/no other job/business	3	3	4
Net (more hours minus less hours)	37%	36%	39%

-- Compared to other businesses they have owned or operated or other jobs they have held, respondents tended to report they were working more hours (51%) as owner of the franchise operation. This was particularly true of respondents who owned multiple franchises. Fifty-seven percent (57%) of these respondents said they worked more hours than they did compare to their previous work history.

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EXHIBIT D

"Relative to other businesses that you have owned or operated, or other jobs you have held, would you say you are more satisfied, have about the same level of satisfaction, or are less satisfied overall with being the owner of this franchise?"

TABLE 10
Level of Overall Satisfaction as Owner of
Franchise Compared to Other business
Owned/Operated of Jobs Held

<u>Response</u>	<u>% Total</u> <u>(n=994)</u>	<u>% IFA Membership</u>	
		<u>Member</u> <u>(n=593)</u>	<u>Nonmember</u> <u>(n=401)</u>
More satisfied	63%	65%	58%
About the same level	23	20	28
Less satisfied	13	14	13
Don't know	1	1	1
Net (more satisfied minus less satisfied)	49%	51%	44%

- Relative to other businesses they have owned or operated, or other jobs they have held, a majority of respondents (63%) reported they were more satisfied with the franchise operation. Only slightly more than one-tenth (13%) of the respondents said that previous businesses they had owned or operated or jobs they had held proved to be more satisfying than their current position of owning a franchise.

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LEVEL OF OVERALL SATISFACTION AS OWNER OF FRANCHISE
COMPARED TO OTHER BUSINESSES OWNED/OPERATED
OR JOBS HELD
(n=994)

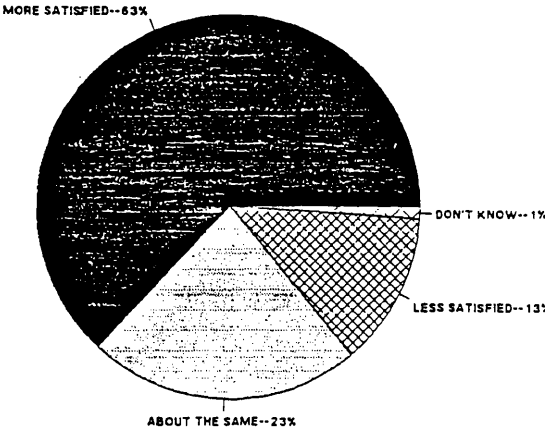


FIGURE 5

EXHIBIT D

"Would you rate your working relationship with the franchisor company as being excellent, good, fair or poor?"

TABLE 11
Ratings of Working Relationships
With Franchisor Company

<u>Response</u>	<u>% Total</u> <u>(n=994)</u>	<u>% IFA Membership</u>	
		<u>Member</u> <u>(n=593)</u>	<u>Nonmember</u> <u>(n=401)</u>
Excellent	39%	38%	43%
Good	40	40	40
Fair	14	15	12
Poor	6	7	6
Mean*	3.13	3.10	3.20

- Approximately four-fifths (79%) of the respondents rated their relationship with the franchisor company as being either excellent (39%) or good (40%). Only 6% of the respondents rated their relationship as poor.

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EXHIBIT D

RATINGS OF WORKING RELATIONSHIPS
WITH FRANCHISOR COMPANY
(n=994)

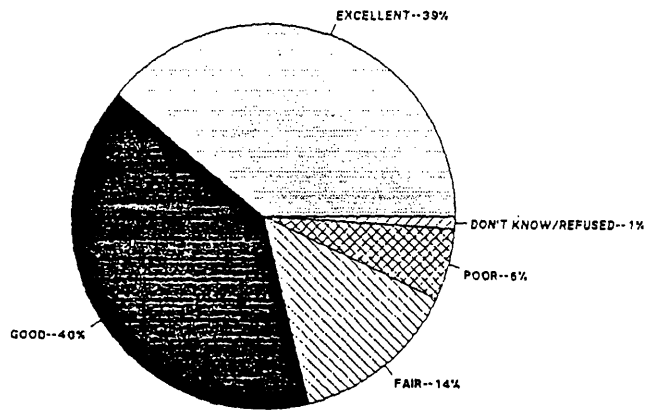


FIGURE 6

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EXHIBIT D

"AS A BUSINESS OWNER, COMPARED TO THREE YEARS AGO,
DO YOU THINK GENERAL ECONOMIC CONDITIONS ARE
BETTER, ABOUT THE SAME OR WORSE?"
(n=994; % TOTAL)

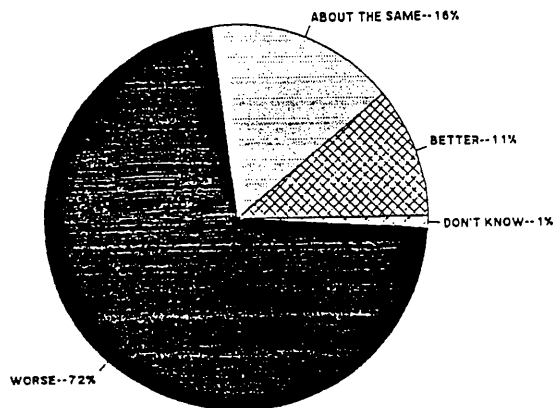


FIGURE 7

- More than seven-tenths (72%) of the respondents said that compared to three years ago, they felt the general economic conditions were worse now. Only one-tenth (11%) considered economic conditions better than they were three years ago for business owners.

EXHIBIT D

"AS A BUSINESS OWNER, IN THE NEXT THREE YEARS,
DO YOU THINK GENERAL ECONOMIC CONDITIONS WILL BE
BETTER, ABOUT THE SAME OR WORSE?"

(n=994)

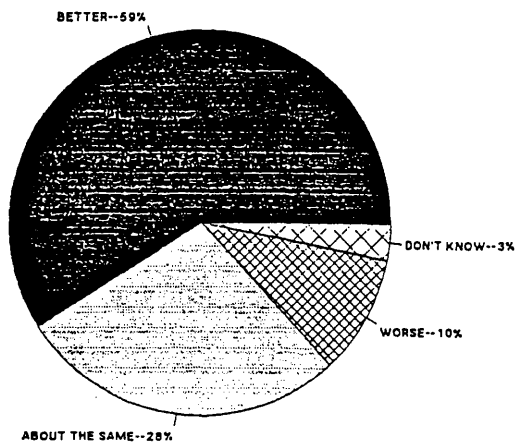


FIGURE 8

-- Although respondents considered economic conditions to be worse over the last three years, as business owners in the next three years, the majority (59%) believed that general economic conditions will be better.

EXHIBIT D

"How many total franchises do you own or have investments in?"

TABLE 12
Number of Franchises Own or Invest In

<u>Response</u>	<u>% Total</u> <u>(n=994)</u>	<u>% IFA Membership</u>	
		<u>Member</u> <u>(n=593)</u>	<u>Nonmember</u> <u>(n=401)</u>
One	54%	51%	62%
Two	17	17	17
Three	12	14	7
Four	3	4	2
Five	4	4	4
Six or more	10	9	8
Mean	2.96	2.89	3.13
Median	1.00	1.00	1.00

-- Although a majority of respondents (54%) reported they owned only one franchise, on average, respondents reported owning or investing in three (2.96) franchises.

Complaint

120 F.T.C.

EXHIBIT D

(Ask for name on card or owner)

Hello, this is _____ with The Gallup Organization in Lincoln, Nebraska. Today, we are conducting a very brief study with franchise owners across the United States regarding their experiences with franchises.

1. In total, how many years have you been in business as a franchise owner? (Open ended and code actual number of years)
- | | | | | |
|----|------------------|----|-----------|-------------------|
| 96 | 96+ | 98 | (DK) | |
| 97 | Less than 1 year | 99 | (Refused) | |
| | | | | 1.10 |
| | | | | <hr/> (412) (413) |
2. In total, how many years have you been in business as a franchise owner for this particular business? (Open ended and code actual number of years)
- | | | | | |
|----|------------------|----|-----------|-------------------|
| 96 | 96+ | 98 | (DK) | |
| 97 | Less than 1 year | 99 | (Refused) | |
| | | | | 2.10 |
| | | | | <hr/> (414) (415) |
3. Overall, would you consider your franchise operation to be very successful, somewhat successful, somewhat unsuccessful, or very unsuccessful?
- | | | | | |
|---|-----------------------|--|--|---------------|
| 1 | Very successful | | | |
| 2 | Somewhat successful | | | |
| 3 | Somewhat unsuccessful | | | |
| 4 | Very unsuccessful | | | |
| 5 | (DK) | | | |
| 6 | (Refused) | | | <hr/> 3 (416) |
4. How involved are you with your franchise operation? Would you say you are actively involved on a day-to-day basis, moderately involved, but not on a day-to-day basis, rarely involved, or not involved?
- | | | | | |
|---|---------------------|--|--|---------------|
| 1 | Actively involved | | | |
| 2 | Moderately involved | | | |
| 3 | Rarely involved | | | |
| 4 | Not involved | | | |
| 5 | (DK) | | | |
| 6 | (Refused) | | | <hr/> 4 (417) |

EXHIBIT D

5. Please tell me if your franchise operation has exceeded (E) your expectations, met most (MM) of your expectations, met some (MS) of your expectations, or not met (NM) your expectations with regard to the following? How about regarding (read and rotate A-E)?

	<u>E</u>	<u>MM</u>	<u>MS</u>	<u>NM</u>	<u>(DK)</u>	<u>(RF)</u>	
A. Profit	1	2	3	4	5	6	<u>5.10</u> (418)
B. The number of hours you have had to work with your franchise operation	1	2	3	4	5	6	<u>5.20</u> (419)
C. The level of assistance provided by your franchisor	1	2	3	4	5	6	<u>5.30</u> (420)
D. Personal satisfaction in operating the franchise	1	2	3	4	5	6	<u>5.40</u> (421)
E. Overall satisfaction	1	2	3	4	5	6	<u>5.50</u> (422)

6. As the owner of the franchise, would you estimate that your annual gross income, before taxes, is over or under \$100,000?

- (If "Under", ask:) Is it over or under \$50,000
- (If "Under", ask:) Is it over or under \$25,000
- (If "Over", ask:) Is it over or under \$150,000?
- (If "Over", ask:) Is it over or under \$200,000?
- (If "Over", ask:) Is it over or under \$300,000?

1	Less than \$25,000	
2	\$25,000 to \$49,999	
3	\$50,000 to \$99,999	
4	\$100,000 to \$149,999	
5	\$150,000 to \$199,999	
6	\$200,000 to \$299,999	
7	\$300,000 or more	
8	(DK)	
9	(Refused)	<u>6</u> (53)

7. Knowing what you know now, if given the opportunity, would you purchase or invest in this same franchise business again?

