FEDERAL TRADE COMMISSION DECISIONS

FINDINGS, OPINIONS AND ORDERS JANUARY 1, 1996 TO JUNE 30, 1996

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MEMBERS OF THE FEDERAL TRADE COMMISSION

DURING THE PERIOD JANUARY 1, 1996 TO JUNE 30, 1996

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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Findings, Opinions, and Orders

IN THE MATTER OF

FIRST DATA 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-3635. Complaint, Jan. 16, 1996--Decision, Jan. 16, 1996

This consent order requires, among other things, First Data, a New Jersey-based corporation, to divest, within 12 months to a Commission-approved acquirer, either its own MoneyGram business or First Financial's Western Union business. If the divestiture is not completed on time, the consent order allows the Commission to appoint a trustee.

Appearances

For the Commission: *Ann Malester, Craig Waldman,* and *William Baer.*

For the respondent: *David Bailis,* in-house counsel, Hackensack, N.J. and *William Fifield, Sidley & Austin*, Chicago, IL.

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that First Data Corporation, hereinafter sometimes referred to as respondent, a corporation subject to the jurisdiction of the Commission, has agreed to acquire all of the stock of First Financial Management Corporation, a corporation subject to the jurisdiction of the Commission, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act ("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 First Data Corporation ("First Data") 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 401 Hackensack Avenue, Hackensack, New Jersey.

2. Respondent, a corporation providing certain services including consumer money wire transfers marketed under the name "MoneyGram," is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

II. ACQUIRED COMPANY

3. First Financial Management Corporation ("First Financial") is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Georgia, with its principal place of business located at 3 Corporate Square, Suite 700, Atlanta, Georgia.

4. First Financial, a corporation providing certain services including consumer money wire transfers through Western Union Financial Services, Inc., is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

III. THE ACQUISITION

5. On June 13, 1995, First Data and First Financial agreed to merge in a stock swap valued at $6.7 billion. Under the proposed agreement, First Financial shareholders would receive 1.5859 shares of First Data stock for each share of First Financial ("the Acquisition").

IV. THE RELEVANT MARKET

6. For purposes of this complaint, the relevant line of commerce in which to analyze the effects of the Acquisition is the sale of consumer money wire transfer services.

7. For purposes of this complaint, the United States is the relevant geographic area in which to analyze the effects of the Acquisition.

8. The relevant market set forth in paragraphs six and seven is highly concentrated, whether measured by Herfindahl-Hirschmann Indices ("HHI") or two-firm and four-firm concentration ratios.

9. Entry into the relevant market, which requires significant sunk costs, would not be timely, likely and sufficient to deter or counteract the adverse competitive effects described in paragraph eleven because, among other things, of the difficulty of gaining brand name recognition and establishing a nationwide network of retail outlets to sell the relevant service.

10. First Data and First Financial are the only two actual competitors in the relevant market; thus, the Acquisition would result in a monopoly in the relevant market.

V. EFFECTS OF THE ACQUISITION

11. The effect of the Acquisition may be substantially to lessen competition and to tend to create a monopoly in the relevant market in violation of Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, in the following ways, among others:

a. By eliminating direct actual competition between First Data and First Financial;

b. By increasing the likelihood that First Data would unilaterally exercise market power;

c. By increasing the likelihood that consumers would be forced to pay higher transfer fees;

d. By increasing the likelihood that consumer money wire transfer agents would be forced to accept lower commissions and guarantees for providing consumer money wire transfer services; and

e. By increasing the likelihood that consumer money wire transfer advertising, services and innovation would be reduced.

VI. VIOLATIONS CHARGED

12. The acquisition agreement described in paragraph five constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

13. The Acquisition described in paragraph five, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of the proposed merger of respondent and First Financial Management Corporation ("First Financial"), and the respondent having been furnished thereafter with a copy of a draft of complaint that the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and

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 Acts, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comment 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 First Data Corporation ("First Data") is a corporation organized and existing under the laws of Delaware with its offices and principal place of business at 401 Hackensack Avenue, Hackensack, New Jersey.

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

ORDER

I.

It is ordered, That, as used in this order (including Appendix I), the following definitions shall apply:

A. *"Respondent"* or *"First Data"* means First Data Corporation, its subsidiaries, divisions, groups and affiliates controlled by First Data Corporation, and their respective directors, officers, employees, agents, and representatives, and their respective successors and assigns.

B. *"First Financial"* means First Financial Management Corporation, a corporation providing certain services including consumer money wire transfers through Western Union Financial Services, Inc.

C. *"Western Union"* means Western Union Financial Services, Inc., a wholly-owned subsidiary of First Financial Management Corporation, with its principal office and place of business located at One Mack Center Drive, Paramus, New Jersey. Western Union provides and markets, among other things, consumer money wire transfer services.

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

E. *"Acquisition"* means the direct or indirect acquisition of control of First Financial by respondent First Data.

F. *"Consumer money wire transfer service"* means the business of transferring the right to money using computer or telephone lines from one person through the location of a selling agent to a different person physically present at the location of a selling agent available to the general public through selling agents at retail outlets as currently offered by First Data and Western Union. "Consumer money wire transfer service" does not include transactions involving

only one customer utilizing automatic teller machines and other point or sale devices, transactions involving debit cards, cash advances utilizing credit cards, home banking, prepaid telephone and cash cards, money orders, and utility bill payment services and further does not include the provision of data processing services to a consumer money wire transfer service business.

G. *"Selling agent"* means a person or business, such as a check cashing store, a drug store, a supermarket, a postal service, a bus station, or a travel agency, that contracts with consumer money wire transfer service providers to provide the consumer money wire transfer service to customers.

H. *"MoneyGram service"* means First Data's consumer money wire transfer service marketed under the name "MoneyGram."

I. *"MoneyGram Assets"* or *"MoneyGram Business"* include all assets, properties, business and goodwill, tangible and intangible, related to the sale and marketing of the MoneyGram Service, including, but not limited to:

1. The MoneyGram trade name, trade dress, trade marks, and service marks; and,

2. A group of contracts with selling agents to provide the MoneyGram Service that provides a network of selling agents at least comparable to the group of selling agents under contract to provide the MoneyGram service on May 1, 1995 other than the American Express Travel Related Services Company Travel Services Offices, based on characteristics of the selling agents such as the countries and cities served, number of selling agents, and type of outlet; provided, however, that the condition regarding the "number of selling agents" is satisfied if the number of selling agents is 10,000 or greater.

J. *"Western Union Service"* means Western Union's Consumer Wire Transfer Service.

K. *"Western Union Assets"* or *"Western Union Business"* include all assets, properties, business and goodwill, tangible and intangible, related to the sale and marketing of the Western Union Service, including, but not limited to:

1. The Western Union trade name, trade dress, trade marks, and service marks; and,

2. All contracts with selling agents to provide the Western Union Service.

L. *"Assets To Be Divested"* means either the MoneyGram Assets or the Western Union Assets. The definition of "Assets To Be Divested" as well as any other provision in this order, however, shall not be construed to prohibit First Data from divesting both the MoneyGram Assets and the Western Union Assets to different acquirers.

M. *"Marketability, viability, and competitiveness"* of the Assets To Be Divested means that such assets when used in conjunction with the assets of the acquirer or acquirers are capable of providing a consumer money wire transfer service substantially similar to the consumer money wire transfer service that the Assets To Be Divested are capable of providing at the time of the Acquisition.

N. *"Non-public information"* means any information not in the public domain furnished to First Data in its capacity as a provider of data processing services by a consumer money wire transfer service provider.

II.

It is further ordered, That:

A. Respondent shall divest, absolutely and in good faith, within twelve (12) months after the date this order becomes final, the Assets To Be Divested and shall also divest such additional ancillary assets and businesses other than money order or utility bill payments businesses and effect such arrangements as are necessary to assure the marketability, viability, and competitiveness of the Assets To Be Divested.

B. Respondent shall divest the Assets To Be Divested only to an acquirer or acquirers that receive the prior approval of the Commission and only in a manner that receives the prior approval of the Commission. The purpose of the divestiture of the Assets To Be Divested is to ensure the continued use of the Assets To Be Divested in the same businesses in which the Assets To Be Divested are presently engaged, and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's complaint.

C. Respondent shall make available to the acquirer or acquirers such First Data personnel, assistance and training as the acquirer or acquirers reasonably need to transfer technology and know-how, and First Data shall continue providing such personnel, assistance and training at no additional cost for a period of time sufficient to satisfy the acquirer's or acquirers' management that its personnel are appropriately trained in the business. However, respondent shall not be required to continue providing such personnel, assistance and training for more than six (6) months after the Assets To Be Divested are divested pursuant to this order.

D. Pending divestiture of the Assets To Be Divested, respondent shall take such actions as are necessary to maintain the marketability, viability, and competitiveness of the Assets To Be Divested, and to prevent the destruction, removal, wasting, deterioration or impairment of any of the Assets To Be Divested except for ordinary wear and tear. Provided, however, that nothing in this paragraph shall be construed to prohibit First Data from competing in the ordinary course of business.

E. 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 divested all Assets To Be Divested as required by this order.

III.

It is further ordered, That:

A. If First Data has not divested, absolutely and in good faith, and with the Commission's prior approval, the Assets To Be Divested within the time period specified in paragraph II. A. of this order, the Commission may appoint a trustee to divest the Western Union Assets. In the event that the Commission or the Attorney General brings an action pursuant to Section 5(1) of the Federal Trade Commission Act, 15 U.S.C. 45(1), or any other statute enforced by the Commission, First Data 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 Western Union Assets.

3. Within ten (10) days after appointment of the trustee, respondent shall execute a trust agreement that, subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestiture required by this order.

4. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in paragraph III. B. 3. to accomplish the divestiture of the Western Union Assets, 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 Western Union Assets 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 divestitures. Any delays in divestiture caused by respondent shall extend the time for divestiture under this paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed trustee, by the court.

6. The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to respondent's absolute and unconditional obligation to divest at no minimum price. The divestiture shall be made in the manner and to the acquirer or acquirers as set out in paragraph II. of this order; provided, however, if the trustee receives *bona fide* offers from more than one 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 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 Western Union 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 to the same manner as provided in this paragraph of this order.

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

11. The trustee shall have no obligation or authority to operate or maintain the Western Union Assets.

12. The trustee shall report in writing to respondent and the Commission every thirty (30) days concerning the trustee's efforts to accomplish divestiture.

IV.

It is further ordered, That if First Data divests the MoneyGram Assets pursuant to paragraph II. of this order, First Data shall not enter into any consumer money wire transfer service contract with any selling agent who is under contract to provide the MoneyGram Service at the time of the divestiture; provided, however, that First Data may enter into such a consumer money wire transfer service contract (i) after the time the selling agent's contract with First Data would have expired had the divestiture not occurred, determined without regard to any contract extension or renewal that could occur after the date of the divestiture, (ii) if the contract is terminated in accordance with its terms other than as may be permitted as a result of the divestiture of the MoneyGram Assets or (iii) if the First Data consumer money wire transfer service being provided is a transfer service utilizing automatic teller machines or any other point of sale device, and the MoneyGram Service contract upon its terms would not have barred the selling agent from entering into such a contract.

V.

It is further ordered, That nothing in this order shall be construed as prohibiting First Data from entering into agreements with any consumer money wire transfer service provider, including the acquirer or acquirers of the MoneyGram Business and the Western

Union Business, for the provision of data processing service provided that:

A. Any such agreement entered into within eighteen (18) months of the date of the divestiture does not run for a period of more than two years;

B. No First Data officer, employee or agent who is involved in providing First Data's consumer money wire transfer service receives non-public information of any other consumer money wire transfer service provider;

C. First Data uses any non-public information obtained by First Data only in First Data's capacity as a provider of data processing services; and

D. First Data delivers a copy of this order to each officer, employee or agent involved in marketing First Data's consumer money wire transfer service or in providing data processing to any other consumer money wire transfer service provider prior to First Data's obtaining any non-public information relating to the provider's business.

VI.

It is further ordered, That:

A. Within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until respondent has fully complied with the provisions of paragraphs II. and III. of this order, respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with 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.

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, 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 IV. and V. 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, or 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 this order.

VIII.

It is further ordered, That, for the purpose of determining or securing compliance with this order, subject to any legally recognized privilege, and upon written request with reasonable notice to First Data made to its General Counsel, respondent shall permit any duly authorized representative of the Commission:

A. Access during office hours of First Data 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, who may have counsel present regarding such matters.

APPENDIX I

AGREEMENT TO HOLD SEPARATE

This Agreement to Hold Separate (the "Agreement") is by and between First Data Corporation ("First Data"), 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 401 Hackensack Avenue, Hackensack, New Jersey; 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, First Data has proposed to acquire, directly or indirectly, all of the voting stock or substantially all of the assets of First Financial Management Corporation ("First Financial"), (hereinafter "Acquisition"); and

Whereas, First Data, with its principal office and place of business located at 401 Hackensack Avenue, Hackensack, New Jersey, provides and markets, among other things, consumer money wire transfer services; and

Whereas, First Financial, with its principal office and place of business located at 3 Corporate Square, Suite 700, Atlanta, Georgia, provides and markets, among other things, consumer money wire transfer services; and

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

Whereas, if the Commission accepts the attached Agreement Containing Consent Order ("consent order"), the Commission must place it on the public record for a period of at least sixty (60) days and may subsequently withdraw such acceptance pursuant to the provisions of Section 2.34 of the Commission's Rules; and

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

Whereas, the Commission is concerned that if the Acquisition is consummated, it will be necessary to preserve the Commission's ability to require the divestiture of the Assets To Be Divested as

described in paragraph I. of the consent order and the Commission's right to have the MoneyGram Business continued as a viable competitor; and

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

1. To preserve the viability of the MoneyGram Business pending the divestiture of the Assets To Be Divested as a viable and ongoing enterprise,

2. To remedy any anticompetitive effects of the Acquisition, and

3. To preserve the MoneyGram Business as an ongoing and competitive consumer money wire transfer service until divestiture is achieved; and

Whereas, First Data's entering into this Agreement shall in no way be construed as an admission by First Data that the Acquisition is illegal; and

Whereas, First Data 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 the understanding that the Commission has not yet determined whether the Acquisition will be challenged, and in consideration of the Commission's agreement that, at the time it accepts the consent order for public comment it will grant early termination of the Hart-Scott-Rodino waiting period, and unless the Commission determines to reject the consent order, it will not seek further relief from First Data with respect to the acquisition, except that the Commission may exercise any and all rights to enforce this Agreement to Hold Separate and the consent order to which it is annexed and made a part thereof, and in the event the required divestiture is not accomplished, to appoint a trustee to seek divestiture of the Western Union Assets pursuant to the consent order, as follows:

1. First Data agrees to execute and be bound by the attached consent order.

2. First Data agrees that from the date this Agreement is accepted until the earliest of the dates listed in subparagraphs 2.a. - 2.b., it will comply with the provisions of paragraph 3. of this Agreement:

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

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

3. To ensure the complete independence and viability of the MoneyGram Business and to assure that no competitive information is exchanged between the MoneyGram Business and First Data, First Data shall hold the MoneyGram Business separate and apart on the following terms and conditions:

a. First Data will appoint three individuals to manage and maintain the MoneyGram Business. These individuals ("the management team") shall manage the MoneyGram Business independently of the management of First Data's other businesses. The individuals on the management team shall not be involved in any way in the marketing, selling or management of any other First Data business, including the Western Union Business.

b. The management team, in its capacity as such, shall report directly and exclusively to an independent auditor/manager, to be appointed by First Data. The independent auditor/manager shall have expertise in management and marketing. The independent auditor/manager shall have exclusive control over the operations of the MoneyGram Business, with responsibility for the management of the MoneyGram Business and for maintaining the independence of that business.

c. First Data shall not exercise direction or control over, or influence directly or indirectly the independent auditor/manager or the management team or any of its operations relating to the operations of the MoneyGram Business; provided, however, that First Data may exercise only such direction and control over the independent auditor/manager, management team and MoneyGram Business as is necessary to assure compliance with this Agreement and with all applicable laws.

d. First Data shall maintain the marketability, viability, and competitiveness of the MoneyGram Assets and shall not sell, transfer, encumber (other than in the normal course of business), or otherwise impair their marketability, viability or competitiveness.

e. Except for the management team, sales and marketing employees involved in the MoneyGram Business, and support service employees involved in the MoneyGram Business, such as human resource, legal, tax, accounting, insurance, and internal audit employees, First Data shall not permit any other First Data employee, officer, or director to be involved in the management of the MoneyGram Business. Sales and marketing employees involved in the MoneyGram Business, shall not be involved in any other First Data business, including the Western Union Business. Support service employees involved in the MoneyGram Business shall not be involved in the Western Union Business.

f. Except as required by law, and except to the extent that necessary information is exchanged in the course of evaluating the Acquisition, defending investigations or litigation, or negotiating agreements to divest assets, First Data, other than sales and marketing employees involved in the MoneyGram Business, or support service employees involved in the MoneyGram Business, shall not receive or have access to, or the use of, any material confidential information about the MoneyGram Business, the activities of the management team, sales and marketing employees involved in the MoneyGram Business, or support service employees involved in the MoneyGram Business in managing that business not in public domain, nor shall the management team, sales and marketing employees involved in the MoneyGram Business, or support service employees involved in the MoneyGram Business receive or have access to, or the use of, any material confidential information about the Western Union Business or the activities of First Data in managing the Western Union Business not in the public domain. 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:

(a) First Data, with regard to the MoneyGram Business, from sources other than the management team, sales and marketing employees involved in the MoneyGram business, or support service employees involved in the MoneyGram Business; or

(b) The management team, sales and marketing employees involved in the MoneyGram Business, or support service employees

involved in the MoneyGram Business with regard to the Western Union Business

and includes but is not limited to customer lists, price lists, marketing methods, patents, technologies, processes, or other trade secrets.)

g. First Data shall not change the composition of the management team unless the independent auditor/manager consents. The independent auditor/manager shall have the power to remove members of the management team and to require First Data to appoint replacement member to the management team in the same manner as provided in paragraph 3.a. of this Agreement to Hold Separate.

h. First Data shall circulate to all its employees involved with the MoneyGram Business, Western Union Business, or the data processing services provided to either the MoneyGram or Western Union Businesses, and appropriately display, a notice of this Hold Separate Agreement and consent order in the form attached hereto as Attachment A.

i. First Data shall make available for use in the MoneyGram Business until divestiture of the Assets To Be Divested is accomplished an amount of money for advertising and trade promotion of the MoneyGram Service not lower than $24 million annually, with no less than $10 million for any two consecutive quarters. First Data shall pay all direct costs and indirect overheads for the MoneyGram Business. The MoneyGram Business shall not be charged with the compensation and expenses of the independent auditor/manager.

j. First Data shall make available for use in the MoneyGram Business until divestiture of the Assets To Be Divested an amount of money needed to provide an additional 20% sales commission to the MoneyGram Business sales force on all MoneyGram agent renewals and MoneyGram agent recruitments above and beyond the 1995 sales commission rate for MoneyGram agent renewals and MoneyGram agent recruitments.

k. The independent auditor/manager shall serve at the cost and expense of First Data. First Data shall indemnify the independent auditor/manager against any losses or claims of any kind that might arise out of his or her involvement under this Agreement to 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 independent auditor/manager.

l. If the independent auditor/manager ceases to act or fails to act diligently, a substitute auditor/manager shall be appointed in the same manner as provided in paragraph 3.b. of this Agreement to Hold Separate.

m. The independent auditor/manager shall have access to and be informed about all companies who inquire about, seek or propose to buy the MoneyGram Assets. First Data may require the independent auditor/manager to sign a confidentiality agreement prohibiting the disclosure of any material confidential information gained as a result of his or her role as independent auditor/manager to anyone other than the Commission.

n. All material transactions, out of the ordinary course of business and not precluded by subparagraphs 3.a - 3.n. hereof, shall be subject to a majority vote of the management team. In case of a tie, the independent auditor/manager shall cast the deciding vote.

o. The independent auditor/manager shall report in writing to the Commission every thirty (30) days concerning the independent auditor/manager's efforts to accomplish the purposes of this Agreement to Hold Separate.

4. Should the Federal Trade Commission seek in any proceeding to compel First Data to divest itself of the MoneyGram Assets or the Western Union Assets, or to seek any other equitable relief, First Data 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. First Data also waives all rights to contest the validity of this Agreement.

5. For the purpose of determining or securing compliance with this Agreement, subject to any legally recognized privilege, and upon written request with reasonable notice to First Data made to its General Counsel, First Data shall permit any duly authorized representative or representatives of the Commission:

a. Access during the office hours of First Data 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 First Data relating to compliance with this Agreement; and

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

6. This Agreement shall not be binding until approved by the Commission.

ATTACHMENT A

NOTICE OF DIVESTITURE AND
REQUIREMENT FOR CONFIDENTIALITY

First Data Corporation ("First Data") has entered into a Consent Agreement and Agreement to Hold Separate with the Federal Trade Commission relating to the divestiture of the MoneyGram Business or the Western Union Business. Until after the Commission's order becomes final and First Data's interest in either the MoneyGram Business or the Western Union Business is divested, the MoneyGram Business must be managed and maintained as a separate, ongoing business, independent of all other First Data businesses and independent of the Western Union Business. All competitive information relating to the MoneyGram Business, except information received by First Data in connection with the provision of data processing services to the MoneyGram Business as described in and protected by the confidentiality provision of paragraph V. of the consent order, must be retained and maintained by the persons involved in the MoneyGram Business on a confidential basis and such persons shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any such information to or with any other person whose employment involves any other First Data business, including the Western Union Business. Similarly, all such persons involved in the Western Union Business shall be prohibited from providing, discussing, exchanging, circulating or otherwise furnishing competitive information about such business to or with any person whose employment involves the MoneyGram Business.

Any violation of the Consent Agreement or the Agreement to Hold Separate, incorporated by reference as part of the consent order, may subject First Data to civil penalties and other relief as provided by law.

STATEMENT OF COMMISSIONER CHRISTINE A. VARNEY

The First Financial/First Data merger represents another milestone in the fast-paced development of electronic payment systems. While combinations such as this may have efficiency driven, pro-competitive effects, I remain concerned about increased concentration in the merchant acquirer services industry. This market is growing dramatically, and is increasingly central to back-end processing of credit card purchases. I expect that we will soon see additional acquisitions in the merchant acquirer services industry and, in that light, I have asked the staff of the Commission to continue to monitor the competitive situation in this evolving market.

IN THE MATTER OF

JOHNSON & JOHNSON CONSUMER PRODUCTS, INC.

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

Docket C-3636. Complaint, Jan. 18, 1996--Decision, Jan. 18, 1996

This consent order prohibits, among other things, a New Jersey-based personal health-care products company and its parent corporation from misrepresenting the results or conclusions of any test or study concerning any over-the-counter products with a use relating to human reproduction, reproductive organs or sexually transmitted diseases ("STDs"). It requires the respondent to have competent and reliable scientific evidence for any claims regarding the efficacy of over-the-counter contraceptives or products to protect against STDs. In addition, the respondent must have competent and reliable scientific evidence to substantiate the advertising claims of any personal lubricant and/or spermicide.

Appearances

For the Commission: *Linda K. Badger, Matthew D. Gold,* and *Jeffrey Klurfeld.*

For the respondent: *Clayton Patterson,* in-house counsel, New Brunswick, N.J.

COMPLAINT

The Federal Trade Commission, having reason to believe that Johnson & Johnson Consumer Products, Inc., ("respondent"), a corporation, has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent Johnson & Johnson Consumer Products, Inc., a wholly-owned subsidiary of Johnson & Johnson, is a New Jersey corporation with its offices and principal place of business at 1999 Grandview Road, Skillman, New Jersey.

PAR. 2. Respondent has manufactured, advertised, labeled, offered for sale, sold, and distributed K-Y Plus Nonoxynol-9

Spermicidal Lubricant ("K-Y Plus"), and other products to consumers. K-Y Plus is a "drug" 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 K-Y Plus, including but not necessarily limited to the attached Exhibits A-C. These advertisements contain the following statements:

A. "K-Y Plus, because one out of every six condoms develops tiny holes during use. Holes invisible to the naked eye, but big enough for sperm, HIV and other viruses to pass through. K-Y Plus Brand Spermicidal Lubricant with Nonoxynol-9 provides double protection. First, the natural-feeling lubrication guards your condom against friction that can cause holes. Second, it contains a highly effective spermicide, doctor-recommended Nonoxynol-9, to give you peace of mind in case your condom fails. Ask your doctor about K-Y Plus. For your own protection.
Condom Insurance. The safer choice."
[Exhibit A (Print: "Condom Insurance")]

B. "New K-Y Plus, because one out of six condoms fails. Anyone can make a mistake, or a condom can develop tiny holes during use - invisible to the eye, but big enough for sperm, HIV and other viruses to pass through. So new K-Y Plus Brand with Nonoxynol-9 just makes good sense for personal lubrication. It provides double protection.
First, the clean-rinsing and natural-feeling lubrication of K-Y Plus guards your condom against friction that can cause invisible holes. Second, it contains a highly effective spermicide, doctor-recommended Nonoxynol-9, to give you peace of mind in case your condom fails.
Introducing condom insurance. The safer choice."
[Exhibit B (Print: "Introducing Condom Insurance.")]

C. "Studies show that up to 18.5% of condoms will fail - leaving patients vulnerable to pregnancy and STDs.
. . .
Like regular K-Y BRAND Jelly - available as always - new K-Y PLUS is crystal clear and provides safe water-soluble lubrication to guard against friction and condom breakage. New K-Y PLUS also contains proven nonoxynol-9 for extra protection against unplanned pregnancy.
NEW K-Y PLUS Spermicidal Lubricant An extra layer of protection."
[Exhibit C (Print: "Protect the Protector")]

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 C,

respondent has represented, directly or by implication, that scientific tests or studies show that up to eighteen and one half percent of condoms will fail; leaving users vulnerable to pregnancy and sexually transmitted diseases.

PAR. 6. In truth and in fact, scientific tests or studies do not show that eighteen and one half percent of condoms will fail, leaving users vulnerable to pregnancy and sexually transmitted diseases. 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 advertisements attached as Exhibits A-C, respondent has represented, directly or by implication, that:

A. One out of six condoms develops tiny holes during use which are big enough for sperm, HIV and other viruses to pass through.

B. One out of six condoms fails due to mistakes in using condoms or through the development of tiny holes during use.

C. K-Y Plus provides protection against the development of tiny holes in condoms during use.

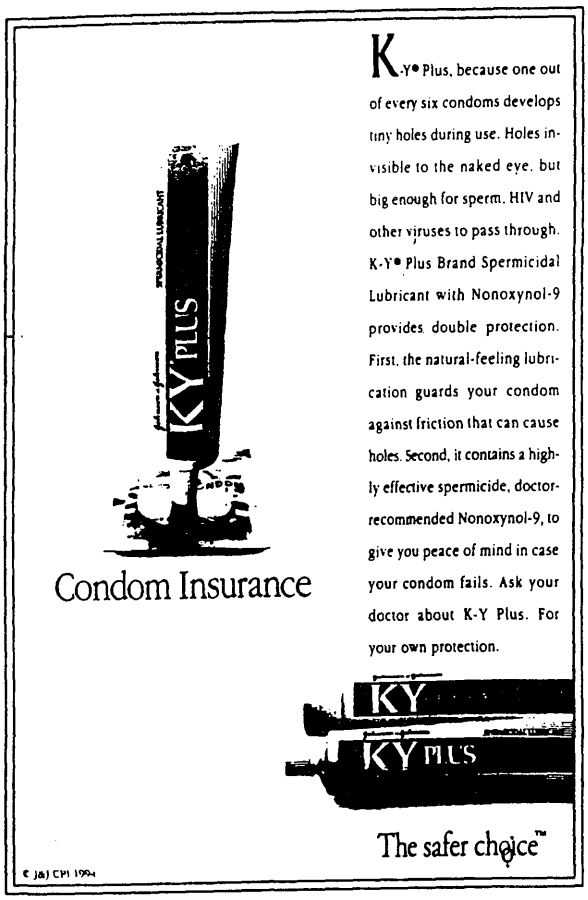
D. K-Y Plus provides protection against HIV and other viruses.

PAR. 8. Through the use of the statements contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits A-C, 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. 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.

EXHIBIT A



This advertisement created by:
LINTAS:NEW YORK
Ad No: P4-1129
Client: Johnson & John
Title: Condom Insurance

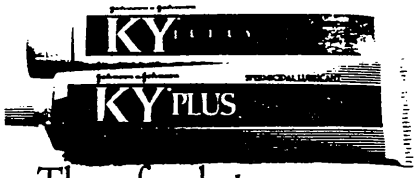
EXHIBIT A

EXHIBIT B

Introducing condom insurance.

New K-Y® Plus, because one out of six condoms fails. Anyone can make a mistake, or a condom can develop tiny holes during use — invisible to the eye, but big enough for sperm, HIV and other viruses to pass through. So new K-Y® Plus Brand with Nonoxynol-9 just makes good sense for personal lubrication. It provides double protection.

First, the clean-rinsing and natural-feeling lubrication of K-Y® Plus guards your condom against friction that can cause invisible holes. Second, it contains a highly effective spermicide, doctor-recommended Nonoxynol-9, to give you peace of mind in case your condom fails. And if you don't need a spermicide, regular K-Y® Brand Jelly is the water-based lubricant that won't erode latex condoms like petroleum jelly and other oil-based products can. Ask your doctor about regular K-Y® Jelly and new K-Y® Plus.



The safer choice

EXHIBIT B

000005
J&J

EXHIBIT C

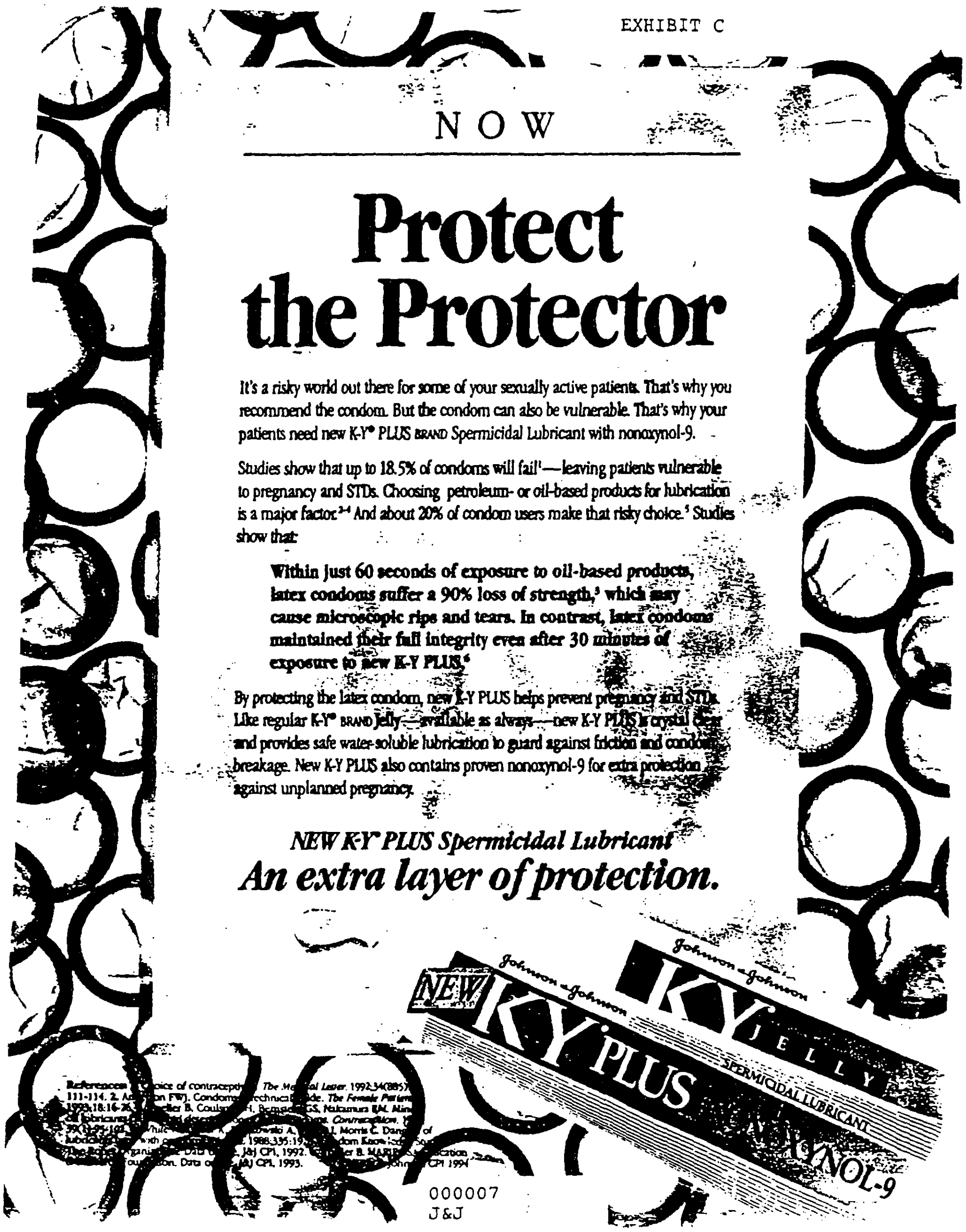


EXHIBIT C
NOW
Protect the Protector
It's a risky world out there for some of your sexually active patients. That's why you recommend the condom. But the condom can also be vulnerable. That's why your patients need new K-Y® PLUS BRAND Spermicidal Lubricant with nonoxynol-9.
Studies show that up to 18.5% of condoms will fail[1]—leaving patients vulnerable to pregnancy and STDs. Choosing petroleum- or oil-based products for lubrication is a major factor.[2-4] And about 20% of condom users make that risky choice.[5] Studies show that:
Within just 60 seconds of exposure to oil-based products, latex condoms suffer a 90% loss of strength,[3] which may cause microscopic rips and tears. In contrast, latex condoms maintained their full integrity even after 30 minutes of exposure to new K-Y PLUS.[6]
By protecting the latex condom, new K-Y PLUS helps prevent pregnancy and STDs. Like regular K-Y® BRAND Jelly—available as always—new K-Y PLUS is crystal clear and provides safe water-soluble lubrication to guard against friction and condom breakage. New K-Y PLUS also contains proven nonoxynol-9 for extra protection against unplanned pregnancy.
NEW K-Y® PLUS Spermicidal Lubricant
An extra layer of protection.
NEW
K-Y PLUS
K-Y JELLY
SPERMICIDAL LUBRICANT
000007
J&J

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 and its parent corporation, Johnson & Johnson, 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 parent corporation, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent and its parent corporation 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 or its parent corporation 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, 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 Johnson & Johnson Consumer Products, Inc., 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 1999 Grandview Road, in the City of Skillman, State of New Jersey;

Johnson & Johnson 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 Johnson & Johnson Plaza, in the City of New Brunswick, State of New Jersey.

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

ORDER

I.

It is ordered, That respondent, Johnson & Johnson Consumer Products, Inc., a corporation, its parent corporation, Johnson & Johnson, and all the other subsidiaries of Johnson & Johnson, their successors and assigns (hereinafter collectively "the companies"), and the companies' 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 K-Y Plus Nonoxynol-9 Spermicidal Lubricant, or any other personal lubricant and/or spermicide, 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, relating to:

A. The failure rate of any method of contraception due to defects, misuse, or any other cause;

B. Any such product's ability to provide protection against the development of tiny holes in condoms during use;

C. Any such product's ability to provide protection against HIV and other viruses; or

D. The health-related benefits of any such product;

unless, at the time of making any such representation, the companies possess and rely upon 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.

II.

It is further ordered, That the companies and their 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 "food," "drug" or "device," as those terms are defined in Section 15 of the Federal Trade Commission Act, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, in any manner, directly or by implication, the efficacy of any over-the-counter product as a contraceptive or as a method of protection against the transmission of any sexually-transmitted disease, unless, at the time of making any such representation, the companies possess and rely upon competent and reliable scientific evidence that substantiates such representation.

III.

It is further ordered, That the companies and their 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 over-the-counter product with a use relating to human reproduction, reproductive organs or sexually-transmitted diseases, 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 for five (5) years after the last date of dissemination of any representation covered by this order, the companies 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 the companies notify the Commission at least thirty (30) days prior to any proposed change in the companies such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

VI.

It is further ordered, (1) That respondent Johnson & Johnson Consumer Products, Inc., 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 (2) that the parent corporation, Johnson & Johnson, 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 and of its subsidiaries' officers, agents, representatives or employees engaged in the preparation, review or placement of advertising of any over-the-counter product with a use relating to human reproduction, reproductive organs or sexually-transmitted diseases.

VII.

It is further ordered, That this order will terminate on January 18, 2016, 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 the companies 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.

IX.

It is further ordered, That nothing in this order shall prohibit the companies 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.

CONCURRING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

I concur in the approval and issuance of the final decision and order in this matter except to the extent that the order imposes obligations on Johnson & Johnson (the parent company of the respondent Johnson & Johnson Consumer Products, Inc.), which is not named in the accompanying complaint.

IN THE MATTER OF

BBDO WORLDWIDE, INC.

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

Docket C-3637. Complaint, Jan. 24, 1996--Decision, Jan. 24, 1996

This consent order prohibits, among other things, a New York advertising firm from misrepresenting the amount of fat, calories, or cholesterol in any frozen yogurt, any frozen sorbet, and most ice cream products. This action stems from the firm's role in developing certain advertisements for Häagen-Dazs frozen yogurt products.

Appearances

For the Commission: *Anne V. Maher.*
For the respondent: *Pro se.*

COMPLAINT

The Federal Trade Commission, having reason to believe that BBDO Worldwide, 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 BBDO Worldwide, Inc. is a New York corporation, with its principal office or place of business at 1285 Avenue of the Americas, New York, NY.

PAR. 2. Respondent, at all times relevant to this complaint, was an advertising agency of Häagen-Dazs Company, Inc., and prepared and disseminated advertisements to promote the sale of Häagen-Dazs Frozen Yogurt, 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 Häagen-Dazs Frozen Yogurt,

including but not necessarily limited to the attached Exhibits 1-3. These advertisements contain the following statements and depictions:

A. [In a 70-point type headline:]
WHY IS HÄAGEN-DAZS® FROZEN YOGURT BETTER THAN YOUR FIRST TRUE LOVE?
[Depiction of "Honeymooners"]
HÄAGEN-DAZS IS STILL 98% FAT FREE*.
[In 15-point text below the headline:]
Imagine pineapple sorbet tantalizingly wrapped around a coconut frozen yogurt bar. And now imagine that this bar has 100 calories. Or imagine a pint of vanilla frozen yogurt swirled with heavenly raspberry sorbet. And that these and all the rest of our irresistible frozen yogurt and sorbet combinations are 98% fat free. But they're still totally Häagen-Dazs.
What could be better?
[Depiction of frozen yogurt carton container and box of frozen yogurt bars]
[In 8-point type at the bottom right side of the page:]
*frozen yogurt and sorbet combinations
(Exhibit 1)

B. [In a 70-point type headline:]
WHY IS HÄAGEN-DAZS® FROZEN YOGURT BETTER THAN YOUR FIRST TRUE LOVE?
[Depiction of "Honeymooners"]
HÄAGEN-DAZS IS STILL 98% FAT FREE*.
[In 20-point text below the headline:]
Try new Raspberry Rendezvous™ and Orange Tango™ Frozen Yogurt.
Both are 98% fat free and still totally Häagen-Dazs.
[Depiction of frozen yogurt carton container]
[In 8-point type at the bottom right side of the page:]
*frozen yogurt and sorbet combinations
(Exhibit 2)

C. [In a 110-point type headline:]
NOW DISAPPEARING AT A STORE NEAR YOU.
[Depiction of frozen yogurt bar]
[In 15-point text below the headline:]
Take a good look. This is what a Häagen-Dazs Frozen Yogurt bar looks like. We thought we'd point that out, just in case you have some trouble finding them in your store. Because it seems that people are demanding them faster than we can supply them. Not that we're really surprised. After all, we're the ones who made them so irresistible in the first place -- with flavors like Raspberry & Vanilla, Peach, Strawberry Daiquiri and Piña Colada. And each with just 1 gram of fat and 100 calories. So now that you know what they look like -- go ahead and try one. And you'll find out for yourself just how quickly they can disappear.
(Exhibit 3)

PAR. 5. Through the use of the statements and depictions contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits 1 and 2, respondent has represented, directly or by implication, that Häagen-Dazs Frozen Yogurt is 98% fat free.

PAR. 6. In truth and if fact, in most cases Häagen-Dazs Frozen Yogurt is not 98% fat free. Seven of the nine Häagen-Dazs Frozen Yogurt flavors sold in cartons and three of the eight Häagen-Dazs Frozen Yogurt Bar flavors contained more than two percent fat content at the time of dissemination of the advertisements referred to in paragraph four. Therefore, the representation set forth in paragraph five was, and is, false and misleading.

PAR. 7. Through the use of the statements and depictions contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits 1 and 2, respondent has represented, directly or by implication, that Häagen-Dazs Frozen Yogurt is low fat.

PAR. 8. In truth and if fact, in most cases Häagen-Dazs Frozen Yogurt is not low fat. Three of the nine Häagen-Dazs Frozen Yogurt flavors sold in cartons and three of the eight Häagen-Dazs Frozen Yogurt Bar flavors contained from eight to twelve grams of fat per serving at the time of dissemination of the advertisements referred to in paragraph four. In addition, four of the nine Häagen-Dazs Frozen Yogurt flavors sold in cartons contained from four to six grams of fat per serving. Therefore, the representation set forth in paragraph seven was, and is, false and misleading.

PAR. 9. Through the use of the statements and depictions contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisement attached as Exhibit 3, respondent has represented, directly or by implication, that Häagen-Dazs Frozen Yogurt Bars contain one gram of fat per serving.

PAR. 10. In truth and in fact, in many cases Häagen-Dazs Frozen Yogurt Bars contain more than one gram of fat per serving. Three of the eight Häagen-Dazs Frozen Yogurt Bar flavors contained from eleven to twelve grams of fat per serving at the time of dissemination of the advertisements referred to in paragraph four. Therefore, the representation set forth in paragraph nine was, and is, false and misleading.

PAR. 11. Through the use of the statements and depictions contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisement attached as Exhibit 3, respondent has represented, directly or by implication, that Häagen-Dazs Frozen Yogurt Bars are low fat.

PAR. 12. In truth and in fact, in many cases Häagen-Dazs Frozen Yogurt Bars are not low fat. Three of the eight Häagen-Dazs Frozen Yogurt Bar flavors contained from eleven to twelve grams of fat per serving at the time of dissemination of the advertisements referred to in paragraph four. Therefore, the representation set forth in paragraph eleven was, and is, false and misleading.

PAR. 13. Through the use of the statements and depictions contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisement attached as Exhibit 3, respondent has represented, directly or by implication, that Häagen-Dazs Frozen Yogurt Bars contain 100 calories per serving.

PAR. 14. In truth and in fact, in many cases Häagen-Dazs Frozen Yogurt Bars contain more than 100 calories per serving. Three of the eight Häagen-Dazs Frozen Yogurt Bar flavors contained from 210 to 230 calories per serving at the time of dissemination of the advertisements referred to in paragraph four. Therefore, the representation set forth in paragraph thirteen was, and is, false and misleading.

PAR. 15. Respondent knew or should have known that the representations set forth in paragraphs five, seven, nine, eleven and thirteen were, and are, false and misleading.

PAR. 16. The acts and practices of the 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.

EXHIBIT 1

WHY IS HÄAGEN-DAZS® FROZEN YOGURT BETTER THAN YOUR FIRST TRUE LOVE?

HÄAGEN-DAZS IS STILL 98% FAT FREE.*

Imagine pineapple sorbet tantalizingly wrapped around a coconut frozen yogurt bar. And now imagine that this bar has 100 calories. Or imagine a pint of vanilla frozen yogurt swirled with heavenly raspberry sorbet. And that these and all the rest of our irresistible frozen yogurt and sorbet combinations are 98% fat free. But they're still totally Häagen-Dazs.

What could be better?

HÄAGEN-DAZS. IT'S BETTER THAN ANYTHING.®

*frozen yogurt and sorbet combinations

EXHIBIT 2

EXHIBIT 2

WHY IS HÄAGEN-DAZS® FROZEN YOGURT BETTER THAN YOUR FIRST TRUE LOVE?

HÄAGEN-DAZS IS STILL 98% FAT FREE.*

COUPON EXPIRES 12/31/93

SAVE $1.00

ON ANY FLAVOR HÄAGEN-DAZS® FROZEN YOGURT PINT!

18023

VOID

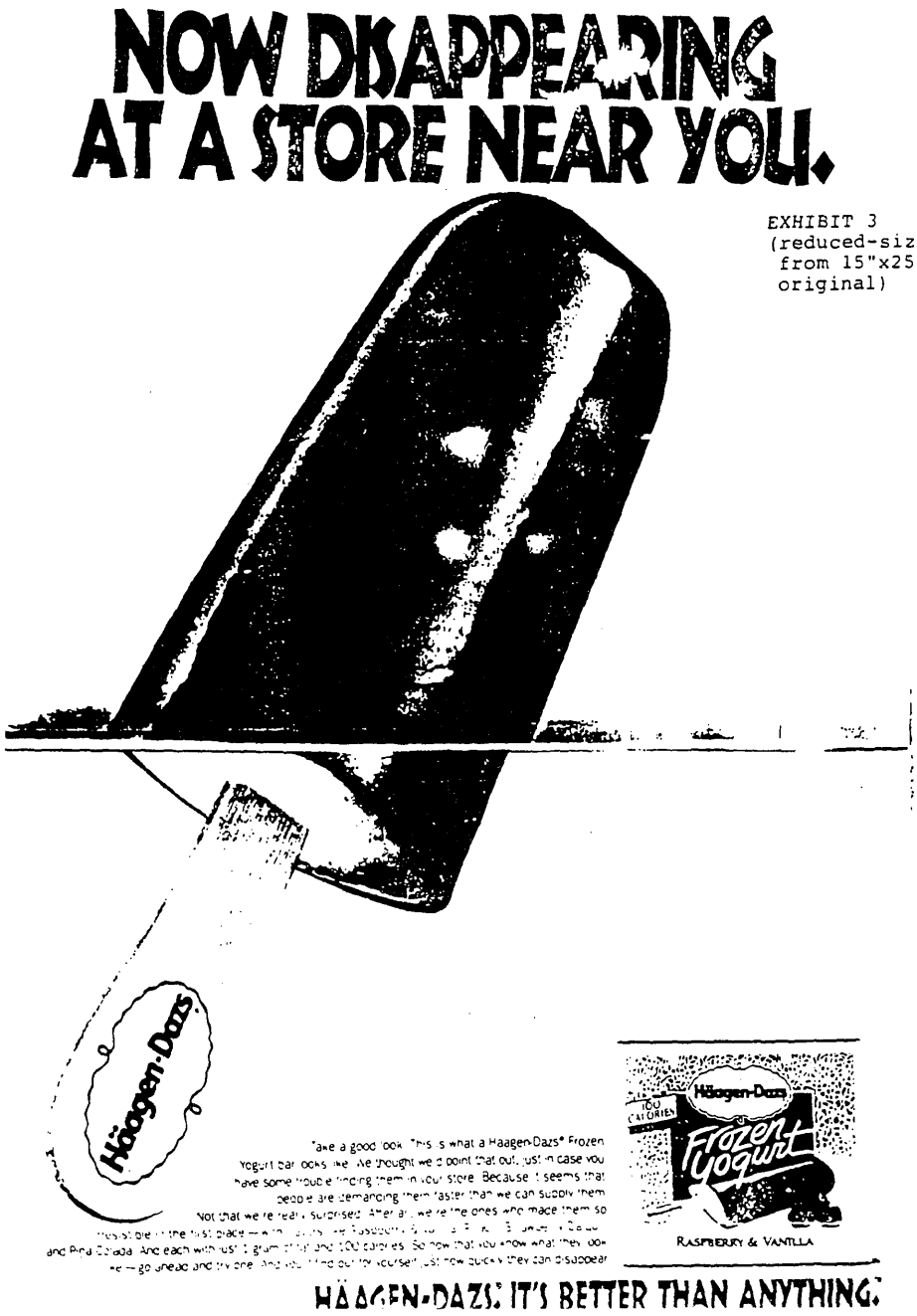
This certificate is redeemable at grocery convenience stores and participating Haagen-Dazs Ice Cream Shops

Try new Raspberry Rendezvous™ and Orange Tango™ Frozen Yogurt. Both are 98% fat free and still totally Häagen-Dazs.