1	2	3	4	
Yes	No	(DK)	(RF)	<u>7</u> (423)

8. When you first purchased or invested in this franchise operation, what was the total investment cost, including franchise fees and any additional expenses that you incurred? (Open ended and code actual amount) (NOTE: If "unsure", probe for approximation) (NOTE TO INTERVIEWER: You MUST enter ALL 6 digits)

- 999997 \$999,997+
- 999998 (DK)
- 999999 (Refused)

8.10

(424) (425) (426) (427) (428) (429)

Complaint

120 F.T.C.

EXHIBIT D

9. Considering other businesses that you have owned and operated, or other jobs that you have held, would you say that you have worked more hours, about the same amount of hours, or less hours as the owner of this franchise?
- | | | | |
|---|---|---|---------------------------|
| 1 | More hours | | |
| 2 | About the same |) | (Continue) |
| 3 | Less hours | | |
| 4 | (NA/No other job or business) - (Skip to #11) | | |
| 5 | (DK) | | |
| 6 | (Refused) |) | (Continue) <u>9</u> (430) |
10. (If codes "1-3", "5" or "6" in #9, ask) Relative to other businesses that you have owned or operated, or other jobs you have held, would you say you are more satisfied, have about the same level of satisfaction, or are less satisfied overall with being the owner of this franchise?
- | | | | |
|---|--------------------------------------|--|-----------------|
| 1 | More satisfied | | |
| 2 | About the same level of satisfaction | | |
| 3 | Less satisfied | | |
| 4 | (DK) | | |
| 5 | (Refused) | | <u>10</u> (431) |
11. Would you rate your working relationship with the franchisor company as being excellent, good, fair, or poor?
- | | | | |
|---|-----------|---|-----------------|
| 1 | Excellent | 4 | Poor |
| 2 | Good | 5 | (DK) |
| 3 | Fair | 6 | (Refused) |
| | | | <u>11</u> (432) |
12. As a business owner, compared to three years ago, do you think general economic conditions are better, about the same, or worse?
- | | | | |
|---|----------------|---|-----------------|
| 1 | Better | 4 | (DK) |
| 2 | About the same | 5 | (Refused) |
| 3 | Worse | | |
| | | | <u>12</u> (433) |
13. As a business owner, in the next three years, do you think general economic conditions will be better, about the same, or worse?
- | | | | |
|---|----------------|---|-----------------|
| 1 | Better | 4 | (DK) |
| 2 | About the same | 5 | (Refused) |
| 3 | Worse | | |
| | | | <u>13</u> (434) |
14. How many total franchises do you own or have investments in? (Open ended and code actual number)
- | | | | |
|----|-----------|--|--------------|
| 97 | 97+ | | |
| 98 | (DK) | | |
| 99 | (Refused) | | |
| | | | <u>14.10</u> |
| | | | (435) (436) |

1078

Complaint

EXHIBIT D

15. Are you the sole owner of this franchise operation, or are there multiple owners?

1	Sole owner	3	(DK)	
2	Multiple owners	4	(Refused)	15 (437)

(VALIDATE PHONE NUMBER AND THANK RESPONDENT)

(NOTE TO INTERVIEWER: You will have demos to code when you hand up!)

INTERVIEWER I.D.#
(241) (242) (243) (244)

vkt\assoc\ifa.111

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 Blenheim Expositions, 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 1133 Louisiana Avenue, Suite 210, Winter Park, 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

I.

It is ordered, That respondent, Blenheim Expositions, Inc., a corporation, its successors and assigns, and its officers; and respondent's agents, representatives and employees, directly or through any corporation, subsidiary, affiliate, division or other device, in connection with the advertising, promotion, or marketing of franchise shows 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, purpose, sample, contents, validity, results, conclusions or interpretations of any survey, poll, test, report or study.

II.

It is further ordered, That respondent, Blenheim Expositions, Inc., a corporation, its successors and assigns, and its officers; and respondent's agents, representatives and employees, directly or through any corporation, subsidiary, affiliate, division or other device, in connection with the advertising, promotion, marketing, or conducting of franchise shows 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:

A. The sales, income, or profits that current or prospective franchise owners have earned or can or will earn; or

B. The chances of success or success rates that franchise owners have enjoyed or can or will enjoy,

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 the representation. For purposes of this order, "competent and reliable scientific evidence" shall mean analyses, research, surveys, polls, reports, 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.

III.

It is further ordered, That respondent, Blenheim Expositions, Inc., a corporation, its successors and assigns, and its officers, for a period of five (5) years after the date of entry of this order, shall distribute, at each franchise show it promotes, directly or through any corporation, subsidiary, affiliate, division or other device, to at least 500 persons attending such show, or to each person attending such show if the total number of such persons is fewer than 500, a brochure entitled, "A Consumer Guide To Buying A Franchise," provided to the respondent by the Federal Trade Commission. The Commission shall provide to the respondent one camera-ready copy of the brochure, and the respondent is responsible for the printing, and printing costs, of the brochure for distribution at the franchise shows. The brochures distributed by respondent pursuant to this paragraph shall be reproduced in a format substantially similar to the original format, as provided by the Federal Trade Commission; provided, however, that reproduction in a black and white format shall be deemed substantially similar to the original for purposes of this paragraph. Respondent may revise the text of said brochure or substitute another similar document only after submitting said revision or substitution to staff of the Commission, and receiving written approval thereof.

IV.

It is further ordered, That respondent, Blenheim Expositions, Inc., a corporation, its successors and assigns, and its officers, shall:

A. For a period of five (5) years after the date of the last dissemination by or on behalf of the respondent of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission or its staff for inspection and copying:

1. All advertisements and promotional materials setting forth such representation;

2. All polls, surveys, reports, studies, or other documents and materials relied upon by the respondent to substantiate such representation; and

3. All polls, surveys, reports, studies, or other documents and materials (such as correspondence) in the respondent's possession or control that contradict, qualify, or call into question such representation or the basis upon which the respondent relied for such representation;

B. For a period of five (5) years after the date of their creation, maintain and upon request make available to the Federal Trade Commission or its staff for inspection and copying such other documents and materials as shall demonstrate full compliance with this order.

V.

It is further ordered, That, within thirty (30) days after service of this order upon it, respondent, Blenheim Expositions, Inc., its successors and assigns 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 or placement of advertisements, promotional materials, or other such sales materials covered by this order.

VI.

It is further ordered, That respondent, Blenheim Expositions, Inc., its successors and assigns shall notify the Commission at least thirty (30) days prior to any proposed change in said 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 this order will terminate twenty years from the date of its issuance, or twenty years from the most recent date that the United States or the Federal Trade Commission files a

complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

- A. Any paragraph in this order that terminates in less than twenty years;
- B. This order's application to any respondent that is not named as a defendant in such complaint; and
- C. This order if such complaint is filed after the order has terminated pursuant to this paragraph.

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

VIII.

It is further ordered, That respondent, Blenheim Expositions, Inc., 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.

1129

Complaint

IN THE MATTER OF

PHILLIPS PETROLEUM 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-3634. Complaint, Dec. 28, 1995--Decision, Dec. 28, 1995

This consent order requires, among other things, Phillips Petroleum Company, an Oklahoma-based corporation, to modify the acquisition agreement so that 830 specified miles of pipe and related gas gathering assets within the Panhandle counties are not included in the sale of Enron assets to Phillips. The consent order also requires Phillips, for 10 years, to notify the Commission before it acquires more than five miles of gas gathering pipeline located within the Panhandle counties from any one person during any 18-month period; and requires Enron, for 10 years, to notify the Commission before it can sell any of the 830 miles of pipeline assets excluded from the challenged deal to Phillips or to Maxus Energy Corporation.

Appearances

For the Commission: *Ronald B. Rowe and Frank Lipson.*

For the respondents: *William J. Kolasky, Wilmer, Cutler & Pickering, Washington, D.C. Neil W. Imus, Vinson & Elkins, Washington, D.C.*

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that respondent Phillips Petroleum ("Phillips") Company, through its subsidiary GPM Gas Corporation ("GPM"), is subject to the jurisdiction of the Commission and Phillips' proposed acquisition of the outstanding voting securities of Enron Anadarko Gathering Company and Transwestern Anadarko Gathering Company, two subsidiaries of Enron Corp. ("Enron") is 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"), 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 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. PHILLIPS

PARAGRAPH 1. Respondent Phillips 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 Phillips Building, Bartlesville, Oklahoma.

PAR. 2. Respondent Phillips 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 affects commerce as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

II. ENRON

PAR. 3. Respondent Enron 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 1400 Smith Street, Houston, Texas.

PAR. 4. Enron 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 affects commerce, as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

III. THE PROPOSED ACQUISITION

PAR. 5. Respondent Phillips through its subsidiary GPM entered into two agreements with respondent Enron Corp. through its subsidiaries, Enron Operations Corp. and Transwestern Gathering Company, to acquire the outstanding voting securities of Enron Anadarko Gathering Company and Transwestern Anadarko Gathering Company, which will own certain gas gathering assets currently owned by Transwestern Gathering Company and Northern Natural Gas Company, two subsidiaries of respondent Enron.

IV. THE RELEVANT MARKETS

PAR. 6. The relevant line of commerce in which to analyze the effects of the merger is natural gas gathering services or the transportation, for the respondents' own account or for other persons, of natural gas from the wellhead or producing area to a natural gas transmission pipeline or a natural gas processing plant.

PAR. 7. The relevant geographic market in which to analyze the effects of the merger includes the Texas counties of Hansford, Ochiltree, and Lipscomb and all portions of Beaver County, Oklahoma, within ten miles of the Texas border.

PAR. 8. The relevant line of commerce is highly concentrated in the relevant geographic market. Respondents Phillips and Enron are the only competitive providers of natural gas gathering services in many areas of the relevant market. Respondents will have the largest market share in the relevant line of commerce throughout the relevant geographic market.

PAR. 9. Respondent Phillips is an actual and potential competitor of Enron in the relevant line of commerce in the relevant geographic market.

PAR. 10. Timely and effective entry in the relevant line of commerce in the relevant geographic market is unlikely.

V. EFFECTS OF THE MERGER

PAR. 11. The effects of the merger may be substantially to lessen competition or to tend to create a monopoly in the relevant markets in the following ways, among others:

a. Actual and potential competition between Phillips and Enron to provide natural gas gathering services to existing natural gas wells will be eliminated;

b. Actual and potential competition between Phillips and Enron to provide natural gas gathering services for new natural gas wells will be eliminated;

c. The respondents are likely to exact anticompetitive price increases from producers in the relevant geographic market for performance of natural gas gathering services in the relevant geographic market; and

d. Producers may be less likely to do exploratory and developmental drilling for new natural gas in the relevant geographic market than prior to the merger.

VI. VIOLATIONS CHARGED

PAR. 12. The merger agreement described in paragraph five constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

PAR. 13. The merger 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 ("Commission"), having initiated an investigation of the proposed acquisition by Phillips Petroleum Company ("Phillips"), through its subsidiary GPM Gas Corporation ("GPM"), of the outstanding voting securities of Enron Anadarko Gathering Company and Transwestern Anadarko Gathering Company, two subsidiaries of Enron Corp. ("Enron"), that will own certain gas gathering assets currently owned by Transwestern Pipeline Company ("Transwestern") and Northern Natural Gas Company ("Northern Natural"), two other subsidiaries of Enron, and Phillips and Enron, hereinafter sometimes referred to as "respondents," having been furnished with a copy of a draft complaint that the Bureau of Competition proposed to present to the Commission for its consideration, and which, if issued by the Commission, would charge respondents with violations of the Clayton Act and Federal Trade Commission Act;

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 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 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, and having duly considered the comments received, and having modified such agreement, 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 Phillips 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 Phillips Building, Bartlesville, Oklahoma.

2. Respondent Enron 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 1400 Smith Street, Houston, Texas.

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. "*Phillips*" means Phillips Petroleum Company, its directors, officers, employees, agents, and representatives, predecessors, successors, and assigns, its subsidiaries, divisions, groups, and affiliates controlled by Phillips, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "*Enron*" means Enron Corp., its directors, officers, employees, agents, and representatives, predecessors, successors, and assigns, its subsidiaries, divisions, groups, and affiliates controlled by Enron, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "*Respondent*" or "*respondents*" means Phillips and Enron, collectively and individually.

D. "*Maxus*" means Maxus Energy Corporation, its predecessors, successors, and assigns, subsidiaries, divisions, groups, and affiliates controlled by Maxus Energy Corporation.

E. The "*Acquisition*" means the proposed acquisition by Phillips of the outstanding voting securities of Enron Anadarko Gathering Company and Transwestern Anadarko Gathering Company, which will own certain gas gathering assets currently owned by Transwestern Pipeline Company and Northern Natural Gas Company, two subsidiaries of Enron, pursuant to the stock purchase agreements executed on November 15, 1994, by Phillips and Enron as subsequently modified and amended.

F. "*Gas gathering*" means pipeline transportation, for oneself or other persons, of natural gas over any part or all of the distance between a well and a gas transmission pipeline or gas processing plant.

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

H. "*Related person*" means a person controlled by, controlling, or under the common control with, another person.

I. "*Relevant geographic area*" means the Texas counties of Hansford, Ochiltree, and Lipscomb and all portions of Beaver County, Oklahoma, within ten miles of the Texas border.

J. "*Schedule A assets*" means the whole and any part of the assets listed in Schedule A of this order (including, but not limited to, the assets listed in annex 1 and annex 2).

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

II.

It is further ordered, That Enron shall not sell, transfer, or otherwise convey, directly or indirectly, the Schedule A assets, or any stock, share capital, equity, or other interest in any person controlling the Schedule A assets, to Phillips in connection with the Acquisition; and, within thirty (30) days after this order becomes final, Enron shall provide notice of the requirements of this order to the Federal Energy Regulatory Commission.

III.

It is further ordered, That Phillips shall not acquire, directly or indirectly, any stock, share capital, equity, or other interest in any person controlling the Schedule A assets in connection with the Acquisition.

IV.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, Phillips shall not, without prior notification to the Commission, directly or indirectly:

A. Acquire the Schedule A assets;

B. Acquire any stock, share capital, equity, or other interest in any person engaged in gas gathering within the relevant geographic area at any time within the two years preceding such acquisition, provided, however, that an acquisition of securities will be exempt from the requirements of this paragraph (IV.B) if after the acquisition Phillips will hold cumulatively no more than two (2) percent of the outstanding shares of any class of security of such person; and provided further, that this paragraph (IV.B) shall not apply to the acquisition of any interest in a person that is not at the time of the acquisition engaged in gas gathering within the relevant geographic area due to the sale within the preceding two years of all assets used for gas gathering within the relevant geographic area to another party who intended to operate said assets for gas gathering within the relevant geographic area; or

C. Enter into any agreements or other arrangements with any person or with two or more related persons to obtain, within any 18 month period, direct or indirect ownership, management, or control of more than five miles of pipeline previously used for gas gathering and suitable for use for gas gathering within the relevant geographic area.

V.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, Enron shall not, without prior notification to the Commission, directly or indirectly:

- A. Transfer Schedule A assets to Phillips or Maxus;
- B. Transfer any stock, share capital, equity, or other interest in any entity controlling the Schedule A assets to Phillips or Maxus; or
- C. Enter into any agreement or other arrangement to transfer direct or indirect ownership, management, or control of any of the Schedule A assets to Phillips or Maxus.

Provided, however, that prior notification shall not be required for Enron to transfer Transwestern System 3 -- Catesby/Ivanhoe -- to Maxus.

VI.

It is further ordered, That the prior notifications required by paragraphs IV and 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 (hereinafter referred to as "the Notification"), 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 shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of respondents and not of any other party to the transaction. In lieu of furnishing (1) documents filed with the Securities and Exchange Commission, (2) annual reports, (3) annual audit reports, (4) regularly prepared balance sheets, or (5) Standard Industrial Code (SIC) information in response to certain items in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations, Phillips shall provide a map showing the location of the pipeline whose acquisition is proposed and other pipelines used for gas gathering in the relevant geographic area and a statement showing the quantity of gas that flowed through pipeline whose acquisition is proposed in the previous 12 month period. Respondents shall provide the Notification to the Commission at least thirty days prior to consummating any such transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information, respondents shall not consummate the transaction until twenty days after substantially complying with such request for additional information. Early termination of the waiting

periods in this paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition.

Provided, however, that prior notification shall not be required by paragraphs IV and V of this order for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. 18a.

VII.

It is further ordered, That:

A. Within sixty (60) days after the date this order becomes final, each respondent shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and is complying with this order; and

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, each respondent shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and is complying with this order. Provided, however, that if Enron sells all of the Schedule A assets, it will no longer be required to file any further written reports with the Commission.

VIII.

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 corporation, or the creation or dissolution of subsidiaries or any other change 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, and subject to any legally recognized privilege, upon written request and on reasonable notice to such respondent, each 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 such respondent relating to any matters contained in this order; and

B. Without restraint or interference from it, to interview officers, directors, or employees of such respondent, who may have counsel present, relating to any matters contained in this order.

X.

It is further ordered, That this order shall terminate twenty (20) years from the date this order becomes final.

SCHEDULE A

Transwestern System 3--Catesby/Ivanhoe
Beaver County, OK
Ellis County, OK
ASSETS:

All Transwestern-owned facilities located upstream of the discharge side of the Catesby Compressor unit. Includes approximately 45.5 miles of pipe and the Catesby compressor #745, 422 horsepower. Material assets are listed in Annex 1 for Transwestern system 3.

Transwestern System 4--Frass Como
Lipscomb County, TX
Beaver County, OK
ASSETS:

All Transwestern-owned facilities located upstream of, but not including, the side/hot-tap valve that connects the Frass Como Lateral to the 12 inch Lipscomb-Mocaine Lateral, including the Frass Como compressor station. Includes approximately 55.1 miles of pipe. Material assets are listed in Annex 1 for Transwestern system 4.

Transwestern System 5--Follett
Lipscomb County, TX
ASSETS:

All Transwestern-owned facilities located upstream of, but not including, the side/hot-tap valve that connects the 4 inch Follett Lateral to the 12 inch Lipscomb-Mocaine Lateral. Includes approximately 8.3 miles of pipe. Material assets are listed in Annex 1 for Transwestern system 5.

Transwestern System 7--Kiowa Creek
Lipscomb County, TX

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ASSETS: All Transwestern-owned facilities located upstream of, but not including, the side/hot-tap valve that connects the 6 inch Kiowa Creek Lateral and the 8 inch Kiowa Creek Loop to the 12 inch Lipscomb-Mocaine Lateral, including the Kiowa Creek #2 compressor station. Includes approximately 77 miles of pipe and three compressor units: Kiowa Creek #2 Compressor #865, 1,078 horsepower; Kiowa Creek #1 Compressor #828, 1,078 horsepower; and E. Lipscomb Compressor #858, 531 horsepower. Material assets are listed in Annex 1 for Transwestern system 7.

Transwestern System 8--Wolf Creek

Lipscomb County, TX

Ellis County, OK

ASSETS: All Transwestern-owned facilities located upstream of, but not including, the side/hot-tap valve that connects the 6 inch Wolf Creek Lateral to the 12 inch Lipscomb-Mocaine Lateral. Includes approximately 45.2 miles of pipe and the Wolf Creek compressors #755 and #853, 1,470 combined horsepower. Material assets are listed in Annex 1 for Transwestern system 8.

Transwestern System 13--Waka/Perryton

Ochiltree County, TX

ASSETS: All Transwestern-owned facilities located upstream of and including the pig receiver for the 8 inch Perryton lateral, located on the upstream side of and to the NE of the Waka compressor station. Includes approximately 77.8 miles of pipe and the Perryton Transwestern compressor # 827, 779 horsepower. Material assets are listed in Annex 1 for Transwestern system 13.

Transwestern System 14--Gray Rock

Ochiltree County, TX

Lipscomb County, TX

ASSETS: All Transwestern-owned facilities located upstream of, but not including, the 6 inch pig launcher on the discharge side of the Gray Rock compressor station. Includes approximately 43.3 miles of pipe and the Gray Rock compressor #826, 810 horsepower. Material assets are listed in Annex 1 for Transwestern system 14.

Transwestern System 20--Brillhart

Hansford County, TX

ASSETS: All Transwestern-owned facilities located upstream of, but not including, the side/hot-tap valve that connects the 8 inch Brillhart Lateral to the 10 inch Cactus-Hugoton Lateral. Includes approximately 78.5 miles of pipe and two compressors: Brillhart #748, 708 horsepower; and Brillhart #796, 785 horsepower.

Material assets are listed in Annex 1 for Transwestern system 20.

Transwestern System 21--John Creek

Hansford County, TX

Ochiltree County, TX

Hutchinson County, TX

Roberts County, TX

ASSETS:

All Transwestern-owned facilities located upstream of, but not including, the side/hot-tap valve that connects the 6 inch John Creek Lateral to the 12 inch Cactus-Hugoton Lateral. Includes approximately 31 miles of pipe and the John Creek compressor #747, 537 horsepower. Material assets are listed in Annex 1 for Transwestern system 21.