HÄAGEN-DAZS. IT'S BETTER THAN ANYTHING.

*Frozen yogurt and sorbet combinations

EXHIBIT 3


NOW DISAPPEARING
AT A STORE NEAR YOU.
EXHIBIT 3
(reduced-size
from 15"x25"
original)
Häagen-Dazs
Häagen-Dazs
100 CALORIES
Frozen Yogurt
RASPBERRY & VANILLA
HÄAGEN-DAZS. IT'S BETTER THAN ANYTHING.

DECISION AND ORDER

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

The respondent, 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 the 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 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 a 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 BBDO Worldwide, 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 1285 Avenue of the Americas, 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

I.

It is ordered, That respondent BBDO Worldwide, 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 frozen yogurt, frozen sorbet or ice cream product (excluding all other food or confection products in which ice cream is an ingredient comprising less than fifty percent of the total weight of the involved product) in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting, in any manner, directly or by implication, through numerical or descriptive terms or any other means, the existence or amount of fat, saturated fat, cholesterol or calories in any such product. If any representation covered by this Part either directly or by implication conveys any nutrient content claim defined (for purposes of labeling) by any regulation promulgated by the Food and Drug Administration, compliance with this Part shall be governed by the qualifying amount for such defined claim as set forth in that regulation.

II.

Nothing in this order shall prohibit respondent from making any representation that is specifically permitted in labeling for any frozen yogurt, frozen sorbet or ice cream by regulations promulgated by the Food and Drug Administration pursuant to the Nutrition Labeling and Education Act of 1990.

III.

It is further ordered, That for three (3) years after the last date of dissemination of any representation covered by this order, respondent, or its successors and assigns, shall maintain and upon request make available to the Federal Trade Commission for inspection and copying:

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

2. 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 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.

V.

It is further ordered, That respondent shall, within thirty (30) days after service of this order, distribute a copy of this order to each of its operating divisions and to each of its officers, agents, representatives, or employees engaged in the preparation or placement of advertisements or other materials covered by this order.

VI.

This order will terminate on January 24, 2016, 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 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.

IN THE MATTER OF

THE UPJOHN 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-3638. Complaint, Feb. 8, 1996--Decision, Feb. 8, 1996

This consent order requires, among other things, the respondents to divest, within 12 months, Pharmacia Aktiebolag's 9-AC assets, an inhibitor drug for the treatment of colorectal cancer, to a Commission-approved acquirer. If the transaction is not completed in the prescribed time, the Commission will be allowed to appoint a trustee.

Appearances

For the Commission: *Ann Malester, Claudia Higgins* and *William Baer.*

For the respondents: *Stuart Meiklejohn, Sullivan & Cromwell,* New York, N.Y. and *Steven Sunshine, Shearman & Sterling,* Washington, D.C.

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that respondents The Upjohn Company ("Upjohn"), a Michigan corporation subject to the jurisdiction of the Commission, and Pharmacia Aktiebolag ("Pharmacia"), a Swedish corporation subject to the jurisdiction of the Commission, have agreed to merge in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, ("FTC Act"), 15 U.S.C. 45; and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. RESPONDENTS

1. Respondent Upjohn 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 7000 Portage Road, Kalamazoo, Michigan.

2. Respondent Pharmacia is a corporation organized, existing, and doing business under and by virtue of the laws of Sweden, with its principal place of business located at Frösundaviks allé 15, S-171 97 Stockholm, Sweden.

II. JURISDICTION

3. Respondents are, and at all times relevant herein have been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and are corporations whose 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. Respondents propose to combine their respective businesses in a transaction valued at approximately $13.9 billion, pursuant to the terms of a Combination Agreement dated August 20, 1995 ("the Merger").

IV. THE RELEVANT MARKET

5. The relevant line of commerce in which to analyze the effects of the Merger is the research, development, manufacture and sale of topoisomerase I inhibitors for the treatment of colorectal cancer. While no topoisomerase I inhibitor has yet been approved for sale in the United States, anticipated sales of all topoisomerase I inhibitors for the treatment of colorectal cancer will exceed $100 million by 2002.

6. An estimated 443,000 people in the United States are diagnosed with colorectal cancer each year. For most solid tumors, the first method of treatment is surgery, with radiation therapy and chemotherapy typically used as adjuncts to the surgery. Current protocols for colorectal cancer suggest that patients be treated with the chemotherapy agents 5-fluorouracil ("5FU") and either leucovorin or levamisole. For those patients whose cancer recurs, the survival rate is only fifteen percent. Topisomerase I inhibitors are expected to increase the rate of survival for colorectal cancer patients.

7. 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 MARKET

8. The relevant market set forth in paragraphs five and seven is highly concentrated. Upjohn and Pharmacia are two of only a very small number of firms currently in the advanced stages of developing topoisomerase I inhibitors for the treatment of colorectal cancer in the United States. Upjohn's product in development, CPT-11, is expected to be the first topoisomerase I inhibitor for the treatment of colorectal cancer on the market in the United States. Pharmacia plans to seek Food and Drug Administration ("FDA") approval for its topoisomerase I inhibitor, 9-Aminocamptothecin ("9-AC"), within the next few years.

VI. BARRIERS TO ENTRY

9. Entry into the relevant market is difficult and time consuming. Entry into the relevant market is governed by the requirements of the FDA which involve lengthy clinical trial periods, time consuming data collection and analysis from clinical trials, and expenditures of significant resources over a period of many years with no assurance that a viable commercial product will result. No company may reach advanced stages of development in the relevant market without engaging in scientific research that requires well over least two years time to complete.

VII. EFFECTS OF THE MERGER

10. The effects of the Merger may be substantially to lessen competition or tend to create a monopoly in the relevant market in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. 45, by, among other things:

a. Eliminating actual, direct and substantial competition in research and development between Upjohn and Pharmacia in the relevant market; and

b. Potentially decreasing the number of research and development tracks for topoisomerase I inhibitors for the treatment of colorectal cancer; and

c. Eliminating the potential for actual, direct and substantial price competition between Upjohn and Pharmacia in the relevant market.

VIII. VIOLATIONS CHARGED

11. The Combination Agreement described in paragraph four constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

12. The Merger described in paragraph four, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of the proposed merger by respondents The Upjohn Company ("Upjohn") and Pharmacia AB ("Pharmacia"), and the respondents having been furnished thereafter with a copy of a draft of complaint that the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and

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, 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 Acts, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the

executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure described in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Upjohn 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 7000 Portage Road, Kalamazoo, Michigan.

2. Respondent Pharmacia is a corporation organized, existing, and doing business under and by virtue of the laws of Sweden, with its principal place of business located at Frösundaviks allé 15, S-171 97 Stockholm, Sweden.

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. *"Upjohn"* means The Upjohn Company, its directors, officers, employees, agents and representatives, successors and assigns; its subsidiaries, divisions, groups and affiliates controlled by Upjohn; and the respective directors, officers, employees, agents and representatives, and the respective successors and assigns of each.

B. *"Pharmacia"* means Pharmacia Aktiebolag, its directors, officers, employees, agents and representatives, successors and assigns; its subsidiaries, divisions, groups and affiliates controlled by Pharmacia; and the respective directors, officers, employees, agents and representatives, and the respective successors and assigns of each.

C. *"Respondents"* means Upjohn and Pharmacia.

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

E. *"NCI"* means the National Cancer Institute.

F. *"Merger"* means the combination of Upjohn and Pharmacia pursuant to a Combination Agreement dated August 20, 1995.

G. *"9-AC"* or *"9-amino-20(S)-camptothecin"* means the semisynthetic compound which refers to the compound 1-pyrano [3', 4' : 6, 7] indolizino [1, 2-b] quinoline-3, 14 (4H, 12H) -dione, 10-amino-4-ethyl-4-hydroxy-(S) in respect of its therapeutic indication for the treatment of cancer.

H. *"CPT-11"* or *"irinotecan hydrochloride trihydrate"* means the chemical compound which refers to the compound (+) - (4S) -4, 11 - diethyl - 4 - hydroxy - 9 - [(4 - piperidinopiperidino) carbonyl - oxy] - 1H - pyrano [3', 4' : 6, 7] indolizino [1, 2 - b] quinoline - 3, 14 (4H, 12H) - dione hydrochloride trihydrate.

I. *"Pharmacia's 9-AC Assets"* means an exclusive license to all Pharmacia's assets relating to the research and development of 9-AC for sale in the United States that are not part of Pharmacia's physical facilities or other tangible assets. "Pharmacia's 9-AC Assets" includes, but is not limited to, all formulations, patents, trade secrets, technology, know-how, specifications, designs, drawings, processes, testing and quality control data, research data, technical information, information stored on management information systems (and specifications sufficient for the Acquirer to use such information), proprietary software used in connection with Pharmacia's 9-AC, and all data, contractual rights, materials and information relating to obtaining FDA approvals and other government or regulatory approvals for the United States for Pharmacia's 9-AC. "Pharmacia's 9-AC Assets" also includes the assignment of all rights of Pharmacia to NCI patents, trade secrets, technology, know-how, specifications, designs, drawings, processes, testing and quality control data, research materials, technical information, information stored on management information systems (and specifications sufficient for the Acquirer to use such information), proprietary software used in connection with Pharmacia's 9-AC and all data, contractual rights, materials and information relating to obtaining FDA approvals and other government or regulatory approvals for the United States for Pharmacia's 9-AC.

J. *"Acquirer"* means the entity to whom the respondents shall divest Pharmacia's 9-AC Assets pursuant to this order.

K. *"Cost"* means Pharmacia's actual per unit cost of manufacturing Pharmacia's 9-AC, which may be adjusted once annually to reflect any increases in Pharmacia's actual cost, provided,

however, that for any year, the total rate of such adjustment with respect to all components of cost other than material and labor shall not exceed the rate of increase in the Consumer Price Index for such year.

II.

It is further ordered, That:

A. Respondents shall divest, absolutely and in good faith, within twelve (12) months of the date this order becomes final, Pharmacia's 9-AC Assets.

B. Respondents shall divest Pharmacia's 9-AC 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. Respondents shall obtain all necessary approvals and releases for such divestiture from NCI as a condition of the Commission's prior approval. The purpose of the divestiture of Pharmacia's 9-AC Assets is to ensure continued research and development of Pharmacia's 9-AC, in the same manner in which Pharmacia's 9-AC would be researched and developed absent the proposed Merger, and to remedy the lessening of competition resulting from the proposed Merger as alleged in the Commission's complaint.

C. At the Acquirer's option, respondents shall enter into a supply agreement with the Acquirer. Such agreement, if entered into, shall be provided to the Commission as part of respondents' application to the Commission for approval of the divestiture. This supply agreement shall include the following and respondents shall commit to satisfy the following:

1. Respondents shall manufacture and deliver to the Acquirer in a timely manner the Acquirer's requirements for 9-AC at respondents' cost for a period not to exceed three (3) years from the date the divestiture is approved. This supply agreement can be cancelled at the request of the Acquirer.

2. Respondents shall make representations and warranties to the Acquirer that the 9-AC manufactured by respondents for the Acquirer meets the United States Food and Drug Administration approved specifications therefor and are not adulterated or misbranded within the meaning of the Food, Drug and Cosmetic Act, 21 U.S.C. 321, *et*

seq. Respondents 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 9-AC manufactured for the Acquirer by respondents to meet FDA specifications. This obligation shall be contingent upon the Acquirer giving respondents prompt, adequate notice of such claim, cooperating fully in the defense of such claim, and permitting respondents 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 respondents 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 respondents to the Acquirer.

3. During the term of the supply agreement, upon reasonable request by the Acquirer, respondents shall make available to the Acquirer all records kept in the normal course of business that relate to the cost of manufacturing 9-AC.

D. The time period for divestiture pursuant to paragraph II of this order shall be tolled if and when respondents:

1. Provide to the Commission objective evidence, including, but not limited to, results of clinical trials indicating that, based on 9-AC's or CPT-11's medical profile, and through no fault of respondents, either Pharmacia's 9-AC or Upjohn's CPT-11 is not medically safe or efficacious for use in the treatment of colorectal cancer; and

2. Petition 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 subparagraph II.D.1 of this order.

This tolling of the time period for divestiture shall end when the Commission rules on respondents' petition to modify this order.

III.

It is further ordered, That:

A. If Upjohn and Pharmacia have not divested, absolutely and in good faith and with the Commission's prior approval, Pharmacia's 9-AC Assets within the time required by paragraph II.A. of this order, the Commission may appoint a trustee to divest, at Pharmacia's option, either (1) an exclusive United States license and a non-exclusive worldwide (excluding the United States) license in perpetuity, and in good faith, to all Pharmacia's assets relating to the research and development of 9-AC for sale throughout the world or (2) an exclusive worldwide license, in perpetuity, and in good faith, to all Pharmacia's assets relating to the research and development of 9-AC for sale throughout the world. The trustee shall obtain all necessary approvals and releases for the applicable license from NCI. Neither the decision of the Commission to direct the trustee nor the decision of the Commission not to direct the trustee to divest a license shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to Section 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the respondents to comply with this order.

B. If the trustee is directed under subparagraph A. of this paragraph to divest, at Pharmacia's option, either (1) an exclusive United States license and a non-exclusive worldwide (excluding the United States) license or (2) an exclusive worldwide license, respondents shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:

1. The Commission shall select the trustee, subject to the consent of respondents, which consent shall not be unreasonably withheld. If respondents have 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 respondents of the identity of any proposed trustee, respondents shall be deemed to have consented to the selection of the proposed trustee.

2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest, at Pharmacia's option, either (1) an exclusive United States license and a nonexclusive worldwide (excluding the United States) license or (2) an exclusive worldwide license.

3. Within ten (10) days after the appointment of the trustee, respondents 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 the rights and powers necessary to permit the trustee to assure respondents' compliance with the terms of this order. As part of the trustee agreement, the trustee shall execute confidentiality agreement(s) with respondents.

4. The trustee shall have twelve (12) months from the date the Commission approves the appointment of the trustee to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve month period, the trustee has submitted a plan of divestiture or believes that divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or, in the case of a court-appointed trustee, by the court; provided, however, the Commission may extend this period only two (2) times.

5. The trustee shall have full and complete access to the personnel, books, records, facilities and technical information related to Pharmacia's 9-AC, 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 research and development of, and the cost of manufacturing, Pharmacia's 9-AC. Respondents shall develop such financial or other information as the trustee may request and shall cooperate with the trustee. Respondents shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays in divestiture caused by respondents shall extend the time for divestiture under this paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed trustee, by the court.

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 respondents' absolute and unconditional obligation to divest at no minimum price. The divestiture shall be made in the manner and to the Acquirer as set out in paragraphs II and III of this order, as appropriate; provided, however, if the trustee receives *bona fide* offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest to the acquiring entity selected by respondents from among those approved by the Commission. If requested by the trustee or Acquirer, respondents shall provide the Acquirer with the assistance required by paragraph IV of this order.

7. The trustee shall serve, without bond or other security, at the cost and expense of respondents, on such reasonable and customary terms and conditions as the Commission may set. The trustee shall have the authority to employ, at the cost and expense of respondents, 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 respondents. The trustee's compensation shall be based at least in significant part on a commission arrangement based on a percentage of the selling price of the assets divested.

8. Respondents shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparations for, or defense of, any claim whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.

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

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

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

12. If a divestiture application filed pursuant to this paragraph III is pending before the Commission, and respondents petition the Commission to modify this order based on the conditions in paragraph II.D., then the Commission shall not approve the divestiture application until it rules on the petition to modify.

IV.

It is further ordered, That:

A. Upon reasonable notice and request from the Acquirer to respondents, respondents shall provide information, technical assistance and advice to the Acquirer with respect to Pharmacia's 9-AC Assets such that the Acquirer will be capable of continuing the current research and development. Such assistance shall include reasonable consultation with knowledgeable employees of respondents and training at the Acquirer's facility for a period of time sufficient to satisfy the Acquirer's management that its personnel are adequately knowledgeable about Pharmacia's 9-AC Assets. However, respondents shall not be required to continue providing such assistance for more than one (1) year after divestiture of Pharmacia's 9-AC Assets. Respondents may require reimbursement from the Acquirer for all of their own direct costs incurred in providing the services required by this paragraph. Direct costs, as used in this paragraph, means all actual costs incurred exclusive of overhead costs.

B. Upon reasonable notice and request from the Acquirer, respondents shall provide information, technical assistance and advice sufficient to assist the Acquirer in obtaining all necessary FDA approvals to manufacture 9-AC for use in clinical trials in the United States. Upon reasonable notice and request from the Acquirer, respondents shall also provide consultation with knowledgeable employees of respondents and training at the Acquirer's facility for a period of time, not to exceed one (1) year, sufficient to satisfy the Acquirer's management that its personnel are adequately trained in the manufacture of 9-AC. Respondents may require reimbursement from the Acquirer for all of their own direct costs incurred in providing the services required by this paragraph. Direct costs, as used in this paragraph, means all actual costs incurred exclusive of overhead costs.

V.

It is further ordered, That respondents shall comply with all terms of the Interim Agreement, attached to this order and made a part hereof as Appendix I. Said Interim Agreement shall continue in

effect until the provisions in paragraphs II., III. and IV. of this order are complied with or until such other time as is stated in said Interim Agreement.

VI.

It is further ordered, That if, following approval of the divestiture required by paragraph II. of this order, disputes arise between respondents and the Acquirer regarding: (1) fulfillment of the terms of the supply agreement described in paragraph II.C of this order; (2) the continuation of the clinical trials for the testing of 9-AC described in Attachment A to Appendix I of this order; or (3) the continuation of the defense of existing patents and the pursuit of the filing of new patents relating to Pharmacia's 9-AC, the Acquirer may elect to cause the issue to be submitted to outside, independent, binding arbitration in the District of Columbia. In the event the Acquirer so elects, respondents shall agree to submit to such arbitration, and the issue shall be settled by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association ("AAA") and AAA's Supplementary Procedures for International Commercial Arbitration or any successor rules thereto. Judgment upon the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof. The decision of the arbitrator, after confirmation by the court pursuant to 9 U.S.C. 9, or succeeding statutory provisions, shall be final and binding upon the parties, and the failure of the respondents thereafter to abide by the arbitrator's award shall be a violation of this order.

VII.

It is further ordered, That:

A. Within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until respondents have fully complied with the provisions of paragraphs II.A. and II.B. or III. of this order, respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with this order. Respondents shall include in their compliance reports, among other things that are required from time to time, a full description of

the efforts being made to comply with paragraphs II., III., IV. and V. of this order, including a description of all substantive contacts or negotiations for accomplishing the divestiture and the identity of all parties contacted. Respondents shall include in their compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning divestiture.

B. One (1) year from the date this order becomes final, annually on the anniversary of the date this order becomes final, and at all other times as the Commission may require, until respondents have fully complied with paragraphs II.C., IV. and V., respondents shall file a verified written report with the Commission setting forth in detail the manner and form in which they have complied and are complying with paragraphs II.C., IV. and V. of this order.

VIII.

It is further ordered, That, for the purpose of determining or securing compliance with this order, respondents shall permit any duly authorized representatives of the Commission:

A. Access, during office hours and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of respondents, relating to any matters contained in this order; and

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

IX.

It is further ordered, That respondents shall notify the Commission at least thirty (30) days prior to any proposed change in respondents 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.

APPENDIX I

INTERIM AGREEMENT TO MAINTAIN RESEARCH AND DEVELOPMENT

This Interim Agreement to Maintain Research and Development ("Interim Agreement") is by and among Pharmacia Aktiebolag ("Pharmacia"), a corporation organized, existing, and doing business under and by virtue of the laws of Sweden, with its office and principal place of business at Frösundaviks allè 15, S-171 97 Stockholm, Sweden, The Upjohn Company ("Upjohn"), 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 7000 Portage Road, Kalamazoo, Michigan 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 August 20, 1995, Pharmacia entered into a Combination Agreement with Upjohn providing for the combination of Pharmacia and Upjohn (hereinafter "Merger"); and

Whereas, Pharmacia is involved in, among other things, the research and development of 9-Amino-20(S)-camptothecin ("9-AC"), a topoisomerase I inhibitor; and

Whereas, Upjohn is involved in, among other things, the research and development of Camptosar ("CPT-11"), a topoisomerase I inhibitor; and

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

Whereas, if the Commission accepts the Agreement Containing Consent Order ("consent order"), the Commission must place it on the public record for a period of at least sixty (60) days and subsequently may either withdraw such acceptance or issue and serve its complaint and decision in disposition of the proceeding 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 ongoing and future research of Pharmacia's 9-AC, as defined in paragraph I of the consent order,

during the period prior to the final acceptance of the consent order by the Commission (after the 60-day public comment period) and until the divestiture required by paragraphs II or III of the consent order has been accomplished may not be possible and divestiture resulting from any proceeding challenging the legality of the Merger might not be possible, or might be less than an effective remedy; and

Whereas, the Commission is concerned that if the Merger is consummated, it will be necessary to preserve the Commission's ability to require the divestiture of Pharmacia's 9-AC Assets, and the Commission's right to have Pharmacia's 9-AC Assets continue as viable assets independent of Upjohn; and

Whereas, the purpose of the Interim Agreement and the consent order is:

1. To ensure continued research and development of Pharmacia's 9-AC in the same manner in which Pharmacia's 9-AC would be researched and developed absent the Merger; and

2. To preserve the Commission's ability to remedy any anticompetitive effects of the Merger; and

Whereas, Pharmacia's and Upjohn's entering into this Interim Agreement shall in no way be construed as an admission by Pharmacia and Upjohn that the Merger is illegal; and

Whereas, Pharmacia and Upjohn understand that no act or transaction contemplated by this Interim 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 Interim Agreement;

Now, therefore, the Parties agree, upon the understanding that the Commission has not yet determined whether the Merger 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, as follows:

1. Pharmacia and Upjohn agree to execute and be bound by the consent order.

2. Pharmacia agrees that from the date this Interim Agreement is accepted until the earliest of the time listed in subparagraphs 2.a. -

2.b., it will comply with the provisions of paragraph 4 of this Interim Agreement:

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

b. The time that the divestiture obligations required by the consent order are completed.

3. Pharmacia and Upjohn agree to take such actions as are necessary to prevent the destruction, removal, wasting, deterioration or impairment of Pharmacia's 9-AC Assets, except for ordinary wear and tear.

4. With respect to the continued research and development of Pharmacia's 9-AC, Pharmacia agrees:

a. To continue to pursue its obligations under the Cooperative Research and Development Agreement with the National Cancer Institute and the previously determined 9-AC research and development plan, as set forth in confidential Attachment A to this Interim Agreement; and

b. To fund the research and development of Pharmacia's 9-AC at levels no less than those contained in the budget for 1995, as set forth in confidential Attachment B to this Interim Agreement; and

c. To use its best efforts to support and defend Pharmacia's rights relating to 9-AC in U.S. Patent # 5,106742 dated April 21, 1992 (Camptothecin Analogs as Potent Inhibitors of Topoisomerase I), U.S. Patent # 5,225,404 dated July 6, 1993 (Methods of Treating Colon Tumors with Tumor-Inhibiting Camptothecin Compounds), and U.S. Serial # 08/323081 filed October 14, 1994 (pending patent application for Lyophilizate of Lipid Complex of Water Insoluble Camptothecins); and

d. To use its best efforts to obtain all necessary approvals and releases from the National Cancer Institute to accomplish the requirements of paragraphs II and III of the consent order; and

e. Within thirty days of acceptance of this Interim Agreement by the Commission, to have available for clinical trials at least sufficient inventory of Pharmacia's 9-AC sufficient to supply the clinical trials set forth in confidential Attachment A to this Interim Agreement that are likely to be initiated through November 1996.

5. Upjohn agrees to allow Pharmacia to fulfill its obligations under paragraphs 2 and 4 of this Interim Agreement, without restraint or interference from Upjohn.

6. Should the Commission seek in any proceeding to compel Pharmacia to divest itself of the Pharmacia 9-AC Assets, as provided in the consent order, or seek any other equitable relief relating to Pharmacia's 9-AC Assets, Pharmacia and Upjohn 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 Merger. Pharmacia and Upjohn shall also waive all rights to contest the validity of this Interim Agreement.

7. Should the Commission, pursuant to paragraph II.D. of the consent order, act on a petition from Pharmacia and Upjohn to modify the consent order based on the circumstances described in subparagraph II.D.1, this Interim Agreement shall be automatically modified to reflect any changes made by the Commission.

8. For the purpose of determining or securing compliance with this Interim Agreement, subject to any legally recognized privilege, and upon written request with reasonable notice to Pharmacia and Upjohn made to its General Counsel, Pharmacia and Upjohn shall permit any duly authorized representative or representatives of the Commission:

a. Access during the office hours of Pharmacia and Upjohn 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 Pharmacia and Upjohn relating to compliance with this Interim Agreement; and

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

9. This Interim Agreement shall not be binding until approved by the Commission.

IN THE MATTER OF

GENETUS ALEXANDRIA, INC., ET AL.

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

Docket C-3639. Complaint, Feb. 12, 1996--Decision, Feb. 12, 1996

This consent order prohibits, among other things, the Virginia-based corporations and their officers from misrepresenting the nature or extent of a physician's participation in any treatment procedure, the safety or efficacy of any treatment procedure, and the extent to which a treatment is covered by a patient's medical insurance. The consent order requires the respondents to pay $250,000 in consumer redress to the Commission.

Appearances

For the Commission: *Sondra L. Mills* and *Eric J. Bash.*

For the respondents: *Charles D. Nelson*, in-house counsel, Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that Genetus Alexandria, Inc., a corporation ("Genetus"), George Oprean, individually and as President and a director of said corporation, and Linda Huffman Oprean, individually and as an officer and a director of said corporation, have violated the provisions of the Federal Trade Commission Act, and that Galen Medical Centers, Ltd., a corporation, is a successor corporation to Genetus and is an *alter ego* of Genetus and/or George Oprean, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent Genetus Alexandria, Inc. ("Genetus") is a corporation formed under the laws of the Commonwealth of Virginia with its office and principal place of business located at 2843 Duke Street, Alexandria, Virginia. From approximately March of 1991 through July of 1994, Genetus operated a clinic for the treatment of impotence at this location.

Respondent Galen Medical Centers, Ltd. ("Galen") is a corporation formed under the laws of the Commonwealth of Virginia with its office and principal place of business located at 2843 Duke Street, Alexandria, Virginia. Some time after May 10, 1994, Galen acquired certain assets of, and became obliged to guarantee payment of certain debts incurred by, respondent Genetus. Commencing in approximately July of 1994, Galen began operating the impotence treatment clinic previously operated by Genetus located at 2843 Duke Street, Alexandria, Virginia. Galen also operates a clinic for treating impotence located at 714 Park Avenue in Baltimore, Maryland. Galen is a successor corporation to Genetus and is the *alter ego* of Genetus and/or George Oprean.

Respondent George Oprean is the President, Secretary, Treasurer and a director of respondent Genetus. George Oprean is also the President and a director of respondent Galen. Individually, or in concert with others, he formulates, directs, controls and performs the acts and practices of Genetus and Galen, including the acts and practices alleged in this complaint. His principal office or place of business is the same as that of Genetus and Galen.

Respondent Linda Huffman Oprean ("Linda Oprean") is the Vice President and a director of Genetus and is also a director of Galen. She was licensed as a registered nurse by the Virginia Board of Nursing from approximately June of 1991 until approximately July 13, 1994, when this license was revoked by the Virginia Board of Nursing. Individually, or in concert with others, including respondent George Oprean, she formulates, directs, controls and performs the acts and practices of Genetus and Galen, including the acts and practices alleged in this complaint. Her principal office or place of business is the same as that of Genetus, Galen and George Oprean.

PAR. 2. Since approximately March of 1991, respondents have been engaged in the offering for sale and the sale of services in connection with the treatment of impotence. Impotence is the inability of a man to attain and maintain an erection of sufficient rigidity and/or duration to permit him to engage in sexual intercourse. Impotence is frequently a symptom or side-effect of serious diseases, such as arteriosclerosis, aneurysms, high blood pressure, diabetes, strokes, kidney disease, and spinal cord injuries. Impotence can be a side-effect of various prescription medications or alcoholism, and can also be caused by depression, stress, anxiety and other psychological factors.

Impotence can be treated by various methods. Some methods treat the underlying physical, psychological or behavioral causes of impotence. Other methods produce an erection without treating the underlying cause of the impotence. The only treatment method offered by Genetus consisted of injections of the drug Prostaglandin E1 or of a solution containing a combination of Prostaglandin El, Papaverine and Phentolamine (hereinafter referred to as "Tri-mix"). Prostaglandin E1 or Tri-mix may, if injected in appropriate doses into the patient's penis, cause an erection to occur for a patient experiencing impotence. Injections of Prostaglandin E1 or Tri-mix do not, however, treat the underlying condition that causes a patient's impotence.

Patients purchasing Genetus' treatments typically received an examination and a test injection of Prostaglandin El and had blood and urine specimens taken and submitted to a laboratory. Genetus prepared the prescribed dosage of the Prostaglandin El or Tri-mix and sold these drugs directly to patients. Genetus also taught patients how to self-inject the Prostaglandin El or Tri-mix and sold them a self-injection device and additional supplies of the drug.

In many instances, Genetus submitted claims for reimbursement for services, laboratory tests, drugs and devices directly to the patients' medical insurance companies. In other instances, patients paid Genetus directly and submitted the invoices themselves to their medical insurers for reimbursement. Genetus typically required its patients to make an initial cash payment and to pay for all or part of the charges not paid to Genetus by the patients' insurance companies.

PAR. 3. In the course and conduct of Genetus' business, respondents Genetus, George Oprean and Linda Oprean have disseminated or caused to be disseminated advertisements and promotional materials for the purpose of promoting the sale of impotence treatment services described above in paragraph two. The self-injection device prescribed and sold by Genetus is a "device" for purposes of Section 12 of the Federal Trade Commission Act. Prostaglandin El, Papaverine, Phentolamine, and the Tri-mix combination prescribed and sold by Genetus are "drugs" for purposes of Section 12 of the Federal Trade Commission Act. Genetus, George Oprean and Linda Oprean placed, or caused to be placed, advertisements on various radio stations broadcast generally to the public to promote their impotence treatment services to prospective patients. Genetus, George Oprean and Linda Oprean further

advertised their impotence treatment services through the use of fact sheets, letters, brochures, and pamphlets provided to patients and prospective patients.

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

PAR. 5. Respondents Genetus, George Oprean and Linda Oprean have disseminated or have caused to be disseminated radio advertisements and promotional materials, including but not necessarily limited to the attached Exhibits A, B, and C.

PAR. 6. The radio advertisements and promotional materials referred to in paragraph five contained the following statements:

A. Did you know that impotence is a medical problem? It can be caused by diabetes, alcohol, smoking or stress. There are over 200 prescription and non-prescription medications that can cause impotence. This is Phil Chenier speaking to you on behalf of Genetus. Before Genetus, most men with impotence suffered needlessly not knowing that there was help available. Now thanks to the doctors and medical staff at Genetus, thousands of men are functioning better than ever before. At Genetus, you'll be medically evaluated, tested and treated and when you leave on your very first visit, you will be functional again. Many members of the Genetus staff have experienced some problem with impotence. They understand what a man goes through when impotence creeps up on him. They know how it can affect his life and relationships. So if you are having any problem with impotence, call the impotence specialists at Genetus today at 703/461-9269. That's 703/461-9269 for Genetus. Your best chance to restore your life. (Exhibit A);

B. Impotence. The word itself would strike down the strongest of men, but no more. Medical science has discovered a simple, safe and effective way to treat impotence. I am George Oprean speaking for Genetus where all we do is treat impotence. If you are one of the seven hundred thousand men in this area that are afflicted by impotence, I want you to know that you don't have to suffer anymore. By calling 703/461-9269 you can permanently arrest your impotence. At Genetus, you will be medically evaluated and treated, and when you leave you will be functional -- or as I like to say, you're back in business. Impotence is not curable. It knows no age, color or creed. But it is 100% treatable. You no longer have to say I'm sorry or feel guilty. Call 703/461-9269 and find out for yourself what a new beginning feels like. That's 703/461-9269. And believe me, it works. (Exhibit B);

C. . . . .

THE GENETUS PROGRAM

Impotence is a disease but not a primary disease. When you call you will be given an appointment to see one of the Genetus physicians. You will be given a complete medical evaluation. The purpose of the evaluation is to find out what is the underlying cause of your impotence. You will also be given a diagnostic

injection of Prostaglandin E-1, and you will be asked to keep track of two very important things duration and rigidity. The erection should last at least one hour. It may last longer or less than an hour. You rate the rigidity on a scale of 1-10. This information is important to us so that we can adjust your final dosage to [sic] that you are pleased with the end product.

Prostaglandin E-1, or PG-1 is the medication that is used to produce the erection. PG-1 is a vaso dilator that expands the vessels in the penis and draws the blood into the penis so that an erection can occur. Without getting blood into the penis and keeping it in the penis you cannot have or maintain an erection.

PG-1 has no side effects or contraindications which means that it does not effect [sic] any other organ in your body nor does it effect [sic] any medication that you might be taking. It passes out of your body in your urine and there are no residual effects. It is the safest drug that can be used.

You will be asked to return within 72 hours. At that time all your lab work will be back and you will tell us about the duration and rigidity. It is at this time that the medical staff will determine your maintenance dosage. You will also be taught how to use the Inject Ease system so that you can self inject. In fact you will self inject yourself with normal saline so that we know you know the proper method.

There after [sic] each time you use the PG-1 you will achieve an erection that will last you at lease [sic] an hour, even after ejaculation takes place.

IN MOST CASES YOUR INSURANCE WILL COVER THE MAJORITY OF THE COSTS [sic] IT DEPENDS ON YOUR COMPANY AND YOUR COVERAGE.

. . . .

(Exhibit C).

PAR. 7. Through the use of the statements contained in the radio advertisements and promotional materials referred to in paragraph six, including but not necessarily limited to the promotional materials attached as Exhibits A, B and C, respondents Genetus, George Oprean and Linda Oprean have represented, directly or by implication, that:

A. Each patient purchasing Genetus' services would be examined by a physician at Genetus.

B. Each patient purchasing Genetus' services would receive a medical diagnosis and treatment of the underlying cause of his impotence.

C. Each patient purchasing Genetus' services would be evaluated and treated by a physician or other medical practitioner licensed to do so.

PAR. 8. In truth and in fact:

A. Not every patient who purchased Genetus' services was examined by a physician; in fact, many patients were examined solely by respondent Linda Oprean, who was not a physician.

B. Not every patient who purchased Genetus' services received a medical diagnosis and treatment of the underlying cause of his impotence.

C. Not every patient was evaluated and treated by a physician or other medical practitioner licensed to do so; in fact, many patients were evaluated or treated solely by respondent Linda Oprean, who was not licensed to perform these activities.

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

PAR. 9. Through the use of the statements contained in the radio advertisements and promotional materials referred to in paragraph six, including but not necessarily limited to the radio advertisements and promotional materials attached as Exhibits A, B and C, respondents Genetus, George Oprean and Linda Oprean have represented, directly or by implication, that:

A. Prostaglandin El has no side-effects or contraindications.
B. The treatment program offered by Genetus is unqualifiedly safe.
C. The treatment program offered by Genetus would arrest each patient's impotence.

PAR. 10. In truth and in fact:

A. Prostaglandin El has possible side-effects, including priapism (a prolonged erection) and fibrosis of penile tissue, and use of Prostaglandin El is contraindicated for certain patients.

B. The treatment program offered by Genetus was not unqualifiedly safe.

C. The treatment program offered by Genetus did not arrest each patient's impotence.

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

PAR. 11. In the course and conduct of Genetus' business, respondents Genetus, George Oprean and Linda Oprean represented,

directly or by implication, to doctors who were employed by Genetus, to patients who received various services from Linda Oprean, and to insurance companies to whom Genetus and its patients submitted claims for reimbursement for goods and services provided to patients, that Linda Oprean was a "nurse practitioner" under the laws of Virginia.

PAR. 12. In truth and in fact, respondent Linda Oprean is not now, and never has been, a "nurse practitioner" under the laws of Virginia; rather she was licensed in Virginia only as a registered nurse. Therefore, the representations set forth in paragraph eleven were, and are, false and misleading.

PAR. 13. In the course and conduct of Genetus' business, respondents Genetus, George Oprean and Linda Oprean represented, directly or by implication, to patients and to insurance companies that:

A. All medical tests and laboratory procedures billed by Genetus had been performed.

B. All patients had been diagnosed by, and services performed or ordered by, a medical practitioner licensed to do so.

C. All claims submitted by Genetus to insurance companies for reimbursement were signed, or approved for signature, by a physician.

PAR. 14. In truth and in fact:

A. Not all medical tests and laboratory procedures billed by Genetus were performed.

B. Not all patients were diagnosed by, nor were services rendered or ordered by, a medical practitioner licensed to do so in many instances, patients were purportedly diagnosed by, and services rendered or ordered by, respondent Linda Oprean, who was not licensed to perform these services.

C. Not all claims submitted by Genetus to insurance companies for reimbursement were signed, or approved for signature, by a physician; in many instances, claims were instead signed by respondent Linda Oprean without a physician's knowledge or permission.

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

PAR. 15. Through the representations in paragraph thirteen and through the letter attached hereto as Exhibit C, respondents Genetus, George Oprean and Linda Oprean also falsely represented to patients and prospective patients that in most cases, the majority of the costs of Genetus' treatment program would be covered by the patients' medical insurance, depending on the insurance company and the patients' coverage.

PAR. 16. In truth and in fact, the majority of the costs billed to insurance companies for Genetus' treatment program were not, in most cases, covered by the patients' insurance for reasons independent of the scope of the patients' health insurance policy. In fact, insurers frequently rejected claims for goods and services billed by Genetus for numerous reasons, including, but not limited to:

A. The reasons set forth in paragraph fourteen; and

B. The fact that the amounts Genetus charged for certain goods and services bore no reasonable relationship to their costs and substantially exceeded the amounts insurers had agreed to pay for such goods and services.

Consequently, patients were responsible for paying most or all of the costs billed by Genetus.

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

PAR. 17. 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 Sections 5(a) and 12 of the Federal Trade Commission Act.

PAR. 18. Respondent Galen is a successor corporation to respondent Genetus and is the *alter ego* of respondents Genetus and/or George Oprean. As such, Galen is liable for the false, misleading and deceptive acts and practices in violation of Sections 5(a) and 12 of the FTC Act committed by Genetus and George Oprean as alleged herein.

EXHIBIT A

GENETUS CHENIER TAPE #2

VOICEOVER:

Did you know that impotence is a medical problem? It can be caused by diabetes, alcohol, smoking or stress. There are over 200 prescription and non-prescription medications that can cause impotence. This is Phil Chenier speaking to you on behalf Genetus. Before Genetus, most men with impotence suffered needlessly not knowing that there was help available. Now thanks to the doctors and medical staff at Genetus thousands of men are functioning better than ever before. At Genetus, you'll be medically evaluated, tested and treated and when you leave on your very first visit, you will be functional again. Many members of the Genetus staff have experienced some problem with impotence. They understand what a man goes through when impotence creeps up on him. They know how it can affect his life and relationships. So if you are having any problem with impotence. Call the impotence specialist at Genetus today at 703/461-9269. That's 703/461-9269 for Genetus. Your best chance to restore your life.

EXHIBIT B

GENETUS - GEORGE OPREAN TAPE

VOICEOVER:

Impotence. The word itself would strike down the strongest of men, but no more. Medical science has discovered a simple, safe and effective way to treat impotence. I am George Oprean speaking for Genetus where all we do is treat impotence. If you are one of the seven hundred thousand men in this area that are afflicted by impotence, I want you to know that you don't have to suffer anymore. By calling 703/461-9269 you can permanently arrest your impotence. At Genetus, you will be medically evaluated and treated, and when you leave you will be functional -- or as I like to say, you're back in business. Impotence is not curable. It knows no age, color or creed. But it is 100% treatable. You no longer have to say I'm sorry or feel guilty. Call 703/461-9269 and find out for yourself what a new beginning feels like. That's 703/461-9269. And believe me, it works.

EXHIBIT C

GENETUS CORP.

Welcome to GENETUS:

Thank you for your inquiry about GENETUS and its impotence treatment program. Enclosed is the information you requested.

As you read this information, I would like you to understand a few things. First, male sexual dysfunction (more commonly referred to as impotence) is primarily a medical problem. Second, there are very few people who are suffering from this problem solely as a result of physchological difficulties. Third, THAT IMPOTENCE IS NOT CURABLE, BUT IS 100% TREATABLE.

The medical community has only recently recognized male sexual dysfunction as being primarily a medical problem. Previously, due to the lack of understanding and disinterest it was universally thought of as a mental problem, giving rise to the lie that "It's all in your head." In fact, psychogenic impotence occurs in less than 10% of the male population. Today, it is generally agreed that most impotence is a symptom of a physical disorder originating elsewhere in the body and can be serious if not diagnosed and treated.

Until recently, the subject of impotence was never discussed publicly. The media and others shunned the topic. Even today in this enlightened age, many local and national television, radio outlets and magazines will not accept advertising that would let people know there is a medically approved treatment program, like ours, that is effective for 95% of the men suffering from any form of impotence.

We at GENETUS take pride in the leading role that we have taken in providing a safe effective treatment program and more important in making the public aware of the fact that IMPOTENCE IS A MEDICAL PROBLEM AND JUST LIKE DIABETES IS NOT CURABLE BUT IS TREATABLE.

Impotence can and does destroy a man's self esteem, confidence and personal relationships, believe me I know because I have been there.

The staff at GENETUS is here to help in any way we can. GENETUS MEANS A NEW BEGINNING. It has been that for hundreds of thousands of men, and it could be yours too.

Sincerely;

George Oprean
President

THE GENETUS PROGRAM

Impotence is a disease but not a primary disease. When you call you will be given an appointment to see one of the Genetus physicians. You will be given a complete medical evaluation. The purpose of the evaluation is to find out what is the underlying cause of your impotence. You will also be given a diagnostic injection of Prostaglandin E-1, and you will be asked to keep track of two very important things duration and rigidity. The erection should last at least one hour. It may last longer or less than an hour. You rate the rigidity on a scale of 1-10. This information is important to us so that we can adjust your final dosage to that you are pleased with the end product.

Prostaglandin E-1, or PG-1 is the medication that is used to produce the erection. PG-1 is a vaso dilator that expands the vessels in the penis and draws the blood into the penis so that an erection can occur. Without getting blood into the penis and keeping it in the penis you cannot have or maintain an erection.

PG-1 has no side effects or contraindications which means that it does not effect any other organ in your body nor does it effect any medication that you might be taking. It passes out of your body in your urine and there are no residual effects. It is the safest drug that can be used.

You will be asked to return within 72 hours. At that time all your lab work will be back and you will tell us about the duration and rigidity. It is at this time that the medical staff will determine your maintenance dosage. You will also be taught how to use the Inject Ease system so that you can self inject. In fact you will self inject yourself with normal saline so that you know the proper method.

There after each time you use the PG-1 you will achieve an erection that will last you at lease an hour, even after ejaculation takes place.

IN MOST CASES YOUR INSURANCE WILL COVER THE MAJORITY OF THE COSTS IT DEPENDS ON YOUR COMPANY AND YOUR COVERAGE.

Appointments are required so please call before you come.

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 a 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 Genetus Alexandria, Inc. ("Genetus"), George Oprean, and Linda Huffman Oprean ("Linda Oprean"), with violation of the Federal Trade Commission Act, and would charge respondent Galen Medical Centers, Ltd. ("Galen") as a successor to Genetus and an *alter ego* of Genetus and/or George Oprean; 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 the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true, and the 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 Genetus, George Oprean, and Linda Oprean had violated said Act, and that respondent Galen is the successor corporation to Genetus and an *alter ego* of Genetus and/or George Oprean, and that the complaint should issue stating its charges in those respects, 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 by Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Genetus Alexandria, Inc. is a corporation organized, existing and doing business under and by virtue of the

laws of the Commonwealth of Virginia, with its office and principal place of business located at 2843 Duke Street, Alexandria, Virginia.

Respondent Galen Medical Centers, Ltd. is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Virginia, with its office and principal place of business located at 2843 Duke Street, Alexandria, Virginia.

Respondent George Oprean is the President, Secretary, Treasurer and a director of Genetus and is the President and a director of Galen. He formulates, directs, controls and implements the policies, acts and practices of Genetus and Galen. His address is 2843 Duke Street, Alexandria, Virginia.

Respondent Linda Huffman Oprean is the Vice President and a director of Genetus and is a director of Galen. Together with George Oprean, she formulates, directs, controls and implements the policies, acts and practices of Genetus and Galen. Her address is 2843 Duke Street, Alexandria, 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

DEFINITIONS

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

1. *"Impotence"* means the inability of a man to attain and maintain an erection of sufficient rigidity and/or duration to enable him to engage in sexual intercourse.

2. *"Treatment procedure"* means any method of treating impotence or any other medical condition, disease or symptom, including, but not limited to, injections, drug therapy, hormone replacements, use of devices to induce erections, vascular surgery, use or implantation of devices, behavior modification, counseling, psychotherapy, or any other method.

I.

It is ordered, That respondents Genetus Alexandria, Inc., a corporation, ("Genetus"), Galen Medical Centers, Ltd. ("Galen"), their successors and assigns, and their officers, and George Oprean, individually and as President and a director of Genetus and Galen, and Linda Huffman Oprean ("Linda Oprean"), individually and as an officer and a director of Genetus and as a director of Galen, 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 treatment procedure in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from, in any manner, directly or by implication:

A. Falsely representing in any manner, directly or by implication, that each individual purchasing any impotence treatment procedure will receive an examination by a physician, or otherwise misrepresenting the nature or extent of physician participation in any treatment procedure;

B. Falsely representing in any manner, directly or by implication, that each individual purchasing any impotence treatment procedure will receive a medical diagnosis and treatment of the underlying cause of his impotence, or otherwise misrepresenting the nature or extent of medical diagnosis or treatment provided in connection with any treatment procedure;

C. Falsely representing in any manner, directly or by implication, the qualifications, credentials, or licenses held by any person involved in providing any treatment procedure;

D. Representing in any manner, directly or by implication, that Prostaglandin E1, Papaverine, or Phentolamine, or any combination thereof, has no side-effects or contraindications, or otherwise misrepresenting the side-effects or contraindications of any drug or treatment procedure;

E. Falsely representing in any manner, directly or by implication, that any impotence treatment procedure is unqualifiedly safe, or otherwise misrepresenting the safety of any treatment procedure;

F. Falsely representing in any manner, directly or by implication, that any impotence treatment procedure will arrest impotence, or

otherwise misrepresenting the efficacy or the duration of results of any treatment procedure;

G. Falsely representing in any manner, directly or by implication, the extent to which medical insurance will cover the costs of any treatment procedure;

H. Falsely representing in any manner, directly or by implication, that medical procedures were performed;

I. Falsely representing in any manner, directly or by implication, that claims submitted to insurance companies were signed, or approved for signature, by a physician;

J. Misrepresenting the safety, side-effects, or efficacy of, or the extent, nature, or duration of results of, any treatment procedure.

II.

It is further ordered, That respondents and their officers, agents, servants, employees, attorneys, subsidiaries, affiliates, successors, assigns, and all persons in active concert or participation with them who receive actual notice of this order by personal service or otherwise, and each of them, shall take no further actions to collect any payments from customers of Genetus on any outstanding accounts receivable of Genetus; provided, however, that this paragraph shall not prohibit respondents from fulfilling any legal obligations arising out of any *bona fide* pledge or assignment of such accounts receivable made to third party creditors of Genetus prior to September 1, 1994.

III.

It is further ordered:

A. That respondents Genetus, George Oprean and Linda Oprean shall jointly and severally pay to the FTC as consumer redress the sum of $250,000; provided, however, that this liability will be suspended, subject to the provisions of subparts B and C below, upon the execution and submission to the Commission of a truthful sworn declaration by respondents Genetus, Galen, George Oprean, and Linda Oprean, in the form shown on Exhibit A to this order, no later than three (3) days after the date of service of this order, that shall reaffirm and attest to the truth, accuracy and completeness of the

financial statement provided by each such respondent dated August - - - , 1995, and previously submitted to the Commission.

B. That the Commission's acceptance of this order is expressly premised upon the financial statements and related documents provided by respondents to the FTC referred to in subpart A above. After service upon respondents of an order to show cause, the FTC may reopen this proceeding to make a determination whether there are any material misrepresentations or omissions in said financial statements and related documents. Respondents shall be given an opportunity to present evidence on this issue. If, upon consideration of respondents' evidence and other information before it, the FTC determines that there are any material misrepresentations or omissions in said financial statements and related documents showing that any of the respondents failed to disclose the existence of assets in the financial statements, that determination shall cause the entire amount of $250,000 to become immediately due and payable to the FTC, and interest computed at the rate prescribed in 28 U.S.C. 1961, as amended, shall immediately begin to accrue on any unpaid balance of this amount. Proceedings initiated under Part III are in addition to, and not in *lieu* of, any other civil or criminal remedies as may be provided by law, including any proceedings the FTC may initiate to enforce this order.

C. That any funds paid by respondents pursuant to subparts A and B above shall be paid into a redress fund administered by the FTC and shall be used to provide direct redress to consumers who purchased Genetus' services. If the FTC determines, in its sole discretion, that redress to consumers is wholly or partially impracticable, any funds not so used shall be paid to the United States Treasury. Respondents shall be notified as to how the funds are disbursed, but shall have no right to contest the manner of distribution chosen by the Commission.

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, for a period of five (5) years from the date of entry of this order, respondents shall distribute a copy of this order to each of their operating divisions, to each of their managerial employees, and to each of their officers, agents, representatives, or employees engaged in the preparation or placement of advertising or other material covered by this order and shall secure from such person a signed statement acknowledging receipt of this order.

VI.

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

VII.

It is further ordered, That, for a period of ten (10) years from the date of entry of this order, each individual respondent named herein shall promptly notify the Commission of the discontinuance of his or her present business or employment, with each such notice to 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.

VIII.

It is further ordered, That this order will terminate on February 12, 2016, 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 a 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.

IX.

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

EXHIBIT A

DECLARATION OF _____ PURSUANT TO 28 U.S.C. 1746

Pursuant to 28 U.S.C. 1746, I, _____, hereby state that the information contained in the financial statement of _____, provided to the Federal Trade Commission on _____, 1995, was true, accurate and complete at such time.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: _____

_____

[signature]

IN THE MATTER OF

FRANK A. LATRONICA, JR., ET AL.

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

Docket C-3640. Complaint, Feb. 12, 1996--Decision, Feb. 12, 1996

This consent order requires, among other things, the distributor and the manufacturer of the Duram Emergency Escape Mask to possess competent and reliable scientific evidence to substantiate claims that their mask will absorb, filter out, or otherwise protect the user from any hazardous gas or fumes associated with fires, and for claims that the mask is appropriate for use in mines. In addition, the consent order requires the respondents to provide a disclosure statement on all package labels and inserts for the mask, or any substantially similar products.

Appearances

For the Commission: *Alan E. Krause* and *C. Steven Baker.*

For the respondents: *George Miron, Feith & Zell,* Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that Frank A. Latronica, Jr., individually and doing business as Life Safety Products; and Duram Rubber Products, a partnership, ("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 Frank A. Latronica, Jr., is an individual doing business as Life Safety Products. His principal office or place of business is located at 412 North Pacific Coast Highway, Suite 357, Laguna Beach, California.

PAR. 2. Respondent Duram Rubber Products is a registered partnership of Kibbutz Ramat Hakovesh with its principal office or place of business at Kibbutz Ramat Hakovesh, 44930 Israel.

PAR. 3. Respondents have advertised, offered for sale, sold, and distributed the Duram Emergency Escape Mask to the public.

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

PAR. 5. Respondents have disseminated or have caused to be disseminated advertisements and other promotional materials for the Duram Emergency Escape Mask, including, but not necessarily limited to, the attached Exhibit 1. This advertisement contains the following statements:

A. "WHEN SECONDS COUNT . . .

The Duram Emergency Escape Mask Provides Protection from Deadly Toxic Smoke and Gases."

B. "The Duram mask provides up to 20 minutes of protection in the most toxic environment; sufficient time to escape safely."

C. "The Duram Smoke Filier [sic] Mask is a disposable hood designed to provide emergency respiratory protection to enable safe escape from fires and related dangers such as heavy smoke, most poisonous fumes, dust, and lethal gases."

D. "Test results show that the mask filters 94% of the smoke and enables regular breathing in an environment filled with heavy smoke."

E. "APPLICATIONS . . . .

Factories and mines (in case of explosions)."

PAR. 6. Through the use of the statements contained in the advertisements referred to in paragraph five, including but not necessarily limited to the advertisement attached as Exhibit 1, respondents have represented, directly or by implication, that:

A. The Duram Emergency Escape mask will absorb or filter out all significant toxic smoke and poisonous fumes and lethal gases associated with fires.

B. The Duram Emergency Escape Mask will protect the user from all significant hazards associated with toxic smoke, poisonous fumes and lethal gases in fires for up to twenty minutes.

C. The Duram Emergency Escape Mask is appropriate for use in mines.

PAR. 7. In truth and in fact:

A. The Duram Emergency Escape Mask will not absorb or filter out all significant toxic smoke or poisonous fumes or lethal gases associated with fires, because it does not absorb or filter out carbon monoxide, a lethal gas associated with fires.

B. The Duram Emergency Escape Mask will not protect the user from all significant hazards associated with toxic smoke, or poisonous fumes or lethal gases in fires for up to twenty minutes, because it does not absorb or filter out carbon monoxide, a lethal gas associated with fires.

C. The Duram Emergency Escape mask is not appropriate for use in mines because it does not meet the standards developed by the National Institute for Occupational Safety and Health and the United States Bureau of Mines for Respiratory Protective Devices, as set forth in 30 CFR 11.

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

PAR. 8. Through the use of the statements contained in the advertisements referred to in paragraph five, including but not necessarily limited to the advertisement attached as Exhibit 1, respondents have represented, directly or by implication, that at the time they made the representations set forth in paragraph six, respondents possessed and relied upon a reasonable basis that substantiated such representations.

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

PAR. 10. Through the use of the statements contained in the advertisements referred to in paragraph five, including but not necessarily limited to the advertisement attached as Exhibit 1, respondents have represented, directly or by implication, that scientific tests prove that the Duram Emergency Escape Mask filters 94% of the smoke in an environment filled with heavy smoke.

PAR. 11. In truth and in fact, scientific tests do not prove that the Duram Emergency Escape Mask filters 94% of the smoke in an environment filled with heavy smoke. Therefore, the representation set forth in paragraph ten was, and is, false and misleading.

PAR. 12. In the advertising and sale of the Duram Emergency Escape Mask, respondents have represented that the Duram Emergency Escape Mask absorbs or filters out all significant toxic smoke, poisonous fumes and lethal gases associated with fires. Respondents have failed to disclose to consumers that the Duram Emergency Escape Mask does not absorb or filter out carbon monoxide, a lethal gas associated with fires. This fact would be material to consumers in their purchase or use decisions regarding the Duram Emergency Escape Mask. The failure to disclose this fact, in light of the representations made, was, and is, a deceptive practice.

PAR. 13. In providing the advertisements and promotional materials referred to in paragraph five to its distributors, respondent Duram Rubber Products has furnished the means and instrumentalities to those distributors to engage in the acts and practices alleged in paragraphs five through twelve.

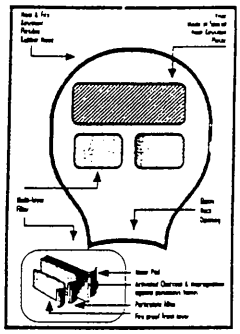
PAR. 14. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

EXHIBIT 1

EXHIBIT 1

When Seconds Count ...

The Duram Emergency Escape Mask Provides Protection from Deadly Toxic Smoke and Gases



- **Increased Survivability**
  The Duram mask provides up to 20 minutes of protection in the most toxic environment; sufficient time to escape safely.

- **Ease of Use**
  The extreme flexibility and special design enables the user to don the mask very quickly; easily adjusting to any head shape, long or short hair, glasses or jewelry.

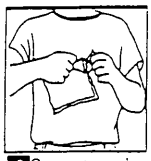
- **Compact**
  Constructed of a unique flame resistant rubber, the Duram Mask is thin, strong and very light weight. The 4"x5"x¼" low profile package makes it comfortable to carry in a coat pocket, briefcase or purse.

- **Visibility**
  The wide visor made of heat-resistant material, enables clear visibility with a wide 180 degree angle of vision.

- **Storage**
  The Duram Mask is vacuum sealed in a foil container to guarantee the effectiveness of the filter for 4 years (travel case and wall mount fixture also available)

- **Affordability**
  At a cost $49.95 respiratory protection is affordable for residential, personal or corporate applications

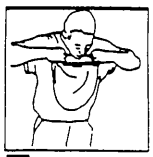
The Duram Mask is protected by patents and pending patents worldwide. US Patent No. 4870959



1 Open container along dotted line.

2 Extract mask from the vacuum sealed wrapper

3 Hold mask upside down, facing your body



4 Tuck edge under your chin

5 Pull mask over your head

6 Adjust mask to proper fit

The Duram Smoke Filter Mask is a disposable hood designed to provide emergency respiratory protection to enable safe escape from fires and related dangers such as heavy smoke, most poisonous fumes, dust, and lethal gases.

Smoke Is Very Dangerous

Research conducted by the NFPA (National Fire Protection Association) has determined that most deaths in fires result from smoke inhalation.

Utilizing advanced filtration technology, this mask gives the user extra time to find a way out and escape safely. Test results show that the mask filters 94% of the smoke and enables regular breathing in an environment filled with heavy smoke.

Applications

- Private homes, apartment houses, and high-rise buildings.
- Hotels, public facilities, and office buildings.
- Aircrafts, cruise ships, and trains.
- Factories and mines (in case of explosions).
- Industrial areas with severe ecological problems such as air pollution, heavy dust or chemical exposure.

For Complete Information Contact

LIFE SAFETY
PRODUCTS

1-800-359-4323

4130 South Sandhill Road
Suite A-5
Las Vegas, Nevada 89121

DECISION AND ORDER

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

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such 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 Frank A. Latronica, Jr., is an individual doing business as Life Safety Products with his principal office or place of business at 412 North Pacific Coast Highway, Suite 357, Laguna Beach, California.

2. Respondent Duram Rubber Products is a registered partnership of Kibbutz Ramat Hakovesh organized, existing and doing business under and by virtue of the laws of the country of Israel, with its principal office or place of business at Kibbutz Ramat Hakovesh 44930 Israel.

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

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) *"Duram Emergency Escape Mask"* shall mean the over-the-head escape hood manufactured by Duram Rubber Products, an Israeli company.

(2) *"Substantially similar product"* shall mean any mask, hood or other product that is designed or advertised as offering the user protection from the hazards associated with fires.

(3) *"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 Frank A. Latronica, Jr., individually and doing business as Life Safety Products; and Duram Rubber Products, a partnership, its successors and assigns, and its officers; and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of the Duram Emergency Escape Mask, 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, directly or by implication that:

A. Such product is capable of absorbing, removing, filtering out, or otherwise protecting the user from any hazardous gas or fumes associated with fire, unless such representation is true and, at the time of making such representation, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation; or

B. Such product can protect the user from any hazards associated with fire, unless such representation is true and, at the time of making such representation, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation; or

C. Such product is appropriate for use in mines, unless such representation is true and, at the time of making such representation, respondents possess and rely upon competent and reliable evidence that substantiates the representation.

II.

It is further ordered, That respondents Frank A. Latronica, Jr., individually and doing business as Life Safety Products; and Duram Rubber Products, a partnership, its successors and assigns, and its officers; and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, shall include, as specified below, the following disclosure in any advertisement or promotional material for the Duram Emergency Escape Mask, or any substantially similar product, that is advertised, offered for sale, or sold by respondents that is incapable of absorbing, removing, filtering or otherwise providing significant protection from carbon monoxide, if that advertising or promotional material expressly or impliedly represents that the device protects the user from any hazard associated with fire:

> NOTICE: This device does not filter carbon monoxide -- a lethal gas associated with fire.

In any print advertisement or promotional material, the above disclosure shall be printed in a typeface and color that are clear and prominent in at least ten-point bold type print, in close conjunction with the representation. In multipage documents, the disclosure shall appear on the cover or first page.

In any advertisement disseminated on television broadcast, cablecast, home video or theatrical release, the above disclosure shall be displayed in a legible superscript with a simultaneous voice-over recitation of the disclosure in a manner designed to ensure clarity and prominence.

In any radio advertisement, the above disclosure shall be spoken in a manner designed to ensure clarity and prominence.

Nothing contrary to, inconsistent with, or in mitigation of the above disclosure shall be used in any advertisement in any medium.

III.

It is further ordered, That respondents Frank A. Latronica, Jr., individually and doing business as Life Safety Products; and Duram Rubber Products, a partnership, its successors and assigns, and its officers; and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, shall include, as specified below, the following disclosure on all package labels and package inserts for the Duram Emergency Escape Mask, or any substantially similar product, advertised, offered for sale, or sold by respondents that is incapable of absorbing, removing, filtering or otherwise providing significant protection from carbon monoxide:

> WARNING: This device does not filter carbon monoxide -- a lethal gas associated with fire.

The above-required language shall be printed in at least ten-point bold type print in a typeface and color that are clear and prominent. Nothing contrary to, inconsistent with, or in mitigation of the above disclosure shall be used on any such package label or product insert.

IV.

It is further ordered, That respondents Frank A. Latronica, Jr., individually and doing business as Life Safety Products; and Duram Rubber Products, a partnership, its successors and assigns, and its officers; and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the labeling, advertising, promotion,

offering for sale, sale, or distribution of any fire protection or safety related product, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, in any manner, directly or by implication, that any such product protects or assists in protecting the user from respiratory hazards associated with fire, explosions, air pollution, chemical exposure or other environments where normal breathing is impaired, 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.

V.

It is further ordered, That respondents Frank A. Latronica, Jr., individually and doing business as Life Safety Products; and Duram Rubber Products, a partnership, its successors and assigns, and its officers; and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of any fire protection or safety related product, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting, in any manner, directly or by implication, the existence, contents, validity, results, conclusions or interpretations of any test or study.

VI.

It is further ordered, That respondents shall:

A. Within thirty (30) days from the date of service of this order, deliver by first class mail, a dated notification letter, on Life Safety Products letterhead stationery, in the form set forth in Appendix A to this order, to each person, partnership or corporation who purchased a Duram Emergency Escape Mask from Life Safety Products. The notification letter shall be delivered by itself in a format that does not include any additional communication from respondent.

B. Within sixty (60) days from the date of service of this order, deliver by first class mail, a dated notification letter, on Life Safety

Products letterhead stationery, in the form set forth in Appendix A to this order, to each person, partnership, or corporation who purchased a Duram Emergency Escape Mask from any of the catalog retailers to whom Life Safety Products sold the Duram Emergency Escape mask for resale. The notification letter shall be delivered by itself in a format that does not include any additional communication from respondent.

VII.

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 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.

VIII.

It is further ordered, That respondents shall:

A. Within thirty (30) days from the effective date of this order deliver a copy of this order to each of their officers, agents, representatives, and employees who are engaged in the preparation or placement of advertisements, promotional materials, product labels or other such sales materials covered by this order.

B. For a period of ten (10) years from the effective date of this order deliver a copy of this order to each of their future officers, agents, representatives, and employees who are engaged in the preparation or placement of advertisements, promotional materials, product labels or other such sales materials covered by this order, within three (3) days after the person assumes such position.

IX.

It is further ordered, That the respondent Duram Rubber Products shall notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in its partnership structure, including but not limited to dissolution, assignment or sale resulting in the emergence of a successor partnership or corporation, the creation or dissolution of subsidiaries or affiliates, the planned filing of a bankruptcy petition or any other partnership change, that may affect compliance obligations arising under this order.

X.

It is further ordered, That respondent Frank A. Latronica, Jr., doing business as Life Safety Products, shall, for a period of ten (10) years from the date this order becomes final, notify the Commission within thirty (30) days of the discontinuance of his present business or employment and of each affiliation with a new business or employment. Each notice of affiliation with any new business or employment shall include his new business address and telephone number, current home address, and a statement describing the nature of the business or employment and the duties and responsibilities. The expiration of the notice provision of this Part X shall not affect any other obligation arising under this order.

XI.

It is further ordered, That each 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.

XII.

This order will terminate on February 12, 2016, 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.

APPENDIX A

Dear Purchaser of a Duram Emergency Escape Mask:
Please note this important safety information:

The Duram Emergency Escape Mask you purchased does not filter carbon monoxide -- a lethal gas associated with fire. This mask will not protect you from the effects of carbon monoxide gas.

This means that if you are wearing the Duram Emergency Escape Mask during a fire, exit immediately. You should know that carbon monoxide is colorless and odorless.

Our company, Life Safety Products, is sending all Duram Emergency Escape Mask ("Duram Mask") purchasers this alert as a result of a consent order with the Federal Trade Commission. According to the Federal Trade Commission, advertisements for the Duram Mask claimed that the mask would protect you from all significant fire hazards for up to 20 minutes. These hazards included toxic smoke, poisonous fumes, and lethal gases.

The advertisements for the Duram Mask did not make it clear that the mask does not filter carbon monoxide -- a lethal gas associated with fires.

We have now agreed not to make any claims about the mask's ability to protect you from fire hazards, unless we have reliable scientific evidence to back up these statements.

We also have learned that these masks are not appropriate for use in U.S. mines.

While the Duram Mask will not protect you from carbon monoxide gas, it will protect you from other potentially lethal gases associated with fire. These gases include hydrogen chloride, hydrogen cyanide, nitrogen dioxide, and sulfur dioxide.

Life Safety Products

IN THE MATTER OF

L'AIR LIQUIDE S.A., ET AL.

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-3216. Consent Order, July 15, 1987--Set Aside Order, Feb. 15, 1996

This order reopens a 1987 consent order--which required L'Air Liquide to divest certain specified air separation gases assets and required prior Commission approval before making certain acquisitions--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 November 15, 1995, L'Air Liquide S.A. (formerly known as L'Air Liquide Societe Anonyme pour L'Etude et L'Exploitation des Procedes Georges Claude) ("L'Air Liquide"), the respondent named in the consent order issued by the Commission on July 15, 1987, in Docket No. C-3216 ("order"), filed its Petition To Reopen and Vacate Order ("Petition") in this matter. L'Air Liquide asks that the Commission reopen and vacate the order 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 on June 21, 1995 ("Prior Approval Policy Statement" or "Statement").[1] L'Air Liquide's Petition requests that the Commission "reopen the order in Docket No. C-3216, terminate the prior approval and related reporting obligations in paragraph VII, and vacate the order." Petition at 3. The thirty-day public comment period on L'Air Liquide's Petition ended on January 8, 1996. No comments were received. For the reasons discussed below, the Commission has determined to grant L'Air Liquide's Petition.

The Commission, in its Prior Approval Policy Statement, "concluded that a general policy of requiring prior approval is no

[1] 60 Fed. Reg. 39745-47 (August 3, 1995); 4 Trade Reg. Rep. (CCH) ¶ 13, 241.

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.*

The Commission stated that it will continue to fashion remedies as needed in the public interest, including ordering narrow prior approval or prior notification requirements in certain limited 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. 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 also announced, in its Prior Approval Policy Statement, 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 complaint in this matter ("complaint") alleged that L'Air Liquide's acquisition of Big Three Industries, Inc. ("BTI") 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, by lessening competition and tending to create a monopoly in the production and sale of merchant oxygen and nitrogen in the Southern Rocky Mountain region, West Texas, North Texas and South Texas, and Florida, and by lessening competition and tending to create a monopoly in the production and sale of merchant argon in the United States.

The complaint alleged that the acquisition would eliminate actual competition between L'Air Liquide and BTI in the relevant markets; increase concentration in the relevant markets; and enhance the likelihood of collusion or interdependent coordination between or among the remaining firms in the relevant markets. The Commission's order required L'Air Liquide to divest certain specified air separation gases assets. After obtaining the Commission's approval, L'Air Liquide completed the required divestiture. Paragraph VII of the order prohibits L'Air Liquide from acquiring without prior approval of the Commission the stock or assets of any United States merchant air separation gases producer. Paragraph VII further requires L'Air Liquide to submit annual reports of compliance with the prior approval requirement.

The presumption is that setting aside the prior approval requirement in this order is in the public interest. Nothing to overcome the presumption has been presented, and nothing in the record suggests that L'Air Liquide would engage in the same acquisition as alleged in the complaint. Accordingly, and because the only remaining obligation under the order is the prior approval requirement and the attendant reporting obligations, the Commission has determined to reopen the proceeding in Docket No. C-3216 and set aside the order.

Accordingly, *It is hereby ordered*, That this matter be, and it hereby is, reopened, and that the Commission's order issued on July 15, 1987, be, and it hereby is, set aside as of the effective date of this order.

IN THE MATTER OF

WLAR CO., ET AL.

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

Docket C-3641. Complaint, Feb. 21, 1996--Decision, Feb. 21, 1996

This consent order prohibits, among other things, a Virginia-based corporation and its officer from making unsubstantiated representations for their weight-loss booklets, products or program. The consent order requires the respondents to provide, in future advertisements, a disclosure statement that the products consist solely of a booklet or pamphlet containing information and advice on weight-loss.

Appearances

For the Commission: *Richard Cleland* and *C. Lee Peeler.*

For the respondents: *Randall Shaheen, Arnold & Porter,* Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that WLAR Co., a corporation, and Michael K. Craig, individually and as an officer of said corporation ("respondents"), have violated the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent WLAR Co. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware. Its principal place of business is located at 5622 Columbia Pike #106, Falls Church, VA.

Respondent Michael K. Craig is or was at relevant times herein the sole owner, officer, and employee of the corporate respondent. Individually, or in concert with others, he participated in and/or formulated, directed, and controlled the acts and practices of the corporate respondent, including the acts and practices alleged in this complaint. His address is the same as that of the corporate respondent.

PAR. 2. Respondents have advertised, offered for sale, sold, and distributed weight-loss and body-shaping products, consisting of booklets containing advice on dieting and exercise, to the public. Respondents have marketed these products under various names, including "Swedish 19," "Body Maker," "BM Program," "New Shape," and "Swedish 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 advertisements for their products, including but not necessarily limited to the attached Exhibits A through E. These advertisements contain the following statements:

A. Swedish 19:

Get the look that boys really notice!

You can have a cute body!

Now you, too can have the cute, foxy body you've always wanted -- the kind of body that really gets you noticed. And it can happen faster than you think!

You can have a narrower waist, thinner hips, legs and thighs, and a firmer behind. That's right -- no matter what you look like right now, just a few short weeks from today you could have a body that's thinner, firmer and cuter than you ever thought possible! JUST FOLLOW THE EASY INSTRUCTIONS IN THE SWEDISH 19 GUIDE!

No matter how many times you've tried and failed before, this time you really can do it. Finally, here's something that really works!

How Swedish 19 works

Swedish 19 will quickly show you how to lose weight while eating the foods you like -- including those snacks you love so much. It's not a diet -- so there's no list of things you have to eat. No list of things you can't eat, either. But when you use Swedish 19, you'll end up eating less (but still enough to keep you healthy.) Pretty soon, all those extra pounds will be gone for good.

Swedish 19 will help you control your appetite before meals and avoid over-eating -- even when you're dying to have a snack! And before you know it, you'll have a whole new set of eating habits, be thin, and stay thin -- with nothing more to buy. This is not like those diet pills you have to keep buying over and over again!

And -- if you're too skinny and just dying to get some curves -- you can make your body cuter and foxier -- adding shape and curves in all the right places!

Made for a teenage girl's body

Swedish 19 was designed especially for a teenage girl's body. It's the safest, most natural way to lose weight we could find for you. It's a safe, healthy way to lose weight. And it works. Show it to your doctor -- we're sure he'll agree!

Here's more good news. You never have to do any long boring exercises -- and you won't need to! When you use Swedish 19 you'll just feel like being more active all the time. You'll burn up calories while you're having fun!

It works!

Just days after you get Swedish 19, you can be eating less, feeling more active, and really happy about the changes starting to take place.

* * * *

Try to imagine how gorgeous you'll look. How your body can be really slim, trim and firm. Really picture it in your mind. It can happen to you!

You can do it!

The best part is -- you'll be sooo. . . proud of yourself when you find out you really can have a cute body. It's not your fault you haven't lost weight -- it's those worthless diets that don't work!

* * * *

Get a totally cute body - - or your money back!

Swedish 19 has worked for thousands of girls. And we're so sure it'll work for you, too, that we want you to try it for a whole month at no risk.

Go ahead -- really use it as much as you want. Let it help you slim down, shape up and beautify your body.

* * * *

Here's all you've got to do. Fill out the coupon and send it in with $12 right away. We'll send you Swedish 19 fast. (The package won't say who it's from or what's inside.)

* * * *

(Exhibit A)

B. Swedish System:

New! How you can...

Get the shape that boys really notice!

You can have a cute body!

Now you, too can have the cute, foxy body you've always wanted - the kind of body that really gets you noticed. And it can happen faster than you think!

Swedish girls are famous for their beautiful bodies. And the awesome Swedish System will quickly and easily show you how to get rid of excess, flabby fat - while adding shape and curves in all the right places!

You can have a narrower waist, thinner hips, legs and thighs, and a firmer behind. Yes - just a few short weeks from today you could have a body that's thinner, firmer and cuter than you ever thought possible!

No matter how many times you've tried and failed before, this time you really can do it. Finally, here's something that really works!

How the Swedish System works

When you use the Swedish System, you still get to eat the same foods you've been eating - including those snacks you love so much. It's not a diet - so there's no list of things you have to eat. No list of things you can't eat, either. But when you use the Swedish System, you'll end up eating less (but still enough to keep you healthy.) Pretty soon, all those extra pounds will be gone for good.

If you're overweight, the Swedish System will help you control your appetite before meals and avoid over-eating - even when you're dying to have a snack! And before you know it, you'll have a whole new set of eating habits, be thin, and stay

thin - with nothing more to buy. This is not like those diet pills you have to keep buying over and over again!

Or - if you're too skinny and just dying to get some curves - you can make your body shapelier and foxier - adding shape and curves in all the right places!

Made for a teenage girl's body

The Swedish System was designed especially for a teenage girl's body. It's the safest, most natural weight loss product we could find for you. . . .

Here's more good news. You never have to do any long boring exercises - and you won't need to! When you use the Swedish System you'll just feel like being more active all the time. You'll burn up calories while you're having fun!

It works!

Just days after you start using the Swedish System, you can be eating less, feeling more active, and really happy about the changes starting to take place. Just follow the easy directions in the Swedish System guide.

* * * *

Can you see it? Try to imagine how gorgeous you'll look. How every part of your body can be slim, trim and firm. Really picture it in your mind. It can happen to you!

You can do it!

The best part is - you'll be sooo. . . proud of yourself when you find out you really can have a cute body. It's not your fault you haven't lost weight - it's those worthless diets that don't work! Now you really can make your dreams come true. Definitely!

* * * *

Try it for a whole month!

This system has worked for thousands of girls. And now we've made it even better! We're so sure it'll work for you, too, that we want you try it for a whole month at no risk.

* * * *

(Exhibit B)

C. BM Program:

Get the body that gets the boys

How to lose weight fast and look great

You can have the cute, thin body you've always wanted -- the kind of body that really gets boys' attention. And lose weight fast from your waist, butt, hips and thighs -- so you're thin everywhere. You can do it without going on the usual kind of diet -- thanks to a special new discovery called the BM Program.

A great new body

You'll lose fat from every part of your body. Want a narrow waist? No problem. Firm behind? You got it. Slim hips? Sure. Thin legs? Of course. The BM Program's extra fast action will work on every part of your body. So -- no matter what parts of your body are too big right now -- you'll have the great body you want fast and easy.

It doesn't matter whether you need to lose ten, twenty, even forty pounds or more. You can get them off and keep them off for good. . . .

Every square inch of your body can be trim and firm. . . .

At last, here's something that really works. No matter how many times you've tried and failed to lose weight before, now you can do it. Just follow the easy directions in the BM Program guide.

Why diets don't work

You know what all those diets are like. You're supposed to have half a grapefruit for lunch and nothing else. But if you had the willpower to eat just that, you wouldn't have a weight problem now, would you?

* * * *

But it's not your fault. The big problem with diets is that they leave you hungry, and you can only hold out for so long. Heavy exercise just makes you tired and hungry. And diet pills can be dangerous.

It's new

The BM Program is totally different from anything you've ever tried before. Don't confuse this program with any other one. Here's why it's different. It helps you fight hunger and change your eating habits so you eat less -- without getting hungry. There's no "diet" or list of things you have to eat. No forbidden foods, either. No calorie-counting. You can keep on eating your favorite foods -- even snacks. But you'll end up eating less. You just won't feel like pigging out. And, best of all, those extra pounds that make you look ugly will go away fast!

It works

Even if you've tried everything else and failed, the BM Program is the last weight loss solution you'll ever need. It really works.

BM can help you to 1) stop gaining weight, 2) lose weight by getting rid of body fat and best of all 3) help you stay slim and trim.

BM works fast, too. You'll start changing your eating habits the first day -- giving you results you can start to notice in just a couple of weeks. And although not everyone loses weight at the same speed, the results will be absolutely amazing.

This program is so powerful that you have to be careful not to lose weight too fast. If that happens, just stop using it for a day or two. BM is safe and natural. There are no drugs or anything artificial.

* * * *

Here's proof

How well does the BM Program work? We had 100 girls try it. Desperate girls who had tried almost everything else, and who had given up hope. And -- guess what? Only two of them asked for their money back. Just two out of 100.

So we're 98% sure that it'll work for you. . . .

Hard to believe it could be so easy? Of course it is. That's what those other girls thought before they tried it. Boy, were they surprised!

It's the best

We've checked out over a dozen weight loss systems and this one's the best one we found. Just give it a try and we know you'll agree.

* * * *

(Exhibit C)

D. New Shape:

New! How you can...
Get the cute shape that boys like and girls envy!

* * * *

The perfect body

Now you, too, can have the kind of body that boys like and girls envy; thin, shapely legs and thighs, firm behind, narrow waist, and foxy, exciting curves in all the right places. . . .

No matter how many times you've tried and failed before, now you can really do it -- thanks to an excellent new discovery that can really work for you . . . .

Extra help for special areas

New Shape™ does more than just help you get rid of excess fat. It helps you add shape and firmness too. It's a total shape-up system that you can customize to your own special needs . . . . Whether you're too fat or too skinny, New Shape can help you get the kind of body you've always wanted. It really works.

This system was designed especially for teenage girls and is made to fit your lifestyle. So you can still have snacks and go out for hamburgers with your friends.

Works twice as fast

The New Shape System works twice as well -- and twice as fast -- because it combines two powerful factors. Yet it's completely natural and safe for girls of all ages. With no dangerous crash diets, no drugs, and no special foods.

It's easy and safe (no drugs!)

You won't find a faster, easier, safer way to slim down and shape up your body. We know -- because we've tried pretty much everything there is. Don't confuse New Shape with any other product or company.

* * * *

Order the New Shape System. You'll get it fast -- in a plain, unmarked package . . . . Use it as much as you need to get the body you want . . . . We've helped thousands of girls just like you -- and we know we can help you, too.

* * * *

(Exhibit D)

E. Body Maker:

HOW YOU CAN HAVE A FIRM, FOXY,
THINNER BODY - in just a few weeks!

THE BODY YOU'VE ALWAYS WANTED!

You can have the cute, foxy body you've always wanted -- the kind of body that really gets guy's attention. And you can look that way sooner than you think!

Just a few short weeks from today you could have a body that's thinner, firmer and cuter than you ever imagined -- thanks to an awesome new discovery.

Body Maker™ helps you lose weight from every part of your body. You can have a narrower waist, thinner hips, legs and thighs, and a firmer behind -- and add shape, firmness and curves in all the right places!

No matter how many times you've tried and failed before, now the awesome new Body Maker can quickly and easily show you how to get a body that's cuter and foxier than you ever thought possible! Finally, here's something that really works!

HOW BODY MAKER WORKS

With Body Maker, you still get to eat the foods you like -- including those snacks you love so much. It's not a diet -- so there's no list of things you have to eat. No list of things you can't eat, either. But when you follow the Body Maker program, you'll end up eating less (but still enough to keep you healthy.) You just

won't feel like pigging out! And pretty soon, all those extra pounds will be gone for good.

Body Maker will help you cut down on you appetite before meals and avoid over-eating -- even when you're dying to have a snack! And before you know it, you'll have a whole new set of eating habits, be thin, and stay thin -- with nothing more to buy. This is not like those diet pills you have to keep buying over and over again!

MADE ESPECIALLY FOR TEENAGE GIRLS

Body Maker was created especially for a teenage girl's body. It's the safest, healthiest way to lose weight we've ever seen. And it works! . . .

Here's more good news. You never have to do any exercises -- and you won't need to! With Body Maker you'll just feel like being more active all the time!

IT WORKS!

Just days after you get Body Maker, you can be eating less, feeling more active, and really happy about the changes starting to take place.

* * * *

It's not your fault you haven't lost weight -- it's those worthless diets that don't work!

* * * *

Body Maker has worked for thousands of girls . . . .

Go ahead -- really use it as much as you want. Let it help you slim down, shape up and beautify your body.

* * * *

(The Package won't say who it's from or what's inside.)

* * * *

(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 advertisements attached as Exhibits A through E, respondents have represented, directly or by implication, that:

A. BM Program, New Shape, and Body Maker are new weight-loss discoveries; and

B. Users of Swedish 19, Swedish System, BM Program, New Shape, and Body Maker are not required to consciously diet to lose weight.

PAR. 6. In truth and in fact:

A. BM Program, New Shape, and Body Maker are not new weight-loss discoveries; and

B. Users of Swedish 19, Swedish System, BM Program, New Shape, and Body Maker are required to consciously diet to lose weight. These products are booklets containing advice for reducing caloric intake and require conscious dieting to lose weight.

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

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

A. Swedish 19, Swedish System, BM Program, New Shape, and Body Maker cause fast and easy weight loss;

B. Swedish 19, Swedish System, BM Program, New Shape, and Body Maker are more effective than other products or programs in controlling appetite and causing weight loss;

C. Purchasers of Swedish 19, Swedish System, BM Program, New Shape, and Body Maker are successful in controlling appetite, losing weight, and reducing body fat;

D. Swedish 19, Swedish System, BM Program, and Body Maker cause users to develop a new set of eating habits, thereby reducing caloric intake and causing significant and long-term or permanent weight loss; and

E. Thousands of girls have successfully lost weight by using Swedish 19, Swedish System, New Shape, and Body Maker.

PAR. 8. 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 through E, 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 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. In their advertising and sale of Swedish 19, Swedish System, BM Program, New Shape, and Body Maker, respondents have represented that these products will reduce appetite and result in significant weight loss. Respondents have failed to disclose adequately that these products consist only of booklets or pamphlets containing advice concerning techniques for reducing caloric intake and/or exercise, and that reducing caloric intake and/or increasing exercise is required to lose weight. These facts would be material to consumers in their purchase or use decisions regarding the products. The failure to disclose these facts, in light of the representations made, was, and is, a deceptive practice.

PAR. 11. 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.

Chairman Pitofsky recused.

EXHIBIT A

Get the look that boys really notice!

You can have a cute body!

Now you, too can have the cute, foxy body you've always wanted -- the kind of body that really gets you noticed. And it can happen faster than you think!

You can have a narrower waist, thinner hips, legs and thighs, and a firmer behind. That's right -- no matter what you look like right now, just a few short weeks from today you could have a body that's thinner, firmer and cuter than you ever thought possible! JUST FOLLOW THE EASY INSTRUCTIONS IN THE SWEDISH 19 GUIDE!

No matter how many times you've tried and failed before, this time you really can do it. Finally, here's something that really works!

How Swedish 19 works

Swedish 19 will quickly show you how to lose weight while eating the foods you like -- including those snacks you love so much. It's not a diet -- so there's no list of things you have to eat. No list of things you can't eat, either. But when you use Swedish 19, you'll end up eating less (but still enough to keep you healthy.) Pretty soon, all those extra pounds will be gone for good.

Swedish 19 will help you control your appetite before meals and avoid over-eating -- even when you're dying to have a snack! And before you know it, you'll have a whole new set of eating habits, be thin, and stay thin -- with nothing more to buy. This is not like those diet pills you have to keep buying over and over again!

And -- if you're too skinny and just dying to get some curves -- you can make your body cuter and foxier -- adding shape and curves in all the right places!

Made for a teenage girl's body

Swedish 19 was designed especially for a teenage girl's body. It's the safest, most natural way to lose weight we could find for you. It's a safe, healthy way to lose weight. And it works. Show it to your doctor -- we're sure he'll agree!

Here's more good news. You never have to do any long boring exercises -- and you won't need to! When you use Swedish 19 you'll just feel like being more active all the time. You'll burn up calories while you're having fun!

It works!

Just days after you get Swedish 19, you can be eating less, feeling more active, and really happy about the changes starting to take place.

Before you know it, you'll be going to the mall to get that cute bikini you always wished you could wear. And when you look in the mirror, you won't believe how good you look!

Can you see it? Try to imagine how gorgeous you'll look. How your body can be really slim, trim and firm. Really picture it in your mind. It can happen to you!

You can do it!

The best part is -- you'll be sooo... proud of yourself when you find out you really can have a cute body. It's not your fault you haven't lost weight -- it's those worthless diets that don't work! Now you really can make your dreams come true. Definitely!

Your high school years are supposed to be the happiest time of your life. Make sure you don't miss out on all those special moments -- the beach, parties, school dances, the prom.

Sure -- once you look so good, all those guys that never noticed you before might start asking you out. But don't just do this for the guys. Do it for yourself. You deserve it!

Get a totally cute body -- or your money back!

Swedish 19 has worked for thousands of girls. And we're so sure it'll work for you, too, that we want you to try it for a whole month at no risk.

Go ahead -- really use it as much as you want. Let it help you slim down, shape up and beautify your body.

Then -- if you feel you haven't changed enough -- if you don't have the awesome body you've always wanted -- just send everything back to us and we'll give you your money back. We don't want your money unless you get the body you want!

Do it now!

Here's all you've got to do. Fill out the coupon and send it in with $12 right away. We'll send you Swedish 19 fast. (The package won't say who it's from or what's inside.)

So don't wait. If you put it off you might forget, and miss out on the cute body you want, and all the good times you deserve.

Do it now. You'll be so glad you did.

P.S.: Wanna get a cute body even faster? We've put together some really easy, fun exercises you can do in just 15 minutes a day. Use them with Swedish 19 and you'll get terrific results super-fast! They're yours for just $3 extra when you get Swedish 19. Good deal!

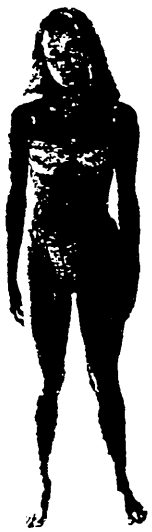
Plus -- we'll even throw in a . . .

FREE Gift!

You'll also get a chart to keep track of your weight loss absolutely FREE, just for ordering Swedish 19.

Hurry up and be the first one at your school to get that cute body! Make this the best year of your life!

Coupon gone? Send $12 with your name and address to Swedish 19, P.O. Box 2245, Kensington, MD 20891



FREE 30-DAY TRIAL!

Swedish 19 3-S
Nicholson Lane
P.O. Box 2245
Kensington, MD 20891-2245

Cool! I want a totally cute body. Send me Swedish 19 fast! Money back guarantee. Here's
☐ $12 for just Swedish 19
☐ $15 for Swedish 19 plus exercises

PRINT
Name_____

Address_____

City_____ State_____ Zip_____

BODY GOALS SURVEY FORM

(Answer only if you want to)

☐ I'm overweight and want a thinner body... or
☐ I'm too skinny and want more shape & curves

I want to change: (Check as many as you want)

☐ Arms ☐ Waist ☐ Thighs
☐ Stomach ☐ Butt ☐ Legs
☐ Chest ☐ Hips ☐ Other_____

EXHIBIT A

EXHIBIT B

New! How you can ...

Get the shape that boys really notice!

You can have a cute body!

Now you, too can have the cute, foxy body you've always wanted – the kind of body that really gets you noticed. And it can happen faster than you think!

Swedish girls are famous for their beautiful bodies. And the awesome Swedish System will quickly and easily show you how to get rid of excess, flabby fat – while adding shape and curves in all the right places!

You can have a narrower waist, thinner hips, legs and thighs, and a firmer behind. Yes – just a few short weeks from today you could have a body that's thinner, firmer and cuter than you ever thought possible!

No matter how many times you've tried and failed before, this time you really can do it. Finally, here's something that really works!

How the Swedish System works

When you use the Swedish System, you still get to eat the same foods you've been eating – including those snacks you love so much. It's not a diet – so there's no list of things you have to eat. No list of things you can't eat, either. But when you use the Swedish System, you'll end up eating less (but still enough to keep you healthy.) Pretty soon, all those extra pounds will be gone for good.

If you're overweight, the Swedish System will help you control your appetite before meals and avoid over-eating – even when you're dying to have a snack! And before you know it, you'll have a whole new set of eating habits, be thin, and stay thin – with nothing more to buy. This is not like those diet pills you have to keep buying over and over again!

Or – if you're too skinny and just dying to get some curves – you can make your body shapelier and foxier – adding shape and curves in all the right places!

Made for a teenage girl's body

The Swedish System was designed especially for a teenage girl's body. It's the safest, most natural weight loss product we could find for you. It won't hurt or harm your body in any way. Everything in the Swedish System is healthy for you. Show it to your doctor – we're sure he'll agree!

Here's more good news. You never have to do any long boring exercises – and you won't need to! When you use the Swedish System you'll just feel like being more active all the time. You'll burn up calories while you're having fun!

It works!

Just days after you start using the Swedish System, you can be eating less, feeling more active, and really happy about the changes starting to take place. Just follow the easy directions in the Swedish System guide.

Before you know it, you'll be going to the mall to get that cute bikini you always wished you could wear. And when you look in the mirror, you won't believe how good you look!

Can you see it? Try to imagine how

gorgeous you'll look. How every part of your body can be slim, trim and firm. Really picture it in your mind. It can happen to you!

You can do it!

The best part is – you'll be sooo... proud of yourself when you find out you really can have a cute body. It's not your fault you haven't lost weight – it's those worthless diets that don't work! Now you really can make your dreams come true. Definitely!

The new school year is just starting. Your high school years are supposed to be the happiest time of your life. Make sure you don't miss out on all those special moments – the beach, parties, school dances, the prom.

Sure – once you look so good, all those guys that never noticed you before might start asking you out. But don't just do this for the guys. Do it for yourself. You deserve it!

Try it for a whole month!

This system has worked for thousands of girls. And now we've made it even better! We're so sure it'll work for you, too, that we want you to try it for a whole month at no risk.

Go ahead – really use it as much as you want. Let it help you slim down, shape up and beautify your body.

Then – if you feel you haven't changed enough – if you don't have the awesome body you've always wanted – just send back the Swedish System and we'll give you your money back. We don't want your money unless you get the body you want!

Do it now!

Here's all you've got to do. Fill out the coupon and send it in with $12 right away. We'll send you the Swedish System fast. (The package won't say who it's from or what's inside.)

So don't wait. If you put it off you might forget, and miss out on the cute body you want, and all the good times you deserve.

Do it now. You'll be so glad you did.

P.S.: Wanna get a cute body even faster? We've put together some really easy, fun exercises you can do in just 15 minutes a day. Use them with the Swedish System and you'll get terrific results super-fast! They're yours for just $3 extra when you get the Swedish System. Good deal!

Plus – we'll even throw in a . . .

FREE Gift!

You'll also get a chart to keep track of your weight loss absolutely FREE, just for ordering the Swedish System.

Hurry up and be the first one at your school to get that cute body! Make this the best year of your life!

30-Day Trial Coupon

Swedish System
Nicholson Lane
P.O. Box 2245
Kensington, MD 20891-2245

1-S

Cool! I want a totally cute body. Send me the Swedish System fast! Money back guarantee. Here's

- ☐ $12 for just the Swedish System
- ☐ $15 for the Swedish System plus exercises

PRINT

Name_____

Address_____

City_____ State_____ Zip_____

Body Goals Survey Form

(Answer only if you want to)

- ☐ I'm overweight and want a thinner body... or
- ☐ I'm too skinny and want more shape & curves

I want to change: (Check as many as you want)

☐ Arms	☐ Waist	☐ Thighs
☐ Stomach	☐ Butt	☐ Legs
☐ Chest	☐ Hips	☐ Other_____

EXHIBIT B

EXHIBIT C

Get the body that gets the boys

How to lose weight fast and look great

You can have the cute, thin body you've always wanted – the kind of body that really gets boys' attention. And lose weight fast from your waist, butt, hips and thighs – so you're thin everywhere. You can do it without going on the usual kind of diet – thanks to a special new discovery called the BM Program.

A great new body

You'll lose fat from every part of your body. Want a narrow waist? No problem. Firm behind? You got it. Slim hips? Sure. Thin legs? Of course. The BM Program's extra fast action will work on every part of your body. So – no matter what parts of your body are too big right now – you'll have the great body you want fast and easy.

It doesn't matter whether you need to lose ten, twenty, even forty pounds or more. You can get them off and keep them off for good. And get the look that really gets you noticed.