Northern Natural System 35--Spearman System - North

Hansford County, TX

ASSETS:

The following four sections: (1) Approximately 6.3 miles of 6 inch and 2.0 miles of 4 inch Northern-owned gathering lines, upstream of where the 6 inch TG385 connects to the 8 inch--TG24001 in the northwest quarter of Section 42, Block 1, Washington County RR Survey. (2) Approximately 6.5 miles of 4 inch Northern-owned gathering lines, upstream of the side valve on the 10 inch TG24001 in the northeast quarter of Section 30, Block 1, Cherokee Iron Furnace CO Survey. (3) The Buckner A1 wellhead facilities and approximately 3.4 miles of 4 inch Northern-owned gathering lines from the Buckner A1 well in Section 20 to the side valve on the 10 inch TG24001 in Section 27, Block 1, Cherokee Iron Furnace Co Survey. (4) Approximately 3.5 miles of 8 inch, 3.8 miles of 6 inch, and 10 miles of 4 inch Northern-owned gathering lines, upstream of where the 6 inch TG247 and the 8 inch TG246 connects to the 12 inch TG24001 near the East Section Line of Section 7, Block 2, SA&MG RR Survey. Material assets are listed in Annex 2 for Northern Natural system 35.

Northern Natural System 35--Spearman System - East

Hansford County, TX

Hutchinson County, TX

Roberts County, TX

ASSETS:

The following two sections: (1) The Brainard Lateral consisting of approximately 1.9 miles of 8 inch, 5.8 miles of 6 inch, and 19.2 miles of 4 inch Northern-owned gathering lines, upstream of a side valve where the 8 inch TG335 connects to the 26 inch TG24001 in Section 8, Block H&GN Survey. (2) The East Leg consisting of approximately 11.1 miles of 10 inch, 19.5

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miles of 8 inch, 19.0 miles of 6 inch, and 49.6 miles of 4 inch gathering lines, upstream of where 10 inch TG301 connects to the suction of Northern's Spearman Compressor Station. Material assets are listed in Annex 2 for Northern Natural system 35.

Northern Natural System 37--Fuller System

Hansford County, TX

Sherman County, TX

Hutchinson County, TX

ASSETS:

The following two sections: (1) The Hansford County No. 1 System consisting of approximately one-half mile of 2 inch, 5 miles of 8 inch, 3 miles of 6 inch, and 11 miles of 4 inch gathering lines, upstream of the suction of Northern's Hansford County No. 1 compressor station. (2) The Hutchinson County No. 2 system consisting of approximately 5 miles of 6 inch and 5 miles of 4 inch gathering lines, upstream of the suction of Northern's Hutchinson County No. 2 compressor station. Material assets are listed in Annex 2 for Northern Natural system 37.

Northern Natural System 79--Perryton System

Ochiltree County, TX

Beaver County, OK

ASSETS:

The Northern-owned facilities upstream of the suction of Northern's Perryton Compressor Station. The facilities consist of approximately one quarter mile of 2 inch, 89 miles of 4 inch, 58 miles of 6 inch, 23 miles of 8 inch, 4 miles of 10 inch, and 10 miles of 16 inch gathering lines. Material assets are listed in Annex 2 for Northern Natural system 79.

ANNEX I
TO
SCHEDULE A

TRANSWESTERN GATHERING COMPANY
ANNEX 1 TO SCHEDULE A
PAGE 1 OF 11

SYS	LINE SEG	DESCRIPTION	WH	COMP LINE	METER	COMP. H/P	PIPE DIAMETER	PIPE LENGTH	PIPE 2 DIAMETER	PIPE 2 LENGTH
3	CA-1	4" SHEPHERD #1/L E MAYER #1 LAT		X	0	0	6.6	31680.	0.0	0.00
3	CA-1	MTR STA SHL MAYER WL1	X		42800	0	4.5	100.	0.0	0.00
3	CA-1	MTR STA SHL SHEPRD WL1	X		42810	0	4.5	100.	0.0	0.00
3	CA-1-01	IRWIN #1-20 WL LN	X		41610	0	4.5	422.	0.0	0.00
3	CA-1-01	SHELL-TUBB #1-30 WL LN	X		41630	0	4.5	400.	0.0	0.00
3	CA-1-01	PEETOOM #1-29 WELL LINE	X		41660	0	4.5	5280.	0.0	0.00
3	CA-1-02	SHELL-OHEARN #1-32 WELL	X		41620	0	4.5	6864.	0.0	0.00
3	CA-1-02	SHELL-WHITE #1-31 WELL	X		41640	0	4.5	400.	0.0	0.00
3	CA-1-03	WHITE B #1-5 WELL LINE	X		42830	0	4.5	14256.	0.0	0.00
3	CA-1-03	PHIL-DRAKE #1-6 WEL LN	X		42840	0	4.5	106.	0.0	0.00
3	CA-1-04	PEARSON #1 4 LN & EQ	X		41590	0	0.0	0.	0.0	0.00
3	CA-1-04	CONN KELLN 11-1	X		41750	0	0.0	0.	0.0	0.00
3	CA-1-04	SMENN #1 4 LN & EQ	X		42870	0	4.5	5808.	0.0	0.00
3	CA-1-04	MESA PETROLEUM CO-#1 PIERSALL	X		43090	0	0.0	0.	0.0	0.00
3	CA-1-05	CONN SHELL - #2-31 WHITE	X		41730	0	4.5	2600.	0.0	0.00
3	CA-1-05	CONN CHG-STATE UNIT #1	X		43210	0	0.0	0.	0.0	0.00
3	CA-2	COMMEDALLION PETR-WHITE A#1&2	X		41021	0	0.0	0.	0.0	0.00
3	CA-2	STATE #1-36	X		41690	0	0.0	0.	0.0	0.00
3	CA-2	WHITE A #1-1 WELL LN	X		42820	0	4.5	53.	0.0	0.00
3	VH-1	12" IVANHOE & CATESBY LAT		X	0	0	12.7	34320.	0.0	0.00
3	VH-1	CONN MELBOURNE OIL #1-24 WYNN	X		41911	0	0.0	0.	0.0	0.00
3	VH-1	TW #745 IVANHOE/CATESBY COMP		X	0	422	0.0	0.	0.0	0.00
3	VH-1-01	BERYL JET #1-14 WL LN	X		42690	0	4.5	158.	0.0	0.00
3	VH-1-04	CONN BURKHART #1-15 BEDELL INOIN FL	X		41910	0	0.0	0.	0.0	0.00
3	VH-2-01	CONN MARLIN OIL #1 HALLIBURTON	X		41740	0	4.5	2050.	0.0	0.00
3	VH-2-01	FOX #1 WL LN	X		41970	0	0.0	0.	0.0	0.00
3	VH-2-01	BOCKELMAN #1-17 WL LN	X		42760	0	4.5	106.	0.0	0.00
3	VH-2-02	MTR STA UNION DYCHE WL	X		41020	0	4.5	4852.	0.0	0.00
3	VH-2-03	4" O'HARE W/KAISER FRANCIS-REDELSPERGR#1	X		40301	0	0.0	0.	0.0	0.00
3	VH-2-03	OHAIR #1-40 TIN WL LN	X		42770	0	4.5	5280.	0.0	0.00
3	VH-2/3	10" CATESBY EXTENSION		X	0	0	10.7	44880.	0.0	0.00
3	VH-3	MCCLURE #1-13 WELL LINE	X		41680	0	4.5	400.	0.0	0.00
3	VH-3-01	SUE HILL #1	X		41700	0	4.5	1750.	0.0	0.00

TRANSWESTERN GATHERING COMPANY
ANNEX 1 TO SCHEDULE A
PAGE 2 OF 11

SYS	LINE SEG	DESCRIPTION	WH	COMP	LINE	METER	COMP. H/P	PIPE DIAMETER	PIPE LENGTH	PIPE 2 DIAMETER	PIPE 2 LENGTH
4	FC-1	CONN TEX OKG - #2 PINKARD "B"	X			38980	0	0.0	0.	0.0	0.00
4	FC-1	FRASS-COMO FLD TW #746		X		0	0	0.0	0.	0.0	0.00
4	FC-1/2	8" COMO J FRASS FLD LAT			X	0	0	8.6	52800.	0.0	0.00
4	FC-2	DAROVZET SALES MTR STA	X			20	0	0.0	0.	0.0	0.00
4	FC-2-02	MTR STA HUM-FRASS #B-1	X			3651	0	4.5	3980.	0.0	0.00
4	FC-2-02	MTR STA HBL-FRASS WL-1	X			3653	0	4.5	8220.	0.0	0.00
4	FC-2-03	CONN NAT GAS ANADARKO #1-26 DEPEU	X			43340	0	4.5	10500.	0.0	0.00
4	FC-3	8" COMO & FRASS FLD LAT			X	0	0	8.6	25080.	0.0	0.00
4	FC-3-01	4" HOWARD / MAHAFFEY / MIER / ANDERSON			X	0	0	6.6	13200.	0.0	0.00
4	FC-3-01	MTR STA CSO VICKERS WL	X			42530	0	4.5	100.	0.0	0.00
4	FC-3-2	PHILLIPS EXCHANGE 3 SIDE VLVS	X			952	0	0.0	0.	0.0	0.00
4	FC-5-02	CONN FALCON-CLENHEY #1	X			40390	0	4.5	25.	0.0	0.00
4	FC-5-02	CONN FALCON-SCHUSTER #1	X			40400	0	4.5	20600.	0.0	0.00
4	FC-5-05	CONN FALCON-#2 CLENHEY	X			40430	0	4.5	400.	0.0	0.00
4	FC-5-07	CONN NAT GAS ANDRKO #1-2 DICK BVR	X			40460	0	4.5	8037.	2.3	136.00
4	FC-5-08	CONN MELBOURNE #1 BARNES 14 BEAVER	X			40520	0	4.5	2540.	0.0	0.00

TRANSWESTERN GATHERING COMPANY
ANNEX 1 TO SCHEDULE A
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SYS	LINE SEG	DESCRIPTION	WH	COMP	LINE	METER	COMP. H/P	PIPE DIAMETER	PIPE LENGTH	PIPE 2 DIAMETER	PIPE 2 LENGTH
5	FT-1	LFR B&T-R #1 TO LIP-M			X	0	0	4.5	29040.	0.0	0.00
5	FT-1	CONN SAM REGER #1	X			36100	0	4.5	100.	0.0	0.00
5	FT-1-01	CONN COTTON #1 KRAFT	X			37800	0	4.5	3600.	0.0	0.00
5	FT-1-02	FARM TAP - MERLIN LAUBHAM	X			3110	0	0.0	0.	0.0	0.00
5	FT-1-02	FARM TAP - RUSSELL SINGER	X			3490	0	0.0	0.	0.0	0.00
5	FT-1-03	CONN JACK G JONES - #1 MASON	X			38030	0	0.0	0.	0.0	0.00
5	FT-1-03	CONN COTTON - #2 LAUBHAM	X			38480	0	4.5	9800.	0.0	0.00
5	FT-2-04	CONN LAUBHAM UNIT A #1	X			36220	0	4.5	50.	0.0	0.00