Every square inch of your body can be trim and firm. Your body will have a great new shape. You'll look great in shorts, a miniskirt, or a bikini. You'll be able to wear the kinds of clothes that show off your new thin body – instead of trying to find clothes to hide it. Even your face will look prettier as you lose extra weight.

At last, here's something that really works. No matter how many times you've tried and failed to lose weight before, now you can do it. Just follow the easy directions in the BM Program guide.

Why diets don't work

You know what all those diets are like. You're supposed to have half a grapefruit for lunch and nothing else. But if you had the willpower to eat just that, you wouldn't have a weight problem now, would you?

So you cheat on your diet. And end up feeling fat and guilty.

But it's not your fault. The big problem with diets is that they leave you hungry, and you can only hold out for so long. Heavy exercise just makes you tired and hungry. And diet pills can be dangerous.

It's new

The BM Program is totally different from anything you've ever tried before. Don't confuse this program with any other one. Here's why it's different. It helps you fight hunger and change your eating habits so you eat less – without getting hungry. There's no "diet" or list of things you have to eat. No forbidden foods, either. No calorie-counting. You can keep on eating your favorite foods – even snacks. But you'll end up eating less. You just won't feel like pigging out. And, best of all, those extra pounds that make you look ugly will go away fast!

It works

Even if you've tried everything else and failed, the BM Program is the last weight loss solution you'll ever need. It really works.

BM can help you to 1) stop gaining weight, 2) lose weight by getting rid of body fat and best of all 3) help you stay slim and trim.

BM works fast, too. You'll start changing your eating habits the first day – giving you results you can start to notice in just a couple of weeks. And although not everyone loses weight at the same speed, the results will be absolutely amazing.

This program is so powerful that you have to be careful not to lose weight too fast. If that happens, just stop using it for a day or two. BM is safe and natural. There are no drugs or anything artificial.

What makes BM extra special is that it was originally developed especially for actresses and models. They need to get and keep a great-looking body fast. But you don't have to be an actress or model to have a slim body that gets you noticed. Very soon all the cute boys will start paying lots of attention to you – instead of the other girls.

Here's proof

How well does the BM Program work? We had 100 girls try it. Desperate girls who had tried almost everything else, and who had given up hope. And – guess what? Only two of them asked for their money back. Just two out of 100.

So we're 98% sure that it'll work for you. And if for any reason it doesn't, you'll get your money back. So you've got nothing to lose by giving it a try.

Hard to believe it could be so easy? Of course it is. That's what those other girls thought before they tried it. Boy, were they surprised!

It's the best

We've checked out over a dozen weight loss systems and this one's the best one we found. Just give it a try and we know you'll agree.

You know what it's like being ignored at a school dance. Or being too embarrassed to be seen in a bikini. You deserve better than that.

Now it's your turn to look great. Your turn to get all the cute boys' attention. Your turn to have some fun.

You can't get the BM Program in stores. They don't have it yet. But you don't have to wait. You can get it by mail right now.

Send in the coupon with $12 now and you'll get it right away, in a plain package. And pretty soon you'll have the great-looking body you've always wanted.

Give yourself a chance. You'll be glad you did.

Do it now – before some other girl does and gets all the boys' attention.

FREE bonus gift

P.S.: Order now and you'll also get a special chart to keep track of your weight loss, absolutely FREE.

©1990 BM

BM Program
Twinbrook Center 2-W
P.O. Box 727
Rockville, MD. 20848-0727

Hey! I know what kind of body I want. Send me the BM Program in a plain package right away. Here's $12. Money back guarantee.

PRINT Name_____

Address_____

City_____ State_____ Zip_____

EXHIBIT

EXHIBIT D

New! How you can...

Get the cute shape that boys like and girls envy!

There's a girl in every school who is so beautiful -- so foxy -- that all the boys just can't keep their eyes off her. A girl who's surrounded by cute guys wherever she goes. A girl that can have any guy she wants. Very soon, that girl could be you!

The perfect body

Now you, too, can have the kind of body that boys like and girls envy: thin, shapely legs and thighs, firm behind, narrow waist, and foxy, exciting curves in all the right places. With THAT kind of body you'll look great in shorts or a miniskirt, and totally awesome in that cute little two-piece swimsuit that you always wished you could wear.

No matter how many times you've tried and failed before, now you can really do it -- thanks to an excellent new discovery that can really work for you. Just think -- only a few short weeks from today you could have a whole new look!

Extra help for special areas

New Shape™ does more than just help you get rid of excess fat. It helps you add shape and firmness too. It's a total shape-up system that you can customize to your own special needs. So you can work on your legs, waist, butt, hips, thighs and other problem parts of your body to make them shapelier, firmer, tighter and more beautiful. You can change your flabby, embarrassing features -- but keep your good parts. Whether you're too fat or too skinny, New Shape can help you get the kind of body you've always wanted. It really works.

This system was designed especially for teenage girls and is made to fit your lifestyle. So you can still have snacks and go out for hamburgers with your friends.

Works twice as fast

The New Shape System works twice as well -- and twice as fast -- because it combines two powerful factors. Yet it's completely natural and safe for girls of all ages. With no dangerous crash diets, no drugs, and no special foods.

It's easy and safe (no drugs!)

You won't find a faster, easier, safer way to slim down and shape up your body. We know -- because we've tried pretty much everything there is. Don't confuse New Shape with any other product or company.

You'll love having handsome hunks fight over you!

And, best of all, you'll start working on your own special problem areas right away -- to give them the special attention they need and help you get the cute, foxy shape you really want.

You know what it's like being laughed at in gym class or being ignored at a party. Why put up with it when you don't have to?

It really works

You can look beautiful in that special party dress. You can look awesome in a bikini. You can make the other girls envy you. You can get that cute boy to really notice you in school (and hopefully ask you out!) You can have all the fun you've been missing out on -- and you deserve it!

You can do it. You really can make your dream come true.

Here's all you have to do:

Order the New Shape System. You'll get it fast -- in a plain, unmarked package. Try it out for a week, a month, even two months. Use it as much as you need to get the body you want. Then take a look in the mirror. You'll look sooo... cute and foxy you won't believe your eyes! And you can stay that way, too, with nothing more to buy.

We guarantee it

But if you feel you haven't changed enough -- if you don't think you look like a total babe -- just send everything back to us and you'll get your money back right away. We guarantee New Shape because it really works. We've helped thousands of girls just like you -- and we know we can help you, too.

Do it now!

So don't just think about having a beautiful body. Don't just dream about what it would be like. If you put it off until tomorrow, you might never do it. Do something about it now -- and make your dream come true. Don't wait until some other girl starts going out with that guy you've got your eye on. Do it now. Just send in the coupon with $12 today, and get the kind of body you really want. You'll be so glad you did.

FREE bonus gift

You'll also get an extra free bonus -- a special surprise gift that can help you get a more beautiful body even faster. This free gift is available only while supplies last. Get it before we run out!

©1991 NS

Coupon gone? No problem! Just send your name and address with $12 to New Shape, P.O. Box 2245, Kensington, MD 20891.

New Shape
Nicholson Lane
P.O. Box 2245
Kensington, MD 20891-2245

S-N

Yes! I definitely want to look like a babe. Send me the New Shape System in a plain package right away. Here's $12. Money back guarantee.

PRINT Name_____

Address_____

City_____ State_____ Zip_____

EXHIBIT D

EXHIBIT E

HOW YOU CAN HAVE A FIRM, FOXY, THINNER BODY – in just a few weeks!

THE BODY YOU'VE ALWAYS WANTED!

You can have the cute, foxy body you've always wanted -- the kind of body that really gets guys' attention. And you can look that way sooner than you think!

Just a few short weeks from today you could have a body that's thinner, firmer and cuter than you ever imagined -- thanks to an awesome new discovery.

Body Maker™ helps you lose weight from every part of your body. You can have a narrower waist, thinner hips, legs and thighs, and a firmer behind -- and add shape, firmness and curves in all the right places!

No matter how many times you've tried and failed before, now the awesome new Body Maker can quickly and easily show you how to get a body that's cuter and foxier than you ever thought possible! Finally, here's something that really works!

HOW BODY MAKER WORKS

With Body Maker, you still get to eat the foods you like -- including those snacks you love so much. It's not a diet -- so there's no list of things you have to eat. No list of things you can't eat, either. But when you follow the Body Maker program, you'll end up eating less (but still enough to keep you healthy.) You just won't feel like pigging out! And pretty soon, all those extra pounds will be gone for good.

Body Maker will help you cut down on your appetite before meals and avoid over-eating -- even when you're dying to have a snack! And before you know it, you'll have a whole new set of eating habits, be thin, and stay thin -- with nothing more to buy. This is not like those diet pills you have to keep buying over and over again!

MADE ESPECIALLY FOR TEENAGE GIRLS

Body Maker was created especially for a teenage girl's body. It's the safest, healthiest way to lose weight we've ever seen. And it works! Show it to your doctor -- we're sure he'll agree!

Here's more good news. You never have to do any exercises -- and you won't need to! With Body Maker you'll just feel like being more active all the time!

IT WORKS!

Just days after you get Body Maker, you can be eating less, feeling more active, and really happy about the changes starting to take place.

"I tried your product, and it worked." -- Anna, age 16, California

(That's her picture, above!)

Before you know it, you'll be going to the mall to get that cute bikini you always wished you could wear. And when you look in the mirror, you won't believe how good you look!

Can you see it? Try to imagine how gorgeous you'll look. How every part of your body can be slimmer, trimmer and cuter than you ever thought possible. Really picture it in your mind. It can happen to you!

YOU'LL FEEL GOOD ABOUT YOURSELF!

The best part is -- you'll be so proud of yourself when you find out you really can lose weight. It's not your fault you haven't lost weight -- it's those worthless diets that don't work! Now you really can make your dreams come true. Absolutely!

Your high school years are supposed to be the happiest time of your life. Make sure you don't miss out on all those special moments -- the beach, pool parties, the prom.

Sure -- once you look so good, all those guys that never noticed you before will start asking you out. But don't just do this for the guys. Do it for yourself. You deserve it!

TRY IT FOR 30 DAYS

Body Maker has worked for thousands of girls. And we're so sure it'll work for you, too, that we want you to try it for a whole month at no risk.

Go ahead -- really use it as much as you want. Let it help you slim down, shape up and beautify your body.

Then -- if you feel you haven't changed enough -- if you don't have the awesome body you've always wanted -- just send back Body Maker and we'll give you your money back. We don't want your money unless you get the body you want!

DO IT NOW!

Here's all you've got to do. Fill out the coupon and send it in with $12 right away. We'll send you Body Maker fast. (The package won't say who it's from or what's inside.)

So don't wait. If you put it off you might forget, and miss out on the cute body you want, and all the good times you deserve.

Do it now. You'll be so glad you did.

P.S.: Want a cute body even faster? We've put together some really easy, fun exercises that you can do in just 15 minutes a day. Use them with Body Maker for extra-fast results! They're just $3 extra when you get Body Maker. Good deal!

Plus -- we'll even throw in a . . .

FREE GIFT!

You'll also get a chart to keep track of your weight loss absolutely free, just for ordering Body Maker.

Hurry up and be the first one at your school to get that cute body!

Coupon gone? No problem! Just send $12 to Body Maker, P.O. Box 727, Rockville, MD. 20848

FREE 30-DAY TRIAL COUPON

Body Maker 12-WN
Viers Mill Road
P.O. Box 727
Rockville, MD. 20848-0727

Yes! I want a totally cute body. Send me Body Maker right away! Money back guarantee. Here's:

☐ $12 for Body Maker and free bonus
☐ $15 for Body Maker, free bonus, and exercises

PRINT Name_____

Address_____

City_____ State____ Zip_____

PERSONAL BODY GOALS FORM

(Answer only if you want to)

I weigh _____ pounds. I WANT to weigh_____

These are the parts of my body I want to change (Check as many as you want)

☐ Face ☐ Arms ☐ Hips
☐ Neck ☐ Waist ☐ Thighs
☐ Chest ☐ Bum ☐ Legs

May I see

EXHIBIT

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, 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 WLAR Co. 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 5622 Columbia Pike #106, in the City of Falls Church, State of Virginia.

Respondent Michael K. Craig is or was at relevant times herein the sole owner, officer, and employee of said corporation. Individually or in concert with others, he participated in and/or formulated, directed, and controlled the acts and practices of said corporation and his address is the same as that of said corporation.

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

ORDER

For purposes of this order:

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

(a) 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.

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

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

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

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

I.

It is ordered, That respondents, WLAR Co., a corporation, its successors and assigns, and its officers; and Michael K. Craig, individually and as an officer of WLAR Co.; 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 Swedish 19, Swedish System, BM Program, New Shape, Body Maker, or any substantially similar product, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, in any manner, directly or by implication, that:

A. Such product is new or is a new weight-loss discovery; or
B. Such product does not require dieting.

II.

It is further ordered, That respondents, WLAR Co., a corporation, its successors and assigns, and its officers; and Michael K. Craig, individually and as an officer of WLAR Co.; and respondents' agents, representatives and employees, directly or through any partnership, corporation, subsidiary, division or other device, in connection with the manufacturing, advertising, packaging, labeling, promotion, offering for sale, sale, or distribution of any weight-loss product, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, in any manner, directly or by implication, that:

A. Such product causes fast or easy weight loss;
B. Such product is more effective than other products or programs in controlling appetite or causing weight loss;
C. Purchasers of such products are successful in controlling appetite, losing weight, or reducing body fat;
D. Such product causes users to develop a new set of eating habits, thereby reducing caloric intake and causing significant and long-term or permanent weight loss; or
E. Such product has any effect on users' weight, body size or shape, body measurements, or appetite,

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, WLAR Co., a corporation, its successors and assigns, and its officers; and Michael K. Craig, individually and as an officer of WLAR Co.; and respondents' agents, representatives and employees, directly or through any partnership, corporation, subsidiary, division or other device, in connection with the manufacturing, advertising, packaging, labeling, promotion, offering for sale, sale, or distribution of any weight-loss product, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, in any manner, directly or by implication, that such product has been used successfully by any number of persons 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.

Nothing in Parts I through III of this order shall prohibit respondents from making representations which promote the sale of books and other publications, provided that, the advertising only purports to express the opinion of the author or to quote the contents of the publication; the advertising discloses the source of the statements quoted or derived from the contents of the publication; and the advertising discloses the author to be the source of the opinions expressed about the publication. This Part shall not apply, however, if the publication or its advertising is used to promote the sale of some other product as part of a commercial scheme.

V.

It is further ordered, That respondents, WLAR Co., a corporation, its successors and assigns, and its officers; and Michael K. Craig, individually and as an officer of WLAR Co.; 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 Swedish 19, Swedish System,

BM Program, New Shape, Body Maker, 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 making any representation, in any manner, directly or by implication, that any such product has any effect on weight or body size, unless respondents disclose, clearly and prominently, and in close proximity to such representation, that such product consists solely of a booklet or pamphlet containing information and advice on weight loss.

VI.

It is further ordered, That respondents, WLAR Co., a corporation, its successors and assigns, and its officers; and Michael K. Craig, individually and as an officer of WLAR Co.; and respondents' agents, representatives and employees, directly or through any partnership, corporation, subsidiary, division or other device, in connection with the manufacturing, advertising, packaging, labeling, promotion, offering for sale, sale, or distribution of any weight-loss product, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from making any representation, in any manner, directly or by implication, that any such weight-loss product has any effect on weight or body size, unless they disclose, clearly and prominently, and in close proximity to such representation, that diet and/or increasing exercise is required to lose weight; provided however, that this disclosure shall not be required if respondents possess and rely upon competent and reliable scientific evidence demonstrating that the weight-loss product is effective without either dieting or increasing exercise.

VII.

It is further ordered, That respondent, WLAR Co., shall:

A. Within thirty (30) days after service of this order, provide a copy of this order to each of respondent's current principals, officers, directors, and managers, and to all personnel, agents, and representatives having sales, advertising, or policy responsibility with respect to the subject matter of this order; 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 respondent's 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 respondent or any subsidiary, successor, or assign, within three (3) days after the person assumes his or her responsibilities.

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 respondent, WLAR Co., 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.

X.

It is further ordered, That respondent, Michael K. Craig, shall, for a period of three (3) 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 involving the advertising, offering for

sale, sale, or distribution of any weight-loss product. 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.

XI.

This order will terminate on February 21, 2016, 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, than 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.

XII.

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

Chairman Pitofsky recused.

IN THE MATTER OF

GOOD NEWS PRODUCTS, INC.

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

Docket C-3642. Complaint, Feb. 22, 1996--Decision, Feb. 22, 1996

This consent order prohibits, among other things, a Michigan corporation from misrepresenting the fat or nutrient content of eggs or products containing egg yolks. In addition, the consent order prohibits the respondent from making health claims regarding such products unless it possesses reliable scientific evidence to substantiate the claims.

Appearances

For the Commission: *Phoebe Morse* and *Kristie Ann Wood.*

For the respondent: *David Vander Haagen, Foster, Swift, Collins & Smith*, Lansing, MI.

COMPLAINT

The Federal Trade Commission, having reason to believe that Good News Products, Inc. ("Good News Products"), a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent Good News Products, Inc. is a Michigan corporation with its offices and principal place of business at East Washington & M-40, Hamilton, Michigan.

PAR. 2. Respondent has advertised, labeled, offered for sale, sold, and distributed Good News Eggs to consumers. These eggs are "foods" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

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

PAR. 4. Respondent has disseminated or has caused to be disseminated advertisements for Good News Eggs, including but not necessarily limited to the attached Exhibits A-G. These advertisements contain the following statements:

A. IF YOU EAT EGGS, HERE'S IMPORTANT NEWS. INTRODUCING, GOOD NEWS EGGS. GOOD NEWS EGGS COME FROM HENS FED A SPECIAL DIET LOW IN SATURATED FAT. THE RESULT IS AN EGG THAT'S LOWER IN SATURATED FAT. . . . IT'S THE BEST NEWS YET FOR PEOPLE WHO LOVE EGGS.
[Exhibit A (Radio: untitled)]

B. Romeo: How do I love thee - let me count the ways. I love thee for thy shape - so round, yet firm and fragile. I love thee for thy good taste and unparalleled versatility. But what I don't care for is your . . .
Announcer: Introducing - Good News Eggs. . . . Good News Eggs are from hens fed a special diet naturally low in saturated fat. So Good News Eggs are lower in saturated fat - and higher in Omega 3's. And that's good news for egg lovers everywhere. . . . Good News Eggs - for today's healthier lifestyle.
[Exhibit B (Radio: "Good News Eggs does Shakespeare.")]

C. If You Love Eggs, We've Got Good News
Introducing, Good News Eggs. Fresh, delicious, 100% real eggs with a difference. The difference is, Good News Eggs come from hens fed a unique, all natural diet, low in saturated fats. And that means our eggs are consistently premium eggs.
Clinical Tests Prove It
Eating a diet that's lower in saturated fat is beneficial to your health. Because Good News Eggs are naturally higher in Omega 3, you can enjoy them as part of your lower fat diet and know you're eating right.
[Exhibit C (Print: "If You Love Eggs")]

D. The Good News Egg:
Questions and Answers
. . .
How is the Good News Egg different?
Our egg is lower in fat than a regular egg. The Good News Egg has only one gram of saturated fat, half as much as a regular egg. The total fat is 20% lower than a regular egg.
. . .
What else is different about the Good News Egg?
It is five times higher in Omega 3, an essential part of a balanced diet.
What is Omega 3?
Omega 3 fatty acids are polyunsaturated fat - one of the three forms of fat: saturated, monounsaturated and polyunsaturated.
Isn't polyunsaturated the "good" fat?
It is saturated fat that has been linked to heart disease and high blood cholesterol. In contrast, the Omega 3 polyunsaturates have been shown to have positive effects on artherosclerosis [sic], high blood pressure, rheumatoid arthritis and high blood cholesterol levels.
. . .

What else does Omega 3 do?
It has been shown to lower blood pressure, and to have anti-inflammatory effects. But the most exciting research shows that Omega 3 may lower blood cholesterol levels.
How does Omega 3 work?
It looks like Omega 3 inhibits the rise in blood lipids, or fat, that occurs after eating. Current thinking emphasizes the level of fat in the blood as the important risk factor for artherosclerosis [sic], or hardening of the arteries. Omega 3 slowed the development of artherosclerotic [sic] plaque in animal studies, even in a high-fat, high cholesterol diet.
Isn't the cholesterol in eggs a problem?
All shell eggs are lower in cholesterol than 40 years ago -- 20% lower. Today's egg has only 213 milligrams of cholesterol. In addition, recent studies have shown dietary cholesterol to have less effect on cholesterol in the blood than previously thought. More important is the level of saturated fat in the diet. And the Good News Egg has only one gram of saturated fat.
. . .
How much Omega 3 is there in a Good News Egg?
One egg provides a minimum of 220 milligrams of Omega 3, more than five times the level found in a regular egg. Good News Eggs may have up to 300 milligrams of Omega 3.
[Exhibit D (Print: Questions and Answers)]

E. GOOD NEWS FOR PEOPLE WHO LOVE EGGS

Good News Eggs come from hens fed a consistent diet that's low in saturated fats. This low-fat diet produces an egg 50% lower in saturated fat than normal eggs.... Clinical tests have shown that feeding chickens a better diet will improve the egg. Our chickens are fed a consistent diet of all natural ingredients including flax, canola and vitamin E. So, enjoy Good News Eggs as part of a low-fat diet. It's a 100% real egg you can feel good about eating!
[Exhibit E (Point-of-purchase: Tear-off sheet)]

F. The Good News Eggs:
Facts and Figures

. . .
Good News Eggs HAVE
. . .
• only one gram of saturated fat
• 20% less fat overall
• between 220 and 300 milligrams of Omega 3
Good News Hens
• eat a diet high in Omega 3 and low in saturated fat so they lay a better egg
• are fed an all-natural diet, including flax, canola, and Vitamin E
• naturally lay eggs lower in fat and higher in Omega 3 than regular eggs
[Exhibit F (Print: Facts and Figures)]

G. THE GOOD NEWS EGGS:
Questions and Answers

. . .
How is the Good News Egg different?

The Good News Egg has only one gram of saturated fat. The total fat is 20% lower than a regular egg.

. . .

Isn't the cholesterol in eggs a problem?

All shell eggs are lower in cholesterol than 40 years ago -- 20% lower. Today's egg has only 213 milligrams of cholesterol. In addition, recent studies have shown dietary cholesterol to have less effect on cholesterol in the blood than previously thought. More important is the level of saturated fat in the diet. And the Good News Egg has only one gram of saturated fat.

[Exhibit G (Print: Questions and Answers)(revised)]

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-G, respondent has represented, directly or by implication, that Good News Eggs are significantly lower in saturated fat than ordinary eggs.

PAR. 6. In truth and in fact Good News Eggs are not significantly lower in saturated fat than ordinary eggs. Good News Eggs have approximately the same amount of saturated fat as ordinary eggs. 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 advertisements attached as Exhibits D, F and G, respondent has represented, directly or by implication, that Good News Eggs are significantly lower in total fat than ordinary eggs.

PAR. 8. In truth and in fact Good News Eggs are not significantly lower in total fat than ordinary eggs. Good News Eggs have approximately the same amount of total fat as ordinary eggs. Therefore, the representation set forth in paragraph seven was, and is, false and misleading.

PAR. 9. 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 D, respondent has represented, directly or by implication, that:

A. The omega 3 fatty acids in Good News Eggs will have a positive effect on risk factors for heart disease, such as atherosclerosis, high blood cholesterol levels and high blood pressure, and on rheumatoid arthritis.

B. The omega 3 fatty acids in Good News Eggs may decrease blood cholesterol.

PAR. 10. 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 D, respondent has represented, directly or by implication, that at the time it made the representations set forth in paragraph nine, respondent possessed and relied upon a reasonable basis that substantiated such representations.

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

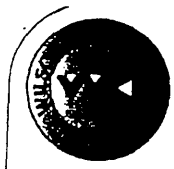
PAR. 12. Through the use of the statements contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits D and G, respondent has represented, directly or by implication, that, because Good News Eggs are lower in saturated fat than ordinary eggs, they will increase blood cholesterol levels less than ordinary eggs.

PAR. 13. 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 D and G, respondent has represented, directly or by implication, that at the time it made the representation set forth in paragraph twelve, respondent possessed and relied upon a reasonable basis that substantiated such representation.

PAR. 14. In truth and in fact, at the time it made the representation set forth in paragraph twelve, respondent did not possess and rely upon a reasonable basis that substantiated such representation. Therefore, the representation set forth in paragraph thirteen was, and is, false and misleading.

PAR. 15. 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.

EXHIBIT A



350 E. Michigan, Suite 16
Kalamazoo, Michigan 49007
(616) 344-5569/FAX 344-5668

1666 Newport Blvd., Suite 146
Costa Mesa, California 92627
(714) 953-7160

Date: 3/19/93
Client: Good News Eggs
Length: :30
Copy:
Music:
Producer:
Talent:

WBAP - Dallas

SCRIPT

IF YOU EAT EGGS, HERE'S IMPORTANT NEWS. INTRODUCING, GOOD NEWS EGGS. GOOD NEWS EGGS COME FROM HENS FED A SPECIAL DIET LOW IN SATURATED FAT. THE RESULT IS AN EGG THAT'S LOWER IN SATURATED FAT. ONE HUNDRED PERCENT REAL EGGS IN THE SHELL...NOT PROCESSED AND POURED OUT OF A CARTON LIKE EGG SUBSTITUTES. SO GO AHEAD...POACH 'EM, HARD BOIL 'EM, SUNNYSIDE UP 'EM. ANYTHING YOU DO WITH EGGS WILL BE BETTER WITH GOOD NEWS EGGS. LOOK FOR THE BRIGHT YELLOW AND RED LABEL ON THE TRADITIONAL WHITE CARTON IN YOUR FAVORITE GROCER'S DAIRY CASE. GOOD NEWS EGGS. IT'S THE BEST NEWS YET FOR PEOPLE WHO LOVE EGGS.

EXHIBIT B

#4 - :30 seconds

ROMEO: Good News Eggs does Shakespeare.
(romantic) How do I love thee –
let me count the ways.
I love thee for thy shape –
so round, yet firm and fragile.
I love thee for thy good taste
and unparalleled versatility.
(fed-up) But what I don't care for is your . . .
ANNC.: Introducing - Good News Eggs. Real California fresh in-the-shell eggs. Good News Eggs are from hens fed a special diet naturally low in saturated fat. So Good News Eggs are lower in saturated fat – and higher in Omega 3's. And that's good news for egg lovers everywhere.
ROMEO: Now... get thee to a gro-cer-ee.
ANNC.: Good News Eggs - for today's healthier lifestyle.

EXHIBIT C

If You Love Eggs, We've Got Good News™

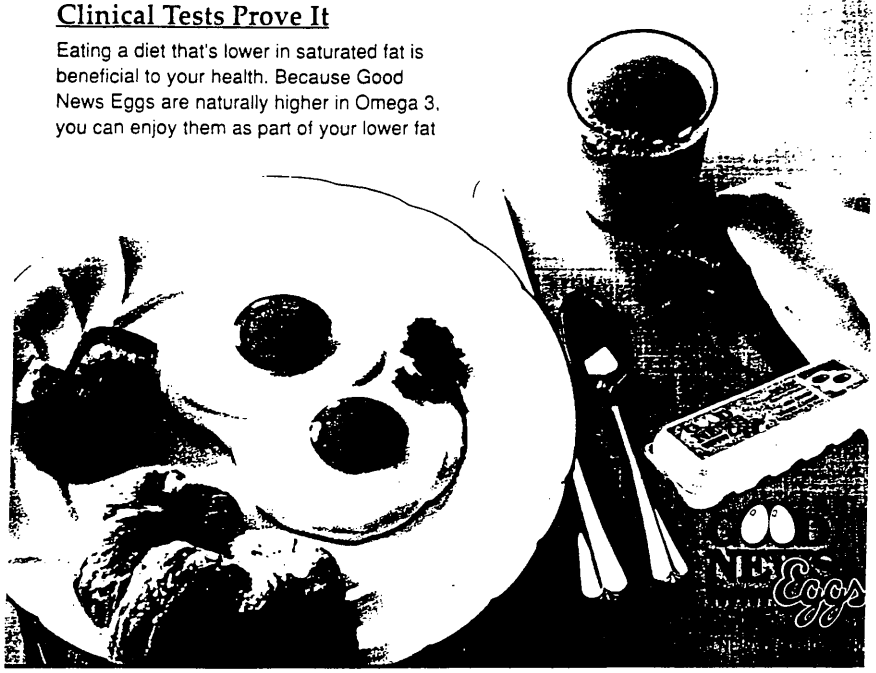
Introducing, Good News Eggs. Fresh, delicious, 100% real eggs with a difference. The difference is, Good News Eggs come from hens fed a unique, all natural diet, low in saturated fats. And that means our eggs are consistently premium eggs.

Clinical Tests Prove It

Eating a diet that's lower in saturated fat is beneficial to your health. Because Good News Eggs are naturally higher in Omega 3, you can enjoy them as part of your lower fat diet and know you're eating right.* It's a better egg for today's life-style.

Good News Eggs. Try them for yourself. It's the best news yet for people who love eggs.

*See your nutritionist



MAGAZINE/NEWSPAPER ADVERTISEMENT

EXHIBIT C

EXHIBIT D

P.O. BOX 186
HAMILTON, MI 49419

The Good News Egg:
Questions and Answers

What are Good News Eggs?
Good News Eggs are all-natural, real eggs in the shell. Unlike liquid eggs and egg substitutes, Good News Eggs haven't been processed, treated or added to.

Do they look the same as regular eggs?
The only difference is in the yolk, which is slightly lighter in color.

Do they taste the same as regular eggs?
Yes. Some people say they taste better.

Do they cook the same as regular eggs?
Yes. Their performance in cooking and baking is identical to regular eggs.

Is the Good News Egg low in cholesterol?
No. The dietary cholesterol is the same as in regular eggs.

How is the Good News Egg different?
Our egg is lower in fat than a regular egg. The Good News Egg has only one gram of saturated fat, half as much as a regular egg. The total fat is 20% lower than a regular egg.

Does that mean there are fewer calories?
Yes. The Good News Egg has ten fewer calories than a regular egg, only 70.

What else is different about the Good News Egg?
It is five times higher in Omega 3, an essential part of a balanced diet.

What is Omega 3?
Omega 3 fatty acids are polyunsaturated fat -- one of the three forms of fat: saturated, monounsaturated and polyunsaturated.

Isn't polyunsaturated the "good" fat?
It is saturated fat that has been linked to heart disease and high blood cholesterol. In contrast, the Omega 3 polyunsaturates have been shown to have positive effects on artherosclerosis, high blood pressure, rheumatoid arthritis and high blood cholesterol levels.

Is fat an essential part of the diet?
Of course. It is the high-fat diet that puts us at risk for heart disease and other ailments. Experts recommend a balaneed diet, with not more than 30% of our daily calories coming from fat.

Should we eat all three forms of fat?
Yes. The 30% should be evenly balanced across the three, and the polyunsaturates, Omega 6 and Omega 3, should be evenly balanced.

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EXHIBIT E

Good News™ For People Who Love Eggs

- Higher in Omega 3
- Less saturated fat

A DIVISION OF GOOD NEWS PRODUCTS

See reverse side for IMPORTANT INFORMATION

Good News™ For People Who Love Eggs

Good News Eggs come from hens fed a consistent diet that's low in saturated fats. This low-fat diet produces an egg 50% lower in saturated fat than normal eggs. And, this unique process makes our eggs naturally higher in Omega 3's, a fatty acid that is an essential part of a healthy diet. University studies have shown the North American diet to be low in Omega 3's. Now, Good News Eggs are a source of Omega 3's, having five times more than regular eggs and each one containing over 220 mg of Omega 3. Other important sources of Omega 3's are marine fish and canola oil.

Clinical tests have shown that feeding chickens a better diet will improve the egg. Our chickens are fed a consistent diet of all natural ingredients including flax, canola and vitamin E. So, enjoy Good News Eggs as part of a low-fat diet.* It's a 100% real egg you can feel good about eating!

**Consult your physician or nutritionist about the benefits of Omega 3.*

EXHIBIT F

The Good News Egg:
Facts and Figures

P.O. BOX 186
HAMILTON, MI 49419

Good News Eggs ARE NOT
- low cholesterol
- a liquid egg substitute
- processed or treated

Good News Eggs ARE
- real eggs in the shell
- higher in Omega 3
- lower in fat

Good News Eggs DO
- come in an egg carton
- look and taste the same as regular eggs
- cook and bake the same as regular eggs
- last as long as regular eggs in your refrigerator
- provide an inexpensive source for the essential Omega 3

Good News Eggs DO NOT
- have fish oil in them
- come in an easy-pour carton

Good News Eggs HAVE
- 10 fewer calories than regular eggs
- only one gram of saturated fat
- 20% less fat overall
- between 220 and 300 milligrams of Omega 3

Good News Hens
- eat a diet high in Omega 3 and low in saturated fat so they lay a better egg
- are fed an all-natural diet, including flax, canola, and Vitamin E
- naturally lay eggs lower in fat and higher in Omega 3 than regular eggs

All shell eggs
- are good for you and your family
- are relatively low in fat
- are an economical source of protein and other nutrients

Good News Eggs
- are premium shell eggs with a little more of something we need, and a little less of something we don't
- can be part of a low-fat, healthy diet
- will make you feel good about eating eggs

EXHIBIT G

The Good News Egg:
Questions and Answers

What are Good News Eggs?
Good News Eggs are all-natural, real eggs in the shell. Unlike liquid eggs and egg substitutes, Good News Eggs haven't been processed, treated or added to.

Do they look the same as regular eggs?
The only difference is in the yolk, which is slightly lighter in color.

Do they taste the same as regular eggs?
Yes. Some people say they taste better.

Do they cook the same as regular eggs?
Yes. Their performance in cooking and baking is identical to regular eggs.

Is the Good News Egg low in cholesterol?
No. The dietary cholesterol is the same as in regular eggs.

How is the Good News Egg different?
The Good News Egg has only one gram of saturated fat. The total fat is 20% lower than a regular egg.

Does that mean there are fewer calories?
Yes. The Good News Egg has ten fewer calories than a regular egg, only 70.

What else is different about the Good News Egg?
It is five times higher in Omega 3, an essential part of a balanced diet.

What is Omega 3?
Omega 3 fatty acids are polyunsaturated fat -- one of the three forms of fat: saturated, monounsaturated and polyunsaturated.

Is fat an essential part of the diet?
Of course. Experts recommend a balanced diet, with not more than 30% of our daily calories coming from fat.

Should we eat all three forms of fat?
Yes. The 30% should be evenly balanced across the three, and the polyunsaturates, Omega 6 and Omega 3, should be evenly balanced.

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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 Boston Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; 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 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 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 Good News Products, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Michigan, with its offices and principal place of business located at East Washington & M-40, Hamilton, MI.

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 Good News Products, Inc., a corporation, its successors and assigns, and its officers; and respondent's agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of eggs or any food containing egg yolk in or affecting commerce, as "food" and "commerce" are defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting, in any manner, directly or by implication, through numerical or descriptive terms or any other means, the absolute or comparative amount of total fat, saturated fat or any other nutrient or ingredient in such food.

II.

It is further ordered, That respondent Good News Products, Inc., a corporation, its successors and assigns, and its officers; and respondent's agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of eggs or any food containing egg yolk in or affecting commerce, as "food" and "commerce" are defined in the Federal Trade Commission Act, do forthwith cease and desist from making any representation, in any manner, directly or by implication:

A. About the absolute or comparative effect of such food on heart disease or heart disease risk factors;

B. About the absolute or comparative effect of such food on serum cholesterol; and

C. About the absolute or comparative health benefits of such food;

unless at the time of making such representation, respondent possesses and relies upon competent and reliable scientific evidence substantiating 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.

III.

Nothing in this order shall prohibit respondent from making any representation that is specifically permitted in labeling for eggs or any food containing egg yolk 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 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.

V.

It is further ordered, That respondent shall, within thirty (30) days after service upon it of this order, distribute a copy of the order to each of the respondent's operating divisions, to each of its licensees, to each of its managerial employees, and to each of its officers, agents, representatives or employees engaged in the preparation or placement of advertising or other materials covered by this order and shall secure from each such person a signed statement acknowledging receipt of this order.

VI.

It is further ordered, That respondent, or its successors and assigns, shall promptly terminate its licensing agreement with any licensee if respondent has actual knowledge or knowledge fairly implied on the basis of objective circumstances that such licensee is engaging in acts or practices that respondent is prohibited from engaging in under Parts I and II of this order, unless such licensee immediately ceases engaging in such acts or practices.

VII.

It is further ordered, That respondent, its successors and assigns, shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent, including but not limited to dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or affiliates, or any other corporate change that may affect compliance obligations arising out of this order.

VIII.

It is further ordered, That this order will terminate on February 22, 2016, 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 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.

IX.

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

IN THE MATTER OF

DILLARD DEPARTMENT STORES, INC.

Docket 9269. Interlocutory Order (Summary), March 7, 1996

ORDER

On February 12, 1996, complaint counsel moved that the Commission dismiss the complaint in this matter based on a change in law. The central allegation in the complaint is that Dillard violated Section 133 of the Truth in Lending Act, 15 U.S.C. 1643, and Section 226.12(b) of Regulation Z, 12 CFR 226.12(b), by placing "unreasonable burdens" on cardholders who make claims of unauthorized use. Unauthorized use of a credit card occurs when a card is used without the authority of the cardholder, such as use after a card has been lost or stolen. The complaint alleges that Dillard imposed unreasonable burdens by conducting investigations of claims of unauthorized use in which cardholders were required to: (1) complete an affidavit; (2) have the affidavit notarized; (3) swear that they do not know who made the unauthorized charges, or identify and testify against the person who did; (4) file police or postal reports; or (5) appear in person at a Dillard store to answer questions about the asserted unauthorized use.

Congress "has specifically designated the Federal Reserve Board and staff as the primary source for interpretation of truth-in-lending law." *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 556 (1980). Because the standard for investigation of claims of unauthorized use in the amended Federal Reserve Board Official Staff Commentary appears to differ from the standard reflected in the complaint in this proceeding, the Commission concludes that it is not in the public interest to continue to prosecute the complaint against Dillard.

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

IN THE MATTER OF

THE DANNON COMPANY, INC.

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

Docket C-3643. Complaint, March 18, 1996--Decision, March 18, 1996

This consent order prohibits, among other things, a New York-based frozen yogurt manufacturer from misrepresenting the amount of fat, calories, or cholesterol in any frozen yogurt products. The consent order requires the respondent to pay $150,000 to the U.S. Treasury. This action settles allegations stemming from nutritional claims made in advertisements for Dannon's Pure Indulgence frozen yogurt.

Appearances

For the Commission: *Peter Metrinko* and *Justin Dingfelder.*

For the respondent: *Stuart M. Pape* and *Mark A. Heller, Patton Boggs,* Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that The Dannon Company, Inc., a corporation, ("respondent"), has violated Section 5(a) of the Federal Trade Commission Act (15 U.S.C. 45(a)), and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent is a Delaware corporation, with its office and principal place of business located at 120 White Plains Road, Tarrytown, NY.

PAR. 2. Respondent has manufactured, advertised, promoted, offered for sale, sold and distributed a frozen yogurt known by the product name Pure Indulgence. This product is a "food" within the meanings 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 Pure Indulgence, including, but not limited to, the following television advertisement, which contained, *inter alia*, the following statements:

Beware: the following graphic images may prompt
feelings of guilt among viewers.
Hey. It's OK.
It's Frozen Yogurt.
Proceed Without Caution.

PAR. 5. Through the use of the statements contained in the advertisement referred to in paragraph four, respondent has represented, directly or by implication, that Dannon Pure Indulgence is low in fat, low in calories, and lower in fat than ice cream.

PAR. 6. In truth and in fact, at the time the advertisement was disseminated, certain flavors of Dannon Pure Indulgence were not low in fat, not low in calories, and not lower in fat than many ice creams. Therefore the representations set forth in paragraph five were false and misleading.

PAR. 7. 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 Section 5(a) and 12 of the Federal Trade Commission Act.

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, and having duly considered the comment 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 The Dannon Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 120 White Plains Road, Tarrytown, NY.

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 respondent The Dannon Company, Inc., a corporation, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any partnership, corporation, subsidiary, division or other device, in connection with the manufacture, advertising, packaging, labeling, promotion, offering for sale, sale or distribution of any frozen food product, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting, in any manner, directly or by implication, through numerical or descriptive terms or any other means, the existence or amount of fat, saturated fat, cholesterol or calories in any such product. If any representation covered by this Part either directly or by implication conveys any nutrient content claim defined (for purposes of labeling) by any regulation promulgated by the Food and Drug Administration,

compliance with this Part shall be governed by the qualifying amount for such defined claim as set forth in that regulation.

II.

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

III.

It is further ordered, That respondent, its successors and assigns, shall pay to the Federal Trade Commission, by cashier's check or certified check made payable to the U.S. Treasury and delivered to the Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 6th and Pennsylvania Ave., NW, Washington, DC 20580, the sum of $150,000. 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.

IV.

It is further ordered, That, for three (3) years after the last date of dissemination of any representation covered by this order, respondent, or its successors and assigns, shall maintain and upon request make available to the Federal Trade Commission for inspection and copying:

1. All labeling, packaging, advertisements and promotional materials setting forth any representation covered by this order;
2. All materials that were relied upon to substantiate any representation covered by this order; and
3. All test reports, studies, surveys, demonstrations or other evidence in its possession or control, that contradict, qualify, or call

into question such representation or the basis upon which respondent relied for such representation, including complaints from consumers.

V.

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

VI.

It is further ordered, That respondent shall, within thirty days after service of this order, 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 materials covered by this order.

VII.

It is further ordered, That respondent 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 it has complied or intends to comply with this order.

VIII.

It is further ordered, That this order will terminate on the eighteenth day of March, 2016, 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

MAMA TISH'S ITALIAN SPECIALTIES, INC.

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

Docket C-3644. Complaint, March 19, 1996--Decision, March 19, 1996

This consent order prohibits, among other things, an Illinois ice cup dessert manufacturer from misrepresenting the existence or amount of calories or any other nutrient or ingredient in any frozen dessert product.

Appearances

For the Commission: *C. Steven Baker* and *Barbara Bender.*
For the respondent: *David Goroff, Hopkins & Sutter,* Chicago, IL.

COMPLAINT

The Federal Trade Commission, having reason to believe that Mama Tish's Italian Specialties, Inc. ("respondent"), a corporation, has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent Mama Tish's Italian Specialties, Inc. is an Illinois corporation, with its principal office or place of business at 4800 Central Avenue, Chicago, Illinois.

PAR. 2. Respondent has advertised, labeled, offered for sale, sold, and distributed Mama Tish's ice cups to the public. These products are "foods" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

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

PAR. 4. Respondent has disseminated or has caused to be disseminated advertisements for Mama Tish's ice cups, including but not necessarily limited to the attached Exhibit 1. These advertisements contain the statement "naturally low in calories."

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 1, respondent represented, directly or by implication Mama Tish's ice cups are low in calories.

PAR. 6. In truth and in fact, Mama Tish's ice cups are not low in calories. The ten regular flavors of Mama Tish's ice cups contain 104 to 145 calories per four fluid ounce serving. The two flavors sweetened with NutraSweet contain 60 calories per serving. Therefore, the representation set forth in paragraph five was, and is, false and misleading.

PAR. 7. The acts and practices of the 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.

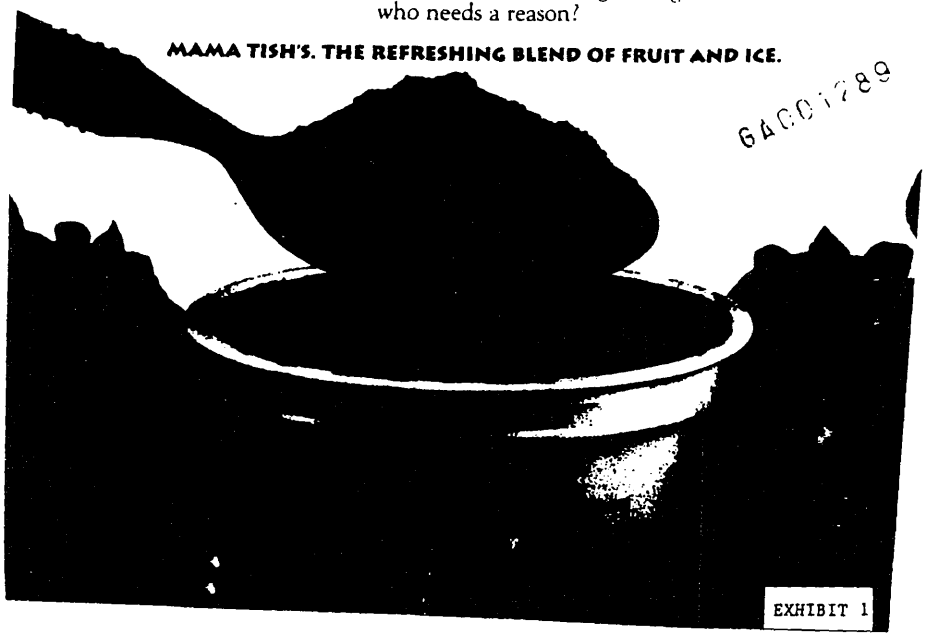
EXHIBIT 1

WHY YOU SHOULD TRY A MAMA TISH'S® ICE CUP.

- ☐ It's made with real fruit.
- ☐ Lots of great refreshing flavors.
- ☐ It's fat-free, cholesterol-free, and naturally low in calories.
- ☐ The payola at the top of this ad.

On second thought, when something's this good, who needs a reason?

MAMA TISH'S. THE REFRESHING BLEND OF FRUIT AND ICE.



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 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 Mama Tish's Italian Specialties, Inc. is an Illinois corporation, with its office and principal place of business located at 4800 South Central Avenue, Chicago, Illinois.

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

ORDER

I.

It is ordered, That respondent Mama Tish's Italian Specialties, 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 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 or any other means, the existence or amount of calories or any other nutrient or ingredient in any such product. If any representation covered by this Part either directly or by implication conveys any nutrient content claim defined (for purposes of labeling) by any regulation promulgated by the Food and Drug Administration, compliance with this Part shall be governed by the qualifying amount for such defined claim as set forth in that regulation.

II.

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.

III.

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

A. All materials that were relied upon in disseminating such 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 complaints from consumers.

IV.

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.

V.

It is further ordered, That respondent shall, within thirty (30) days after service of this order, distribute a copy of this order to each of its operating divisions 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.

VI.

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.

VII.

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

VIII.

This order will terminate on March 19, 2016, 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

JOHNSON & JOHNSON

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-3645. Complaint, March 19, 1996--Decision, March 19, 1996

This consent order prohibits, among other things, a New Jersey-based manufacturer of health care products to divest, within 12 months, the Cordis Neuroscience Business to a Commission-approved acquirer. If the transaction is not completed as required, then the Commission may appoint a trustee.

Appearances

For the Commission: *Ann Malester, Michael Moiseyev* and *William Baer.*

For the respondent: *Steve Newborn, Rogers & Wells,* Washington, D.C. and *Mindy Hatton, Hogan & Hartson*, Washington, D.C.