TRANSMETERN GATHERING COMPANY
ANNEX 1 TO SCHEDULE A
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SYS	LINE SEG	DESCRIPTION	WH	COMP	LINE	METER	COMP. H/P	PIPE DIAMETER	PIPE LENGTH	PIPE 2 DIAMETER	PIPE 2 LENGTH
7	EL-1	4" E. LIPSCOMB FLD LAT			X	0	0	4.5	22176.	4.0	480.00
7	EL-1	LINE PARKER I 4 IN		X		35710	0	4.5	272.	0.0	0.00
7	EL-1	LINE SHULTZ C-1 4 IN		X		35790	0	4.5	272.	0.0	0.00
7	EL-1	EAST LIPS TW #858			X	0	500	0.0	0.	0.0	0.00
7	EL-1-01	LINE TYSON A-1 4 IN		X		35680	0	4.5	4646.	0.0	0.00
7	EL-1-01	LINE SHULTZ 2-5625 4 IN		X		35760	0	4.5	4176.	0.0	0.00
7	EL-1-02	CONN HUMBLE-1 W H SCHULTZ UNIT		X		35932	0	4.5	5280.	0.0	0.00
7	EL-1-02	CONN I SCHULTZ		X		35940	0	4.5	2200.	0.0	0.00
7	KC-1	6" LIBSCOMB F/PIPER #2 & LIPSCOMB LAT			X	0	0	6.6	13781.	0.0	0.00
7	KC-1	LINE PIPER 2 6 IN		X		35730	0	4.5	272.	0.0	0.00
7	KC-1	LINE SHULTZ B-2 6 IN		X		35740	0	4.5	272.	0.0	0.00
7	KC-1	KIOWA CREEK #1 TW #828			X	0	1100	0.0	0.	0.0	0.00
7	KC-1-02	4" LIPSCOMB F/YAUCK/DUKE/SHULTZ B			X	0	0	4.5	12619.	0.0	0.00
7	KC-1-02-01	NATOMAS #1 YAUCK TW #855			X	0	42	0.0	0.	0.0	0.00
7	KC-1-03	CONN SCRATH OIL-PIPER #689		X		9750	0	0.0	0.	0.0	0.00
7	KC-1-03	CONN SCARTH PETR - #601-1 PIPER		X		38360	0	4.5	300.	0.0	0.00
7	KC-1-03	CONN SCARTH - PIPER 600-1		X		38400	0	0.0	0.	0.0	0.00
7	KC-1-03	CONN SCARTH - PIPER 601-2		X		38410	0	0.0	0.	0.0	0.00
7	KC-1-03	CONN MAY PETRO PIPER RNCH #1 ZIPSCO		X		55120	0	0.0	0.	0.0	0.00
7	KC-1-05	MTR RUN-MEUBOURNE-SCHULTZ #1		X		38160	0	2.3	30.	0.0	0.00
7	KC-1-06	CONN NAT GAS-ANADARKO #1-544 OWENS		X		38890	0	4.5	2600.	0.0	0.00
7	KC-1-06	CONN EXXON - #7 OLA O PIPER		X		38900	0	4.5	6000.	0.0	0.00
7	KC-1-07	CONN MAY PET-WM SCHULTZ #1		X		55130	0	0.0	0.	0.0	0.00
7	KC-1-08	CONN MEUBOURNE #1 DUICE "781"		X		55230	0	4.5	2882.	2.3	83.00
7	KC-1-08	CONN MEUBOURNE #1 SCHULTZ "761"		X		55240	0	4.5	873.	2.3	152.00
7	KC-1/2/3	6" KIOWA CREEK LAT			X	0	0	6.6	66264.	0.0	0.00
7	KC-1/2/3 / KC-3-5/6	EXT KIOWA CREEK T/LEAR PET 6" LINE			X	0	0	6.6	27262.	6.6	151.00
7	KC-2	CONN OLA #1		X		36384	0	6.0	1750.	0.0	0.00
7	KC-2	KIOWA CREEK STA#2-TW #865			X	0	1050	0.0	0.	0.0	0.00
7	KC-2-01	MTR STA APAH LAURE WL1		X		36340	0	4.5	13200.	0.0	0.00
7	KC-2-03	CONN BRADFORD FD CSG HD		X		36320	0	4.5	106.	0.0	0.00
7	KC-2-03	PURDOM #1 4LW & EQ		X		37190	0	4.5	422.	0.0	0.00
7	KC-2-03	CONN FALCON-PURDOM UNIT #1		X		38340	0	0.0	0.	0.0	0.00
7	KC-2-04	CONN COTTON PETR-1-A PIPER		X		36720	0	4.0	1000.	0.0	0.00
7	KC-2-06	CONN COTTON PETR-1 BRADFORD "B"			X	0	0	4.5	3100.	0.0	0.00

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FEDERAL TRADE COMMISSION DECISIONS

Decision and Order

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TRANSWESTERN GATHERING COMPANY
ANNEX 1 TO SCHEDULE A
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SYS	LINE SEG	DESCRIPTION	WH	COMP LINE	METER	COMP. H/P	PIPE DIAMETER	PIPE LENGTH	PIPE 2 DIAMETER	PIPE 2 LENGTH
7	KC-2-06	CON UNAPACHE-BRADFOD #1	X		36300	0	6.6	10560.	0.0	0.00
7	KC-2-06	CONN DIAMOND-#3-688 OLA O PIPER	X		37741	0	4.5	4500.	0.0	0.00
7	KC-2-06	CONN COTTON - BRADFORD #2	X		38320	0	0.0	0.	0.0	0.00
7	KC-2-07	PAN PET HLTON #1 WL LN	X		36830	0	4.5	3000.	0.0	0.00
7	KC-2-07	CONN COTTON PETR - 1 FAIR	X		36880	0	4.5	4400.	0.0	0.00
7	KC-2-10	CONN APACHE BRADFORD #3	X		33652	0	0.0	0.	0.0	0.00
7	KC-2-10	CONN COTTON-#4 OLA PIPER	X		37720	0	0.0	0.	0.0	0.00
7	KC-2-10	CONNMEUBOURNE - BRADFORD #1	X		38690	0	0.0	0.	0.0	0.00
7	KC-2-12	CONN COTTON #2 PIPER A	X		37790	0	4.5	900.	0.0	0.00
7	KC-2-13	CONN COTTON PETROLEUM - 1 PIPER	X		36710	0	4.0	400.	0.0	0.00
7	KC-2-13	CONN COTTON PETR-1 PIPER "B"	X		36730	0	4.5	2900.	0.0	0.00
7	KC-2-14	CONNMEUBOURNE #2 BRADFORD	X		36650	0	4.5	640.	0.0	0.00
7	KC-3	6" KIOWA CREEK LATERAL		X	0	0	6.6	5500.	0.0	0.00
7	KC-3	CONN ARCO - #2 FRED LOESCH	X		38700	0	4.5	900.	0.0	0.00
7	KC-3-02	CONN MEDALLION #1		X	0	0	4.5	15840.	0.0	0.00
7	KC-3-02	CONN SINCLAIR-LOESCH #1	X		36032	0	4.5	1684.	0.0	0.00
7	KC-3-02	CONN FULTON SELL #4	X		38806	0	0.0	0.	0.0	0.00
7	KC-3-07	CONN DIAMOND-OLA PIPER #1-691		X	0	0	6.6	4300.	0.0	0.00
7	KC-3-07	CONN ARCO - #1 MARGARET L DIXON	X		38810	0	4.5	600.	0.0	0.00
7	KC-3-08	CONN ARCO - #1 HALBROOK DAILY WELL	X		38740	0	4.5	11000.	0.0	0.00
7	KC-3-09	CONN ARCO - #1 PAINE BROS CO	X		38871	0	4.5	6400.	0.0	0.00
7	KC-3-10	CONN ARCO - #1 FULTON-SELL	X		38822	0	4.5	1500.	0.0	0.00
7	KC-3-10	CONN FULTON SELL #3	X		38885	0	0.0	0.	0.0	0.00
7	KC-3-11	CONN AMOCO-#2 LILLIE M PETERSON	X		33680	0	4.5	2000.	0.0	0.00
7	KC-3-15	CONN ARCO-SORENSEN DIXON CENT POINT	X		55210	0	4.0	880.	0.0	0.00
7	KC-3A	6" KIOWA CREEK LAT		X	0	0	2.3	280.	0.0	0.00

TRANSWESTERN GATHERING COMPANY
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SYS	LINE SEG	DESCRIPTION	LN	COMP LINE	METER	COMP. H/P	PIPE DIAMETER	PIPE LENGTH	PIPE 2 DIAMETER	PIPE 2 LENGTH
B	SG-1	TAP TO INTERNORTH MEIER #1 LIPSC	X		16200	0	0.0	0.	0.0	0.00
B	SG-1	CONN JERNIGAN-BATTIN #1	X		38280	0	0.0	0.	0.0	0.00
B	SG-1-01	CONN FILON EXPL - #1 FRITZ	X		41340	0	4.5	5500.	0.0	0.00
B	SG-1/2	4" W A MEIER #1 & ANNA RUF #1 WELLS, TX		X	0	0	4.5	21120.	0.0	0.00
B	SG-2	4" LAT TO W A MEIER #1 & ANNA RUF #1 WEL		X	0	0	4.5	26400.	0.0	0.00
B	WC-1	PRICE 2 WOLF CK 4 IN	X		35660	0	4.5	272.	0.0	0.00
B	WC-1	WOLF CREEK TW #755 & 853		X	0	1470	0.0	0.	0.0	0.00
B	WC-1-01	PRICE 1B WOLF CK 4 IN	X		35650	0	4.5	2635.	0.0	0.00
B	WC-1-02	CONN EXXON - #4 WILLIS D PRICE "B"	X		38310	0	4.5	1800.	0.0	0.00
B	WC-1-02	CONN EXXON - #5 WILLIS D PRICE	X		38440	0	4.5	200.	0.0	0.00
B	WC-1/2/3	6" WOLF CREEK LAT		X	0	0	6.6	79147.	0.0	0.00
B	WC-2	FARM TAP - MARY & ROBERT SQUIRES	X		3460	0	0.0	0.	0.0	0.00
B	WC-2	R DOYLE 1-WOLF CK 415	X		35630	0	4.5	272.	0.0	0.00
B	WC-2	PRICE 1 WOLF CK 4 IN	X		35640	0	4.5	272.	0.0	0.00
B	WC-2	J DOYLE 1-WOLF CK 4 IN	X		35770	0	0.0	0.	0.0	0.00
B	WC-2	CONNMEUBOURNE OIL CO - SQUIRE #3	X		55540	0	4.5	2550.	0.0	0.00
B	WC-2-01	CONN HUMBLE-1 TYSON	X		35970	0	4.5	6200.	0.0	0.00
B	WC-2-02	CONNMEUBOURNE #1 PRICE	X		38630	0	4.5	3500.	0.0	0.00
B	WC-2-03	CONN HUMBLE-W D PRICE #4	X		35851	0	0.0	0.	0.0	0.00
B	WC-3	BROWN 1-WOLF CRK 4 IN	X		40200	0	4.5	272.	0.0	0.00
B	WC-3-01	CONN FILON-THORNTON TRUST #1	X		40260	0	4.5	165.	0.0	0.00
B	WC-3-02	CONNMAPCO-LOIS BROWN #2-27	X		41460	0	0.0	0.	0.0	0.00
B	WC-3-02	CONNMAPCO-BROWN 1-26	X		41470	0	0.0	0.	0.0	0.00
B	WC-3-02	CONNMAPCO-PIERCE #1-28	X		41480	0	0.0	0.	0.0	0.00
B	WC-3-03	SHERRILL OX 1#1 WL LN	X		40250	0	4.5	6300.	0.0	0.00
B	WC-3-05	CONN BUNKER-WAYLAND #1-5	X		40290	0	0.0	0.	0.0	0.00
B	WC-3-06	CONN 4" JORDAN CENT DELIV PT #1		X	0	0	0.0	0.	0.0	0.00
B	WC-3-06	CONNECT JORDAN O&G #1 CENTRAL DEL PT	X		41510	0	4.5	20803.	0.0	0.00
B	WC-3-07	SHATTUCK OX-1 #3 WL LN	X		41520	0	4.5	4281.	0.0	0.00
B	WC-4	GIBBS #1-19 WELL LINE	X		40230	0	4.5	9240.	0.0	0.00