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that respondent, Johnson & Johnson, a New Jersey based corporation subject to the jurisdiction of the Commission, has proposed to acquire all of the voting stock of Cordis Corporation ("Cordis"), a Florida based 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 ("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, stating its charges as follows:

I. RESPONDENT

1. Respondent Johnson & Johnson is a corporation organized and existing under and by virtue of the laws of the state of New Jersey, with its principal executive offices located at One Johnson & Johnson Plaza, New Brunswick, New Jersey.

2. For purposes of this proceeding, respondent is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

II. ACQUIRED COMPANY

3. Cordis is a corporation organized and existing under and by virtue of the laws of Florida, with its principal executive offices located at 14201 N.W. 60th Avenue, Miami Lakes, Florida.

4. Cordis is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the FTC act, as amended, 15 U.S.C. 44.

III. THE ACQUISITION

5. On or about November 12, 1995, Johnson & Johnson and Cordis agreed to a stock for stock merger valued at $1.8 billion.

IV. THE RELEVANT MARKET

6. For purposes of this complaint, the relevant line of commerce in which to analyze the effects of the acquisition is the manufacture and sale of neurological shunts. Neurological shunts are medical devices used to treat hydrocephalus, which is a brain disorder that primarily affects children.

7. For purposes of this complaint, the relevant geographic area in which to analyze the effects of the acquisition on the neurological shunt market is the United States.

8. The relevant market set forth in paragraphs six and seven is highly concentrated whether measured by Herfindahl-Hirschmann Indices ("HHI") or two-firm and four-firm concentration ratios. The merger would result in an HHI of 4059, a two-firm concentration ratio of 85%, and a four-firm concentration ratio of 98%.

9. Entry into the neurological shunt market would not be timely, likely and sufficient to deter or counteract the adverse competitive

effects described in paragraph eleven because of the difficulty of developing competitive neurological shunt designs, establishing manufacturing facilities, organizing a sales and service network, receiving Food and Drug Administration approval, and gaining physician acceptance in the market.

10. Johnson & Johnson and Cordis are actual significant competitors in the relevant market.

V. EFFECTS OF THE ACQUISITION

11. The effects of the acquisition may be substantially to lessen competition and to tend to create a monopoly in the relevant market set forth above in violation of Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, in the following ways, among others:

a. By enhancing the likelihood of collusion or coordinated action between or among the remaining firms in the relevant market;

b. By eliminating direct actual competition between Johnson & Johnson and Cordis;

c. By increasing the likelihood that Johnson & Johnson would unilaterally exercise market power;

d. By increasing the likelihood that consumers would be forced to pay higher prices for neurological shunts; and

e. By increasing the likelihood that technological innovation in the neurological shunt market would be reduced.

VI. VIOLATIONS CHARGED

12. The acquisition agreement described in paragraph five constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

13. The acquisition described in paragraph five, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of the proposed merger of respondent and Cordis Corporation ("Cordis"), and the respondent having been furnished thereafter with a copy of a draft of complaint that the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and

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

1. Respondent Johnson & Johnson is a corporation organized, existing, and doing business under and by virtue of the laws of the state of New Jersey with its principal executive offices located at One Johnson & Johnson Plaza, New Brunswick, New Jersey.

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

ORDER

I.

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

A. *"Respondent"* or *"Johnson & Johnson"* means Johnson & Johnson, its directors, officers, employees, agents and representatives, predecessors, successors and assigns; its subsidiaries, divisions, and groups and affiliates controlled by Johnson & Johnson, and the respective directors, officers, employees, agents, and representatives, successors, and assigns of each.

B. *"Cordis"* means Cordis Corporation, its directors, officers, employees, agents and representatives, predecessors, successors and assigns; its subsidiaries, divisions, and groups and affiliates controlled by Cordis, and the respective directors, officers, employees, agents, and representatives, successors, and assigns of each.

C. *"Cordis Innovasive Systems"* means Cordis Innovasive Systems Inc., its directors, officers, employees, agents and representatives, predecessors, successors and assigns; its subsidiaries, divisions, and groups and affiliates controlled by Cordis Innovasive Systems, and the respective directors, officers, employees, agents, and representatives, successors, and assigns of each.

D. *"Nobles-Lai"* means Nobles-Lai Engineering, Inc. (formerly known as Visioneering, Inc.), its directors, officers, employees, agents and representatives, predecessors, successors and assigns; its subsidiaries, divisions, and groups and affiliates controlled by Nobles-Lai, and the respective directors, officers, employees, agents, and representatives, successors, and assigns of each.

E. *"Commission"* means the Federal Trade Commission.

F. *"Merger"* means the stock-for-stock merger of Johnson & Johnson and Cordis pursuant to the merger agreement dated November 12, 1995.

G. *"Assets and businesses"* means all assets, properties, business and goodwill, tangible and intangible, including, without limitation, the following:

1. All real property interests, including rights, title and interest in and to owned or leased property, together with all buildings, improvements, appurtenances, licenses and permits;

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, software licenses, inventions, copyrights, trademarks, trade names, trade secrets, intellectual property, patents, technology, know-how, specifications, designs, drawings, processes and quality control data;

4. Inventory, supplies and storage capacity;

5. All rights, title and interest in and to the contracts entered into in the ordinary course of business with Nobles-Lai, 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.

H. *"Cordis Neuroscience Business"* means:

1. Cordis Innovasive Systems and all of its assets and businesses; and

2. All of Cordis's rights, title, and interest, as of November 11, 1995, in all assets and businesses relating to the development, manufacture, distribution and sale of Neuroscience Products, including, but not limited to, all interest in Nobles-Lai.

I. *"Neuroscience products"* means:

1. Neurological shunts, including, but not limited to, the Orbis-Sigma and Hakim shunt products;

2. Neurological external drainage systems, including, but not limited to, External Drainage Systems ("EDS") and External Ventricular Drainage System Set ("EDVS") products; and

3. Neuroendoscopy products, including, but not limited to, the Vision 2020 neuroendoscope product and the Cordis Hawk Vision Neuroendoscopy System.

J. *"Neurological shunts"* means systems consisting of a ventricular catheter, a distal catheter, and a valve that are implanted in the brain to divert cerebrospinal fluid ("CSF") into the bloodstream of patients experiencing excessive intercranial pressure because of a surplus of CSF inside the skull.

K. *"Neurological external drainage systems"* means systems consisting of a ventricular catheter, a drainage bag, tubing, and a stopcock that are used for draining CSF to control intracranial pressure and for monitoring intracranial pressure.

L. *"Neuroendoscopy products"* means:

1. Neuroendoscopes, which are hand-held devices with an optical and light system that permit viewing of the neural cavity for use in neurosurgical procedures;

2. Neuroendoscopy systems, which are imaging systems used in conjunction with neuroendoscopes; and

3. Neuroendoscopy disposables and accessories, including, but not limited to, cannulas, irrigators, plugs, probes, forceps, scissors, graspers, aspirators, couplers, pumps, cameras and other products used in conjunction with neuroendoscopes and neuroendoscopy systems.

II.

It is further ordered, That:

A. Johnson & Johnson shall divest, absolutely and in good faith, within twelve (12) months of the date this order becomes final, the Cordis Neuroscience Business, and shall also divest such additional ancillary assets and businesses and effect such arrangements as are necessary to assure the marketability, viability and competitiveness of the Cordis Neuroscience Business.

B. Johnson & Johnson shall divest the Cordis Neuroscience Business 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 is to ensure the

continuation of the Cordis Neuroscience Business as an ongoing, viable operation, engaged in the same business in which the Cordis Neuroscience Business is engaged at the time of the proposed divestiture, and to remedy the lessening of competition resulting from the Merger as alleged in the Commission's complaint.

C. Pending divestiture of the Cordis Neuroscience Business, Johnson & Johnson shall take such actions as are necessary to maintain the viability, marketability, and competitiveness of the Cordis Neuroscience Business, and to prevent the destruction, removal, wasting, deterioration or impairment of the Cordis Neuroscience Business except for ordinary wear and tear.

D. If Johnson & Johnson is prevented from divesting the Cordis Neuroscience Business because of, or as a result of, the assertion by Nobles-Lai of any contractual rights, requirements or prohibitions, then for a period of five (5) years commencing on the date that this order is accepted by the Commission, Johnson & Johnson shall not:

1. Contract with Nobles-Lai for the research, development or manufacture of any neuroendoscopy product; or

2. Purchase any neuroendoscopy product from, or distribute any neuroendoscopy product for, Nobles-Lai.

III.

It is further ordered, That:

A. If Johnson & Johnson has not divested, absolutely and in good faith, and with the prior approval of the Commission, the Cordis Neuroscience Business within twelve (12) months of the date this order becomes final, the Commission may appoint a trustee to divest the Cordis Neuroscience Business.

B. In the event that 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, Johnson & Johnson 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 III 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 Johnson & Johnson to comply with this order.

C. If a trustee is appointed by the Commission or a court pursuant to paragraph III.A., Johnson & Johnson 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 Johnson & Johnson, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in mergers and divestitures. If Johnson & Johnson 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 Johnson & Johnson of the identity of any proposed trustee, Johnson & Johnson 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 Cordis Neuroscience Business.

3. Within ten (10) days after appointment of the trustee, Johnson & Johnson shall execute a trust agreement that, subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestiture required by this order.

4. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in paragraph III.C.3. to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve month period, the trustee has submitted a plan of divestiture or believes that divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or, in the case of a court-appointed trustee, by the court; provided, however, the Commission may extend this period only two (2) times.

5. The trustee shall have full and complete access to the personnel, books, records and facilities related to the Cordis Neuroscience Business, or to any other relevant information, as the trustee may request. Johnson & Johnson shall develop such financial or other information as such trustee may request and shall cooperate with the trustee. Johnson & Johnson shall take no action to interfere

with or impede the trustee's accomplishment of the divestiture. Any delays in divestiture caused by Johnson & Johnson 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 Johnson & Johnson's absolute and unconditional obligation to divest at no minimum price. The divestiture shall be made in the manner and to the acquirer as set out in paragraph II of this order, as appropriate; provided, however, if the trustee receives *bona fide* offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest to the acquiring entity selected by Johnson & Johnson from among those approved by the Commission.

7. The trustee shall serve, without bond or other security, at the cost and expense of Johnson & Johnson, 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 Johnson & Johnson, 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 Johnson & Johnson, 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 Cordis Neuroscience Business.

8. Johnson & Johnson shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of any claim, whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result

from misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.

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

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

11. The trustee shall have no obligation or authority to operate or maintain the Cordis Neuroscience Business.

12. In the event that the trustee determines that he or she is unable to divest the Cordis Neuroscience Business in a manner consistent with the Commission's purpose as described in paragraph II, the trustee may divest additional ancillary assets of Johnson & Johnson and effect such arrangements as are necessary to satisfy the requirements of this order.

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

IV.

It is further ordered, That Johnson & Johnson shall comply with all terms of the Cordis Neuroscience Business Agreement to Hold Separate, attached to this order and made a part hereof as Appendix I. The Cordis Neuroscience Business Agreement to Hold Separate shall continue in effect until Johnson & Johnson has divested all of the Cordis Neuroscience Business.

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 Johnson & Johnson has fully complied with paragraphs II, III, and IV of this order, Johnson & Johnson 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. Johnson & Johnson 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, including a description of all substantive contacts or negotiations for the divestiture required by this order, including the identity of all parties contacted. Johnson & Johnson shall include in its compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning the divestiture.

B. If Johnson & Johnson is precluded from purchasing from, contracting with, or distributing for Nobles-Lai pursuant to paragraph II.D. of this order, then one (1) year from the date this order becomes final, annually for the next (5) 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 paragraph II.D. of this order.

VI.

It is further ordered, That, for the purpose of determining or securing compliance with this order, Johnson & Johnson 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 Johnson & Johnson, relating to any matters contained in this order; and

B. Upon five (5) days' notice to Johnson & Johnson, and without restraint or interference from Johnson & Johnson, to interview officers, directors, or employees of Johnson & Johnson. Officers and employees of Johnson & Johnson whose places of employment are outside the United States shall be made available on reasonable notice.

VII.

It is further ordered, That Johnson & Johnson shall notify the Commission at least thirty (30) days prior to any proposed change in

the corporate Johnson & Johnson 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.

APPENDIX I

CORDIS NEUROSCIENCE BUSINESS AGREEMENT TO HOLD SEPARATE

This Agreement to Hold Separate ("Hold Separate") is by and between Johnson & Johnson, 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 at One Johnson & Johnson Plaza, New Brunswick, New Jersey; 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.* (collectively, the "Parties").

PREMISES

Whereas, Johnson & Johnson and Cordis Corporation ("Cordis"), on November 12, 1995, entered into a stock-for-stock merger (hereinafter "Merger"); and

Whereas, Cordis, with its principal office and place of business located at 14201 N.W. 60th Avenue, Miami Lakes, Florida develops, manufactures and markets, among other things, neurological shunts; and

Whereas, Johnson & Johnson, with its principal office and place of business located at One Johnson & Johnson Plaza, New Brunswick, New Jersey, through its subsidiary Johnson & Johnson Professional, Inc., develops, manufactures and markets, among other things, neurological shunts; and

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

Whereas, if the Commission accepts the Agreement Containing Consent Order ("Consent Agreement"), the Commission must place it on the public record for a period of at least sixty (60) days and may

subsequently withdraw such acceptance pursuant to the provisions of Section 2.34 of the Commission's Rules; and

Whereas, the Commission is concerned that if an understanding is not reached, preserving the *status quo ante* of Cordis Neuroscience Business, as defined in paragraph I.H. of the Consent Agreement, during the period prior to the final acceptance and issuance of the Consent Agreement by the Commission (after the 60-day public comment period), divestiture resulting from any proceeding challenging the legality of the Merger might not be possible, or might be less than an effective remedy; and

Whereas, the Commission is concerned that if the Merger is consummated, it will be necessary to preserve the Commission's ability to require the divestiture of the Cordis Neuroscience Business and the Commission's right to have the Cordis Neuroscience Business continue as a viable competitor; and

Whereas, the purposes of this Hold Separate and the Consent Agreement are:

A. To preserve the Cordis Neuroscience Business as a viable, competitive, and independent business pending divestiture of the Cordis Neuroscience Business, and

B. To remedy any anticompetitive effects of the Merger; and

Whereas, Johnson & Johnson's entering into this Hold Separate shall in no way be construed as an admission by Johnson & Johnson that the Merger is illegal; and

Whereas, Johnson & Johnson 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 Merger will be challenged, and in consideration of the Commission's agreement that, at the time it accepts the Consent Agreement for public comment, it will grant early termination of the Hart-Scott-Rodino waiting period, as follows:

1. Johnson & Johnson agrees to execute and be bound by the Consent Agreement.

2. Johnson & Johnson agrees that from the date this Hold Separate is accepted until the earliest of the times listed in subparagraphs 2.a. - 2.b., it will comply with the provisions of paragraph 3. of this Hold Separate:

a. Three (3) business days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Section 2.34 of the Commission's Rules; or

b. The time that divestiture of the Cordis Neuroscience Business as required by paragraph II of the Consent Agreement is completed.

3. To assure the complete independence and viability of the Cordis Neuroscience Business, and to assure that no material confidential information is exchanged between Johnson & Johnson and the Cordis Neuroscience Business, Johnson & Johnson shall hold the Cordis Neuroscience Business separate and apart on the following terms and conditions:

a. The Cordis Neuroscience Business, as defined in paragraph I.H. of the Consent Agreement, shall be held separate and apart and shall be managed and operated independently of Johnson & Johnson (meaning here and hereinafter, Johnson & Johnson excluding the Cordis Neuroscience Business and excluding all personnel connected with the Cordis Neuroscience Business as of the date this Agreement is signed, but including all other portions of Cordis), except to the extent that Johnson & Johnson must exercise direction and control over the Cordis Neuroscience Business to assure compliance with this Hold Separate or the Consent Agreement.

b. Johnson & Johnson shall maintain the marketability, viability, and competitiveness of the Cordis Neuroscience 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 it shall not sell, transfer, encumber (other than in the normal course of business), or otherwise impair the marketability, viability or competitiveness of the Cordis Neuroscience Business.

c. Johnson & Johnson shall appoint a knowledgeable person among the top management of the Cordis Neuroscience Business, as Manager to manage and maintain the Cordis Neuroscience Business on a day to day basis during the Hold Separate. The Manager shall

have exclusive management and control of the Cordis Neuroscience Business, and shall manage the Cordis Neuroscience Business independently of Johnson & Johnson's other businesses.

d. The Manager shall report exclusively to the Cordis Neuroscience Business Management Committee ("Management Committee"), which shall be appointed by Johnson & Johnson. The Committee shall consist of two knowledgeable persons from among the top management of the Cordis Neurological Products business; and a Johnson & Johnson financial officer or a comparable, knowledgeable person from Johnson & Johnson's financial office who has no direct involvement with Johnson & Johnson's Neurological Products Business ("Johnson & Johnson Management Committee Member"). The Manager shall be the Chairman of the Management Committee. Except for the Johnson & Johnson Management Committee Member serving on the Management Committee, Johnson & Johnson shall not permit any officer, employee, or agent of Johnson & Johnson also to be an officer, employee or agent of the Cordis Neuroscience Business. Each Management Committee member shall enter into a confidentiality agreement agreeing to be bound by the terms and conditions set forth in Attachment A, appended to this Hold Separate. The Management Committee shall meet monthly during the course of the Hold Separate, and as otherwise necessary. Meetings of the Management Committee during the term of the Hold Separate shall be audio recorded, and the recording shall be retained for two (2) years after the termination of the Hold Separate.

e. All material transactions, out of the ordinary course of business and not precluded by paragraph three hereof, shall be subject to a majority vote of the Management Committee.

f. Johnson & Johnson shall not exercise direction or control over, or influence directly or indirectly, the Cordis Neuroscience Business, the Management Committee, or the Manager of the Cordis Neuroscience Business, any of their operations, assets, or businesses; provided, however, that Johnson & Johnson may exercise only such direction and control over the Cordis Neuroscience Business as is necessary to assure compliance with this Hold Separate, the consent order and with all applicable laws and except as otherwise provided in this Hold Separate.

g. Except as required by law, and except to the extent that necessary information is exchanged in the course of evaluating and

consummating the Merger, defending investigations or litigation, obtaining legal advice, complying with this Hold Separate or the consent order or negotiating agreements to divest assets, Johnson & Johnson shall not receive or have access to, or the use of, any material confidential information of the Cordis Neuroscience Business or the activities of the Manager or Management Committee not in the public domain, nor shall the Cordis Neuroscience Business, Manager, or the Management Committee receive or have access to, or the use of, any material confidential information about Johnson & Johnson. Johnson & Johnson may receive on a regular basis from the Cordis Neuroscience Business aggregate financial information necessary and essential to allow Johnson & Johnson to file financial reports, tax returns, and personnel reports. Any such information that is obtained pursuant to this subparagraph shall be used only for the purposes set forth in this subparagraph. ("Material confidential information," as used herein, means competitively sensitive or proprietary information not independently known to:

1. Johnson & Johnson, with regard to the Cordis Neuroscience Business, from sources other than the Cordis Neuroscience Business or its employees or the Management Committee; or

2. The Management Committee or the Cordis Neuroscience Business or its employees, with regard to Johnson & Johnson, from sources other than Johnson & Johnson,

and includes, but is not limited to, customer lists, price lists, marketing methods, patents, technologies, processes, or other trade secrets.)

h. Except as is permitted by this Hold Separate, the Johnson & Johnson Management Committee Member shall not receive any Cordis Neuroscience Business material confidential information and shall not disclose any such information obtained through his or her involvement with the Cordis Neuroscience Business to Johnson & Johnson or use it to obtain any advantage for Johnson & Johnson. The Johnson & Johnson Management Committee Member shall participate in matters that come before the Management Committee only for the limited purpose of considering any capital investment of over $250,000, approving any proposed budget and operating plans, authorizing dividends and repayment of loans consistent with the provisions hereof, reviewing material transactions described in

subparagraph 3.e, and carrying out Johnson & Johnson's responsibilities under the Hold Separate and the Consent Agreement. Except as permitted by the Hold Separate, the Johnson & Johnson Management Committee Member shall not participate in any matter, or attempt to influence the votes of the other directors on the Management Committee with respect to matters that would involve a conflict of interest between Johnson & Johnson and the Cordis Neuroscience Business.

i. Johnson & Johnson shall not change the composition of the Management Committee unless a majority of the Management Committee consents. The Chairman of the Management Committee shall have the power to remove members of the Management Committee for cause and to require Johnson & Johnson to appoint replacement members to the Management Committee in the same manner as provided in paragraph 3.d. of this Hold Separate. Johnson & Johnson shall not change the composition of the management of the Cordis Neuroscience Business; except that the Management Committee shall have the power to remove management employees for unsatisfactory performance or for cause.

j. If the Chairman of the Management Committee ceases to act or fails to act diligently, a substitute Chairman shall be appointed in the same manner as provided in paragraphs 3.c. and 3.d.

k. Cordis personnel connected with the Cordis Neuroscience Business or providing support services to the Cordis Neuroscience Business as of the date this Hold Separate is signed shall continue, as employees of Johnson & Johnson, to provide such services as of the date of this Hold Separate. Such Johnson & Johnson personnel must retain and maintain all material confidential information relating to the Cordis Neuroscience Business on a confidential basis and, except as is permitted by this Hold Separate, such persons shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any such information to or with any other person whose employment involves any other Johnson & Johnson business.

Such Johnson & Johnson personnel shall also execute a confidentiality agreement prohibiting the disclosure of any material confidential Cordis Neuroscience Business or Johnson & Johnson information.

1. The Cordis Neuroscience Business shall be staffed with sufficient employees to maintain the viability and competitiveness of the Cordis Neuroscience Business, which employees shall be the Cordis Neuroscience Business's employees and may also be hired from sources other than Johnson & Johnson. Each management employee of the Cordis Neuroscience Business shall execute a confidentiality agreement prohibiting the disclosure of any Cordis Neuroscience Business confidential information.

m. Johnson & Johnson shall circulate to the management employees of the Cordis Neuroscience Business and appropriately display a notice of this Hold Separate and consent order in the form attached hereto as Attachment A.

n. Johnson & Johnson shall cause the Cordis Neuroscience Business to expend funds for research and development, quality control, manufacturing and marketing of Cordis Neuroscience Business products at a level not lower than that budgeted for either the 1994 or 1995 fiscal year, and shall increase such spending as deemed reasonably necessary in light of competitive conditions. Within thirty (30) days of the date of this Hold Separate, the Chairman of the Management Committee shall develop a budget and operating plan for the 1996 fiscal year that complies with the provisions of this paragraph and present it to the Management Committee for approval. If necessary, Johnson & Johnson shall provide the Cordis Neuroscience Business with any funds to accomplish the foregoing. Johnson & Johnson shall provide to the Cordis Neuroscience Business such support services as provided by Cordis prior to the Merger.

o. Johnson & Johnson shall provide the Cordis Neuroscience Business with sufficient working capital to operate at a level not less than the rate of operation in effect during the twelve (12) months preceding the date of this Hold Separate.

p. The Management Committee shall serve at the cost and expense of Johnson & Johnson. Johnson & Johnson shall indemnify the Management Committee 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 Management Committee members.

q. The Management Committee shall have access to and be informed about all companies who inquire about, seek or propose to buy the Cordis Neuroscience Business.

r. Notwithstanding the provisions of paragraph 3.h., companies who undertake a due diligence process in the course of negotiations to purchase the Cordis Neuroscience Business may be accompanied and assisted by the Johnson & Johnson Management Committee Member, in addition to appropriate Cordis Neuroscience Business employees selected by the Management Committee. The Johnson & Johnson Management Committee Member may delegate tasks relating to such due diligence to attorneys, accountants and/or other financial employees of Johnson & Johnson who are not directly engaged in the Johnson & Johnson Neurological Products Business; provided, however, that such Johnson & Johnson employees, accountants and attorneys shall execute a confidentiality agreement prohibiting the disclosure of any Cordis Neuroscience Business material confidential information.

4. Should the Federal Trade Commission seek in any proceeding to compel Johnson & Johnson to divest itself of the Cordis Neuroscience Business, or any additional assets, as provided in the Consent Agreement, or to seek any other injunctive or equitable relief, Johnson & Johnson 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 Merger. Johnson & Johnson shall also waive all rights to contest the validity of this Hold Separate.

5. To the extent that this Hold Separate requires Johnson & Johnson to take, or prohibits Johnson & Johnson from taking, certain actions that otherwise may be required or prohibited by contract, Johnson & Johnson shall abide by the terms of this Hold Separate or the Consent Agreement, 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 Hold Separate or the Consent Agreement.

6. For the purpose of determining or securing compliance with this Hold Separate, subject to any legally recognized privilege or provision of applicable law, and upon written request with reasonable notice to Johnson & Johnson made to its General Counsel, Johnson

& Johnson shall permit any duly authorized representative or representatives of the Commission:

a. Access during the office hours of Johnson & Johnson 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 Johnson & Johnson or relating to compliance with this Hold Separate;

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

7. This Hold Separate shall not be binding until approved by the Commission.

ATTACHMENT A

NOTICE OF DIVESTITURE AND
REQUIREMENT FOR CONFIDENTIALITY

Johnson & Johnson and Cordis Corporation have entered into a Consent Agreement and Agreement to Hold Separate with the Federal Trade Commission ("Commission") relating to the divestiture of the Cordis Neuroscience Business. Until after the Commission's Order becomes final and the Cordis Neuroscience Business are divested, the Cordis Neuroscience Business must be managed and maintained as a separate, ongoing business, independent of all other Johnson & Johnson businesses. All competitive information relating to The Cordis Neuroscience Business must be retained and maintained by the persons involved in the Cordis Neuroscience Business on a confidential basis and such persons shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any such information to or with any other person whose employment or agency involves any other Johnson & Johnson business. Similarly, all such persons involved in any other Johnson

& Johnson business shall be prohibited from providing, discussing, exchanging, circulating or otherwise furnishing competitive information about such business to or with any person whose employment or agency involves the Cordis Neuroscience Business.

Any violation of the Consent Agreement or the Agreement to Hold Separate, incorporated by reference as part of the Consent Order, may subject Johnson & Johnson to civil penalties and other relief as provided by law.

IN THE MATTER OF

SERVICE CORPORATION INTERNATIONAL

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-3646. Complaint, March 21, 1996--Decision, March 21, 1996

This consent order permits Service Corporation International ("SCI"), the largest owner of funeral homes in North America, to acquire Gilbraltar Mausoleum Corporation and requires SCI, among other things, to divest, within 12 months, a number of properties, including assets in Amarillo, Texas, and Brevard and Lee Counties, Florida, to Commission-approved acquirers. In addition, the consent order requires SCI, for 10 years, to notify the Commission before acquiring certain similar assets in any of these markets.

Appearances

For the Commission: *Harold Kirtz, Ann Schenof, Katharine Alphin, Daniel Ducore, Paul Davis* and *William Baer.*

For the respondent: *Michael Byowitz, Wachtell, Lipton, Rosen & Katz*, 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 Service Corporation International ("SCI"), a corporation, through its wholly-owned subsidiary Rocky Acquisition Corp., a corporation, has entered into an agreement with Gibraltar Mausoleum Corporation ("Gibraltar") a corporation, in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and that such acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended 15 U.S.C. 45, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. DEFINITIONS

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

a. *"SCI"* means Service Corporation International, its predecessors, subsidiaries, divisions, and groups and affiliates controlled by Service Corporation International, their successors and assigns, and their directors, officers, employees, agents, and representatives.

b. *"Gibraltar"* means Gibraltar Mausoleum Corporation, its predecessors, subsidiaries, divisions, and groups and affiliates controlled by Gibraltar Mausoleum Corporation, their successors and assigns, and their directors, officers, employees, agents, and representatives.

c. *"Funerals"* means a group of services provided at the death of an individual, the focus of which is some form of commemorative ceremony concerning the deceased at which ceremony the body is present; this group of services ordinarily includes, but is not limited to: the removal of the body from the place of death; its embalming or other preparation; making available a place for visitation and viewing, for the conduct of a funeral service, and for the display of caskets and outside cases; and the arrangement for and conveyance of the body to a cemetery or crematory for final disposition.

d. *"Perpetual care cemetery services"* means the provision of plots of land, mausoleum spaces, and niches for, and the services associated with, including maintenance and upkeep, the final disposition of human remains.

e. *"Crematory services"* means the incineration of human remains.

f. *"Lee County"* means Lee County, Florida.

g. *"Brevard County"* means Brevard County, Florida.

h. *"Amarillo"* means the city of Amarillo, Texas and its immediate environs.

II. THE RESPONDENT

2. Respondent SCI 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 1929 Allen Parkway,

Houston, Texas. SCI, whose 1994 revenues were $1,117,175,000, is the largest funeral home and cemetery company in North America.

III. THE ACQUIRED PARTY

3. Gibraltar 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 9102 N. Meridian Street, Indianapolis, Indiana. Gibraltar is a privately-owned corporation which owns both funeral homes and cemeteries.

IV. JURISDICTION

4. SCI and Gibraltar are, and at all times relevant herein have been, engaged in commerce, as "commerce" is defined in Section 1 of the Clayton Act, 15 U.S.C. 12, and are corporations whose businesses are in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

V. THE PROPOSED ACQUISITION

5. On or about June 7, 1995, SCI entered into an Agreement and Plan of Merger with Gibraltar, in which SCI, via its wholly-owned subsidiary Rocky Acquisition Corp., would acquire 100% of the voting securities of Gibraltar. At the time the voting securities of Gibraltar were valued at $190 million. In exchange for the merger of Gibraltar into SCI, the shareholders of Gibraltar will receive an aggregate consideration of $87,984,000 in cash and 3,286,759 shares of SCI common stock. Two of the stockholders will each receive in excess of $15 million but less than 10% of that stock.

VI. THE RELEVANT MARKETS

6. The relevant lines of commerce in which to evaluate the effects of the acquisition are the provision of funerals, the provision of perpetual care cemetery services, and the provision of crematory services.

7. The three relevant sections of the country in which to evaluate the effects of the acquisition are Lee County, Brevard County, and Amarillo.

VII. MARKET STRUCTURE

8. SCI and Gibraltar both own and operate funeral homes and perpetual care cemeteries in Brevard County and compete in the provision of funerals and perpetual care cemetery services.

9. The markets for funerals and perpetual care cemetery services in Brevard County are highly concentrated, whether measured by the Herfindahl-Hirschmann Index or four firm concentration ratios. Gibraltar and SCI respectively are the first and second largest sellers of funerals and perpetual care cemetery services in the relevant area.

10. SCI and Gibraltar both own and operate funeral homes in Lee County and compete in the provision of funerals.

11. The market for funerals in Lee County is highly concentrated, whether measured by the Herfindahl-Hirschmann Index or by four-firm concentration ratios. SCI is the largest seller of funerals in the relevant area and Gibraltar is the third largest.

12. SCI and Gibraltar both own and operate funeral homes, perpetual care cemeteries and crematories in Amarillo and compete in the provision of funerals, perpetual care cemetery services and crematory services.

13. The markets for funerals, perpetual care cemetery services and crematory services in Amarillo are highly concentrated, whether measured by the Herfindahl-Hirschmann Index or by four-firm concentration ratios. SCI is the largest seller of funerals in the relevant area and Gibraltar is the second largest. The two firms own two of the three perpetual care cemeteries in the area, and also own the only two crematories in the area.

VIII. ENTRY

14. Entry into the relevant markets is difficult because of the long period of time required to establish a reputation within a community. The funeral and cemetery industry has expanded slowly because of high entry costs and the long period of time required to establish a loyal family clientele.

15. State and local regulations in the relevant geographic areas of the provision of funerals and the building of new cemeteries and crematories may also inhibit timely entry into these lines of commerce.

IX. COMPETITIVE EFFECTS OF THE PROPOSED ACQUISITION

16. The effects of the proposed acquisition, if consummated, may be to substantially lessen competition in each of the relevant markets in violation of Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, in the following ways, among others:

a. By eliminating actual competition between SCI and Gibraltar;

b. By tending to create a dominant firm in certain of the relevant markets;

c. By tending to increase the likelihood of coordinated interaction among the remaining firms in other relevant markets; and

d. By eliminating effective competitors from each of the relevant markets.

X. VIOLATION CHARGED

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

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of the acquisition of the voting securities of Gibraltar Mausoleum Corporation by respondent and respondent having been furnished thereafter with a copy of a draft of complaint that the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondent of all the jurisdictional facts set forth in the aforesaid draft of the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute

an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that respondent has violated the said Acts, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Service Corporation International 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 1929 Allen Parkway, Houston, Texas.

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 *"SCI"* means Service Corporation International, its predecessors, subsidiaries, divisions, and groups and affiliates controlled by Service Corporation International, their successors and assigns, and their directors, officers, employees, agents, and representatives.

B. *"Commission"* means the Federal Trade Commission.

C. *"Funerals"* means a group of services provided at the death of an individual, the focus of which is some form of commemorative ceremony concerning the deceased at which ceremony the body is present; this group of services ordinarily includes, but is not limited to: the removal of the body from the place of death; its embalming or other preparation; making available a place for visitation and

viewing, for the conduct of a funeral service, and for the display of caskets and outside cases; and the arrangement for and conveyance of the body to a cemetery or crematory for final disposition.

D. *"Funeral establishment"* means the assets and businesses of a facility that provides funerals.

E. *"Perpetual care cemetery services"* means the provision of plots of land, mausoleum spaces, and niches for, and the services associated with, including maintenance and upkeep, the final disposition of human remains.

F. *"Cemetery"* means the assets and businesses of a facility that provides perpetual care cemetery services.

G. *"Crematory services"* means the incineration of human remains.

H. *"Crematory"* means the assets and businesses of a facility that performs cremations.

I. *"Assets and businesses"* include all assets, properties, business and goodwill, tangible and intangible, utilized by a funeral establishment, cemetery or crematory, including, but not limited to, the following:

1. All right, title and interest in and to owned or leased real property, together with appurtenances, licenses and permits;

2. All vendor lists, management information systems and software used on-site, and all catalogs, sales promotion literature and advertising materials, except that SCI may delete from such materials the SCI, Gibraltar or Schooler Gordon names, trademarks or other identification;

3. All machinery, fixtures, equipment, vehicles, transportation facilities, furniture, tools and other tangible personal property;

4. All right, title and interest in and to the contracts entered into in the ordinary course of business with customers (together with associated bids and performance bonds), suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors and consignees;

5. All right, title and interest in the trade name of each funeral establishment, cemetery or crematory, but excluding the trade name "Schooler Gordon"; and

6. All right, title and interest in the books, records and files pertinent to any of the properties to be divested.

J. *"Properties to be divested"* means all of the assets and businesses of the following funeral establishments, cemeteries and crematories:

1. Blackburn-Shaw Funeral Home (now known as Schooler-Gordon Blackburn-Shaw Funeral Home) 315 East Fifth Street Amarillo, Texas.
2. Blackburn-Shaw Funeral Home (now known as Schooler-Gordon Blackburn-Shaw Funeral Home) 1505 Martin Street Amarillo, Texas.
3. Memory Gardens of Amarillo & Crematory I-27 & McCormack Road Amarillo, Texas.
4. North Brevard Funeral Home 1450 Norwood Avenue Titusville, Florida.
5. Oaklawn Memorial Gardens & Mausoleum 2116 Garden Street Titusville, Florida.
6. Metz Funeral Home 1306 Lafayette Street Cape Coral, Florida.
7. Harvey-Englehardt Funeral Home 1600 Colonial Boulevard Ft. Myers, Florida.

II.

It is further ordered, That:

A. Respondent shall divest, absolutely and in good faith, within twelve months of the date this order becomes final, the properties to be divested.

B. Respondent shall divest the properties to be divested only to an acquirer or acquirers that receive the prior approval of the Commission and only in a manner that receives the prior approval of the Commission. The purpose of the divestiture of the properties to be divested is to ensure the continued use of the properties to be divested in the same business in which the properties to be divested are engaged at the time of the proposed divestiture, and to remedy the lessening of competition resulting from the proposed acquisition as alleged in the Commission's complaint.

C. Pending divestiture of the properties to be divested, respondent shall take such actions as are necessary to maintain the viability and marketability of the properties to be divested and to prevent the

destruction, removal, wasting, deterioration, or impairment of any of the properties to be divested except for ordinary wear and tear.

D. 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 divested all the properties to be divested as required by this order.

III.

It is further ordered, That:

A. If SCI has not divested, absolutely and in good faith and with the Commission's prior approval, the properties to be divested within twelve months of the date this order becomes final, the Commission may appoint a trustee to divest the properties to be divested. In the event that the Commission or the Attorney General brings an action pursuant to Section 5(1) of the Federal Trade Commission Act, 15 U.S.C. 45(l), or any other statute enforced by the Commission, SCI 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 and its counsel 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 properties to be divested.

3. Within ten (10) days after appointment of the trustee, respondent shall execute a trust agreement that, subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestiture required by this order.

4. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in paragraph III B.3 to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve-month period, the trustee has submitted a plan of divestiture or believes that divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or, in the case of a court-appointed trustee, by the court; 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 properties to be divested 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 divestitures. Any delays in divestiture caused by respondent shall extend the time for divestiture under this paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed trustee, by the court.

6. The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to respondent's absolute and unconditional obligation to divest at no minimum price. The divestiture shall be made in the manner and to the acquirer or acquirers as set out in paragraph II of this order; provided, however, if the trustee receives *bona fide* offers from more than one 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 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 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 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 properties 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 preparation for, or defense of any claim, whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.

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

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

11. The trustee shall have no obligation or authority to operate or maintain the properties to be divested.

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

IV.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, respondent shall not, without 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, engaged in at the time of such acquisition, or within the two years preceding such acquisition, the sale of funerals, perpetual care cemetery services, or crematory services within the city limits of, or the area extending ten (10) miles outward in any direction of the city limits of, Amarillo, Texas; the sale of funerals or perpetual care cemetery services in Brevard County, Florida; or the sale of funerals in Lee County, Florida; or

B. Acquire any assets used for or used in the previous two years for (and still suitable for use for) the sale of funerals, perpetual care cemetery services or crematory services within the city limits of, or the area extending ten (10) miles outward in any direction of the city limits of, Amarillo, Texas; the sale of funerals or perpetual care cemetery services in Brevard County, Florida; or the sale of funerals in Lee County, Florida.

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 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 respondent and not of any other party to the transaction. Respondent 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, respondent 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.

This paragraph IV shall not apply to new facilities constructed or developed by respondent.

V.

It is further ordered, That:

A. Within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until respondent has fully complied with the provisions of paragraphs II and III of this order, respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with 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 as required by 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 paragraph IV of this order.

VI.

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

of subsidiaries or any other change in the corporation that may affect compliance obligations arising out of the order.

VII.

It is further ordered, That, for the purpose of determining or securing compliance with this order, subject to any legally recognized privilege, and upon written request with reasonable notice to respondent made to its principal office, respondent shall permit any duly authorized representative or representatives of the Commission:

A. Access, during office hours of respondent and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of respondent relating to any matters contained in this order; and

B. Upon five (5) days' notice to respondent and without restraint or interference therefrom, to interview officers 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 Service Corporation International ("SCI"), a corporation organized and existing under the laws of the State of Texas, with its principal executive office located at 1929 Allen Parkway, Houston, Texas, 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.* (collectively, "Parties").

PREMISES

Whereas, on or about June 7, 1995, SCI entered into an Agreement and Plan of Merger with Gibraltar Mausoleum Corporation ("Gibraltar"), in which (1) Gibraltar would be merged into Rocky Acquisition Corp., a wholly-owned subsidiary of SCI, and

(2) Gibraltar shareholders would receive SCI common stock and other consideration specified therein ("Acquisition"); and

Whereas, both SCI and Gibraltar own interests in funeral establishments that provide funerals, cemeteries that provide perpetual care cemetery services, and crematories that provide cremations to consumers; and

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

Whereas, if the Commission accepts the Agreement Containing Consent Order ("SCI/Gibraltar Consent Agreement"), the Commission must place the SCI/Gibraltar Consent Agreement on the public record for public comment 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* and holding separate the assets and businesses of certain funeral establishments, cemeteries, and a crematory ("Hold Separate Assets") listed in Exhibit A attached hereto and made a part hereof until the divestitures contemplated by the SCI/Gibraltar Consent Agreement have been made, 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 purposes of this Agreement are to: (1) preserve the Hold Separate Assets as viable independent businesses pending the divestitures described in the SCI/Gibraltar Consent Agreement; (2) preserve the Commission's ability to require the divestitures of the funeral establishments, cemeteries, and a crematory as specified in the SCI/Gibraltar Consent Agreement; and (3) remedy any anticompetitive aspects of the Acquisition; and

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

Whereas, SCI 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 unless the Commission determines to reject the

SCI/Gibraltar Consent Agreement, it will not seek further relief from SCI with respect to the Acquisition, except that the Commission may exercise any and all rights to enforce this Agreement, the SCI/Gibraltar Consent Agreement to which it is annexed and made a part, and the order, once it becomes final, and in the event that the required divestitures are not accomplished, to appoint a trustee to seek divestiture of the properties to be divested pursuant to the SCI/Gibraltar Consent Agreement, as follows:

1. SCI agrees to execute and be bound by the SCI/Gibraltar Consent Agreement.

2. SCI shall hold the Hold Separate Assets separate and apart from the date this Agreement is accepted until the first to occur of (a) ten business days after the Commission withdraws its acceptance of the SCI/Gibraltar Consent Agreement pursuant to the provisions of Section 2.34 of the Commission's Rules or (b) the date the divestitures required by the order contained in the SCI/Gibraltar Consent Agreement are accomplished. SCI's obligation to hold the Hold Separate Assets separate and apart shall be on the following terms and conditions and for the periods set forth in Exhibit A:

a. SCI shall hold separate and apart the Hold Separate Assets.

b. Except as provided herein and as is necessary to assure compliance with this Agreement and the consent order, SCI shall not exercise direction or control over, or influence directly or indirectly, the Hold Separate Assets or any of their operations or businesses.

c. SCI shall cause the Hold Separate Assets to continue using their present names and trade names, and shall maintain and preserve the viability and marketability of each of the Hold Separate Assets and shall not sell, transfer, encumber (other than in the normal course of business), or otherwise impair their marketability or viability. During the term of this Agreement, SCI shall provide the Hold Separate Assets with the same or better quality of support services, including without limitation, payroll processing, accounting, management information systems, and computer support, as SCI or Gibraltar provided to the Hold Separate Assets prior to the acquisition.

d. SCI shall refrain from taking any actions that may cause any material adverse change in the business or financial conditions of the Hold Separate Assets.

e. SCI shall not change the composition of the management of the Hold Separate Assets, except that SCI may fill vacancies and remove management for cause.

f. SCI shall maintain separate financial and operating records and shall prepare separate quarterly and annual financial statements for the Hold Separate Assets and shall provide the Commission with such statements for each funeral establishment, cemetery and crematory within ten days of their availability.

g. Except as required by law, and except to the extent that necessary information is exchanged in the course of evaluating the Acquisition, defending investigations or litigation, or negotiating agreements to dispose of assets, SCI shall not receive or have access to, or the use of, any of the Hold Separate Assets' material confidential information not in the public domain. Any such information that is obtained pursuant to this subparagraph shall only be used for the purpose set out in this subparagraph. ("Material confidential information," as used herein, means competitively sensitive or proprietary information not independently known to SCI from sources other than Gibraltar or itself, and includes but is not limited to pre-need customer lists, prices quoted by suppliers, or trade secrets.)

h. All earnings and profits of the Hold Separate Assets shall be held separate. If necessary, SCI shall provide any or all of the Hold Separate Assets with sufficient working capital to operate at their current levels.

i. SCI shall refrain from, directly or indirectly, encumbering, selling, disposing of, or causing to be transferred any assets, property, or business of the Hold Separate Assets, except that the Hold Separate Assets may advertise, purchase merchandise and sell or otherwise dispose of merchandise in the ordinary course of business.

3. Should the Federal Trade Commission seek in any proceeding to compel SCI to divest itself of the shares of Gibraltar stock that SCI may acquire, or to compel SCI to divest any assets or businesses of Gibraltar that it may hold, or seek any other injunctive or equitable relief, SCI shall not raise any objection based upon the fact that the Commission has permitted the Acquisition. SCI also waives all rights to contest the validity of this Agreement.

4. For the purpose of determining or securing compliance with this Agreement, subject to any legally recognized privilege, and upon

written request with reasonable notice to SCI made to its principal office, respondent shall permit any duly authorized representative or representatives of the Commission:

a. Access, during office hours of SCI, 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 SCI relating to any matters contained in this Agreement; and

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

This Agreement shall not be binding until approved by the Commission.

EXHIBIT A

HOLD SEPARATE ASSETS

A. The following funeral establishment, cemetery, and crematory shall be held separate until the divestitures of the two Blackburn-Shaw Funeral Homes (now known as Schooler-Gordon Blackburn-Shaw Funeral Homes) and Memory Gardens of Amarillo & Crematory pursuant to the order as is set forth in the SCI/Gibraltar Consent Agreement:

1. Memorial Park Funeral Home, 6969 I-40 East, Amarillo, Texas
2. Memorial Park Cemetery & Crematory, 6969 I-40 East, Amarillo, Texas

B. The following cemetery and funeral establishments shall be held separate until their divestiture pursuant to the order as is set forth in the SCI/Gibraltar Consent Agreement:

1. Oaklawn Memorial Gardens and Mausoleum, 2116 Garden Street, Titusville, Florida
2. North Brevard Funeral Home, 1450 Norwood Avenue, Titusville
3. Metz Funeral Home, 1306 Lafayette Street, Cape Coral, Florida
4. Harvey-Englehardt Funeral Home, 1600 Colonial Boulevard, Ft. Myers, Florida

IN THE MATTER OF

CALIFORNIA DENTAL ASSOCIATION

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

Docket 9259. Complaint, July 9, 1993--Final Order, March 25, 1996

This final order prohibits the 19,000 member professional association from restricting, regulating, impeding, declaring unethical, or interfering with the advertising or publishing of the prices, terms or conditions of sale of dentists' services and the solicitation of patients, patronage or contracts to supply dentists' services. In addition, the final order requires, among other things, the respondent to update its Code of Ethics to comply with the provisions of the Commission's order and to publish the Commission's order and complaint, as well as an announcement describing the order's effect, in the California Dental Association Journal.

Appearances

For the Commission: *Sally L. Maxwell, Markus Meier, Gary H. Schorr, Linda B. Blumenreich, George R. Bellack, Elizabeth R. Hilder, David R. Pender* and *Robert Leibenluft.*

For the respondent: *Peter Sfikas* and *Tamra S. Kempf, Bell, Boyd & Lloyd,* Chicago, IL.

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 the California Dental Association, a corporation, has violated and is violating 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 its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent California Dental Association ("CDA" or "respondent") is a corporation organized, existing and doing business under and by virtue of the laws of the State of California. Its principal office and place of business is located at 818 "K" Street Mall (Post Office Box 13749), Sacramento, California.

PAR. 2. CDA is a professional association organized in substantial part to represent the interests of its dentist members. CDA has approximately 15,000 dentist members, constituting approximately 75% of the practicing dentists in California. CDA is engage in substantial activities that further its members' pecuniary interests. By virtue of its purposes and activities, CDA is a corporation within the meaning of Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

PAR. 3. CDA has 32 local component dental societies. Dentists are required to be members of the CDA component within whose jurisdiction they practice in order to be eligible for membership in CDA. CDA's activities, including those complained of, are directed by its House of Delegates, which is composed of delegates from CDA's component societies. CDA is a constituent society of the American Dental Association ("ADA"). To be eligible for membership in ADA, a dentist practicing in California must be a member of CDA.