TRANSWESTERN GATHERING COMPANY
ANNEX 1 TO SCHEDULE A
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SYS	LINE SEG	DESCRIPTION	WH	COMP LINE	METER	COMP. H/P	PIPE DIAMETER	PIPE LENGTH	PIPE 2 DIAMETER	PIPE 2 LENGTH
13	NP-1	6" F/HAN #1, WITT #1, KERSHAW #1		X	0	0	6.6	29515.	0.0	0.00
13	NP-1-01	INST TAP HOT-NEUFELD #1	X		36430	0	0.0	0.	0.0	0.00
13	NP-1-02	CONN GARY GEORGE #1	X		38965	0	0.0	0.	0.0	0.00
13	NP-1-02	CONN ANADARKO MARIE #1-62 WLDCT	X		52190	0	0.0	0.	0.0	0.00
13	NP-2	MTR STA 5H KERSHAW WL1	X		37000	0	4.5	18880.	0.0	0.00
13	NP-2	CONN MEBBOURNE SCHULK #1	X		53260	0	0.0	0.	0.0	0.00
13	NP-2-02	HAROLD D COURSON - #1-43 WAGGOWER	X		38130	0	4.5	20.	0.0	0.00
13	NP-2-03	CONN FALCON-WAGGOWER #1-43	X		38080	0	4.5	1300.	0.0	0.00
13	NP-2-03	CONN FALCON-WAGGOWER #1-43	X		38130	0	4.5	9600.	0.0	0.00
13	NP-2-04	CONN COURSON #1-42 MCGARROUGH	X		38540	0	4.5	2200.	0.0	0.00
13	NP-3	CONN PHILCON - 1 MAXWELL	X		36940	0	4.5	15312.	0.0	0.00
13	PE-1	PSHIGODO 1-PP LAT 4 IN	X		34910	0	4.5	272.	0.0	0.00
13	PE-1-02	CONN ANADARKO #1-661 DUDLEY	X		38620	0	4.5	600.	0.0	0.00
13	PE-1-03	PHL-MC WL1B-B PERY LAT	X		34900	0	4.5	2900.	0.0	0.00
13	PE-1-03	CONN COURSON OIL AND GAS #4-571 1ST	X		34911	0	0.0	0.	0.0	0.00
13	PE-1-03	CONN #1-571 1ST NATL TRUST-ACCT REC	X		38460	0	4.5	4400.	0.0	0.00
13	PE-1-04	LN FR RIDGMOR TO PSH L	X		34930	0	4.5	15840.	0.0	0.00
13	PE-1-05	CONN COURSON - #2-571 1ST NATL TRUST	X		38551	0	4.5	1600.	0.0	0.00
13	PE-1-06	CONN NAT GAS ANADARKO #1-64 CAMP	X		38962	0	4.5	5400.	0.0	0.00
13	PE-1-06	CONN SANTA FE ENRGY #2-49 WFL AR	X		52110	0	4.5	6172.	4.5	69.00
13	PE-1-06	CONN NAT GAS ANADARKO 1-46 RICHROSN	X		52150	0	4.0	7300.	0.0	0.00
13	PE-1/2/3	6" & 8" N. PARRYTON ALT		X	0	0	8.6	72072.	0.0	0.00
13	PE-2	LAND-EXCHANGE NN DUDE WILSON	X		9170	0	6.6	650.	0.0	0.00
13	PE-2	HUM-PER WL1-B PERY LAT	X		34610	0	4.5	272.	0.0	0.00
13	PE-2	HUM PER WL1-B PERY LAT	X		34811	0	4.5	272.	0.0	0.00
13	PE-2	PERRYTON TW #827		X	0	785	0.0	0.	0.0	0.00
13	PE-2-01	WC HERNDON C #1 WL LN	X		34750	0	4.5	264.	0.0	0.00
13	PE-2-01	W C HERNDON 1 U L WL LN	X		37910	0	6.6	475.	0.0	0.00
13	PE-2-01	CONN HERNDON #1	X		37970	0	4.5	2650.	0.0	0.00
13	PE-2-02	4" F/DUDE WILSON GU5 #1 & GU4 #1		X	0	0	4.5	13200.	0.0	0.00
13	PE-2-02	JONES #2-750 WELL LINE	X		34740	0	4.5	317.	0.0	0.00
13	PE-2-02	JONE #1-750 WL LN	X		34770	0	4.5	400.	0.0	0.00
13	PE-2-03	MTR STA HUM-D W WE GU4	X		34830	0	4.5	100.	0.0	0.00
13	PE-2-03	DUDE WILSON GU-4 #2 WL	X		37930	0	4.5	211.	0.0	0.00
13	PE-2-04	BRUHLMAN #1-17 WL LN	X		34870	0	4.5	4752.	0.0	0.00

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Decision and Order

PHILLIPS PETROLEUM COMPANY, ET AL.

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SYS	LINE SEG	DESCRIPTION	WH	COMP LINE	METER	COMP. H/P	PIPE DIAMETER	PIPE LENGTH	PIPE 2 DIAMETER	PIPE 2 LENGTH
13	PE-2-04	CONN HORIZON #2-17 BRUHLMAN	X		52080	0	4.5	3389.	2.3	98.00
13	PE-2-05	PSHIGODA B #1 4LN & EQ		X	0	0	4.5	15790.	0.0	0.00
13	PE-2-05	CONN EXXON CORP DUDE WILSON GU 7-3	X		34711	0	0.0	0.	0.0	0.00
13	PE-2-05	CONN EXXON CORP DUDE WILSON GU 5-4	X		34731	0	0.0	0.	0.0	0.00
13	PE-2-05	CONN HD WILSON GU7 #7	X		34950	0	4.5	53.	0.0	0.00
13	PE-2-07	4" LN ROGERS #3-DUDE WILSON GSG LAT		X	0	0	6.6	10666.	0.0	0.00
13	PE-2-07	CONN EXXON-#2 DUDE WILSON UNIT #2	X		33080	0	4.5	800.	0.0	0.00
13	PE-2-07	D WLSN GU WL 2-DU LAT	X		34800	0	4.5	272.	0.0	0.00
13	PE-2-07	ROGERS 1-PP LAT 4 IN	X		34820	0	4.5	4277.	0.0	0.00
13	PE-2-07	MTR STA HBL ROGERS WL 3	X		34860	0	4.5	400.	0.0	0.00
13	PE-2-09	HBL D WILSON 5-2 WL LN	X		34791	0	4.5	400.	0.0	0.00
13	PE-2-10	CONN EXXON-DUDE WILSON #6	X		38720	0	4.5	3000.	0.0	0.00
13	PE-2-10	CONN EXXON - #2 DUDE WILSON UNIT #7	X		38760	0	4.5	600.	0.0	0.00
13	PE-2-10	CONN HBL OPER - #2 PSHIGODA	X		38850	0	4.5	1200.	0.0	0.00
13	PE-2-11	CONN EXXON-DUDE WILSON GAS UNIT 5-3	X		33460	0	4.5	1340.	0.0	0.00
13	PE-2-12	CONN EXXON - #2 DUDE WILSON UNIT #1	X		38800	0	4.5	900.	0.0	0.00
13	PE-2-13	CONN EXXON - #3 DUDE WILSON UNIT #4	X		38860	0	4.5	2135.	0.0	0.00
13	PE-2-14	CONN EXXON-#5 HELEN ROGERS	X		33070	0	4.5	2400.	0.0	0.00
13	PE-2-14	DODSON #1-B34 WL LN	X		34890	0	0.0	0.	0.0	0.00
13	PE-2-16	CONN SAMSON RESOURCES DODSON #3 OCH	X		52121	0	4.5	738.	2.3	360.00
13	PE-2-17	W C HERMDON B #1-L WL LN	X		37900	0	4.5	5808.	0.0	0.00
13	PE-2-17	CONN COURSON #2-662 HERNDON OCHL	X		52160	0	0.0	0.	0.0	0.00
13	PE-2-18	CONN COURSON #1-747 ELDEN WAKA PRT	X		52181	0	4.5	600.	0.0	0.00
13	SH-1	CON PITMAN-SWINK WL #1	X		34700	0	4.5	100.	0.0	0.00
13	SH-1-03	SCHNEIDER #1-93 WL LN	X		36410	0	4.5	24816.	0.0	0.00
13	SH-1/2	6" SHARE-WEST PERRYTON LAT		X	0	0	6.6	66000.	0.0	0.00
13	SH-2-01	MTR STA RDG GREGG WL 1	X		34530	0	4.5	2640.	0.0	0.00
13	SH-2-02	TEVIS #1-20 WL LN	X		36420	0	4.5	15312.	0.0	0.00
13	SH-2-02	CONNOR #1-36 WL LN	X		36750	0	4.5	370.	0.0	0.00
13	SH-2-03	SMITH #1-30 WELL LN	X		34540	0	4.5	6864.	0.0	0.00