PAR. 4. Most CDA members are engaged in the business of providing dental services for a fee. Except to the extent that competition has been restrained as herein alleged, and depending upon their specialties and geographic location, CDA's members have been and are now in competition among themselves and with other dentists.

PAR. 5. The acts and practices of CDA, including the acts and practices alleged herein, have been, or are, in or affecting commerce within the meaning of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

PAR. 6. In selecting a dentist, consumers generally consider factors of price and quality of service, including the dentist's training and experience, modes of treatment, areas of concentration or special interest, and the efficiency and convenience of the dental office. Truthful, nondeceptive advertising enables dentists to inform consumers about the price and quality factors of their services and about how their practices differ from other dentists, and thereby benefits consumers and promotes competition among dentists. For example, through advertising dentists can inform consumers of the location and nature of their practices and that they offer special discounts, such as for senior citizens. Such advertising can provide an incentive for dentists to offer services and prices desirable to consumers.

PAR. 7. CDA has restrained competition among dentists in California by acting as a combination of its members, or by conspiring with at least some of this members and its component societies to restrict unreasonably the dissemination of information to consumers. In particular, CDA has combined or conspired to restrict the ability of dentists to engage in a wide variety of forms of advertising without regard to whether the advertising is truthful and nondeceptive, including:

A. Advertising price information such as discounted fees;

B. Advertising relating to the quality of dentists' services, including statements that inform consumers that the dentist takes special steps to address consumers' fears about dental treatment; offers treatments not available from other dentists in the area; or has a practice that in some other respects is different from the practices of other dentists in the community; and

C. Advertising that uses methods that may be particularly effective in conveying information to consumers.

PAR. 8. CDA has engaged in various acts and practices in furtherance of this combination or conspiracy, including, among other things:

A. Adopting, publishing, and maintaining rules that require dentists to refrain from a variety of forms of advertising without regard to whether the advertising is truthful and nondeceptive;

B. Coercing members who violate its advertising rules into ceasing such advertising;

C. Expelling members who refuse to refrain from engaging in such advertising;

D. Refusing to grant membership to any dentist who engages in such advertising; and

E. Attempting to coerce non-members to comply with its rules, by, among other things, denying membership to, or cancelling the membership of, dentists whose non-CDA member employers advertise in a manner not acceptable to CDA.

PAR. 9. CDA's acts and practices have harmed consumers by restricting or preventing dentists from truthfully and nondeceptively informing the public of the price, quality and availability of their

services and how their practices differ from those of other dentists. Among other things:

A. CDA restricts certain categories of price advertising without regard to whether such advertising is truthful and nondeceptive. For example,

1. CDA prohibits all announcements of across-the-board discount offers, such as "SENIOR CITIZEN DISCOUNT" and $25-off coupons for new patients.

2. CDA prohibits statements relating to low prices, such as "CARE AT REASONABLE PRICES," that can serve to signal a dentist's sensitivity to consumers' concerns about prices.

B. CDA restricts representations that relate to the quality of dental services without regard to whether the representations are truthful and nondeceptive. For example,

1. CDA bans a wide variety of advertising that it deems to constitute claims of "quality" or "superiority" without regard to whether such advertising is truthful and nondeceptive. CDA also prohibits quality claims through its bans on the use in advertising of adjectives, superlatives and subjective representations.

2. CDA has stopped dentist from using phrases in advertising such as "SPECIAL TREATMENT FOR NERVOUS PATIENTS," and "SPECIAL CARE FOR COWARDS," and thus has restricted claims that can inform the public that the dentist pays particular attention to consumers' fears and anxieties regarding dental procedures, and that the dentist takes special care to relieve those fears and anxieties.

C. CDA restricts certain methods of advertising without regard to whether the advertising claims are truthful and nondeceptive. For example,

1. CDA in effect discourages free dental screenings of schoolchildren by preventing dentists who provide such screenings from using their professional forms, which are imprinted with their names and addresses, in reporting the results of the screening.

2. CDA restricts the ability of dentists to attract patients and convey information to them about the dentists' practices by, for example, prohibiting dentists from hiring an agent to pass out coupons in front of the building in which a dentist practices, and from distributing business cards or other materials promoting the dentist's practice.

3. CDA prohibits dentists from advertising in any manner other than that which "contributes to the esteem of the public." Such a prohibition restricts dentists from using advertising techniques that may be particularly effective at gaining attention and conveying information to consumers.

4. CDA bans the advertising of 'guarantees' of dental services without regard to whether the advertisement is truthful and nondeceptive.

PAR. 10. In some of its activities that restrict truthful, nondeceptive advertising for dental services, CDA purports to "enforce" state statutes and regulations pertaining to advertising and solicitation. CDA, however, imposes on the market its own restrictive position on advertising regulation in situations where the state's policy is either unclear or is contrary to CDA's position. CDA is not an agent of the State and has not been authorized to interpret or enforce state laws on behalf of the State.

PAR. 11. CDA's actions described in paragraphs seven, eight and nine have had, or have, the tendency and capacity to restrain competition unreasonably and to injure consumers in the following ways, among others:

A. Consumers of dental services have been deprived of the benefits of price and quality competition;

B. Consumers of dental services have been deprived of truthful, nondeceptive information for use in their selection of a dentist;

C. The costs to consumers of finding dental services at their desired cost and quality have been raised; and

D. Innovation in the delivery of dental services has been, or likely has been, hindered or restrained.

PAR. 12. The combination or conspiracy and the acts and practices described in paragraphs seven, eight, and nine constitute unfair methods of competition in violation of Section 5 of the Federal

Trade Commission Act, as amended, 15 U.S.C. 45. CDA's combination or conspiracy, or the effects thereof, is continuing and will continue or recur in the absence of the relief herein requested.

INITIAL DECISION

BY LEWIS F. PARKER, ADMINISTRATIVE LAW JUDGE
JULY 17, 1995

I. INTRODUCTION

The Commission issued its complaint in this matter on July 9, 1993, charging California Dental Association ("CDA") with violations of Section 5 of the Federal Trade Commission ("FTC") Act, as amended, 15 U.S.C. 45.

The complaint identifies CDA as a California corporation which is a professional association organized in substantial part to represent the interests of its dentist members who are required, if they want to belong to CDA, to join one of its 32 component dental societies.

The complaint charges that CDA has violated Section 5 of the FTC Act by restraining competition among dentists in California by acting as a combination of its members, or by conspiring with at least some of its members and its component societies to restrict unreasonably the dissemination of information to consumers by coercing its members to refrain from particular forms of advertising without regard to whether they are truthful and nondeceptive.

According to the complaint, these acts and practices have harmed consumers by preventing dentists from truthfully and nondeceptively informing the public of the price, quality, and availability of their services.

CDA's answer denied Commission jurisdiction over its activities because it is not a corporation within the generally accepted meaning of Sections 4 and 5 of the FTC Act, 15 U.S.C. 44 and 45, because its activities do not restrain or affect interstate commerce directly or substantially, and because its activities are the result of its desire to fulfill its public service obligations.

After extensive pretrial discovery, trial was held in San Francisco, California, from February 7, 1995 to February 21, 1995. The parties filed their proposed findings of fact and conclusions of law on April 6, 1995. The record was closed on April 20, 1995.

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

II. FINDINGS OF FACT

A. Description of CDA

1. Members

1. CDA is a professional association which is organized as a California non-profit corporation (Cplt at ¶ 1; Ans. at ¶ 1; Tr. 1139),[1] has no shares of stock or certificates of interest (Tr. 1769, 1141), and qualifies as a tax-exempt organization under Section 501(c)(6) of the IRS Code (Tr. 1770-71). CDA's principal place of business is located at 1201 K Street Mall, Sacramento, California (Ans. at ¶ 1). It has approximately 200 employees (Tr. 1138).

2. CDA has more than 19,000 dentist members, of which 13,500-13,700 are in active practice, who provide dental services for a fee (Ans. at ¶ 2) (Tr. 1166; CX-1550, CX-1656). The members represent about 75% of the practicing dentists in California (Tr. 1166; CX-1505, CX-1508-B, CX-1510-A, CX-1587-Z-107-08).

3. CDA is a "constituent" society of the American Dental Association ("ADA") (Ans. at ¶ 3; CX-1450-E) and its policies may not conflict with the ADA's Constitution and Bylaws (CX-1450-J). Its Code of Ethics conforms with the Principles of Ethics and Code of Professional Conduct of the ADA (CX-1450-J). To be eligible for membership in ADA, a dentist practicing in California must be a member of CDA (Ans. at ¶ 3; Tr. 1139).

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[1] Abbreviations used in this decision are:
Tr.: Transcript of the trial
CX: Commission exhibit
RX: CDA's exhibit
Cplt: Complaint
Ans.: Answer
CB: Complaint counsel's trial brief
RB: CDA's trial brief
CPF: Complaint counsel's proposed findings
RPF: CDA's proposed findings
F. Finding

4. CDA has 32 "component" societies (Ans. at ¶ 3; CX-1450-I), which are local or regional societies, located within California, which it charters (CX-1450-E, I). The bylaws of the CDA component societies may not conflict with CDA's Bylaws or the Constitution and Bylaws of the ADA (CX-1450-I). CDA requires dentists to be members of the component within whose jurisdiction they practice in order to be eligible for membership in CDA (Ans. at ¶ 3; Tr. 1139; CX-1450-I).

5. Members of CDA are bound by the codes of ethics of ADA, CDA, and the members' respective component societies (CX-1450-Y).

6. CDA collects dues from its members for itself, its component societies, and ADA, and transmits those dues to its component societies and ADA (CX-1450-H, CX-1649-Y, CX-1650-Z-61, CX-1651-A-26-27). CDA dues are $525 (CX-1649-X), ADA dues are $330, and components charge from $135 to several hundred dollars annually; the average annual "tripartite" dues paid by a member to all three associations are about $1,100 (Tr. 1159). CDA also collects voluntary contributions for the California Dental Political Action Committee ("CalDPAC") from CDA members (CX-1649-X, CX-1650-Z-61).

7. For fiscal year 1993-1994, CDA projected annual revenues of $19,889,461 (CX-1484-P). Membership dues represent the largest single source of CDA's revenues (Tr. 1762, Tr. 1142; CX-1484-P). Other major sources of revenues are: CDA scientific sessions; subscriptions to, and advertising in, CDA's official publications; interest income; sales of printed materials; and rent generated by CDA's headquarters building (CX-1484-P).

2. House of Delegates

8. CDA's House of Delegates is its supreme authoritative body (CX-1450-E) and is composed of 202 to 205 CDA members, 200 of whom are elected by CDA's component societies (Tr. 1139; Ans. at ¶ 3; CX-1450-J).

9. The House of Delegates has the power to determine CDA's policies, to amend its articles of incorporation, to adopt and amend its Code of Ethics, to determine and assess dues, to adopt an annual budget, to grant or revoke the charters of its component societies, and

to elect its officers, members of its council, and delegates to the ADA House of Delegates (CX-1450-K, Q, Z-4, Z-5, CX-1472-A).

3. Board of Trustees

10. CDA's administrative and managing body, the Board of Trustees, is vested with the power to conduct its business according to the policies established by the House of Delegates (CX-1450-O).

11. The Board has 52 members, including 43 trustees elected by CDA's component societies, the seven elected officers of CDA and two "appointed officers" -- the Executive Director and Editor -- who are appointed by the Board (CX-1450-N, O, S-T).

4. Standing Committees

12. CDA has six standing committees: Executive, Communications, Direct Reimbursement, Finance, Nominating, and Interdisciplinary Affairs (CX-1450-V-Y).

5. Councils

13. CDA operates ten councils, each of which is responsible for specific functions (Tr. 1148; CX-1450-T-V, CX-1484-Z-23-28). They are the:

14. a. Judicial Council which is charged with interpretation and enforcement of the CDA Code of Ethics (including the advertising restrictions which are the subject of this proceeding), as well as the discipline of CDA members found to have violated its Code (CX-1450-U-V, CX-1484-Z-27-28, CX-1571-G).

15. b. Council on Legislation which formulates positions on legislation and regulation on behalf of CDA and its members (Tr. 1285, 1154, 1208; CX-1483-Z-13, CX-1484-Z-25). The council has a close working relationship with CalDPAC, the "political arm" of CDA (CX-1483-Z-13, CX-1484-Z-26).

16. c. Council on Membership Services which recruits CDA members and is responsible for membership services and benefits (CX-1524-E).

17. d. Council on Education and Professional Relations which oversees a variety of CDA programs, including those which maintain a liaison role with the laboratory industry and monitor national and

statewide developments related to denturism and the expanded role of the dental hygienist (Tr. 1205-06; CX-1484-Z-24-25, CX-1571-I, CX-1649-N, Z-30-33).

18. e. Council on Dental Research and Development which monitors trends in infection control and monitors federal and state agency regulations (Tr. 1154; CX-1277-E, CX-1483-Z-11, CX-1484-Z-24).

19. f. Council on Peer Review which provides CDA members with a patient complaint resolution alternative to costly and protracted litigation (Tr. 1151-52; CX-1448-D, CX-1520-A, CX-1563, CX-1644-B).

20. g. Council on Scientific Sessions which holds two sessions yearly featuring continuing education courses, and displays by hundreds of vendors of new technology, treatment modalities, supplies, and equipment (Tr. 1155; CX-1483-Z-14, CX-1484-Z-27, CX-1502-A, CX-1571-A, D).

21. h. Council on Insurance which develops, monitors, and evaluates insurance programs to serve the needs of CDA members through its subsidiary, The Dentists Company Insurance Services (CX-1482-Z-19, CX-1483-Z-12, CX-1484-Z-5, CX-1571-H).

22. i. Council on Dental Care Programs which monitors government health care programs (Tr. 1149; CX-1483-Z-10, CX-1484-Z-23-24) and the activities of the State Board of Dental Examiners (Tr. 1149). It also has provided: input to third-party payers concerning dental care benefits and claims, insurance claim information to CDA members, and, in conjunction with ADA, a contract analysis service to help members to understand the legal implications of dental contracting (Tr. 1204; CX-1484-Z-23, CX-1571-F; CX-1483-Z-10). It also sponsors an annual dental care and insurance conference (CX-1481-Z-22, CX-1482-Z-17, CX-1483-Z-10).

23. j. Council on Community Health which is CDA's communications center for dental health activities and promotes National Children's Dental Health Month and Senior Smile Week (CX-1484-Z-23, CX-1571-H).

6. For-Profit Subsidiaries

24. CDA has five for-profit subsidiaries--four of which are operating companies--and a holding company for the operating companies (Tr. 1168).

a. The Dentists Insurance Company ("TDIC")

25. TDIC is a dental malpractice insurance company which underwrites insurance in California only for CDA members (Tr. 1768, 1785, 1168; CX-1587-Z-74). It also underwrites insurance for non-CDA members in Minnesota (Tr. 1785).

26. As of October 1993, TDIC insured approximately 8,800 California dentists, about two-thirds of all actively practicing CDA members (CX-1478-G).

27. CDA created TDIC in 1979 (Tr. 1784; CX-1575-A) as a result of the malpractice crisis in California and the threat of prohibitive insurance premiums for professional liability insurance (CX-1587-Z-62-63, CX-1482-L).

28. Except for one person, all members of TDIC's Board of Directors are, and always have been, members or officials of CDA. CDA's Executive Director is the Vice-Chairman of the TDIC Board of Directors (CX-1587-Z-101-02). TDIC's offices are located in the CDA headquarters building (CX-1448-B, C, CX-1587-Z-58-59, Z-65).

29. TDIC has made dividend payments of $120,000 and $320,000 to CDA during the last two years (Tr. 1769; CX-1484-Z-30). Additionally, TDIC pays CDA's Government Relations Office ("GRO") $30,000 a year (Tr. 1785) for GRO's legislative and lobbying activities relating to professional liability insurance issues (CX-1650-Z-13-14).

b. The Dentists Company ("TDC")

30. CDA created TDC in 1982 to provide and broker a wide range of high quality products to CDA members (Tr. 1776; CX-1652-Y, CX-1484-Z-29), and to contribute financially to CDA's activities (CX-1448-C, CX-1472-A). TDC offers professional and personal financial services and other services to CDA members (Tr. 1778-80; CX-1570-A-F).

31. Except for one non-dentist/non-employee member, all members of the TDC Board of Directors are, and always have been, members or officials of CDA (CX-1587-Z-101-02). CDA's Executive Director is the Vice-Chairman of the TDC Board of Directors (CX-1587-Z-102). CDA's Chief Financial Officer ("CFO") is the CFO and sole Vice-President of TDC (Tr. 1775-76). TDC's offices are located in the CDA headquarters building (Tr. 1778; CX-1448-B, C).

32. TDC made a dividend payment of $100,000 to CDA in September 1992 (Tr. 1769; CX-1484-Z-29), and TDC's activities have added over $5 million to CDA's assets (CX-1483-Z-15), materially improving CDA's financial position (CX-1483-Z-15, CX-1637-D).

c. The Dentists Company Insurance Services ("TDCIS")

33. CDA created TDCIS in 1983 (Tr. 1781). TDCIS is the broker/administrator for a number of CDA-sponsored business and personal insurance plans offered to CDA members (Tr. 1768, 1783-84; CX-1558-A-F, CX-1575-G-H). These insurance plans are offered only to CDA members (Tr. 1782; CX-1652-Z-9) and, in some cases, to the spouses and staff of CDA members and to employees of CDA's local component societies (CX-1558-A, F, CX-1575-G). TDCIS's insurance plans have more than 13,000 policyholders and more than 30,000 individual policies in place (Tr. 1782-83; CX-1484-W, Z-25, Z-29). TDCIS bills and collects more than $55 million a year (Tr. 1783; CX-1484-W, Z-29).

34. TDCIS has a "close working relationship" with CDA's Council on Insurance (CX-1484-Z-29), which is "the entity that determines which insurance programs will be sponsored by [CDA], and subsequently brokered by [TDCIS]" (CX-1649-V). Members of the TDCIS staff attend the council's meetings and "maintain close levels of communication" (CX-1484-Z-29).

35. Except for one non-dentist/non-employee member, all members of the TDCIS Board of Directors are, and always have been, members or officials of CDA (Tr. 1781; CX-1587-Z-101-02). CDA's Executive Director is the Vice-Chairman of the TDCIS Board of Directors (CX-1587-Z-102). CDA's CFO is the CFO and sole Vice-President of TDCIS (Tr. 1780; CX-1652-V). TDCIS's offices

are located in CDA's headquarters building (Tr. 1782; CX-1448-B, C).

36. "Each year, TDCIS has presented [CDA] with a dividend or other support based on TDCIS's income" (CX-1475-D). TDCIS pays CDA's GRO $30,000 a year (Tr. 1781-82) for legislative and lobbying activities relating to insurance issues (CX-1650-Z-13-14).

d. The Dentists Company Management Services ("TDCMS")

37. CDA created TDCMS in 1987 (CX-1346-E). Its function is to manage the operation of the CDA headquarters building (Tr. 1768). Prior to 1994, TDCMS also provided many of the administrative services currently provided to CDA and its subsidiaries by CDA Holding Company, Inc. (CX-1346-E, CX-1466-A, G). CDA's Executive Director is the Chairman of the Board of TDCMS (CX-1652-Z-1-2). CDA's CFO is the CFO and Vice-President of TDCMS (Tr. 1784).

e. CDA Holding Company, Inc. ("CDAHC")

38. CDAHC was created to assume ownership of CDA's for-profit subsidiaries as part of its corporate reorganization in 1993 (Tr. 1764, 1773; CX-1466-A, G, CX-1472-A, N).

39. This reorganization was done primarily to further define and protect CDA's status as a Section 501(c)(6) tax-exempt organization (Tr. 1774, 1188; CX-1472-A, N, CX-1587-Z-60, CX-1652-Z-5).

40. CDA is the sole owner of CDAHC which, in turn, holds the stock of CDA's other for-profit subsidiaries (Tr. 1768, 1773, 1187).

41. CDA elects the members of CDAHC's Board of Directors (Tr. 1188-89, 1778; CX-1450-K, M, Z-4-5), and CDA's Board of Trustees may remove directors of CDAHC (CX-1450-O, CX-1587-Z-67). All but one member of CDAHC's Board of Directors are members or officials of CDA (Tr. 1189, 1792; CX-1450-Z-5, CX-1587-Z-66-67). CDA's current President is a member of CDAHC's Board of Directors (Tr. 1413; CX-1651-Z-20); CDA's Executive Director is Chief Executive Officer of CDAHC (Tr. 1136; CX-1652-R); and CDA's CFO is the CFO and sole Vice-President of CDAHC (Tr. 1787-88; CX-1652-Q). CDA employees assist CDA's CFO with his duties relating to CDA's for-profit subsidiaries (CX-1652-K-L, R, X). CDAHC pays a portion of the salaries of CDA's CFO and the staff

that assists him in providing services for CDAHC (Tr. 1774-75; CX-1652-S).

42. CDA's House of Delegates recommends candidates for the boards of directors of the operating companies to CDAHC, which then selects the directors of the operating companies (CX-1450-K, O, Z-5, CX-1587-Z-67). CDAHC may remove and replace any of a subsidiary operating company's board members (CX-1450-Z-5).

43. CDA's Bylaws provide for payments by CDAHC to CDA of dividends or other payments generated by CDA's for-profit subsidiaries (CX-1450-Z-5, CX-1466-A, CX-1484-W, CX-1587-Z-103). By design, CDAHC currently does not generate profits; instead, it bills CDA and its subsidiaries for administrative services it provides, at cost (Tr. 1775).

7. Nonprofit Subsidiaries

44. CDA has two nonprofit subsidiaries organized under 501(c)(3) of the IRS Code: The CDA Relief Fund grants financial aid to dentists, their dependents, and survivors. The CDA Charitable Fund maintains a separate financial account for a disaster loan program (Tr. 1167-68, 1172; CX-1450-Z-4).

8. Rotunda Partners

45. CDA is the general partner of Rotunda Partners, which owns most of the CDA headquarters building in Sacramento (Tr. 1790). CDA owns 60% of Rotunda; TDIC owns the remaining 40% (Tr. 1169; CX-1652-Z-3).

9. California Dental Political Action Committee ("CalDPAC")

46. CalDPAC is an unincorporated association of dentists that was formed to make financial contributions to political candidates and parties sympathetic to issues of concern to dentistry (CX-1483-J, CX-1587-Z-129, CX-1650-Z-67-69).

47. CalDPAC is not legally a subsidiary or division of CDA, but it is considered the "political arm" of CDA and is closely affiliated with it (CX-1483-Z-13, CX-1484-Z-26, CX-1650-Z-3-4, Z-16, Z-50-55, Z-62-63, Z-67-68, CX-1587-Z-129-31; Tr. 1202).

48. Approximately 40 to 45% of CDA members contribute to CalDPAC (Tr. 1194; CX-1448, CX-1464-G, CX-1650-Z-65).

49. Over the past several years, the level of CalDPAC's political contributions has remained stable, at approximately $300,000 to $350,000 per two-year state legislative cycle (Tr. 1194; CX-1448-D, CX-1644-B, CX-1650-Z-67-68).

B. Interstate Commerce

1. Interstate Reimbursement For Dental Services

50. Fifty percent of the funding for California's Medicaid programs for dental services ("Denti-Cal") comes from the federal government. In calendar year 1994, the Denti-Cal program paid out approximately $500 million to billing providers, most of whom were members of CDA (Tr. 728, 1286; CX-1658).

2. Interstate Sale and Lease of Equipment and Supplies

51. CDA members purchase, lease, and use substantial amounts of dental equipment and dental-related products from manufacturers and suppliers located outside of California (Tr. 1405, 295-96, 750-55, 1000-02, 463-64, 328-29, 673-75; CX-1651-Q).

52. The CDA Journal and CDA Update carry many advertisements for products and services by out-of-state manufacturers and suppliers (CX-1451-E, G, CX-1452-B, CX-1455-E, I, CX-1456-J, L, CX-1457-L, CX-1458-E, CX-1461-H, CX-1466-D, CX-1470-J, CX-1474-E, CX-1476-K, CX-1478-F, G, N, CX-1479-K, N, CX-1480-H, CX-1482-M, Z-8, Z-10, Z-13, Z-46, Z-48, Z-54, CX-1483-Z-19, CX-1484-Z-12, Z-32, Z-53), and a substantial number of readers of the publications purchase such items (CX-1453-P).

53. CDA's scientific sessions feature exhibitions by many out-of-state vendors of dental-related products and services which CDA members may purchase (Tr. 782-83, 1772; CX-1452-A, CX-1571-A).

3. Other Activities of CDA and Its Members Involving Interstate Commerce

54. In some cases, out-of-state suppliers of services to CDA members have been unable to use certain advertising practices because of CDA's ethical advertising restrictions (Tr. 803-05, 603-10; CX-1209). CDA has placed advertisements, which must comply with its Code of Ethics, in publications with national distribution, including the "Wall Street Journal," "Fortune," and "Business Week" (CX-1455-M, CX-1450-V, X, CX-1651-Z-43).

55. "[M]any of CDA's members have been and are now in competition among themselves and other dentists, both within and outside the State of California" (Ans. at ¶ 4), and some CDA members reside outside of the State (CX-1656).

56. CDA members treat patients who reside outside of California (Tr. 1405, 771-72, 293, 1000, 462-63, 326-27, 672-73; CX-1608-M-N, CX-1611-I, Z-87, CX-1651-N-O), and approximately 4.5% of its members reside outside of California (CX-1656).

57. CDA and its components use the U.S. Postal Service to communicate with their members or applicants for membership whose advertising they challenge (Tr. 1021, 354). They also communicate, when necessary, with the ADA, which is located in Chicago, Illinois (Tr. 374-75, 1223; CX-1587-Z-55, CX-1450-Z-1-2, CX-1469-Z-57-58, CX-1651-Z-71). CDA also uses the Postal Service to deliver its Journal and Update to out-of-state concerns (Tr. 1772-73; CX-1481-Z-26-31, CX-1482-Z-49-53, CX-1484-Z-47-51, CX-1448-D, CX-1571-D, CX-1625-I-N).

58. CDA officials and members attend out-of-state conferences (Tr. 1185; CX-1450-K, Z-3, Z-40-41, CX-1587-Z-51-54, CX-1651-Z-27-29).

59. CDA, through TDC and TDCIS, offers services to CDA members through out-of-state firms, including providers of life insurance (CX-1480-K), medical insurance (CX-1558-B), income insurance (CX-1558-C), disability insurance (CX-1558-D), accidental death and dismemberment insurance (CX-1480-D, F, CX-1558-E-F), office property insurance (CX-1480-D, F, CX-1558-E-F), VISA cards (CX-1484-Z-29), home equity loans (CX-1484-Z-29), home mortgages (CX-1484-G), and long distance phone service (CX-1484-Z-29).

60. TDIC operates in Minnesota and has applied for licenses to do so in other states (CX-1468-E, CX-1480-A, CX-1484-Z-30).

61. CDA secured a loan for $39 million from an out-of-state insurance company to purchase its current headquarters building in Sacramento, California (Tr. 1790-91; CX-1470-F, CX-1652-Z-34-35).

62. CDA collects annual ADA membership dues from California members and transmits them to ADA headquarters in Illinois (Tr. 1190, 1415).

C. CDA Activities Conferring Pecuniary Benefits On Its Members

1. CDA's Purpose

63. CDA has often stated that one of its primary purposes is to "represent dentists in all matters that affect the profession" (CX-1546-A), and it provides the kind of benefits which individual dentists could not realize by acting individually (CX-1488, CX-1502-A, CX-1508-B, CX-1509-B, CX-1510-A, CX-1533, CX-1544).

2. Source of Revenues

64. CDA's budgeted revenue for its 1993-94 fiscal year was $19,889,461 (CX-1484-P). Its largest source of funding was membership dues and revenue derived from membership-related activities such as the sale of professional liability insurance to members (Tr. 1762, 1142, 1812). CDA's current dues for active members are $525. The average cost of dues for members of ADA, CDA and a CDA component ("tripartite dues") is approximately $1100 (Tr. 1159).

3. Tax Status

65. CDA is exempt from federal income taxation pursuant to Section 501(c)(6) of the Internal Revenue Code, 26 U.S.C. 501(c)(6) (Tr. 1770, 1141, 1853; CX-1587-Z-55), which exempts "business leagues, chambers of commerce, real estate boards and boards of trade" consisting of members that share common business interests (26 CFR 1.501(c)(6)-1; Tr. 1771, 1853). CDA is not exempt from federal income taxation under 501(c)(3) of the Code, 26 U.S.C.

501(c)(3), which governs organizations formed and operated solely for religious, charitable, scientific, or educational purposes (Tr. 1853).

66. In calculating their federal and state income taxes, members of CDA may not deduct the cost of membership dues as a charitable contribution (Tr. 1416, 1858). Instead, members of CDA may deduct most of their dues as ordinary and necessary business expenditures directly connected with or pertaining to their trade or business (26 CFR 1.162-1(a), 1.162-6; Tr. 1415). However, CDA members may not deduct that portion of association dues allocated by CDA to political lobbying activities (Tr. 1416; CX-1478-C; CX-1479-N, CX-1587-Z-111-12), which, in 1993, was estimated to be approximately $26 per member (CX-1478-C, CX-1479-N).

4. General Benefits of CDA Membership

67. CDA has often touted the benefits of membership, including such statements as:

> [CDA] is dedicated to offering the most comprehensive array of benefits and programs to assist practitioners in practice management. OSHA compliance and infection control to name a few (CX-1575-B).
> [CDA] offers far more services to its members than any other state [dental] association (CX-1544).

In fact, CDA's accounting expert identified upwards of 50 CDA membership benefits (Tr. 1843), whose value exceeds the average membership dues, resulting in a net benefit to its members (Tr. 1849, 1851-53, 1859).

68. CDA has stated that a selection of its programs and services has a potential value to members of between $22,739 and $65,127 (CX-1520-A-B, CX-1571-A, L). In 1993, its president stated: "CDA is extremely valuable to the members . . . CDA members are getting their money's worth and then some" (CX-1473-O).

69. CDA's "Direct Member Services" have accounted for as much as 65% of its total financial expenditures in a given year, with "Association Administration & Indirect Member Services" accounting for an additional 20% of expenditures (Tr. 1192-93; CX-1448-C, CX-1587-Z-120-21). The last time CDA conducted this analysis, "Services to the Public" accounted for seven percent of CDA's total expenditures (Tr. 1193; CX-1448-C).

5. Specific Benefits of CDA Membership

a. Lobbying and Efforts to Influence Government Action

(1) Council on Legislation

70. CDA's Council on Legislation monitors legislative and regulatory actions which have potential implications for dentistry and adopts policy positions on behalf of CDA (CX-1484-Z-25; Tr. 1285). CDA's GRO takes the policies established by the Council on Legislation and argues for them before the appropriate governmental body (Tr. 1285; CX-1562, CX-1571-E). The Council on Legislation gives GRO explicit instructions on about 100 bills per session of the California Legislature (CX-1650-Z-33).

71. CDA budgeted $121,309 for "government relations" activities for 1993-94, not including the salaries of GRO's seven employees (CX-1650-Z-4, Z-37, Z-43, CX-1652-Z-22-23).

72. In 1992, CDA's President told its members:

> Government is like an octopus in our lives. Its tentacles are everywhere: in our dental practices and in our homes. If CDA's not there, who is watching out for the interests of dentists? Nobody (CX-1484-X).

73. CDA has also claimed that it "provide[s] a strong, unified voice as we represent the interests of our members before regulatory agencies" (CX-1502-A).

74. Other remarks of CDA officials have emphasized the pecuniary benefits of its lobbying activities:

> CDA's [l]egislative wins "mean money" to members (CX-1463-A).
> CDA represents the interests of its members and has been successful in defeating several bills which would have cost practitioners several thousands of dollars a year (CX-1532-A).

CDA's President stated, in 1993:

> [w]hat we save the dentist in potential costs of what the government would like to do, saves the CDA member at least the equivalent of their annual dues every year (CX-1473-N).

75. Specific examples of CDA actions affecting government decisions include:

(2) Infectious/Hazardous Waste Regulation

76. CDA successfully opposed passage of provisions of three bills relating to infectious waste regulation, hazardous waste generator permits, and informed consent before placement of silver amalgam (CX-1458-F, CX-1463-A, I, CX-1483-K, CX-1510-A, CX-1520-A, CX-1539) at a CDA-estimated savings of over $2,000 per year of practice and $66,600 over 30 years (CX-1510-A, CX-1520-A).

(3) Malpractice Reform

77. CDA supported passage of California's Medical Injury Compensation Reform Act of 1975 ("MICRA") (CX-1555-I, CX-1587-Z-140-41) and continues to defend it (Tr. 1306). The passage of that bill, according to CDA's immediate past President, was of great benefit:

> Professional Liability Premiums in California last year were one billion dollars. Without MICRA, it is estimated conservatively that the figure would easily exceed 2.5 billion dollars. That increase alone would pay all your CDA/ADA/local dues each year forever. What MICRA has done is assure that payments go to victims, that the costs of litigation are reduced, that windfalls are eliminated, and most importantly, that healthcare providers such as you and I can continue to treat patients without the fear of unfounded lawsuits (CX-1484-R, T).

(4) Workers' Compensation

78. CDA successfully supported a package of workers' compensation reform bills, which are projected to save employers, including dentists, a total of $1.5 billion (CX-1477-F).

(5) Taxation of Dentists and Dental Practices

79. CDA, along with others, successfully opposed Proposition 167 which would have increased taxes for high bracket taxpayers (CX-1466-D, F, CX-1484-K).

(6) Mandatory Employer Healthcare Coverage

80. In 1992, CDA successfully opposed Proposition 166, which would have required employers, including dentists, to provide basic health care insurance coverage for part-time employees and their dependents (CX-1466-D, CX-1468-E, CX-1484-K).

(7) Denti-Cal

81. CDA has fought to preserve funding of the dental Medicaid program operated by the State of California ("Denti-Cal") (Tr. 726), and its efforts were "instrumental in retaining the Denti-Cal program and enhancing reimbursement rates" (CX-1571-A). More than 5,000 CDA members provide dental services to Denti-Cal patients (CX-1658).

(8) Unsupervised Practice By Dental Hygienists

82. CDA opposes, and has opposed, legislation that would permit dental hygienists to practice without supervision by a dentist (CX-1462-D, CX-1476-C, CX-1481-P, CX-1482-U, CX-1483-Z-13, Z-37, CX-1484-R, CX-1485-B, CX-1571-A, CX-1587-Z-138), an issue which affects dentists' "pocketbooks" (CX-1473, CX-1477-F, CX-1484-X).

(9) CalDPAC

83. CalDPAC's political activities benefit CDA members economically (CX-1277-C, CX-1375-B, CX-1462-E, CX-1472-F, CX-1483-J, CX-1520-A, CX-1571-A). In 1993, CDA's President described the GRO and CalDPAC as "of all we do, the things with the most importance for our future" (CX-1474-I, CX-1484-N).

(10) Litigation

84. CDA has been involved in legal challenges to or arguments in support of government and regulatory policies, including a challenge to HHS regulations implementing the Health Care Quality Improvement Act (CX-1477-A, CX-1482-M, S-T). CDA estimated the value of victory in that case as "[i]ncalculable related to

reputation" (CX-1571-L). *See also* CX-1453-C, CX-1480-D, H, CX-1650-L-M, CX-1461-F, CX-1472-H, CX-1587-Z-150, CX-1482-U, CX-1483-Z-38, Z-41.

(11) Other Government Action

85. CDA has supported or opposed many other legislative or regulatory actions which would affect its members' pocketbooks (CX-1474-E, K, CX-1484-Z-25, CX-1485-A, B, C, CX-1483-Z-13, Z-40, CX-1467-K, CX-1476-A, CX-1464-K, CX-1481-V, CX-1452-A, F, G, CX-1637-F, CX-1463-K).

b. Marketing and Public Relations

86. CDA budgeted over $2.1 million for its marketing program for 1993-94 (CX-1484-P, CX-1652-Z-20). A major goal of this program, which is assisted by an advertising agency and a public relations firm (Tr. 1164; CX-1446-O, CX-1469-E, CX-1484-Z-1-2, CX-1587-Z-152-54) is to enhance the image of CDA and its member dentists and to distinguish the latter from non-members in terms of their commitment to quality care (Tr. 1412; CX-1481-X, CX-1483-Z-37, CX-1484-F, CX-1563, CX-1587-Z-155-56, CX-1648-A-B, CX-1651-Z-42, CX-1654-D, CX-1455-M).

87. Other marketing schemes used by CDA include: a campaign encouraging dental patients to insist that their dental plans give them the right to choose their own dentists (CX-1481-N, S, CX-1508-A, CX-1552-G); a campaign to encourage the Latino population to use CDA dentists (CX-1469-E, CX-1473-M, CX-1475-K, CX-1476-A, CX-1484-Z-2); and, the use of CDA logos on stationery and other business materials (CX-1497, CX-1555-F).

88. In 1985, CDA estimated that increased patient visits to member dentists because of the marketing program resulted in "nearly $6,000 in additional revenues [per member dentist], or a 20-to-1 return on investment" (CX-1231-B).

c. Direct Reimbursement

89. Since at least 1989, CDA has promoted "direct reimbursement," an alternative to closed panel dental insurance plans (CX-1460-E, CX-1456, CX-1465-F, CX-1473-G, CX-1508-A) under

which employers self-fund the cost of dental benefits for their employees, without insurance company involvement (CX-1275-C, CX-1473-G).

90. Direct reimbursement benefits CDA members (CX-1534, CX-1535) by "eliminat[ing] many of the restrictions imposed by the insurance carriers" (CX-1457-J).

91. CDA has established a Direct Reimbursement Committee which administers this program, for which CDA budgeted $94,985 (excluding staff salaries) in fiscal year 1993-94 (CX-1450-X-Y, CX-1484-P, CX-1652-Z-19, Z-22-23).

d. Practice Management and Related Programs and Services

92. CDA's twice-annual scientific sessions offer seminars on topics relating to the non-clinical aspects of dental practice, including practice management, risk management, dental administration, and investment and estate planning (CX-1448-D, CX-1481-Z-36-37, CX-1482-Z-29-30, CX-1483-Z-57, Z-60-61, CX-1512-B, CX-1522-F).

93. CDA's for-profit malpractice insurance subsidiary, TDIC, has offered practice improvement seminars dealing with patient relations and dental practice risk reduction (CX-1482-Z-37, CX-1484-Z-30, CX-1511-C, CX-1512-A, CX-1587-Z-82). TDIC also provides a quarterly newsletter, a home-study course, and a lending library of risk management resources (CX-1482-Z-37, CX-1563-E, CX-1571-J).

94. In response to "membership concerns about the impact of new OSHA and [EPA] regulations on dental practice" (CX-1481), CDA developed an OSHA compliance manual ($25 for members, $255 for non-members) (CX-1481-N, V, CX-1483-Z-11, Z-40, CX-1501, CX-1503, CX-1528, CX-1531, CX-1537, CX-1562-G, CX-1571-G, CX-1573-D, CX-1575-D; Tr. 1174).

95. CDA provides its members with "delinquent license notification" (CX-1458-A), a service which allows members whose licenses have expired to correct their status before the licenses are cancelled (CX-1526-C).

96. Another "important membership benefit" (CX-1494, CX-1566-B) is CDA's provision to members of OSHA and labor law posters required by law to be displayed in dental offices (Tr. 1174; CX-1462-L, CX-1483-K, CX-1492-A-B, CX-1499, CX-1501, CX-1510-A, CX-1573-D). CDA also provides members with information

about compliance with the Americans With Disabilities Act (CX-1503, CX-1510-A).

97. CDA provides other practice-related programs to members: A professional placement program which, CDA has stated, can save members several thousand dollars (CX-1520-B, CX-1448-E, CX-1453-O, CX-1493, CX-1513-B, CX-1515-B, CX-1520-B, CX-1524-A, CX-1543) (free to members; $100 per six month period for non-members); a guidance or "mentor" program under which experienced dentists offer business advice to new CDA members (Tr. 338-39; CX-1453-D, CX-1496-B, CX-1522-B, CX-1519-G); an auxiliary recruitment program which places urgently needed dental hygienists, dental assistants, and dental lab technicians into member dentists' offices (CX-1455-C, CX-1587-Z-162, CX-1459-I, CX-1462-K, CX-1522-F-H, CX-1634-C, L, M); a program offering in-office training of beginning dental assistants (at a 25% discount) (CX-1455-C, CX-1634-G, CX-1517-B); a program which offers CDA members review and analysis of contracts which members may want to make with third-party payers, such as PPO's, capitation plans, or other dental benefits plans (Tr. 1248-49, 1175; CX-1451-A, C, CX-1483-Z-10, CX-1484-Z-23, CX-1501, CX-1503, CX-1562-F, CX-1563, CX-1571-A, F, CX-1575-C, CX-1639-B, CX-1644-B) which CDA estimates can save members hundreds of dollars in attorneys' fees (Tr. 1204; CX-1563, CX-1571-A); and an annual retirement and financial planning seminar ($95 for CDA members; $245 for non-members) (CX-1487-A-B, CX-1501, CX-1502-A, CX-1525-A, CX-1575-C, CX-1459-H, CX-1486-B).

e. Peer Review

98. CDA's peer review program provides members with an easier, less costly alternative than litigation to resolve patient complaints (Tr. 291-92, 1151, 1397-98; CX-1448-D, CX-1510-A, CX-1520-A, CX-1563, CX-1571-A).

99. CDA estimates that this program's value to members is about $10,000 per incident as compared with "potentially costly, lengthy litigation" or disciplinary action by the State Board of Dental Examiners (CX-1520-A, CX-1571-A).

100. About 900-1,000 peer review cases are resolved each year (Tr. 1152, CX-1484-Z-23).

f. Scientific Sessions and Continuing Education

101. CDA sponsors two scientific sessions each year which it has described as "a premier member benefit" (CX-1488-A, CX-1520-A, CX-1571-A, CX-1489-A) and "the most visible and tangible membership benefit" (CX-1483-W).

102. CDA budgets over $1 million for these two sessions (CX-1481-Z-15, CX-1482-Z-47, CX-1483-M) not including staff salaries (CX-1652-Z-22-23), which are attended by thousands of dentists, dental auxiliaries, staff, exhibitors and guests (Tr. 1155; CX-1452-A, CX-1484-Z-27, CX-1488-A, CX-1489-A).

103. The sessions offer courses, seminars, and workshops covering scientific, clinical, practice management, and financial matters (Tr. 1156-57, 1416-19; CX-1448-D, CX-1480-D, CX-1481-Z-36-37, CX-1482-Z-29-30, CX-1483-Z-57, Z-60-61, CX-1522-F, CX-1587-Z-168).

104. Member dentists may attend these sessions free of charge (Tr. 289; CX-1483-Z-55, CX-1488-A, CX-1510-A, CX-1532-A, CX-1544, CX-1562-C, CX-1571-A, D, CX-1587-Z-166). Non-members must pay a registration fee ($855 in 1993) to attend (Tr. 1156, 289-90, 381; CX-1481-Z-44, CX-1482-Z-35, CX-1483-Z-55, CX-1488-A, CX-1504-A, CX-1587-Z-166-67, CX-1638-A).

105. The scientific sessions also offer dentists a convenient way to earn continuing education credits which are required by the State (Tr. 1157, 1160, 1397, 1195-96; CX-1448-D). This is a free, substantial benefit to members. In contrast, non-members would have to pay from $1,600 to $2,000 a year to earn equivalent credits (Tr. 290-91, 1397; CX-1448-D, CX-1462-I, CX-1562-C, CX-1571-A-D, CX-1575-D, CX-1587-Z-166, CX-1644-B).

106. Income from the scientific sessions helps to defray the costs of operating CDA, and may offset dues increases (CX-1484-N, CX-1482-L).

g. Publications

107. The official publications of CDA, the CDA Journal and CDA Update, provide CDA members with "the latest information regarding dental research, techniques and materials, as well as legal and legislative news" (CX-1571-L). The subscription rate for the Journal for members is $12; for non-members it is $60 (CX-1484).

The rate for the Update is $6 as compared to $24 for non-members (CX-1480-B).

108. CDA has stated that, "[b]y providing its readers with the latest in scientific and practice management information, the Journal keeps CDA members on the leading edge of technology and dental care" (CX-1575-C).

h. Benefits Provided Through For-Profit Subsidiaries

(1) TDIC

109. TDIC's purpose is to provide "stable, reasonable professional liability insurance for CDA member dentists . . . ." (CX-1472-A). In California, insurance is offered only to CDA members (Tr. 1785; CX-1587-Z-74). CDA has estimated the annual "value to member" of this coverage at over $1,000 (CX-1520-B). And, according to CDA's Executive Director: "If TDIC were not in operation, it is an absolute certainty that the kinds of liability insurance costs would have continued to rise and never stabilized the way they have" (CX-1587-Z-84).

110. CDA also provides, through TDIC, state-required liability insurance to candidates for the California, Nevada, and Western Regional dental licensure examinations (CX-1490, CX-1491-A-B, CX-1501, CX-1522-B, CX-1525-B, CX-1526-C, CX-1544, CX-1649-Z-21-22). This insurance is free of charge to CDA members; it is not available to non-members (CX-1501, CX-1544, CX-1649-Z-1).

111. TDIC provides professional liability insurance for over two-thirds of actively practicing CDA members (CX-1478-G, CX-1480-A, G, CX-1484-Z-30).

112. TDIC has paid dividends and made other payments to CDA which contribute to a stable dues structure and keep dues lower than they might have been (Tr. 1413-14, 1189-90, 1769, 1785).

(2) TDCIS

113. TDCIS' stated purpose is "to serve as broker and administrator for various insurance programs provided for CDA members" and "to provide the finest insurance programs at

competitive rates for eligible CDA members, their families and employees" (CX-1472-A, CX-1475-D).

114. TDCIS insurance plans are available only to CDA members (Tr. 1782, 1792; CX-1509-A-B, CX-1532-A, E) and, in some cases, the members' spouses and staff, and to CDA component dental society employees (CX-1558-A, F, CX-1575-G).

115. TDCIS has more than 13,000 policyholders, more than 30,000 individual policies in place, and bills and collects more than $55 million a year (Tr. 1782-83; CX-1484-W, Z-25, Z-29). Moreover, "each policy purchased by a CDA member contributes to the net income of TDCIS, which ultimately provides dividends to CDA" (CX-1484-Z-29).

(3) TDC

116. TDC's purpose is to provide and broker a wide range of high-quality services and products to CDA members at competitive fees with net profits to ensure its growth and to support CDA's activities (CX-1448-C, CX-1472-A, CX-1484-Z-29, CX-1546-B, CX-1562-D, CX-1571-J, CX-1637-D). These services are available only to CDA members (Tr. 1792; CX-1509-A-B).

117. The services and products provided by TDC include: a revolving line of credit of up to $5,000 to patients of CDA members (CX-1455-K, CX-1476-F, CX-1484-Z-29, CX-1570-D, CX-1571-J, CX-1587-Z-95-96). This "valuable service" was used by 1,042 dental offices as of March 1993 (CX-1484-Z-29); dental equipment financing (Tr. 1780; CX-1479, CX-1570-C, CX-1571-J); special discounts on U.S. Sprint long distance telephone services (CX-1460-G, CX-1484-Z-29, CX-1570-F, CX-1571-J); "reduced cost printing services" (CX-1521, CX-1563); a home mortgage program, which shortly after being offered, received over $30.8 million in applications (Tr. 1778-79; CX-1476-G, CX-1480-G, CX-1570-E, CX-1571-J, CX-1651-Z-40); a VISA gold card issued by Marine Midland Bank (Tr. 1779; CX-1480-K, CX-1484-Z-29, CX-1570-E, CX-1571-J, CX-1572-A-B, CX-1651-Z-40); and, automobile leasing services (Tr. 1780; CX-1480-K, CX-1484-Z-29, CX-1570-D, CX-1571-J). These services are used by a substantial number of CDA members (CX-1479-P, CX-1484-Z-29).

118. TDC has paid dividends to CDA which help maintain a stable dues structure and keep membership fees lower than they

otherwise might have been (Tr. 1769, 1413-14, 1189-90). TDC's substantial payments to CDA ($5 million) have materially improved its financial position (CX-1483-Z-15, CX-1484-Z-29, CX-1546-B, CX-1637-D).

i. ADA and Local Component Membership

119. CDA membership carries with it membership in the ADA and local component societies which offer additional worthwhile programs for members.

120. There are many benefits to membership in ADA. These include: a home mortgage program; professional liability insurance coverage; advice about dental benefits programs and alternative delivery systems; a contract analysis service; credit cards for personal and business use; credit union membership; group life and health insurance; an equipment leasing program; long distance telephone discounts; a practice financing program; the "Health Cap Card," providing credit for dental patients; an antitrust law brochure; ADA's Annual Session; national dental health promotions; audiovisual education and training materials; dental product evaluation programs; legislative representation; the "Journal of the American Dental Association" and the "ADA News newsletter"; toll-free access to the world's largest dental library; a health screening program for members; public relations activities that enhance the image of dentists; and, practice management information (CX-1574-A-B, CX-1639-A-M, CX-1649-Z-38-53, CX-1563). ADA membership benefits also include a peer review system (Tr. 1228), and services designed to help dentists run, and become efficient in the administration of, their dental practices (Tr. 1227-28, 1246). ADA also offers publications on "Building Successful Associateships," "Successful Valuation of a Dental Practice," and a "Directory of Dental Practice Appraisers and Valuators" (CX-1493, CX-1524-O, CX-1568-C), and advice regarding the Americans With Disabilities Act and its effect on the dental office (CX-1468-F). CDA has touted many of the above-listed programs, services, and activities of ADA as beneficial to CDA members (CX-1521, CX-1563, CX-1571-A, CX-1575-C, CX-1648-A).

121. Membership in local component societies also carries with it several benefits: referral services, provided at no charge to members (CX-1471-C, CX-1563, CX-1565-B, CX-1571-L), which

can save them thousands of dollars a year in fees which would otherwise be paid to commercial referral services (CX-1563, CX-1565-B, CX-1571-L); emergency referral services which can help new dentists increase their patient base and build their practices (CX-1560, CX-1626-B, CX-1653-F); component "study clubs" which assist new CDA members in learning some of the skills of practice management which are not taught in dental schools (Tr. 337-39; CX-1400-L). In addition, component continuing education courses are often offered at no charge to members (CX-1626-A), or at lower rates than are available to non-members (CX-1277-F, CX-1538-B, CX-1563). CDA has touted all of these programs and services as being beneficial to its members (CX-1499, CX-1521, CX-1563, CX-1571-L, CX-1648-A).

122. Finally, tripartite membership enhances a dentist's reputation and undoubtedly attracts customers who believe that membership in a professional organization is an indication of competence (*see* Tr. 1679, 1407, 1653, 1844, 287, 384; CX-789-B, CX-880-A).

D. CDA's Charitable Activities

123. Dr. Dale F. Redig, CDA's executive director, testified about CDA activities which improve the health of the public and promote the art and science of dentistry (Tr. 1136):

> CDA has supported legislation promoting fluoridation, clarifying regulations and legislation related to OSHA standards, and has supported steps to increase compensation to California dentists under the Denti-Cal Medicard program. After a series of court actions, Denti-Cal's reimbursement level is about 60 to 65% of the usual, customary and reasonable fees (Tr. 1143-45).
> CDA supports infection control and the Dental Patient Bill of Rights, which promotes the welfare of dental patients in California (Tr. 1145-47).
> CDA seeks adequate dental prepayment systems which encourage the public to use dental care regularly (Tr. 1145).

124. CDA has supported legislation which benefits the public, even though it may be opposed by its members.

125. These programs include encouragement of fluoridation (Tr. 1360), increased training requirements for the use of conscious sedation (Tr. 1294), opposition to proposed laws that patients be tested for AIDS (Tr. 1297), opposition to "informed consent laws"

concerning amalgam fillings (Tr. 1299), and, encouragement of legislation to curtail smoking (Tr. 1293).

126. CDA's Council on Scientific Sessions promotes, for the benefit of the public, advances in dentistry by sponsoring scientific presentations (Tr. 1155-56).

127. CDA has disaster and relief funds which help member and non-member dentists who are in desperate financial need because of illness or disaster (Tr. 1167).

128. Dr. Martin Craven, President of CDA and a former member of the AMA, testified that the public service aspects of AMA and CDA are not comparable and described AMA, in contrast, as a mere political organization interested in accumulating wealth whereas CDA's focus is on improving the dental health of the citizens of California (Tr. 1402). In his opinion, the major purpose of CDA's activities is to benefit the public (Tr. 1431).

E. CDA's Advertising Policy

129. As a condition of CDA membership, a California dentist must subscribe to, adhere to, and be bound by its Code of Ethics and Bylaws (CX-1450-E, CX-1258-E).

130. CDA's Code states:

> [a] member may be disciplined for unprofessional conduct as it is defined by the Dental Practice Act, and for violation of any law of the State of California relating to the Practice of Dentistry (CDA Code Section 5) (RX-64-A).

131. In a press release issued after the complaint in this matter was issued, CDA confirmed that its ethical rules govern members' conduct:

> CDA, which represents about 70% of the state's dentists, requires that members follow the law and the organization's code of ethics. The association enforces compliance; violations can result in expulsion (CX-1442-B).

132. CDA's components have agreed with it that the ethical rules which it establishes, including advertising rules, shall be the rules by which all members are governed (CX-1263-B, CX-1281-S, T, CX-1290-C, CX-1315, CX-1410-A).

133. Section 10 of the CDA Code establishes the standard which its members' advertising must satisfy:

Although any dentist may advertise, no dentist shall advertise or solicit patients... in a manner that is false or misleading in any material respect.... (RX-64-B).

134. In addition to the Code's standard, CDA relies on California law (which is incorporated into the Code), the regulations of the Board of Dental Examiners, and on sections of the Business and Professions Code (Tr. 1082; RPF 60; RX-136-A-E) to provide advertising standards which it enforces through the Judicial Council (RPF 66-69).

F. Reasons For CDA's Advertising Policy

135. In 1976, CDA's president noted that:

[d]entists as a whole are in a position now where they can determine their own fees and treatment modalities without being overwhelmed by market pressures, regulated profits, etc.

136. He then warned that:

[If CDA does not survive] we [will] all end up in a frenzied competition for patients on the basis of fees alone . . . It comes down to the potential of each of us being pitted against each other, for fees, to attract patients, and eventually dental care would be downgraded (CX-1623-A-B).

137. This aversion to competition has continued. For example, in December 1987, the executive director of a component, in forwarding an advertisement to CDA, stated:

This dentist is not in our area, Glendora is in the San Gabriel Valley component; however, if you wish me to handle this, I would be happy to do so, Italian style!!! Just let me know. These Drug Store Ads make me sick (emphasis in original) (CX-547).

138. In 1988, referring an advertising matter to CDA, one of its component members stated: "[m]uch of the advertising is in newspaper/flyer type. Perhaps [dentists] would be willing to change or stop this type of advertising" (CX-941). Also in 1988, the editor of a component newsletter stated:

The ethical code . . . discourages the advertising of superior services lest we return to the days when unscrupulous operators defamed the dental profession for personal gain (CX-1392-B).

139. In 1989, the president of another component, writing in its newsletter, generally disparaged advertising and warned members against individual advertising, noting, among other things, that because of a "busyness" crisis (a term coined by CDA in referring to dentists' complaints that they did not have enough business) many dentists had begun to advertise:

I am increasingly disturbed at not only the degree but the nature of advertising occurring in our profession today . . . [A 1978 study found that the group] most likely to seek the services of an advertising dentist is a large family headed by a male with an annual income lower than $15,000 (1978) and a strong belief that dental fees are too high. Is this the type patient you want to make up your practice? The patients responding to advertising are, according to [other] studies, already "on and off" patients that drift from practice to practice with little or no loyalty or bond to their doctor. . . . If the shining image of dentists is tarnished by aggressive advertising we may be viewed as wholesale tradesmen rather than honored professionals (CX-1359-B).

140. In 1994, Dr. Quint, an Ethics Committee Chairman, testified that he conducts what he calls an "indoctrination meeting" with new members of his component (CX-1608-V); at this meeting, Dr. Quint advises:

Then I say does advertising pay. I say it is not cheap. The PennySaver costs -- If you want to send out a list of PennySavers for everybody. I don't know what it is right now but it used to be about $1500 for a postal zone. That's expensive. Telephone book is about $500 for a half a page, $500 a month. Fliers, you can take them to patients' houses and leave them on their door. I have one dentist that did that and he got no patients whatsoever out of it. People just do not go to the dentist because they see a flier. That's my opinion.
What kind of patients do you get when you advertise? You get coupon clippers, one-timers, nonrefers, and your old patients then will say how come I don't get the deal. How come you can't give me a discount? Here's my coupon. I know that from experience of having a person in my office who did advertise (CX-1608-Z-1).

G. Enforcement of CDA's Advertising Policy

1. Dissemination of Policy

141. CDA includes its Code of Ethics in materials it provides to new members and applicants and they receive a copy of the Code annually (CX-1244-A, CX-1608-X).

142. CDA also furnishes articles concerning advertising enforcement to its components for inclusion in their newsletters and distributes copies of its Advertising Guidelines and Code to participants in its ethics workshops (Tr. 1437-38; CX-1219-B, CX-1161-A-E, CX-1244-A, CX-1248-H).

143. CDA also sends copies of its Code to non-members, such as dental schools, who it believes can assist it in enforcing the Code's advertising policy (Tr. 884; CX-1198, CX-1219-B, G, CX-1248-H, CX-1606-F, CX-1607-F, CX-1608-F, Z-35-37, CX-1214-B, CX-1367-A).

2. Review of Advertising

144. Applicants for CDA membership are required to submit copies of their advertising and advertising by employers and associates (Tr. 685; CX-1431-B).

145. Components considering applications for membership list applicants' names in their newsletters and ask that members send them information regarding ethical problems of which the members are aware (CX-1333-D).

146. At the behest of CDA, many components review yellow pages advertising every year to discover possible Code violations (Tr. 472-73, 932-33; CX-1243-D, CX-1253, CX-1268, CX-1283-H, CX-1292, CX-1305-G, CX-1324-C, CX-1338-B, CX-1342-B, CX-1352, CX-1361-B, CX-1371-A-B, CX-1378-B, CX-1404-F, CX-1413, CX-1446-H, CX-1577-Y-Z-2, CX-1608-Z-11-12, CX-1610-V, CX-1611-Z-7).

147. CDA requires that members who enter into settlement agreements to modify or terminate existing advertising submit future advertising for review and prior approval (*see, e.g.*, CX-57-C-D). CDA and its components require applicants who have been granted conditional status to submit advertising for review and prior approval for one year (CX-52-B).

148. CDA requires its components to check the advertising of straying members (Tr. 1354, 931; CX-1195, CX-699, CX-1371-A-B), and some members who have complained about another's advertising have monitored future advertisements for compliance (Tr. 931).

3. The Enforcement Role of CDA and Its Components

149. CDA and its components have agreed to procedures for enforcing the Code's advertising rules: the components undertake an initial investigation into charges of Code violations and, where possible, resolve the matter at the local level (CX-1579-Z-6-7). One component ethics committee chairman stated that the committees are "agents of liaison between [CDA's] Judicial Council and the members of [the component], to monitor the ethical practice of dentistry" (CX-1403-E) (*see also* Tr. 507, 854, 1355; CX-1610-Z-37).

150. When reviewing questioned advertising, component ethics committees take into account CDA's instructions (Tr. 1339-40), and CDA, in some cases, monitors components' advertising enforcement (CX-478-A-B).

151. Components usually follow CDA's advice on advertising issues (Tr. 854-55, 1355; CX-177-Z-4, CX-1608-Z-7, Z-37, Z-45-46).

152. CDA and its components have agreed that when the components cannot decide whether a particular advertisement violates the Code or when local efforts at resolving advertising issues fail, the matter will be referred to CDA (Tr. 1441; CX-1260, CX-1577-Z-9, CX-1579-Z-6, CX-1603-Z-22).

153. If, during the initial investigation, a member's advertising is questioned, the ethics committee looks into the matter. If an applicant's advertising is questioned, the membership committee begins an investigation (CX-642, CX-969-A, CX-1243-D).

154. In some components, questioned advertising is reviewed by the ethics committee as a whole; in other components, an individual committee member handles such matters (Tr. 479-80, 847-48, 927-28).

155. When a component finds that an applicant's advertising violates CDA's Code, it tries to settle the matter by contacting the applicant and asking that he modify or discontinue the advertisement (Tr. 690-91; CX-1606-Z-5-6).

156. If the component fails to resolve the matter, or is not certain that the advertisement violates the Code, it forwards the application to CDA's Membership Application Review Subcommittee ("MARS") for resolution (Tr. 1023; CX-1409-E, CX-1603-Z-24-25, CX-1606-Z-8).

157. MARS is a subcommittee of CDA's Judicial Council which reviews membership applications to ensure that applicants have complied with CDA's ethical rules (Tr. 1023, 1440; CX-1219-A, CX-1259-B, CX-1484-Z-27-28).

158. After MARS has decided whether an advertisement does or does not violate the Code it makes a recommendation to the referring component. Recommendations include: full membership; acceptance with counseling; "conditional applicant status"; or, denial of membership (Tr. 1026-29; CX-118-B, CX-248-B, CX-1589-S-T, CX-1026, CX-1608-Z-8-9, CX-1606-Z-8-9, CX-1609-Z-3).

159. In one of its recommendations concerning an application, CDA told the component:

> Pursuant to action taken by CDA's Board of Trustees in December 1980, CDA will extend financial assistance in the event litigation ensues from the component's membership decision only if the component: 1) follows the recommendation of the MARS; and 2) advises the applicant of its membership decision within six months of the date of this letter. (*See, e.g.*, CX-864-B).

160. Until about 1985, CDA denied membership to any applicant who advertised in a manner that violated CDA's advertising rules (CX-1215-A), and the applicant was invited to re-apply in one year (*see, e.g.*, CX-1058-C).

161. Beginning in about 1986, CDA established a membership category that it refers to sometimes as "conditional applicant" status and sometimes as "pending member" status (*see, e.g.*, CX-993, CX-1243-U). This status was originally designed for first time applicants who were new graduates (within two years of graduation) (CX-1416-E). It can only be granted once, for a one-year period (CX-1243-U), and only CDA (through MARS) can approve this status (CX-1178-A).

162. "Conditional applicant" status is available solely to dentists whose advertising violates CDA's Code, and who are unable to correct the advertising immediately. It is granted only to applicants

who agree to correct the advertising in question as soon as possible, and to cease using the improper advertising representation (CX-1178-A).

163. Dentists who are "conditional" applicants do not receive the benefits of full membership; for example, they may not hold office or advertise that they are members of CDA or ADA (Tr. 1027; CX-1243-U). Moreover, they do not have the right to a Judicial Council trial if they do not agree with the subsequent re-evaluation of their advertising (CX-1243-U).

164. Conditional applicants are given one year to bring their advertising into conformance with CDA's Code (CX-1243-U). At the end of the one year period, the component conducts an inquiry into whether the conditional applicant has brought his or her advertising into compliance, and reports its finding to CDA (CX-1243-U). A conditional applicant is either granted full membership in CDA or dropped from membership at the end of the year depending upon whether he or she has made the changes required by CDA within that time period (CX-1243-U).

165. Beginning in about 1990, MARS began granting full membership to applicants whose advertising was objectionable with the caveat that the component, whose real purpose is to obtain correction of objectionable advertising, "counsel" the dentist regarding such advertising (*see, e.g.*, Tr. 1028-29, 1522-23; CX-375-C, CX-478-A-B, CX-866-A, CX-1613-A). In such instances, CDA or the components first ensure that the applicant is willing to change, or has changed, the objectionable advertising (*see, e.g.*, CX-444-B, CX-648-A, CX-914-B), or that the component has received written assurance that the dentist will comply with CDA's Code (*see, e.g.*, CX-856-A-B). For example, in one recommendation to a component to accept and counsel an applicant, CDA emphasized that:

> [CDA's recommendation of acceptance with counselling] is contingent upon [the applicant's] willingness to comply with your committee's requests in accordance with CDA's Code (CX-648-A).

166. In another recommendation, CDA advised a component:

> Before MARS can recommend acceptance of Dr. Nicholl's application, it requires written assurance from Dr. Nicholl's [sic] that she will make the recommended changes contained herein, and ensure any future advertisements published on her behalf comply with the Dental Practice Act and the CDA Code (CX-775-B).

167. CDA informs applicants who are denied membership that they may reapply in one year or when the offending advertising is corrected (*see, e.g.*, CX-826).

4. Advertising Claims That CDA Has Restricted

a. Price Advertising

(1) Representations of Low Price

168. Advisory Opinion No. 3 to Section 10 of CDA's Code prohibits references to the cost of a dental service unless the representation:

> is exact, without omissions . . . [makes] each service clearly identifiable, without the use of such phrases as "as low as," "and up," "lowest prices" or words or phrases of similar import (CX-1484-Z-49, Z-50).

169. At various times (1988, 1990, 1991, 1993) some of CDA's constituents warned members about using "terms that mislead" such as: "affordable" (CX-1363-C); "from," "between," "and up," "lowest prices" or any other implication of "bargains" (CX-1406-C); "affordable" or "reasonable" (CX-1318-B); comparative statements such as "from," "between," "as low as," "lowest prices" (CX-1257-E); and, words such as "reasonable," and "lowest" (CX-1391-B).

170. Several component ethics officials testified that low price references are objectionable without regard to whether they are false or misleading (CX-1610-Z-12-13, CX-1608-Y) (*see also* Tr. 1738, 703, 716, 944-45; CX-1580-Z-33).

171. From 1982 to 1993 CDA and its components warned members about the use of low price claims. For example, CDA recommended denial of an application because the applicant's use of the phrase "affordable family dentistry" was unverifiable and therefore inherently misleading:

> Since there is no basis of comparison or knowledge upon which Dr. Hibbard could conceivably base his opinion that his fees are "affordable," this statement is false or misleading (CX-445-A).

172. In 1986, CDA recommended denial of an application, in part, because the applicant included in advertising the phrase

"affordable dentistry" on the basis that it "implies Dr. Gyaami is offering lower fees than other practitioners, or that he is offering a 'bargain'" (CX-408-B) (*see also* CX-306-A, CX-391-B, CX-605-B).

173. Appendix E of complaint counsel's proposed findings lists exhibits in which CDA restricted representations of low prices without regard to whether the claims were truthful and nondeceptive. *See also* CX-1659-Z-42-48 which lists the various phrases used by its members to which CDA has, at one time or another, objected.

(2) Representations of Discounts

174. Without regard to whether discount advertising is false or misleading, CDA requires that discount offers include five disclosures: (1) the dollar amount of the non-discounted fee for the service; (2) either the dollar amount of the discounted fee or the percentage of the discount for the specific service; (3) the length of time, if any, the discount will be honored; (4) a list of verifiable fees; and (5) identification of specific groups who qualify for the discount or any other terms and conditions or restrictions for qualifying for the discount (CX-1262-I).

175. Since as far back as 1983, and continuing through 1993, CDA and its components have objected to across-the-board discounts (discounts on each service provided) that do not include at least the regular fee for each discounted service:

Sr. Citizen Discounts (1982)
(CX-753-A) (Dr. Mowery)
discount for cash; senior/family discounts (1989)
(CX-806) (Dr. Ghatnekar)
20% senior discount; 20% military discount (1991)
(CX-684-A) (Dr. McGreevey)
Senior citizen and military discount (1992) (CPF 894)
(CX-926) (Dr. Scott)
sr. citizen discounts; 40% off our regular prices for any treatment; excludes orthodontics; offer expires 3/15/93 (1993) (CPF 921)
(CX-467-B-C) (Dr. Iskaq)
discount for all new patients (1993)
(CX-387-A) (Dr. Ghadimi)
senior citizen/military/student discount (1993)
(CX-333-A, F) (Dr. Dorotheo).

176. A number of component ethics committee chairmen, as well as the current Chairman and a former chairman of CDA's Judicial Council, testified that across-the-board discount offers that do not include at least the regular fee for each discounted service, are objectionable without regard to whether they are, in fact, false or misleading. For example, Dr. Nakashima testified that dentists cannot advertise, without the required disclosures, across-the-board discounts such as "senior citizens discount," and "discount for all new patients," even if the claims are true, and even if the advertiser has appropriate substantiation (Tr. 1742-43). (*See also*, Tr. 1064, 1067; CX-1577-Z-20-21, CX-1606-Z-20, CX-1608-Z-32).

177. One of CDA's components warned its members that its discount advertising requirements came close to a ban on discount advertising:

[T]he CDA Code of Ethics information requirements are nearly prohibitive - fees, %discount, length of time, etc. (CX-42, CX-589, CX-972).

178. In 1988, one of CDA's components made the same point:

The first mistake is advertising a discount. This is against ethical practice in the State of California. The second mistake, is advertising a discount fee without advertising the original fee (CX-806-A).

179. Dr. Miley, who was put on trial by CDA for four objectionable advertisements, testified that CDA's discount advertising rules effectively preclude across-the-board offers because, in order for a dentist to advertise in compliance with CDA's rules, he would have to include the regular fee for one hundred to three hundred different procedures. He concluded: "even though everybody said at the trial it was legal to advertise, the fact is you couldn't and meet their guidelines" (Tr. 360-61).

180. Dr. Kinney, a current member of CDA's Judicial Council, testified that literal application of CDA's discount advertising rules would not make sense:

[T]hat kind of ad would probably take two pages in the telephone book [and] [n]obody is going to really advertise in that fashion (Tr. 1372).

181. Dr. Cowan, a component ethics committee chairman, testified:

We wouldn't expect someone to list the prices of each and every service. Do you realize how many services there are that a dental office provides? . . . I mean, that would be totally unreasonable to expect them to list every single fee and the amount of the discount (Tr. 1593-94).

182. Appendix D to complaint counsel's proposed findings lists exhibits in which CDA restricted discount claims without regard to whether the representations were truthful and nondeceptive. *See also* CX-1659-Z-27-40 for a list of documents which reveal that, at one time or another, CDA has objected to discount claims by its members.

b. Non-Price Advertising

(1) Quality

183. In 1982, CDA informed its members that quality claims in advertising violated the Code of Ethics (CX-1228-A), quoting Advisory Opinion No. 8 to Section 10 of the Code which is still in effect:

Advertising claims as to the quality of services are not susceptible to measurement or verification; accordingly, such claims are likely to be false or misleading in a material respect (CX-1484-Z-50).

184. A checklist used as recently as 1992 by one of CDA's components to inform members that their advertising violated CDA's Code included in a list of categories of phrases under the heading "Prohibitions":

use of words relating to quality of performance such as "high level," "fast results," and "progressive" (*see, e.g.*, CX-731-A).

185. In October of 1993, one of CDA's components warned its members in an "ETHICS UPDATE" that they should not use the term "quality" in advertising ("DON'T: Use terms that mislead: *i.e.*, 'quality' . . .") (CX-1363-D).

186. A number of component ethics committee chairmen testified that advertisements that include the word "quality" are objectionable without regard to whether they are, in fact, false or misleading:

The use of the word quality in any form is misleading because it's nonspecific and it implies superiority (CX-1610-Z-23);

The use of the word quality and perhaps the use of the word gentle are two unverifiable and unsubstantiatable terms (CX-1610-Z-28);

Q. On the occasions that a dentist would use the word "quality" in advertising, would you consider that an unacceptable superiority claim?

A. I think the little blurb on advertising guidelines suggest that you don't use "superior quality" as an advertisement (CX-1577-Z-36-37).

(*See also*, Tr. 706; CX-1608-Z-42 (quality claims are objectionable "because there is no way to prove it")).

187. In 1993, one of CDA's components objected to an applicant's use of the phrase "quality care for less" but did not make any request for substantiation, and made no inquiry into whether the claim was in fact false or misleading; the component simply stated its objection, and directed the dentist to correct the advertising and to acknowledge, by checking a form supplied to him by the component, that he either had "discontinued" the advertising or "will alter or have altered the advertising to conform to" CDA's Code (CX-366-A, B).

188. In 1993, one of CDA's components objected to an applicant's use of the phrases "render personal quality dental care," and "providing you with the best in treatment" on the basis that "quality services are not susceptible to measurement or verification; accordingly, such claims are likely to be false or misleading in a material respect" (CX-120-B).

189. In 1989, CDA notified a dentist that his advertising violated the Code since "you are advertising that your dental office provides superior dental services" because of these statements:

We believe quality in dentistry is never an accident. It is the result of caring, effort, and wise decisions. ("Implies that other dental offices do not put as much effort, care, etc., into achieving and providing quality dental services as your dental office.") (CX-868-A).

[W]e cater to those people that demand quality, personal attention, and punctuality. ("Implies other dental offices do not cater to patients with these demands.") (CX-868-A).

190. In 1986, CDA recommended denial of an application because, among other things, the applicant had advertised "claims as to the quality of services that are not susceptible to measurement or verification":

gentle dentistry team;
gentle, caring dental team
the dedicated professional . . . at Silver Ridge
quality dentistry with a touch of tenderness
quality dentistry in a pleasant and positive manner
the sensitive hygiene team
leading edge technology
you shouldn't have to wait hours or days for dental care. The team at Dr. Reid's is ready to help when you need them (CX-846-A-B).

191. In 1982, CDA notified one of its components that one of its members' advertising was objectionable because, among other things, it included a claim of quality: "we make the finest dental care easy for you" (CX-107-A). CDA did not direct the component to request substantiation for the claim, or to make an inquiry into whether the claim was in fact false or misleading; rather, it simply directed the component to request that the dentist "delete the word 'finest' from future advertisements" (CX-107-A).

192. In responding, the component ethics committee chairman stated:

It was very difficult for Dr. Brown to understand why words like quality and finest were in violation and I can see his point of view (CX-108-A).

193. Appendix F to complaint counsel's proposed findings lists exhibits in which CDA restricted quality claims without regard to whether the representations were truthful and nondeceptive. *See also* CX-1659-Z-50-59 for a list of documents which reveal that, at one time or another, CDA has objected to quality claims by its members.

(2) Comparative and Superiority Claims

194. In 1982, CDA informed its members that claims of superiority violate the Code (members should avoid the "implication of superiority") (CX-1228-A). In that same year it warned its members to avoid claims that imply professional superiority (for example, "comfortable") (CX-1229-A).

195. In 1988, the editor of a component newsletter advised its members that:

The ethical code . . . discourages the advertising of superior services lest we return to the days when unscrupulous operators defamed the dental profession for personal gain (CX-1392-B).

196. In 1991, one of CDA's components warned its members:

You must avoid any inference of superiority, such as "high level," "progressive," "fast results," "modern," "latest," "new," etc. (CX-1406-C).

197. Other components warned members about the use of superiority claims:

The general message is that the advertisement to the general public may not be deceptive or show superiority over other practices (CX-1629-B) (in 1993).

Superiority claims in any form will guarantee problems with the California State Board and the CDA (CX-1363-C-D) (in 1993).

One of the "two most common mistakes" in advertising is:

using words that imply superiority of service, *i.e.*, "newest," "latest," or "progressive" (CX-1627-F) (in 1993).

198. A number of component ethics committee chairmen, as well as a former chairman of CDA's Judicial Council, testified that they object to all statements that they believe imply that the advertising dentist is superior to other dentists, regardless of whether the claims are, in fact, false or misleading:

[phrases that] impl[y] an essence of superiority by [the advertising dentist] as in relationship with other dentists . . . violate [CDA's] Code of Ethics (CX-1610-Z-12).

I don't think you can legally advertise that you are superior to anybody else. . . . You can't imply superiority (CX-1608-Z-15).

And how in heaven's name does any member of the public ever verify that [a dentist's service] is actually superior? (CX-1579-Z-13).

(*See also* Tr. 691-92, 716; CX-1580-Z-4); Tr. 880 (superiority claims are objectionable because they can never be substantiated); Tr. 938 (claims that imply superiority, such as "I am more gentle than other dentists in my area" are objectionable because such claims "may be very hard to verify"); Tr. 1030; CX-1577-Z-13-14, CX-1603-Z-31-32, Z-62 (superiority claims are "absolutely" objectionable).

199. In 1983, CDA recommended denial of an application for membership on the basis that, among other things, the applicant used a phrase ("we care") that violates CDA's Code because the phrase "implies superiority, or that Dr. Hibbard cares more than another dentist" (CX-449-A).

200. In 1986, one of CDA's components notified an applicant that his advertising violated CDA's Code because, among other things, it included the phrases "new improved," "a visit to your dentist needn't be unpleasant," "my number one concern is your care and comfort" because:

> These statements imply that one is professionally superior to other practitioners or that one is pleasant while others are not; that one is concerned where others are not; or that one has some "new" and better technique available (CX-238-A).

201. The record reveals many other instances in which CDA, a component, or an ethics committee member objected to quality or superiority claims because they implied that other dentists did not provide the same quality service:

> You'll appreciate our warm personal attention (CX-978-A) (in 1988)
> State of the art dental services (CX-1026-A) (in 1992)
> gentle (CX-467-A) (in 1993)
> gentle, painless (CX-24-A) (in 1993)
> caring dentistry (implying that [the dentist] cares, implies that others don't, perhaps) (CX-1610-Z-32-33)

202. In another case, CDA advised a member that his advertising was objectionable because the claim "you will find our reputation is impeccable" "implies that other dental offices do not have impeccable reputations" (CX-868-A-B, CX-626-A).

203. Dr. Kinney testified that a representation would be an objectionable superiority claim if the dentist is "claiming that they have something that sets them apart from the rest of the profession, that no one but themselves has the ability to either utilize this technique or understands it well" (CX-1578-Z-17).

204. Appendix G to complaint counsel's proposed findings lists exhibits in which CDA restricted superiority claims without regard to whether the representations were truthful and nondeceptive. *See also* CX-1659-Z-61-71 for a list of documents which reveal that, at

one time or another, CDA has objected to superiority claims by its members.

(3) Guarantees

205. Quoting state law, CDA has, as a practical matter, barred the advertising of guarantees by its members without regard to whether the offers are false or misleading. *See, e.g.*, CX-1017-A in which CDA, asserting that state law "prohibited" guarantees, stated:

Any violation of state law related to the practice of dentistry or unprofessional conduct as defined by the Dental Practice Act renders members liable to disciplinary action by the association according to Section 5 of the CDA Code of Ethics.

(*See also* CX-98-A, CX-354-A, CX-557-C-D, CX-497-C, CX-391-C, in which CDA made similar statements about member's advertisements, ignoring the fact that state law permits truthful, nondeceptive offers of guarantees (RX-137-B [1680(1)], RX-138 [651(L)])).

206. The record contains many examples of CDA's objections to members' advertisements which offered or, according to CDA, implied a guarantee:

Our 15 year reputation is your assurance of personal satisfaction (CDA: "[i]n this context, the word 'assurance' is synonymous with the word 'guarantee'") (CX-644) (in 1985).
removable braces that can straighten your smile in as little as 6 months (CDA: "May imply Dr. Moga is guaranteeing a dental service") (CX-740-C) (in 1985).
we guarantee our work (CX-22-B) (in 1985).
satisfy your dental needs, or we will refund your money (CDA: [phrase] appears to be a guarantee for dental services) (CX-98-A) (in 1987).
Ask about guarantee (CX-274-C) (in 1992).
we offer the safest and most painless (CX-1000-C) (in 1992).
outstanding success rates (CX-354-A) (in 1992).
sure fit, comfortable dentures (CX-495-A) (in 1992).
crowns and bridges that last (CX-497-C) (in 1993).
we guarantee satisfaction (CX-484-B, D) (in 1993).

207. Several component ethics committee chairmen and a former Judicial Council chairman expressed their opposition to offers of guarantees without considering whether they are false or misleading:

I don't think you ought to be saying you guarantee something (CX-1577-Z-14).
Q. In your opinion, does an advertisement that offers a guarantee, whatever the guarantee is, violate CDA's Code of Ethics?
A. I would say anything about a guarantee, yes . . . (Tr. 1047).

See also Tr. 937, 1456-57, CX-1603-Z-49, CX-1606-Z-15, CX-1611-Z-36.

(4) Consumer Anxiety

208. In 1984, one of CDA's components objected to an applicant's use of the phrase "gentle, quality care" (CX-799). The component advised the applicant that before his application could be completed, he would need to submit a written statement agreeing to cease using this phrase "and other terms which violate" CDA's Code (CX-799).

209. In 1983, CDA objected to a member's advertising because it included, among other things, the phrase "special treatment for nervous patients" (CX-367-B).

210. In 1985, CDA objected to advertising by an applicant's employer because it included, among other things, the phrase "special care for cowards" (CX-608-A).

211. In 1986, one of CDA's components notified an applicant that his advertising violated the Code because it included, among other things, the representations "a visit to your dentist needn't be unpleasant," and "my number one concern is your care and comfort" (CX-238-A).

212. In 1988, one of CDA's components objected to a member's advertising because it included, among other things, the words "sensitive" and "caring" (CX-761).

213. In 1991, one of CDA's components notified a member that his advertising did not conform to the Code because it included, among other things, the phrase "provide you with special service and comfort" (CX-684-A).

214. In 1992, one of CDA's components objected to an applicant's advertising because, among other things, it included the use of words relating to apprehensions of patients ("gentle dental care") (CX-767-A).

215. In 1993, one of CDA's components objected to an applicant's advertising because, among other things, it included the word "gentle" (CX-467-A).

216. Appendix C to complaint counsel's proposed findings lists exhibits that reflect CDA's restrictions on representations addressing consumers' fears and anxieties concerning dental care.

5. Materiality & Falsity

217. When CDA or its components analyze members' advertising claims, they purportedly apply the "false or misleading in a material respect" standard (CX-1484-Z-49); however, they have ignored this standard in some cases by overlooking the importance which challenged claims might have to consumers.

218. CDA and its components have objected to advertising to which, they assert, no one pays attention. For example, Dr. Quint testified:

> When you use misleading statements, many people will say that's just a misleading statement and just don't pay any attention to it. That's why we tell our members don't bother using misleading statements because they are against the law and nobody pays any attention to them anyway (CX-1608-Z-19).

219. Dr. Lee, currently a member of CDA's Board of Trustees (Tr. 1007-09), testified that while he does not know whether discounts are important to consumers, discount offers violate CDA's Code if they do not include the regular fee for each discounted service (CX-1589-I, Z-48-49) (*see also* CX-1577-K-L, Z-2-3).

220. CDA and component officials charged with enforcement of the Code's advertising restrictions have, in several cases, equated the "material respect" standard with "misleading." An example of this approach is expressed in a component's 1990 newsletter:

> Interpretation of "material respect" is a matter of degree. If an ad is obviously and demonstrably false or misleading, then it must also be false in some material respect. If an ad contains only slight misrepresentations of fact that would not deceive a prudent person, then the "material respect" rule has not been violated (CX-1252-C).

221. In trial testimony, Dr. Lee defined "material respect" as "[w]ould someone be misled reading the advertisement" (CX-1589-Z-30), as "[s]omething that I guess you can put substance to" and as "something indicating superiority"; furthermore, he could not explain

what was "material" about certain advertising claims that CDA had challenged (Tr. 1042-43).

222. In addition to their confusion about materiality, CDA or its components have applied their own advertising standards in place of "false and misleading" for certain claims regardless of the truth of such claims:

Claims that may "insult the public" (CX-1611-Z-44-45; Tr. 947-49)
Claims that were insulting or offensive to a dentist's peers (Tr. 961-64)
Claims that should be removed from an advertisement so that dentist's peers would feel more comfortable (CX-359-A)
Vague or ambiguous claims or claims the public would not understand (Tr. 944; CX-1611-Z-36-37)
Subjective claims (CX-48-H, CX-945-A)
Claims that do not "lift the image of the profession in the eyes of the public" or conduct which does not "elevate the esteem of the profession" (CX-1484-Z-49, CX-1611-Z-45, CX-115-A)
If advertising lists more than one location or uses fictitious name, unless approved by state (CX-745-C-D, CX-333-B)
Use of religious or ethnic affiliation in advertising (CX-1318-B).

6. Substantiation

223. In many instances, CDA and its components have restricted members' advertising on the ground that certain claims are inherently unverifiable. For example, the following claims were objected to (material in parentheses are comments by CDA or a component):

"a group of dentists dedicated to quality dental care at low cost" (implies superiority, not verifiable, and includes use of lowest price) (CX-373-B-C);
"comfortable and personalized" (CX-1078-A; unverifiable);
"latest equipment and gentle, caring techniques" ("Advertising claims as to the quality of services are not susceptible to measurement or verification. Accordingly, such claims are likely to be false or misleading in any material respect") (CX-759); and
"gentle, caring, qualified dentist" (implies superiority, raises unjustified expectations, and is not verifiable) (CX-413-B).

224. Some ethics committee chairmen, and a former chairman of CDA's Judicial Council, testified that certain advertising claims are inherently unverifiable. These claims include: "State of the art" (Tr. 880, CX-1580-Z-29); claims of low prices or quality claims (Tr. 1053, 1071); "affordable" or "reasonable" fees, "latest in dentistry,"

"quality gentle care" "caring" (Tr. 483-84, 490-91; CX-1610-Z-13, Z-17, Z-27-28, Z-32-33); all superiority and quality claims (CX-1608-Z-17, Z-52-53, Z-41-43); "more gentle than other dentists in my area" (Tr. 938).

225. One of CDA's components warned a member:

We would like to remind you that a fee survey - whether conducted formally or informally and by an individual or the dental society - is illegal and can be construed as price-fixing by the Federal Trade Commission. At this time the FTC is pursuing a lawsuit involving just this type of situation and it is being watched closely by the ADA. Your colleagues are restricted by law from relaying their fee schedule to other dentists - and we would ask that you keep in mind that the word of patients is not always totally reliable (CX-1293-A). (*See also* Tr. 490-91).

7. Verification by the Public

226. CDA components have objected to advertising claims because they are not verifiable by the public. For example:

In May of 1993, one of CDA's components informed a member that his advertisement violated the Code, in part, because the phrase "high quality dental services" suggests unique or general superiority to other practitioners [and] is not susceptible to reasonable verification by the public (CX-63-A);

Also in May of 1993, one of CDA's components objected to an applicant's use of the phrase "gentle" because, among other things, "statements should be avoided which contain a representation or implication regarding the quality of dental services which would suggest unique or general superiority to other practitioners which are not susceptible to reasonable verification by the public" (CX-467-A);

In June of 1993, one of CDA's components objected to an applicant's use of the phrase "with the utmost degree of professional care" because, among other things, it is a quality claim that suggests superiority that is not susceptible to reasonable verification by the public (CX-120-B); and

In November of 1993, one of CDA's components objected to an applicant's use of the phrase "[we] render personal quality dental care" because it is a "representation or implication regarding the quality of dental services which would suggest unique or general superiority to other practitioners which [is] not susceptible to reasonable verification by the public" (CX-381-B).

227. A number of component ethics committee chairmen, as well as Dr. Nakashima, the current chairman of CDA's Judicial Council, testified at trial and in depositions about verification of advertising claims by consumers. Dr. Lukens testified that the word "best" is objectionable because "it implies superiority and is undeterminable by the public" ("[i]f the public was to read that advertisement, they

would have no way of judging whether this dentist was better or worse than another dentist") (CX-1610-Z-10-11).
Dr. Abrahams testified:

> Well, semantically how does one arrive at the ability to say that a practitioner offers something that's superior to what another practitioner offers, how does one verify it? How could the same thing, on the same realm, how does one know that one is offering -- as a consumer now, reading the advertisement -- how does one know that the prices are cheaper than someone else's (CX-1579-Z-20).

228. At trial, Dr. Lukens testified that an advertisement would be false or misleading if the general public would be unable to determine the truthfulness of the advertisement "just by reading it" (Tr. 486), and agreed that "representations that consumers cannot verify on their own from the ad are violations of respondent's code" (Tr. 509). Dr. Nakashima, in explaining his concerns about the phrase "we are dedicated to maintaining the highest quality of endodontic care," testified:

> A. Well, the statement needs to be verified in that it needs to state what specific manner of service qualifies them to say "the highest quality of endodontic" -- they need to spell out what it is that assures the patient the highest quality of -- what is it that they do that assures the patient the highest standards, the highest quality. They need to be able to validate and verify -- he needs to spell out what it is that he does makes the statement correct.
> Q. And he needs to do that in the ad, is that correct?
> A. Yes.
> Q. And even though he can verify it, has adequate substantiation, the dentist cannot advertise this phrase unless that substantiation is in the --
> A. It must be in the ad.
> Q. -- in the ad?
> A. Yes (Tr. 1545).

The next day, the Doctor testified that advertising does not need to include the required substantiation in order to comply with CDA's Code of Ethics (Tr. 1717-18).

229. CDA has also objected to the phrase "a caring gentle dentistry team," because it was not possible for a patient to verify claims such as "we care" (CX-737-B). In another matter, CDA objected to "affordable" because the public purportedly has no means to measure such claims (CX-596). A component also objected to an applicant's use of the word "trustworthy" for the same reason ("statements shall be avoided which would contain a representation

or implication regarding the quality of dental services which would suggest unique or general superiority to other practitioners which are not susceptible to reasonable verification by the public") (CX-391).

H. CDA's Reliance on State Law and Regulation

230. Although not an agent of the State of California (Ans. at ¶ 10), CDA's advertising policies look for guidance to the Dental Practice Act, the Business and Professions Code, and regulations of the State Board of Dental Examiners (Tr. 1447-50, 1468-69; RX-136-A-E, RX-137-A-C, RX-138-A-G).

231. CDA takes an active role in enforcing advertising restrictions because it believes that, due to budget constraints, state agencies are not enforcing the laws on advertising (*see* CX-1442-A, CX-1444-A: "[t]he State Board of Dental Examiners has listed advertising enforcement dead last on its priority list"). (*See also* Tr. 1469-70; CX-1390-B, CX-1350-A, CX-1445-D).

232. The Chairman of CDA's Judicial Council testified that the President of the Board of Dental Examiners told him that "the only reason that there doesn't seem to be a strong emphasis on that [advertising] by the Board is due to budgetary constraints and staff constraints" (Tr. 1469-70); and, the former Chairman of CDA's Judicial Council, and a current member of CDA's Board of Trustees, testified:

> [T]he board's capacity regarding advertisements is very, very low. I have never seen a case where the board has actually restricted or told anyone that their advertising was in violation of state law. . . . [Advertising is at or near the bottom of the Board's priority list] because the Board, because of budgetary restraints, has no money to go out and enforce that (Tr. 1034, 1038).

233. Other statements by CDA echo this sentiment:

> [State law has] not been enforced by the state Board of Dental Examiners because of budgetary restraints. CDA is filling a void (CX-1442-A).
>
> The state Board of Dental Examiners has listed advertisement enforcement dead last on its priority list. . . . The FTC doesn't do much enforcement either. [Respondent] does it because it needs to be done (CX-1444-A).
>
> CDA is basically doing what the state agency should be doing. We are being sued because of [a] Code of Ethics that says 'must abide by the rules and laws of the state' which is the Dental Practice Act. Because the Board of Dental Examiners

does not have the funds to enforce the advertising portions the FTC is saying CDA should not (CX-1390-B).
[Respondent's position is that] our code only enforces state law, which the BDE [Board of Dental Examiners] have so far been unwilling to enforce (CX-1350-A).
Manpower and priorities limit most of the board action to warning letters and follow-ups based only on complaints from other dentists (CX-1445-D).
[I]f Dr. Miley has his way and the CDA went after no one for discipline until the state board had, then the majority of the violations in the state would go unaddressed, they would go unaddressed for nonmembers, they would go unaddressed for members. No advertising violation would ever receive any kind of discipline whether it be a reprimand or a suspension or expulsion (CX-724-Z-161-62) (Argument by prosecutor at a CDA disciplinary hearing).

234. CDA's attempts to enforce state law have resulted in confusion about the appropriate standards which should be used when judging members' advertising. For example, during the trial a CDA representative agreed that 1680(i) of California's Business and Professions Code did not prohibit superiority claims that are truthful and not deceptive (Tr. 1477-78); yet, from 1982-1993, CDA took the position that all claims of superiority were unlawful:

Claims of superiority are proscribed by Section 1680(i) of the Dental Practice Act and thus violate Sections 5 and 20 of the CDA Code of Ethics (1983 letter to a component from CDA) (CX-885-A).
Words denoting professional superiority or the performance of professional services in a superior manner are prohibited by Business and Professions Code Section 1680(i) (CDA's Advertising Guidelines) (CX-1262-G) (1988).
MARS also determined that by using the phrase "Highest Standards in Sterilization," [dentists] are advertising in violation of Section 1680(i) of the Dental Practice Act, which prohibits advertising the performance of services in a superior manner, as well as the previously cited Section 5 of the CDA Code of Ethics (CX-394-B) (1993 letter).

235. CDA objects to "quality" claims, equating them, at times, to superiority claims (*see, e.g.*, CX-391-A); also, it has claimed from 1985-1993 that the Dental Practice Act imposes an absolute ban on guarantee offers (CX-22-B, CX-497-C). However, in 1985, the Board of Dental Examiners stated that it did not consider claims like "quality dental treatment" as superiority claims (CX-1622); and, during the trial a CDA representative testified that Section 1680(i) of the Business and Professions Code did not prohibit all guarantees (Tr. 1478-79).

236. CDA has also, from 1986 through 1993, told its members that Sections 651(b)(4) and (c) of the Business and Professions Code

imposes an across-the-board ban on representations of low prices (CX-832-B, CX-730-B, CX-32-A), but at trial, a CDA representative agreed that the Act does not prohibit all representations of low prices (Tr. 1479-80). Furthermore, the State Board notified CDA in 1986 that it did not object to the phrases "low fees," "reasonable fees," and "low cost" fees (CX-1426-A). (*See also* CX-1622).

237. From 1982 to 1993, CDA and its components have told their members that a Board of Dental Examiner's regulation concerning discount advertisements prohibits such advertising unless five elements are disclosed therein, a requirement which the Board modified in 1985 (CX-1622) but which CDA and its components continued to enforce. This requirement was so complicated that it essentially constituted an absolute ban on discount advertising:

> Additionally, the words in the coupon "Presentation of this card allows one complete dental examination, x-rays, oral evaluation, and treatment plan at 25% discount for cash," violate the Dental Practice Act regulations for advertising a discount . . . (CX-445-B);
> The referenced advertisement also contains the statement, "Senior Discount." The advertisement fails to list the dollar amount of the non-discounted fee for each service, and to inform the public of the length of time the discount will be honored. Therefore, the advertisement violates section 1051 of the regulations adopted by the Board of Dental Examiners . . . (CX-497-C-D, CX-855-A).