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SYS	LINE SEG	DESCRIPTION	WH	COMP LINE	METER	COMP. H/P	PIPE DIAMETER	PIPE LENGTH	PIPE 2 DIAMETER	PIPE 2 LENGTH
14	ER-1/2	6" ELLIS RANCH FLD LAT		X	0	0	6.6	52800.	0.0	0.00
14	ER-3	6" ELLIS RANCH FLD LAT		X	0	0	6.6	31680.	0.0	0.00
14	ER-3-01	MTR STA H KAY WELL W#1	X		34640	0	4.5	10560.	0.0	0.00
14	ER-3-01	CONN AMOCO - #2 KAYNELL-HAMKER TRUSTA	X		38710	0	0.0	0.	0.0	0.00
14	ER-3-02	ARTHUR MORGAN #1 WL LN	X		34660	0	4.5	19008.	0.0	0.00
14	ER-3-03	MORRIS C-1 4 LN & EQ	X		34940	0	4.5	370.	0.0	0.00
14	ER-3-04	CONNMEBOURNE - #1 MORRIS	X		38610	0	4.5	6400.	0.0	0.00
14	ER-3H	4" MITCHELL #1 & #A-1 LAT		X	0	0	4.5	4224.	0.0	0.00
14	ER-3H1	4" MITCHELL #1 & #A-1 LAT		X	0	0	4.5	10560.	0.0	0.00
14	GR-1	PEERY A #1-730 WL LN	X		36490	0	6.6	45408.	0.0	0.00
14	GR-1	CONN ANADARKO #1-5B SELL NORTHRUP	X		55360	0	0.0	0.	0.0	0.00
14	GR-1-01	WHEAT #1-678 WL LN	X		37130	0	4.5	53.	0.0	0.00
14	GR-1-01	SHELL-WHEAT #1-732 WL LN	X		37150	0	6.6	7920.	0.0	0.00
14	GR-1-01	CONNMEBOURNE - PERRY #2	X		38680	0	0.0	0.	0.0	0.00
14	GR-1-02	CONN DICK BARTON #1	X		37260	0	6.6	7920.	0.0	0.00
14	GR-1-03	CONN APACHE-MILES UNIT #1	X		34484	0	4.5	1600.	0.0	0.00
14	GR-1-03	CONN APACHE HARRY L KING #1	X		36470	0	6.6	21120.	0.0	0.00
14	GR-1-03	CONN MOUNTAIN FRONT VARIOUS WELLS	X		36471	0	0.0	0.	0.0	0.00
14	GR-1-04	CONN TED WEINER-MRS Z D GUY-1	X		37400	0	4.5	1700.	0.0	0.00
14	GR-1-07	CONNMEBOURNE - #1 PERRY	X		38600	0	4.5	2160.	0.0	0.00
14	GR-1-09	CONN TARDON OIL-H PEERY #2	X		36480	0	6.6	7392.	0.0	0.00
14	GR-2	GRAY ROCK T# #B26		X	0	785	0.0	0.	0.0	0.00
14	KC-3-02	MTR STA FAL SEA-HAW #1	X		36060	0	4.5	7920.	4.5	100.00
14	KC-3-03	LANDERS #1 WL LN	X		37162	0	4.5	6964.	0.0	0.00
14	KC-3-12	CONN COURSON OIL #2-855 LANDERS	X		55101	0	4.5	2520.	0.0	0.00

TRANSWESTERN GATHERING COMPANY
ANNEX 1 TO SCHEDULE A
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SYS	LINE SEG	DESCRIPTION	WH	COMP LINE	METER	COMP. H/P	PIPE DIAMETER	PIPE LENGTH	PIPE 2 DIAMETER	PIPE 2 LENGTH
20	BH-1/2/3/4/5	8" HANSFORD LAT		X	0	0	8.6	63360.	0.0	0.00
20	BH-2	BRILLHART TV #748 & 796		X	0	1493	0.0	0.	0.0	0.00
20	BH-2-01	LAT 4 GANDY & GLOVER TO BRILLHART		X	0	0	4.0	10800.	0.0	0.00
20	BH-2-01	GO-GAND WL LN-BRLHT LT	X		33930	0	4.5	21120.	4.5	100.00
20	BH-2-03	FARM TAP - GEORGE C. COLLARD	X		352	0	0.0	0.	0.0	0.00
20	BH-2-04	CONN GULF-LOWE-1	X		33440	0	4.0	6000.	0.0	0.00
20	BH-2-04	CONN BILLINGSLEY #1	X		33840	0	0.0	0.	0.0	0.00
20	BH-2-05	HORIZON-LOWE #1 WL LN	X		33960	0	4.5	5808.	0.0	0.00
20	BH-2-05	BALLARD #1-123 WL LN	X		33990	0	4.5	5808.	0.0	0.00
20	BH-2-06	CONN BROCK EXPL CORP #1 ANDERSON	X		33411	0	0.0	0.	0.0	0.00
20	BH-2-06	MTR STA HOR OG COP WL 1	X		33970	0	4.5	7920.	0.0	0.00
20	BH-2-07	CONN GULF-RHODA HART - 1	X		33400	0	8.0	5280.	0.0	0.00
20	BH-3	CONN UMIT DRILL & EXPL WD 1 BECK	X		33090	0	4.5	120.	0.0	0.00
20	BH-3-01	FUR-MUR WL LN-BRLHT LT		X	0	0	4.5	15240.	0.0	0.00
20	BH-3-01	CONN MARY #2	X		33982	0	2.0	60.	0.0	0.00
20	BH-3-03	CONNMEBOURNE -HIGGS #1	X		33160	0	0.0	0.	0.0	0.00
20	BH-3/4	8" BERNSTEIN LAT		X	0	0	8.0	52800.	0.0	0.00
20	BH-4	8" BRILLHART LAT		X	0	0	8.6	36960.	0.0	0.00
20	BH-4-01	FARM TAP - PAT PATTERSON/ROBERT H.ARCHER	X		401	0	0.0	0.	0.0	0.00
20	BH-4-01	GO-STL WL LN-BRLHT LAT	X		33870	0	4.5	15840.	4.5	100.00
20	BH-5-03	CONNMARLIN OIL #1 SUE	X		53250	0	0.0	0.	0.0	0.00
20	BH-5-04	CONN HORIZON TX BRILHRT 1-6 HNGFRD	X		53230	0	4.0	3000.	0.0	0.00

TRANSWESTERN GATHERING COMPANY
ANNEX 1 TO SCHEDULE A
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SYS	LINE SEG	DESCRIPTION	MH	COMP LINE	METER	COMP. H/P	PIPE DIAMETER	PIPE LENGTH	PIPE 2 DIAMETER	PIPE 2 LENGTH
21	JC-1	CONN BARBOUR ENERGY CORP. #1 JARVIS	X		33110	0	0.0	0.	0.0	0.00
21	JC-1	JOHN CREEK TW #747		X	0	708	0.0	0.	0.0	0.00
21	JC-1/2	6" JOHN CREEK LAT		X	0	0	6.6	4382.	0.0	0.00
21	JC-2	JOHN CREEK CROSSOVER	X		9238	0	0.0	0.	0.0	0.00
21	JC-2	MTR STA SUN O-MIN K #1	X		33700	0	4.5	4752.	0.0	0.00
21	JC-2	MTR STA GLE MATT WLI A	X		33941	0	6.6	18480.	4.5	100.00
21	JC-2-01	4" LAT F/JACKSON #1 & K L WEST #1		X	0	0	4.5	13200.	0.0	0.00
21	JC-2-01	ARCHER #1-72 WELL LINE	X		33730	0	4.5	317.	0.0	0.00
21	JC-2-02	PAN AM-BRAINARD #1 LN	X		33780	0	4.5	5280.	0.0	0.00
21	JC-2-02	MATHEWS #1 4LN & EQ	X		38000	0	4.5	6336.	0.0	0.00
21	JC-2-2	MATHEWS #1-80 WL LN	X		35052	0	4.5	264.	0.0	0.00
21	JC-3	CLEMENT #1-14 WL LN	X		33980	0	4.5	28512.	0.0	0.00
21	JC-3	CONN HORIZON #1 CONVERSE A OCHLTR	X		53240	0	0.0	0.	0.0	0.00
21	JC-3-01	PAN AM-BECK B #1 LN	X		35061	0	4.5	264.	0.0	0.00
21	LP-1-01	FLOWERS #1-5 S WL LN	X		35041	0	4.5	158.	0.0	0.00
21	LP-1-02	CONN #2 REED	X		33650	0	4.5	4900.	0.0	0.00
21	LP-1-02	CONN ELEANOR REED WELL #1	X		35071	0	4.5	264.	0.0	0.00
21	LP-1-04	CONN AMOCO PRO #2 WB MCINTIRE "A"	X		52240	0	4.5	1800.	0.0	0.00

ANNEX 2
TO
SCHEDULE A (REVISED 06-13-95)

RES	FN	STATE	ACCT	LOC	LOCATION DESCRIPTION	AREA	LINE NO	MAP
SYS			SYS					REF
SPEARMAN								
35	GP	TX	75	30101	LIPS A8 WELL GATH/TEXAS	A	TG30101	T-2
35	GP	TX	75	30301	JOHNSON #1 WELL GATH/TEXAS	A	TG30301	T-2
35	GP	TX	75	30401	STATEX NITSCHKE #1 WELL GATH/TEXAS	A	TG30401	T-2
35	GP	TX	75	31001	BULTMAN #1 WELL GATH/TEXAS	A	TG31001	T-2
35	GP	TX	75	32101	LIPS B1 WELL GATH/TEXAS	A	TG32101	T-2
35	GP	TX	75	33201	KNOX PIPKIN #1-28 WELL GATH/TEXAS	A	TG33201	T-2
35	GP	TX	75	38601	KILEBREW WELL GATH/TEXAS	A	TG38601	T-2
35	GP	TX	75	43801	FLOWERS #1 WELL GATH/TEXAS	A	TG43801	T-2
35	GP	TX	75	48001	SPEARMAN 16IN SUCTION GATH/TEXAS	A	TG48001	T-2
35	GP	TX	75	53601	FLOWERS #1/FLOWERS #1 TIE-IN	A	TG53601	T-2
35	GP	TX	75	61401	LIPS RANCH GATH/TEXAS	A	TG61401	T-2
35	GP	TX	75	72301	ROBERTS COUNTY #1 SUCTION LINE/TX	A	TG72301	T-2
35	GP	TX	75	73501	ROBERTS CO #1 LINE/TEXAS	A	TG73501	T-2
35	GP	TX	75	81191	HODGES #1-39 WELL GATHERING/TEXAS	A	TG81191	T-2
35	GP	TX	G5	86901	LIPS RANCH LATERAL	A	TG86901	T-2
35	GP	TX	G5	87001	LIPS RANCH TIE-OVER LINE	A	TG87001	T-2
35	GP	TX	75	24001	NORTH OF SPEARMAN GATH/TEXAS	A	TG24001	T-3
35	GP	TX	75	24601	IMC CARTY A1 WELL GATH/TEXAS	A	TG24601	T-3
35	GP	TX	75	24701	VERNON A1 WELL GATH/TEXAS	A	TG24701	T-3
35	GP	TX	75	31601	KIRK #1 WELL GATH/TEXAS	A	TG31601	T-3
35	GP	TX	75	32801	JACKSON A#1 UT/LT WELL GATH LINE/TX	A	TG32801	T-3
35	GP	TX	75	32901	WILMETH WELL GATH/TEXAS	A	TG32901	T-3
35	GP	TX	75	33501	ODC #1-44 WELL GATH/TEXAS	A	TG33501	T-3
35	GP	TX	75	34701	IREX #1 WELL GATH/TEXAS	A	TG34701	T-3
35	GP	TX	75	35001	YANDA ET AL WELL GATH/TEXAS	A	TG35001	T-3
35	GP	TX	75	35101	KENNY WELL GATH/TEXAS	A	TG35101	T-3
35	GP	TX	75	38501	CLEMENTINE-LEE WELL GATH/TEXAS	A	TG38501	T-3
35	GP	TX	75	38801	JACKSON #1LT/BEULAH #1 TIE-IN GATH	A	TG38801	T-3
35	GP	TX	75	38901	BRAINARD #3 WELL GATH/TEXAS	A	TG38901	T-3
35	GP	TX	75	40601	IMC INTIRE B #1-LT AND UT WELL GATH/	A	TG40601	T-3
35	GP	TX	75	41201	BEULAH #1 WELL GATH/TEXAS	A	TG41201	T-3
35	GP	TX	75	46101	MATHEWS #2 WELL GATH/TEXAS	A	TG46101	T-3
35	GP	TX	75	60801	COCKE #1C WELL GATH/TEXAS	A	TG60801	T-3
35	GP	TX	75	64201	CROWE 7-58 WELL GATH/TEXAS	A	TG64201	T-3
35	GP	TX	75	86801	BRACKEN ENERGY-ETLING #1-8	A	TG86801	T-3

ITEM IN BOLD REFLECTS A PORTION OF THE TOTAL LINE NO. REFERENCED AS TG24001

The facilities for line no. TG24001 include only the following facilities:
Buckner A1 wellhead facilities and approximately 3.4 miles of 4-inch pipeline from well connection in section 20 to side valve on the 10-inch TG24001 in section 27; and approximately 6.5 miles of 4-inch pipeline from a side valve on TG64201 in section 25 to a side valve on the 10-inch TG24001 in section 30 (including well facilities for G1, G1A, G2, & G3).

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Decision and Order

ANNEX 2
TO
SCHEDULE A

(REVISED 06-13-95)

RES	FN	STATE	ACCT	LOC	LOCATION DESCRIPTION	AREA	LINE NO	MAP
SYS			SYS				REF	
					FULLER			
37	GP	TX	55	53401	FISHER #1 WELL GATH/TEXAS	A	TG53401	T-3
37	GP	TX	55	53701	R WAMBLE #1	A	TG53701	T-3
37	GP	TX	55	53801	PEARL #1	A	TG53801	T-3
37	GP	TX	55	53901	BOARD #1 WELL GATH/TEXAS	A	TG53901	T-3
37	GP	TX	55	59201	GENE CLUCK #1 WELL GATHERING LINE/T	A	TG59201	T-3
RES	FN	STATE	ACCT	LOC	LOCATION DESCRIPTION	AREA	LINE NO	MAP
SYS			SYS				REF	
					PERRYTON			
79	GP	OK	44	16701	GEORGE MOUNTS WELL GATH/OKLAHOM	A	OG16701	O-13
79	GP	OK	44	17801	SIMS #1 LATERAL GATH/OKLAHOMA	A	OG17801	O-13
79	GP	OK	44	24001	WILSON #1 WELL GATH/OKLAHOMA	A	OG24001	O-13
79	GP	OK	44	27301	PALMER #1 WELL GATH/OKLAHOMA	A	OG27301	O-13
79	GP	OK	44	31901	PITTMAN #1 WELL/GATH/OKLAHOMA	A	OG31901	O-13
79	GP	OK	44	47201	BECKWITH 1-22 WELL GATHERING/OKLA	A	OG47201	O-13
79	GP	OK	44	50501	NAYLOR #1 WELL GATH/OKLA	A	OG50501	O-13
79	GP	TX	71	21301	CUTTER #1 WELL GATH/TEXAS	A	TG21301	T-2
79	GP	TX	71	21401	PHISGODA #1 WELL GATH/TEXAS	A	TG21401	T-2
79	GP	TX	71	21501	ORINGDERFF WELL GATH/TEXAS	A	TG21501	T-2
79	GP	TX	71	21601	WRIGHT #1 WELL GATH/TEXAS	A	TG21601	T-2
79	GP	TX	71	21701	SCHCENHALS #1 WELL	A	TG21701	T-2
79	GP	TX	71	21801	GEORGE MOUNTS #1 WELL GATH/TEXAS	A	TG21801	T-2
79	GP	TX	71	27301	PALMER #1 WELL GATH LINE/TEXAS	A	TG27301	T-2
79	GP	TX	71	28401	GEORGE #1 WELL GATH/TEXAS	A	TG28401	T-2
79	GP	TX	71	28801	LE MASTER #1 WELL GATH/TEXAS	A	TG28801	T-2
79	GP	TX	71	30801	OCELL LA MASTER WELL GATH/TEXAS	A	TG30801	T-2
79	GP	TX	71	32301	GREENE #1 WELL	A	TG32301	T-2
79	GP	TX	71	32601	SIMS #1-36L WELL GATH/TEXAS	A	TG32601	T-2
79	GP	TX	71	34301	IMOYES-GEORGE #1 WELL GATH/TEXAS	A	TG34301	T-2
79	GP	TX	71	38701	PERRY #1 WELL GATH/TEXAS	A	TG38701	T-2
79	GP	TX	71	39201	PERRY B1 WELL GATH/TEXAS	A	TG39201	T-2
79	GP	TX	71	71701	SCHULTZ #1 WELL GATHERING/TEXAS	A	TG71701	T-2
79	GP	TX	71	80031	BATMAN #1-21 SIDE VALVE/TEXAS	A	TG80031	T-2
79	GP	TX	71	80751	TANDY #1 WELL GATHERING LINE/TX	A	TG80751	T-2

Re: The applicability of the Telemarketing Sales Rule -- the Telemarketing Rule generally imposes no restrictions on the legitimate fundraising activities of nonprofit organizations.

[American Telephone Fundraisers Association, Inc., P/R #]

December 15, 1995

Dear Mr. Paper:

This letter responds to your request on behalf of the American Telephone Fundraisers Association, Inc. for an advisory opinion concerning the applicability of the Telemarketing Sales Rule, 16 CFR Part 310, to fundraising telephone calls made by for-profit companies on behalf of nonprofit organizations. The Association seeks advice on the scope of the Rule's coverage as it may apply to fundraising activities of Association members that involve the use of the telephone.

Although the Telemarketing Sales Rule does not apply to entities over which the Commission lacks jurisdiction, it does apply to for-profit telemarketers acting on behalf of such entities. The Commission's view, however, is that telephone fundraising activities on behalf of nonprofit organizations will constitute a "plan, program or campaign which is conducted to induce the purchase of goods or services." As discussed below, this means that the Rule ordinarily imposes no restrictions on legitimate fundraising activities undertaken on behalf of nonprofit organizations.

The Telemarketing Act states that, "[N]o activity is outside the jurisdiction of [the FTC] Act shall be affected by this Act." Section 6(a) of the Telemarketing Act, Pub L. No. 103-297 (to be codified at 15 U.S.C. 6105(a)). Therefore, because the FTC Act does not apply to any entity that is not "organized to carry on business for its own profit or that of its members," neither does the Telemarketing Act or the Telemarketing Sales Rule. *See* 15 U.S.C. 44; *Community Blood Bank v. FTC*, 405 F.2d 1011 (8th Cir. 1969). The Rule, like the FTC Act, however, does apply to a company acting for profit even when it is providing services to a nonprofit organization. Statement of Basis and Purpose, Telemarketing Sales Rule, 60 Fed. Reg. 43,842, at 43,843 (Aug. 23, 1995).

The Rule's applicability to fundraising telephone calls made by for-profit companies depends on whether such calls fall within the definition of "telemarketing." The Rule defines telemarketing as a "plan, program or campaign which is conducted to induce the purchase of goods or services." 16 CFR 310.2(u). This language is identical to the pertinent section of the Telemarketing Act. Section 7(4) (to be codified at 15 U.S.C. 6106(4)). Thus, the critical question in determining coverage under the Rule is whether a call is conducted to induce a "purchase of goods or services."

The Commission's understanding is that telephone fundraising on behalf of nonprofit organizations is not, in fact, typically undertaken as part of a "plan, program or campaign . . . conducted to induce the purchase of goods or services" (emphasis added). This is true despite the fact that fundraising campaigns often involve the incidental provision of goods or services, such as premiums, memberships, or other incentives for donations.¹ Legitimate fundraising activity is conducted primarily to elicit donations and not to induce purchases. Even when donors receive gifts, premiums, memberships or other incentives, representatives of the non-profit sector have advised the Commission that legitimate charities generally do not conduct telephone solicitations in which the stated or actual value of goods or services offered exceeds the amount of a donor's payment. The Commission's enforcement experience suggests that fraudulent telemarketers, in contrast, obtain money from consumers by promising goods or services with inflated values as consideration for smaller "donations."

Thus, the Commission concludes that only if goods or services offered in a covered telemarketing telephone call as an inducement for the consumer's payment have an actual or claimed value equal to or greater than the amount of the donor's payment, is such a call conducted for the purpose of inducing a purchase. Consequently, only calls of that nature would fall within the definition of "telemarketing" and be subject to the applicable requirements of the Telemarketing Sales Rule. The Commission's construction of the term "telemarketing," as defined in the Act and the Rule, is fully consistent with the legislative purpose of the Telemarketing Act. The

¹ Section 170(f)(8) of the Internal Revenue Code provides that contributions of more than \$250 are eligible charitable deductions for the donor only where the donee organization has provided a description and good faith estimate of the value of any goods or services provided as consideration, in whole or in part, for the donation. 26 U.S.C. 170(f)(8). In addition, a taxpayer may claim a deduction only for the difference between a payment to a charitable organization and the market value of any benefit received in return. 3 Fed. Tax Serv. (CCH) A:17-41[4] (1995).

Commission's interpretation permits efficient interdiction of fraud without encumbering the legitimate use of telemarketing by sellers of good or services or by non-profit entities. In sum, the Telemarketing Rule generally imposes no restrictions on the legitimate fundraising activities of nonprofit organizations.

As is true of all Commission advisory opinions, this letter is limited to the proposed conduct described in the request. The Commission retains the right to reconsider the questions involved, and with notice to the requesting party in accordance with Section 1.3(b) of the Commission's Rules of Practice, 16 CFR 1.3(b), to rescind or revoke its opinion should the proposed conduct result in significant consumer injury, the purposes of the conduct be found not to be legitimate, or the public interest so require.

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