238. Requiring an advertisement offering a discount to senior citizens to list the dollar amount of the non-discounted fee for each service is, as a practical matter, a ban on discount advertising (F. 180).

239. Some witnesses understood that state law does not impose absolute prohibitions on certain kinds of advertisements; others were not so sure. For example, Dr. Lukens testified that representations of low prices violate the Dental Practice Act (Tr. 515-18) yet he did not know how the Board applies or enforces the Dental Practice Act regarding claims such as "prices as low as" or "lowest prices" (Tr. 535-36).

240. Dr. Soo Hoo testified that the Dental Practice Act prohibits advertising "anything about quality" (Tr. 706) but he has never asked the Board of Dental Examiners how they apply or enforce the Dental Practice Act regarding quality claims (Tr. 707).

241. Dr. Yee testified that he believes the Dental Practice Act prohibits offers of senior citizen discounts that do not include each

disclosure set out in Board regulations (Tr. 955-56). However, he also testified that he does not know how the Board of Dental Examiners applies or enforces the Dental Practice Act regarding discount advertising (Tr. 956). Nor does CDA, according to Dr. Lee, when it decides that a dentist's advertisement violates state law, determine the position of the Board of Dental Examiners concerning low price, guarantee, or discount advertising (Tr. 1034-36, 1046, 1049-50, 1065-66).

242. Also, Dr. Nakashima testified that he does not know how the Board applies or enforces the Dental Practice Act and Board regulations concerning discount advertising, offers of guarantees that are truthful and non-deceptive (Tr. 1475-76), or offers of a senior citizen discount that do not include the disclosures listed in Board regulations (Tr. 1537).

243. Moreover, CDA and its components challenge advertisements which, by their very nature, could not be false or misleading in a material respect. Thus, it has objected to advertising a fictitious name without obtaining a permit (CX-333-A), and an advertisement which is not exactly as approved by the Board of Dental Examiners . . . (emphasis in the original) (CX-543-B). CDA also objects to all advertising of ethnic or religious affiliations and referred to this objection at a 1990 ethics workshop (CX-1318-B; *see also* CX-731). CDA also challenges advertisements that include more than one location unless the state has permitted practicing at more than one location (CX-389-F).

244. CDA knows that California's attorney general has advised the Board of Dental Examiners that state laws and regulations pertaining to advertising must be enforced in a manner that is consistent with United States Supreme Court rulings with respect to advertising by professionals (CX-1425-D).

245. As early as 1986, CDA knew that the Board of Dental Examiners interpreted the statute concerning representations of low prices less strictly than CDA thought was warranted by the statute. Specifically, the Board informed CDA that it does not interpret literally a statutory restriction on the advertising of "low prices," and does not challenge representations such as "reasonable fees" or "low cost fees"; CDA insisted, however, that those representations are prohibited by the statute and asked for written confirmation of the Board's interpretation (CX-1426).

I. The Administration of CDA's Advertising Policy

1. CDA's Advertising Standards

246. The standard against which CDA has measured its members' advertising is set forth in Section 10 of its Code of Ethics, and has been unchanged from 1985 to 1993 (CX-1227-D, CX-1484-Z-49-50, CX-1577-Z-9-10, CX-1607-Z-8-9, CX-1610-Z-7). The standard during this period was whether the challenged advertisement was "false or misleading in any material respect" (CX-1284-E, 1982 Code of Harbor Dental Society) or "false, misleading or deceptive in a material respect" (1982 minutes of CDA's Judicial Council).

247. In 1993 CDA claimed that in reviewing advertising, it "applies the standard of false and misleading in a material respect to determine whether or not the advertisement in its entirety violates the CDA Code of Ethics" (CX-1205).

248. Dr. Lee, a former chairman of CDA's Judicial Council, instead of using the word "entirety," described the 1993 change as adding "totality" to the standard (CX-1589-Z-18-19).

249. The meaning of the words "entirety" or "totality" is unclear. Dr. Nakashima suggested that "reviewing the advertising in its entirety" means that the greater the seriousness and number of the violations, the more likely that a dentist will be denied membership in CDA or a member will be cited to trial (Tr. 1725-26). On the other hand, Dr. Lee, a current member of CDA's Board of Trustees and a former member, and chairman, of CDA's Judicial Council, when asked about the meaning of "viewing an advertisement in its entirety," answered that he did not know what it was about the entirety of various advertisements that caused claims to be false or misleading (Tr. 1049, 1051; CX-1589-Z-28-29).

2. Guidance With Respect to CDA's Advertising Standards

250. Dr. Yee testified that the phrase "we cater to cowards," which was, at one time, unacceptable, can now be used (Tr. 964). He was then asked:

> Q. Has your committee gone back to that dentist and said "We objected to 'we cater to cowards' before, but we are no longer objecting"?
>
> A. Not specifically that dentist, no.

Q. So how would that dentist know that advertising that the society has objected to before was no longer objectionable?

. . .

A. There is a component newsletter that comes out once a month in which, when it gets close to the time in which dentists are submitting their advertisements for the yellow pages, that we print the guidelines in which -- or in which we also state that we offer to review their advertisements. That's the way we disseminate information as to changes.

Q. And do you recall the newsletter stating that "We cater to cowards" is now okay, and it wasn't before, or is it just that you set out the standard that you use?

A. It's just that we set out the standard that we use.

251. Until 1988, CDA prohibited the following representations:

gentle dentistry; we cater to cowards (1983) (CX-971-B-C); gentle, quality care (1984) (CX-799); Fast and caring (1985) (CX-675-A); personalized (as in "complete personalized family dentistry") (1988) (CX-1106-A, B); gentle dental care (1992) (CX-767-A); and gentle care; gentle exams (1993) (CX-24).

252. In April 1988, CDA began to inform individual components or individual members that the use of the term "gentle" did not violate its Code (RX-6), but CDA did not then notify either its entire membership or all of its components of this change, and a number of the components continued to tell its members and/or applicants that CDA's Code prohibited the use of the term "gentle." For example, components objected to:

gentle dentistry is an art (1991 letter from component to applicant) (CX-563-A); the term "gentle" as in "gentle injections," "gentle exams," and "gentle care" (1993 letter from component to member) (CX-24-A-B); and "gentle"; "we cater to cowards" (1993 component newsletter) (CX-1363).

253. While CDA was aware in November 1992 that at least one of its components continued to restrict the use of the word "gentle" (CX-933), it took no action until June 1993 to notify the remainder of its components that the use of that word was acceptable (CX-1205). Even after this date at least one component continued to question whether the use of the word "gentle" was consistent with CDA's Code (CX-783).

254. Over the years, CDA has taken inconsistent positions concerning the word "reasonable." In 1985, it notified its components that while the use of the word "reasonable" in advertisements previously had been considered acceptable, it no

longer was acceptable because "reasonable" is an inexact reference to the cost of dental services, and along with the term "affordable," "may violate [CDA's] Code and state law and should be avoided." CDA directed the components "as soon as possible" to inform members of the information CDA was providing, referring this time to "violations" of the Code or state law (CX-1199-C).

255. In 1991, CDA changed its position, finding that the term "reasonable" was acceptable (CX-1223-D). This change was based on a 1978 decision -- re-discovered by CDA in 1991 -- by its Judicial Council that the word "reasonable" was not objectionable (RX-57).

256. In 1993, one of CDA's components advised a dentist that the phrase "reasonable fees" violated CDA's Code (CX-778-A).

257. Also in 1993, one of CDA's components objected to an applicant's advertising because, among other things, it included the representations "reasonable," "low prices," and "goes easy on your pocketbook" (CX-391-A).

258. Finally, in 1993, CDA itself recommended denial of an applicant for membership because, among other things, his employer's advertising included the phrase "reasonable fees quoted in advance" (CX-118-B).

259. One of the reasons for CDA's inconsistent interpretation of phrases used by its members in advertisements is the lack of a consistent procedure to inform members about changes in CDA's advertising rules.

260. Some of the problem lies in confusion about the role of CDA's Judicial Council and the component societies. For example, Dr. Nakashima testified that after his component asked CDA's Judicial Council about the use of "comfort" and "gentle treatment" and received a response:

> Q. And when you found what their response was, did you send out a memo with an indication to your members saying that it has now been determined that "comfort" and "gentle treatment" are acceptable terms?
>
> A. No.
>
> . . .
>
> We didn't feel that it was necessary for us to send a letter to all of our members about the determination of the Judicial Council. That has never -- we never perceived that as our role. . . . (Tr. 1489).

261. Interpretation and application of CDA's advertising rules varies between components. For example, Dr. Soo Hoo, the current

ethics committee chairman for the Southern Alameda County Dental Society disagrees with Dr. Nakashima of the San Francisco component that advertising a senior citizen discount without all of the required disclosures violates the Code (Tr. 696, 1742-43).

262. Interpretation and application of CDA's advertising rules even varies within a component depending upon which committee handles a matter: while Dr. Soo Hoo of his component's ethics committee believes that across-the-board senior citizen discounts do not violate the Code, his component's membership committee has challenged this kind of offer and, in 1989, denied an application for membership because the applicant offered "Senior Citizen Special Courtesy Discount" (CX-1016-D-E).

263. Dr. Cowan, ethics committee chairman of the Tri-County Dental Society, testified that he does not object to advertising simply because it contains words such as "reasonable," "low," or "affordable" (Tr. 1574-75), yet, his component's membership committee notified an applicant in 1993 that her advertising violated CDA's Code because, among other things, it included inexact references to the costs of dental services ("reasonable," "low prices," "goes easy on your pocketbook"), and asked her to sign, date and return the component's letter to indicate that she "acknowledges" the component's objections and that she will comply with the Code (CX-391-B). Inconsistencies like this may be due to the lack of contact between ethics committee chairmen in some components and their counterparts on membership committees (*see* Tr. 475-76, 856, 933; CX-1607-Z-1-2, CX-1608-Z-13-14).

264. Such inconsistencies are inevitable because of CDA's failure to adopt a procedure which ensures that rulings on members' advertising are promptly and consistently sent to all members:

Q. When you were on the Judicial Council, Dr. Lee, did you know how the components interpreted and applied CDA's Code of Ethics?

A. Did I -- did I know?

Q. Yes.

A. No.

Q. Did you know, when you were on the council, whether any component prepared and distributed any materials regarding advertising to its general membership?

A. No.

Q. And again this is when you were on the Judicial Council, did you know whether any component prepared and distributed any materials regarding advertising to give to applicants or new members?

A. No.

Q. Do you know whether any component has given its membership guidance concerning how to advertise consistently with CDA's code?

A. No, I'm not aware.

Q. Have you seen any component newsletters in which the component has given its membership guidance on how they could advertise consistently with CDA's code?

A. No.

Q. When you were on the Judicial Council, did you ever ask any of the components whether they were giving their members guidance on how to advertise consistently with CDA's code?

A. No (Tr. 1015-16).

Dr. Nakashima, the current chairman of CDA's Judicial Council, testified similarly at his deposition:

Q. Doctor Nakashima, how does the Judicial Council know, if it does, how the components are interpreting and implying CDA's code of ethics?

A. I don't really know that we know specifically how the -- I think the only time we know is when they refer matters up to us and they fill out the form and -- if they're having trouble, I guess they have to spell out to us exactly what it is that they're having trouble with. So that's the only way we know -- is, as matters are given to us from the forms that they fill out or send to us. That's how we know there's a problem going on.

Q. Doctor Nakashima, have you, as a member of the Judicial Council or as chairman of the Judicial Council, ever reviewed any component materials that addressed advertising? And what I mean at this time is, I -- materials that the component is going to use in workshops or materials that the component is going to give to new members to apprise them of appropriate rules?

A. No, we don't -- I don't individually review materials given out by the components to their new members, no (CX-1588-Y-Z-1).

J. The Effect of CDA's Advertising Restrictions

1. The Importance of Advertising

265. Dr. John Christensen, the owner of an advertising agency which specializes in dental advertising (Tr. 546, 559), testified that "the marketplace" [consumers] "told us that they are staying away from dentists because of this fear aspect" (Tr. 586), and that advertising emphasizing comfort will "absolutely" bring in more patients (Tr. 585); conversely, restrictions on quality of care advertising, or the advertising of discounts would affect both dentists and consumers:

The practitioners themselves, who -- if I am answering the question properly, the practitioners themselves that were not allowed to communicate these optimal benefits to their marketplace would not attract as many new patients into their practice. And I believe in that specific submarket and in a general sense there would be less people going to the dentist (Tr. 603).

266. Consumers of dental services select a dentist because of several factors. They include: price, including out-of-pocket costs, and discounted fees (Tr. 468, 588-89, 680, 778, 788-89, 857-58, 921, 1004; CX-1606-M-N, CX-1609-M, CX-1654-C); convenience (Tr. 680, 921, 1004; CX-1603, CX-1606-M); safeguards to prevent spread of disease (Tr. 578-79; CX-1588-K, L); sensitivity to fears about dental procedures (Tr. 585-88, 777; CX-1577-M, CX-1608-N, CX-1610-S); concern about their well-being (Tr. 576, 920-21; CX-1578-J, CX-1606-L-M, CX-1609-M, CX-1610-S); and, information about the type and quality of service (CX-1589-H-I-J, CX-1579-S-T, CX-1589, CX-1606-N, CX-1607-L-M, CX-1609-Z-13).

267. Advertising which conveys the above information is important to consumers (Tr. 469, 527, 680-81, 922).

2. The Importance of CDA Membership

268. There are important reasons for California dentists to become a member of CDA; reasons which explain why, when a member or applicant's advertising is challenged, the dentist often chooses membership over advertising, and changes his advertising to conform to CDA's rules.

269. As an example, an applicant, who was denied membership in 1989, told one of CDA's components:

As you are well aware, membership in the dental society is a distinction which bears fruit educationally, economically, as well as enhancing my reputation in the community. Denial of membership in the society has serious adverse consequences to me and my practice, and I do not intend to take this matter lightly (CX-880).

270. In 1987, the attorney of a dentist who was denied membership in CDA because of his employer's advertising wrote to the component:

[The applicant] recognizes the advantages of membership in your organization. Membership would allow him to (1) take advantage of the insurance benefits that can be obtained only through [respondent], (2) take advantage of your excellent

continuing education programs, and most important, (3) membership would enhance his reputation as a dentist due to the high standards your organization maintains (CX-789-B).

271. In 1985, an applicant who was denied membership in CDA told one of CDA's components:

One of my main reasons for joining the dental organizations was to have T.D.I.C. Insurance. I have an anesthetist who works with me to provide dental treatment under general anesthesia. T.D.I.C. is the only company providing that type of coverage for the general dentist.
If I am denied membership in the dental association then T.D.I.C. will not renew my insurance coverage and I will not be able to get it back. (Please see enclosed letter from T.D.I.C.) Also, I will have to pay a large payment to maintain the coverage for the year I have been covered by T.D.I.C., so I do not want to change companys [sic], even if there was another company that will be offering coverage (CX-802).

272. In 1988, a dentist facing possible loss of membership told CDA:

I have been a member of CDA and ADA for many years and do not take lightly my possible loss of membership in the ADA due to what I feel are unnecessary and possibly illegal restraints on my ability to advertise. . . . Resigning my membership in CDA will cause me to lose my membership in the ADA which is the only national dental organization of import, and this greatly distresses me (CX-427-A, B).

273. In 1988, an attorney for an applicant denied membership in CDA informed the component to which the applicant had applied that it was "imperative" that reevaluation of his client be completed promptly to avoid termination of the applicant's professional liability insurance, which he had obtained through CDA:

Obviously, any termination of my client's professional liability insurance is likely to cause him significant financial detriment. Therefore, your prompt action is essential (CX-512).

274. CDA is so important to some members that they have hired lawyers to assist them in gaining, or retaining, membership (CX-56, CX-83, CX-506, CX-510, CX-526, CX-789, CX-860). Also, applicants denied membership in CDA have reapplied for

membership (CX-1038-C, CX-1041, CX-362, CX-1011-A, CX-1103, CX-659-B, CX-664-A, CX-666, CX-304-A, CX-308).

3. Member Compliance With CDA's Advertising Restrictions

275. Dr. Abrahams, the Santa Clara County component ethics committee chairman, testified that "[t]o the best of my knowledge, every member of the Dental Association [his component] is compliant" with CDA's advertising rules (CX-1579-Z-38-39).

276. According to Dr. Hoey, the Redwood Empire component ethics committee chairman, "about 100%" of his component's members' advertising is consistent with the component's advertising rules (CX-1577-Z-44).

277. Dr. Quint, the San Gabriel Valley component ethics committee chairman, testified:

> When I get a new phone book at home -- in the office at home I'll thumb through it. We do not see any fractures [sic] anymore because these people are educated to what they can say and what they can't say. It's very rare that you'll see an illegal ad, and if you do see one, it's right on the borderline. . . . We don't see illegal ads in the phone books anymore, hardly at all (CX-1608-Z-12).

278. Dr. Green, the West Los Angeles component ethics committee chairman, estimated that the advertising compliance rate of the members of his component is in the 90th percentile (CX-1606-Z-27).

279. The Central Coast component ethics committee reported at the component's 1988 board meeting that "all current yellow page advertisements in GTE and Pacific Bell telephone books are within the ethical guidelines as set forth by CDA" (CX-1265-A). At a 1989 board meeting, the component reported that the "SLO" directory had no violations (CX-1266-B).

280. In 1990, the Tulare-King ethics committee chairman reported that in the yellow page advertisements:

> all display ads [in the telephone yellow pages] were reviewed & found to be in compliance for [component] members. Several minor errors in the listings section were noted & those not in compliance were contacted by individual Ethics Committee members (CX-1413).

281. In its 1989-90 annual report, the Kern County component reported that there had been no major incidents regarding advertising in the preceding year, only some minor infractions in the yellow pages listings (CX-1298-B), and in its 1992-93 annual report, the component reported:

This year has been a very quiet one for the ethics committee. This is due in large part because each of you is making the effort to follow our guidelines (CX-1300-C).

4. Changes to Challenged Advertisements by Members

282. From 1982 until 1993, CDA and its components have challenged hundreds of advertising representations which on their face are not false or deceptive (*see* CPF's 580-949 which analyze CDA's challenges to the advertisements of 393 dentists). Many dentists, whose advertising was challenged, agreed to modify it (Appendix B to Volume II of complaint counsel's proposed findings) despite the fact that modification or discontinuance of advertising could result in a decrease in patient volume (Tr. 272-74, 602-03).

283. Several component ethics committee chairmen testified that they did not know of a single instance where a member has refused to modify or discontinue challenged advertising (Tr. 862-63, 1353-56, 480, 689, 928; CX-1606-Z-3-4, CX-1608-Z-35, CX-1609-W), even when they disagreed with the component. For example, one dentist responded:

I disagree with your findings and know we could belabor the question for hours and come to no conclusion. Therefore we shall disagree agreeably. The statements in question will no longer be used in any mailings from this office (CX-480).

284. A group of dentists whose advertising was challenged because it included terms such as "fully modern" and "luxurious atmosphere" responded:

We take exception to being chastised for use of the terms "fully modern . . . luxurious atmosphere." To construe that these phrases imply superiority is a matter of opinion and subject to semantic disagreement. Indeed, to state that these terms are not verifiable is open to argument. The term "prices you can afford" should be taken in context. The phrase does not mean nor imply "lowest prices" (sec. 10 #3 & 4). Our philosophy is to strive for quality and our practice is to provide that at affordable prices. This is not a sales gimmick, it is policy.

Our intention is to work within the framework of CDA's code of ethics and we will be incorporating your recommendations in our new brochure. . . . While we agree to comply with your request, we feel that it is time that the Western Dental Association petition the California Dental Association to review the code of ethics (CX-145-A).

285. A dentist whose representation of low prices was challenged, responded:

Thank you for your written notice indicating that the Ethics Committee feels that my ad in the Santa Cruz Yellow Pages may be in violation to the Dental Practice Act . . . and [CDA's] Code of Ethics . . . as it relates to the phrase "Fees that Fit a Family Budget."
I do not feel that the phrase above violates the Code or the cited Dental Practice Act sections. However, I have never been one to take issue with the valuable work of the Ethics Committees of [CDA] unless it was clearly warranted.
In this case I have elected to alter the ad in the subsequent insertions for the Yellow Pages (CX-159).

286. In some cases, members whose advertisements have been challenged have simply given up advertising (CX-1406, CX-570, CX-606, CX-607), in one case, at a substantial cost. Referring to an advertisement which was discontinued ("gentle dentistry in a caring environment"), a component ethics committee stated:

It is the opinion of this Ethics Committee that this advertisement has provided [dentist] with 300 new patients in the last 6 months it is therefore a very big sacrifice for her to eliminate the ad (CX-244).

5. Effect of CDA's Advertising Restrictions on Non-Members

287. Respondent's restrictions on advertising also affect non-members of CDA, for CDA holds members and applicants responsible for advertising published by employers or other businesses such as referral services:

IT IS VERY IMPORTANT TO REMEMBER THAT IN ADVERTISING EACH CDA MEMBER IS RESPONSIBLE FOR ADVERTISEMENTS FROM WHICH HE OR SHE MAY BENEFIT WHETHER OR NOT THE MEMBER'S NAME IS STATED IN THE AD. Accordingly, members need to be aware that if their employers advertise in an unacceptable manner, the member is also responsible since he/she benefits from the advertisement as well. ("7 Questions Frequently Asked of CDA's Judicial Council" (CX-1358-B)).

288. Employers of dentists who are not CDA members have agreed to make changes in their advertising that CDA demands (CX-380-B). In 1993, an associate of a dentist who was applying for employment agreed to change his advertising:

I did have a chance to review the information enclosed and I have no problem making the appropriate modifications. The one advertisement mentioned was not my ad at all (it was placed by Dr. Paul, the general dentist with whom I share space) but I have spoken to him and he has assured me that he will make any and all appropriate modifications to ads that mention or contain my name (CX-124-A). (*See also* CX-510-B, F).

289. CDA has also contacted referral services to correct advertising which is not consistent with the Code. For example, it instructed a number of its components to contact more than twenty member dentists who participated in the da Vinci Studio referral service because its advertising was inconsistent with the Code (CX-279-96). CDA's objection was that the service had advertised "very affordable," and CDA instructed the components to contact participating members and "remind [them] of their ethical and legal obligations" (CX-279-96).

290. Similarly, in 1987, CDA recommended that acceptance of a dentist into membership be conditioned on correction of advertising by a competitor referral service, 1-800-DENTIST:

[Applicant] stated that she is represented by the 1-800-DENTIST referral service. A review of the advertising submitted for this service indicates several statement [sic] are in violation of the CDA Code of Ethics and state law. Please make sure [applicant] understands that she is responsible for any advertisement published on her behalf and that the following changes must be made for her to become an unconditional member next year (CX-413-B).

291. CDA also holds members and applicants responsible for what it deems objectionable advertising by hospitals that promote dental services. For example, in 1992, CDA determined that advertising by a hospital promoting dental services was inconsistent with its advertising rules and directed one of its components to meet with the member-dentists whose services were advertised, and instruct them either to have the advertising corrected, or have their names removed from it (CX-354-B). The hospital did correct the advertising, and did so even though the Board of Dental Examiners

determined that the advertising did not violate the Dental Practice Act (CX-355).

292. CDA members affiliated with a non-profit charitable organization, "Doctors with a Heart," discontinued use of a press release that informed the public that the organization would provide free care "to children whose parents cannot afford it" on Valentine's Day, after CDA threatened disciplinary action against them. The members discontinued the advertising even though they had been informed by a representative of the California State Board of Dental Examiners that the advertising did not violate state law. The members feared that they could not continue to participate in the program after 1988 and maintain their membership in CDA ("At this time it looks doubtful. There is just so much hassle a person can take from one's peers.") (CX-894, CX-897-D).

293. For other examples of applicants or members who have been challenged by CDA or one of its components on the basis that advertising by an employer or other entity with which the applicant is affiliated violates CDA's Code, see Appendix A to Volume II of complaint counsel's proposed findings.

6. Restrictions on Free Dental Screening of Schoolchildren

294. Through their members, CDA's components have offered school dental screening programs whose results are given to parents (CX-1168, CX-1169).

295. In the early 1980's, CDA became concerned that some members were using screening to promote their own practices by including their names and office addresses on materials that were sent to parents (CX-1118-D). It therefore notified members that screening programs should be arranged through the dental societies and that "even the handing out of business cards (or other printed materials) with the screening dentist's name is considered soliciting" (CX-1161-A-E).

296. In 1984, CDA's Judicial Council passed a resolution stating:

> [I]t is the position of the Judicial Council that solicitation of school children on any private or public school ground(s) is deemed not to elevate the esteem of the dental profession (CX-1115-A).

297. CDA based its policy on its interpretation of a state statute prohibiting the solicitation of school children "to subscribe or contribute to the funds of, to become members of, or to work for, any organization not directly under the control of the school authorities" (California Education Code, Article 3, Section 51520) (CX-1115-B-C, CX-1166).

298. In May 1993, at the behest of CDA, which learned that certain members who were conducting school screenings were using materials which included their names and addresses, a component's president "advised all concerned by letter" that "[w]hether a rubber stamp or written name is used [by a screening dentist] it must not continue. It is a violation of state law and [CDA's] code of ethics" (CX-1343-B).

299. Several dentists have acceded to CDA's wishes regarding dental screenings.

Dr. Beth Hamann

300. Dr. Hamann conducted school dental screenings during the years she practiced in California. At times she gave students a toothbrush personalized with her name and telephone number, as well as a copy of her office newsletter (Tr. 797-98).

301. Her component society informed the schools where she conducted screenings that they were "not an acceptable activity for them to do with private dentists" (Tr. 796). Thereafter, the schools would not permit her to do screenings although the component never showed why the screenings were false or misleading (Tr. 797).

302. Cessation of the school screening meant that Dr. Hamann lost some potential customers (Tr. 798-99). Her component society did not, as it promised the schools, conduct screenings after Dr. Hamann was refused permission to do so (Tr. 797).

Dr. Roger C. Sanger, Dr. James P. Stenger and Dr. Ray E. Steward

303. In the 1980's, Drs. Sanger, Stenger, and Steward, CDA members, conducted private pre-school screenings, at their request, outside the auspices of their component; they used either their own forms or their component's form stamped with their name and office address (CX-1149-A).

304. The component to which the dentists belonged objected, in 1983, to the use of forms in their screenings which listed their names and address. The dentists agreed to stop using the component's forms when conducting screenings at private pre-schools (CX-1149-A), but did not agree to stop using their own forms (CX-1149-A).

305. CDA, asked for advice by the component, told it that under a recently adopted policy, solicitation of school children on any private or public school ground is deemed not to elevate the esteem of the dental profession, and recommended that the component counsel the dentists and report the results of the counseling to CDA (CX-1151-A-B).

306. The component then informed the dentists that CDA had advised that the dentists' screening form would need to be changed "to assure conformity with [CDA's] code" (CX-1152-A-D). In response, the dentists agreed not to perform screenings on public or private school premises and to participate only in component screenings. However, they did not agree to cease screening at day care centers using their own forms because they believed that day care centers did not fall within the definition of "schools," as they are not regulated by any educational agency of the state. The dentists did say they would modify their day care screening forms to eliminate the word "school" (CX-1153).

307. In July 1985, the component asked CDA whether day care centers are "schools" within the meaning of its resolution concerning school solicitation (CX-1154-A-B).

308. In form letters dated May 5, 1986, the component objected to the dentists' use of their pre-school health education form because such use "may" violate CDA's Code, and informed the dentists that they would have to delete their names from their screening form "to assure conformity" with CDA's Code. The dentists agreed to alter the screening form to conform to CDA's Code (CX-1155-57). In a separate letter, they informed the component that they no longer would conduct screenings in private or public schools other than at the request of the component, and then would use no forms other than the component's form (CX-1158).

Dr. Douglas Grosmark

309. In 1991, Dr. Douglas Grosmark, a CDA member, attended a Halloween carnival (held at an elementary school after school hours

ended) (CX-1133-A) and distributed toothbrushes imprinted with his name and an attached card containing an offer to have a "complimentary video exam & $25 off your 1st visit" (CX-1132-B). Without Dr. Grosmark's knowledge, principals at two schools distributed the toothbrushes to the children during school hours (CX-1132-A-B, CX-1133-A-B).

310. By letter dated October 21, 1992, the component to which Dr. Grosmark belongs objected to his distribution at schools of any material on which his name was printed because it "may" violate a state law "which was adopted by [CDA] in 1981." The component asked him to confirm that his future visits to any school would comply with state law as interpreted by CDA (CX-1132-A-B).

311. The component was not satisfied with Dr. Grosmark's response and again demanded that he provide assurance that he would not distribute "imprinted" toothbrushes in the future, and informed him that "[a]ny further violations of this nature" would be reported to CDA (CX-1134). By letter dated November 25, 1992, Dr. Grosmark assured the component he would comply ("I do not intend to distribute imprinted toothbrushes to any schools") (CX-1135).

Dr. Rodney L. Mellor

312. Dr. Rodney Mellor, a member of CDA, is another dentist who conducted school screenings outside the auspices of his component and used his own materials in conducting the screenings (CX-1142-A-B).

313. In 1992, the component to which Dr. Mellor belongs objected to his use during school screenings of any materials on which his name was printed because it "may" violate state law (CX-1142-A). The component asked Dr. Mellor to provide assurance that any future visits he made to schools would comply with state law as interpreted by CDA (CX-1142-A).

314. Dr. Mellor acquiesced, and, by letter dated October 22, 1992, promised to comply with "ALL ethical standards" (CX-1143).

Dr. William D. Rawlings and Dr. J. Patrick Davis

315. Drs. Rawlings and Davis, members of CDA, are dentists who distributed their business cards at a pre-school program (CX-1146-A).

316. In 1993, the component to which the dentists belong objected to their distribution at pre-schools of business cards containing their practice's name because it "may" violate CDA's Code and state law (CX-1146-A). The component asked the dentists to provide assurance that they (1) would cease distributing business cards, or any other materials, on which their practice name appears during any school or pre-school programs, and (2) would include on all materials the complete name of their practice as it appears on their fictitious name permit (CX-1146-A-B). Drs. Rawlings, Davis, and Terry T. Yoshikane, by letter dated August 9, 1993, promised to make the required corrections (CX-1147).

317. Other dentists conducting screenings were contacted by CDA or their components with complaints that they did not comply with the Code or state law, but the record does not reveal whether they complied with the advice given them (CPF's 491, 492, 493, 494, 495).

7. Economic Analysis of CDA's Advertising Restrictions

318. CDA called, as a witness, Professor Robert Knox, who, complaint counsel stipulated, is an expert in economics and industrial organization (Tr. 1632).

319. Professor Knox has no expertise in, nor has he made any study of, the economic aspects of the dental market or dental advertising (Tr. 1624-25, 1629-32); however, he testified that since dental service markets are controlled by the same economic phenomena as other businesses, many characteristics of the California dental services market can be analyzed using general economic principles and theory (Tr. 1625).

320. CDA also called Dr. Albert H. Guay, a retired orthodontist, for insight into entry to the dental services market and practice-related aspects of dentistry (Tr. 1223-24, 1226-28). He is the Associate Executive Director of the ADA's Division of Dental Practice which assists members with the business aspects of dental

practice (Tr. 1246). Dr. Guay is not an expert in economics (Tr. 1250-52).

321. Dr. Guay testified that, unlike medical patients, dental patients are relatively price sensitive because they must pay for much of their care (Tr. 1243). Since dental treatment is not urgent, patients can "seek the best deal" (Tr. 1244, 1268).

322. Professor Knox testified that CDA's enforcement of its Code of Ethics with respect to advertising has no negative impact on competition in any dental market in California because it cannot erect any barriers to entry (*i.e.*, an advantage which existing firms have over potential entrants (Tr. 1634)) into any dental market in California (Tr. 1633).

323. Professor Knox testified that the only entry barrier into dental service is the acquisition of a license issued by the California State Board of Dental Examiners (Tr. 1634); the need to complete dental school and the acquisition of an office and dental equipment are not barriers to entry (Tr. 1634, 1636). The over supply of dentists which complaint counsel point to as an entry barrier is, he stated, strong evidence of low entry barriers (Tr. 1637). In Professor Knox's view, CDA membership is not a prerequisite to successful practice in any California dental market (Tr. 1639).

324. Professor Knox also testified that scrutiny of dental advertising is pro-competitive because advertising which is false or misleading has a negative impact on competition (Tr. 1643-45).

325. Professor Knox believes that dental advertising should be critically examined because dental service is an "experience good," *i.e.*, a good that consumers cannot evaluate until after the service has been performed (Tr. 1632-33). Non-price claims, especially those relating to quality, are particularly difficult to verify (Tr. 1646-47), although, he conceded, consumers can make some judgments about quality of care (Tr. 1677-78).

326. Professor Knox concluded that even if CDA occasionally questions member advertisements which are not false or misleading in a material respect:

> the activities of the California Dental Association with respect to their enforcement of their Code of Ethics relative to advertising has no impact on competition in any market in the State of California, particularly with respect to price and output (Tr. 1640).

327. Professor Knox rejected the entire State of California as a relevant geographic market on the basis of Mr. Christensen's testimony that a radius encompassing 20 to 30,000 people "would be a market for dental services in California" (Tr. 1642-43). Professor Knox concluded that the dental markets in California are disaggregated, and it would be very difficult for CDA to exercise market power over price and output in all of them (Tr. 1639).

328. On cross examination, the Professor agreed that dental services "could be" a relevant product market (Tr. 1689) and that California "could be" a relevant geographic market. He also agreed that, hypothetically, CDA members can collectively exercise market power "if they act together. . . ." (Tr. 1692).

329. Complaint counsel called three witnesses to testify about entry into the dental service market in California. According to Dr. John S. Miley, opening a dental practice in California today is "an extremely difficult thing to do" (Tr. 331), and Dr. Richard A. Harder, who has established a number of dental practices in California, testified that "it would take about 18 months to actually start generating enough income to match that current month's expenses, and then it would probably require up to about five years to actually recover the capital costs" (Tr. 300).

330. Dr. Curtis P. Hamann, together with his wife, had to borrow approximately $400,000 to buy two existing dental practices (Tr. 756-60). The practices took about two years to become profitable, and it took about ten years for the Hamanns to pay off all of the associated debt (Tr. 764).

331. Dr. Miley testified that the financial requirements for setting up a dental practice are a big impediment for young dentists today, since they are coming out of school $50,000-100,000 in debt (Tr. 330). *See also* CX-1628 ("private practice is most young dentists' first choice of practice setting . . . However, if young dentists can't make a living in that setting, considering the cost of beginning/buying a practice on top of education loans, they are forced to practice in alternative settings").

III. CONCLUSIONS OF LAW

A. CDA's Activities are in or Affect Commerce

The Commission has jurisdiction over acts or practices "in or affecting commerce," Section 5 FTC Act, 15 U.S.C. 45, providing that their effect on commerce is substantial, *McLain v. Real Estate Board of New Orleans, Inc.*, 444 U.S. 232, 241-42 (1980); *Hospital Building Co. v. Trustees of Rex Hospital* ("Rex Hospital"), 425 U.S. 738, 745-46 (1976). And, as long as the challenged acts or practices create "unreasonable burdens on the free and uninterrupted flow" of commerce, even local activities are subject to FTC jurisdiction, *Rex Hospital*, 425 U.S. at 738, 745-46.

The potential harm from the challenged conduct, rather than its actual effect on commerce, is the jurisdictional standard:

> because the essence of any violation of Section 1 [of the Sherman Act] is the illegal agreement itself--rather than the overt acts performed in furtherance of it--proper analysis focuses, not upon actual consequences, but rather upon the potential harm that would ensue if the conspiracy were successful.

Summit Health, Ltd. v. Pinhas, 500 U.S. 322, 330 (1991).

In *American Medical Association*, 94 FTC at 701 (1979), *aff'd* as modified, 638 F.2d at 443 (2d Cir. 1980), *aff'd* by an equally divided Court, 455 U.S. at 676 (1982) ("AMA"), the Commission determined that it had jurisdiction over state and local medical societies which restricted advertising by health-care professionals because these activities, some of which were local in character, had a substantial effect on interstate commerce, 94 FTC at 993-96.

As in AMA, CDA's activities "as a matter of practical economics," Rex Hospital, 425 U.S. at 745-46, place, or have the potential to place, substantial burdens on interstate commerce. These activities include:

> The receipt by CDA's members of reimbursements, which cross state lines, for dental services provided by them under health insurance plans which involve the federal government, *i.e.* Denti-Cal, which paid $500 million to participating dentists (F. 50).
>
> The purchase or lease of substantial amounts of dental equipment from out-of-state manufacturers (F. 51).

Competition between CDA members and out-of-state dentists for patients, the out-of-state residence of some CDA members, and the treatment of patients residing outside of California (F. 55, 56).
Restrictions on the contents of advertising by out-of-state suppliers and the placement by CDA of advertisements in national publications (F. 54).
The use of the U.S. Postal Service to enforce CDA's Code of Ethics (F. 57).
The collection and transmission of ADA dues from member dentists to ADA in Chicago (F. 62).
The operations of CDA's for-profit subsidiary, TDIC, which provides professional liability insurance to out-of-state dentists (F. 60).
The operations of CDA's subsidiaries, TDC and TDCIS, which provide insurance and other services to CDA members through out-of-state companies (F. 59).
The attendance of CDA officials and members at out-of-state conferences (F. 58).

B. CDA is a Corporation Under Section 4 of the FTC Act

Section 5 of the FTC Act gives the Commission jurisdiction to prevent unfair methods of competition by "persons, partnerships, or corporations," 15 U.S.C. 45. Section 4 of the Act defines "corporation" as "any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, which is organized to carry on business for its own profit or that of its members. . . ." 15 U.S.C. 44.

In AMA, the Commission held that its jurisdiction under Section 4 extends to "nonprofit organizations whose activities engender a pecuniary benefit[2] to its members if that activity is a substantial part of the total activities of the organization, rather than merely incidental to some non-commercial activity," *AMA*, 94 FTC at 701, 983 (1979); *see also Michigan State Medical Soc'y*, 101 FTC 191, 284 (1983) ("MSMS"):

certain organizations ostensibly organized not-for-profit, such as trade associations, may be vehicles through which a profit could be realized for themselves or their members.

In its most recent case dealing with this issue, College Football Ass'n, 5 Trade Reg. Rep. (CCH) ¶ 23,631 ("CFA"), the Commission adopted a "two-pronged" test to determine whether an entity such as CFA is "organized to carry on business . . . for profit" and is subject to its jurisdiction.

[2] An expense which otherwise would necessarily be incurred by members, *Ohio Christian College*, 80 FTC at 815, 848 (1972).

The Commission's test is derived from Section 501(c)(3) of the Internal Revenue Code which provides an exemption from income taxation for:

[c]orporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual. . . .

Looking to this provision the Commission stated:

The guidance from federal tax law is clear. Congress has sought to protect and support specific categories of not-for-profit organizations by freeing them from tax liabilities but only so long as (1) no part of their net earnings inures to the benefit of any private shareholder or individual and (2) the activities which generate the income--whether conducted by a feeder organization or by the exempt entity itself--are in furtherance of exempt purposes. The test is two-pronged and requires an adequate nexus between the entity's operations and recognized public purposes. CFA, at 23,357.

CDA argues that its operations satisfy this test because it is a *bona fide* nonprofit corporation which is exempt from federal taxation under a similar provision of the Internal Revenue Code, 501(c)(6). (RB, pp. 4, 16-17).

CDA made the same argument in a motion for summary decision which I denied on September 27, 1994. In that order, I found that CFA did not undermine the relevance of the AMA decision, for the Commission held:

We recognize that a respondent's status as either a Section 501(c)(3) or (6) tax-exempt organization does not obviate the relevance of further inquiry into a respondent's operations and goals. . . . Rulings of the Internal Revenue Service are not binding upon the Commission.

Citing this language and referring to a significant difference between CFA and AMA, *i.e.*, the for-profit nature of AMA's members' businesses, *AMA*, 94 FTC at 989, I held that:

even though CDA is exempt from federal taxation because it is a "*bona fide*" nonprofit organization, an additional issue must be addressed: whether its activities

which confer a pecuniary benefit to its members are a substantial or incidental part of its total activities.

CDA has not convinced me that my ruling was incorrect; thus, inquiry into the Commission's jurisdiction over CDA must include an analysis of the pecuniary benefits which its activities confer on its members and a determination as to whether those activities represent "a substantial part of [CDA's] overall operation." *AMA*, 94 FTC at 988 n.13.

In *AMA*, 94 FTC at 986-91, 741-63, 785-93, 796-801, 918, 921-34, and *MSMS*, 101 FTC at 283-84, the Commission and the ALJ found that the following activities of the respondents provided economic benefits to their members: lobbying; litigation; public relations and marketing; advice helping members to increase the efficiency, productivity, and profitability of their medical practices; professional placement; peer review; retirement; continuing education; publications; and non-profit subsidiaries and affiliates providing financial, insurance and other services.

Citing *Community Blood Bank of Kansas City Area, Inc. v. FTC,* 405 F.2d 1011, 1017 (8th Cir. 1969), CDA claims that it is not organized for its or its members' profit and that its profit-making activities are ancillary to its primary purpose, which is to serve public, not private, interests.

CDA serves the public interest through its councils which give advice about dental health and which monitor the ethics of its members (F. 14, 17, 18, 19, 22, 23); CDA has also taken positions on fluoridation and other matters which benefit the general public, but may adversely affect its members (F. 123-25, *see also* F. 126-27).

Nevertheless, and despite the testimony of CDA's President, Dr. Craven (F. 128), the evidence presented by complaint counsel convincingly establishes that, as in AMA, a substantial part of CDA's activities result in pecuniary benefits to its members:[3]

Lobbying: CDA represents its members with respect to legislative, political and regulatory matters which, but for its intervention, might result in adverse pecuniary consequences (F. 70-73, 76-85). CDA has brought to its members' attention the pecuniary benefits of these activities (F. 74, 77).

[3] "Our determination that AMA engages in substantial activities for the economic benefit of its membership is intended in no way to denigrate the many valuable eleemosynary activities in which AMA is engaged [but] such activities do not . . . provide immunity from the laws designated to protect the public from anticompetitive practices." *AMA*, 94 FTC at 987.

Litigation: By challenging, or supporting challenges to, legislation and regulatory activities which are adverse to their interests, CDA has benefitted its members' pecuniary interests (F. 84).
Marketing and Public Relations: CDA's marketing and public relations activities benefit its members by fostering a positive image of them (F. 86-88).
Direct Reimbursement: Promoting direct reimbursement benefits CDA's members by avoiding problems engendered by insurer restrictions on payment and procedures (F. 89-91).
Practice Management: CDA has an extensive array of programs which increases its members' efficiency and productivity (F. 92-97).
Peer Review: CDA's peer review system may provide a less costly alternative to traditional methods of resolving patient complaints about dental problems (F. 98-100). *See AMA*, 94 FTC at 798, 932, 988.
Scientific Sessions: CDA's twice-yearly scientific sessions give its members the opportunity, cost free, to satisfy their continuing education requirements (F. 101-06). *See AMA*, 94 FTC at 790, 986; *MSMS*, 101 FTC at 211, 249.
Publications: As in *AMA,* 94 FTC at 761, 791, 928, 932, 987 and *MSMS*, 101 FTC at 208-09, 248, 283, CDA's publications provide pecuniary benefits to its members by providing technical and scientific information about dentistry (F. 107-08).
For-Profit Subsidiaries: CDA, through its for-profit subsidiaries, offers its members professional liability insurance (TDIC, F. 109-12), business and personal insurance (TDCIS, F. 113-15), and financial services (TDC, F. 116-18). *See AMA*, 94 FTC at 757, 761-62, 790-91, 928, 932-33, 987-88; *MSMS*, 101 FTC at 207-08, 210-11, 248-49, 283.
Membership in ADA and Local Components: Membership in ADA and a local component supplements and extends the benefits obtained from membership in CDA (F. 119-22). *See AMA*, 94 FTC at 785, 796, 930-31, 988-89; *MSMS*, 101 FTC at 212, 249.

The enumeration of these benefits establishes that a CDA member taking advantage of all, or even a few of them, would realize a substantial pecuniary benefit.

Statements made by CDA in touting the benefits of these services to its members -- and taking into account some exaggeration -- substantiate that conclusion (F. 67, 68, 74, 76, 77, 84, 88, 97, 99, 105, 108, 109). In contrast, CDA's services to the public accounted for seven percent of its total expenditures. The remainder went to direct member services, association administration and indirect member services (F. 69).

C. CDA, Its Members, and Its Component Societies Have Conspired to Restrain Members' Advertising

When an organization is controlled by a group of competitors, antitrust law views the organization as the competitors' agent, and the organization as a combination or conspiracy of its competitor-members. *See Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500 (1988); *National Soc'y of Professional Engineers v. United States*, 435 U.S. 679, 682, 692 (1978).

CDA is an association of competing dentists, who, by agreeing to abide by its Code of Ethics, including those provisions regarding advertising (F. 129-33), have conspired among themselves, and with CDA and the component societies which enforce those restrictions (F. 149-67). Compare AMA, in which the Commission stated that "promulgation of a code of ethics implies agreement among the members of an organization to adhere to the norms of conduct set forth in the code" 94 FTC at 998 n.33. As to the component societies, the Commission held, in AMA, that AMA had conspired with its constituent and component medical societies since all of them had articulated, implemented, and enforced ethical guidelines, 94 FTC at 996-1002.

Here, the evidence establishes, as complaint counsel contend, "a 'common design and understanding' on the part of respondent, its component societies, and the individual dentists that comprise the membership of those dental societies to promulgate, disseminate, and enforce ethical restrictions on advertising" (CB, p. 33). *See American Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946):

> Where the circumstances are such as to warrant a jury in finding that the conspirators had a unity of purpose or a common design and understanding . . . the conclusion that a conspiracy is established is justified.

Copperweld Corp. v. Independent Tube Corp., 467 U.S. 752, 767 (1984) ("Copperweld"), relied upon by CDA, does not affect this conclusion. In this case, the Supreme Court held that under certain circumstances, legally separate entities such as a parent and its wholly owned subsidiary, "must be viewed as that of a single entity for purposes of [antitrust analysis]." If so treated, "there is no sudden joining of economic resources that had previously served different

interests, and there is no justification for [antitrust] scrutiny." *Id.* at 771.

The Supreme Court in Copperweld was referring to a corporation and its wholly-owned subsidiaries which, because the law views them as an entity, are incapable of conspiring.

CDA, its component societies and its members are, in contrast, legally separate and independent entities which are engaged in activities whose purpose is to restrict truthful advertising, and they have therefore conspired to do so. *See Massachusetts Board of Registration in Optometry*, 110 FTC 549, 610 (1988) ("Mass Board"). *See also Northern Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 215 (D.C. Cir. 1986), *cert. denied,* 107 S. Ct. 880 (1987).

D. The Agreement to Restrict Advertising Violates Section 5 of the FTC Act

1. The Restrictions Are Inherently Suspect

In Mass Board, the Commission found that the Board of Registration in Optometry had promulgated regulations restricting advertising by optometrists.

Citing recent Supreme Court decisions rejecting a *per se* analysis of conduct that is essential to a legitimate purpose,[4] and recognizing that the Supreme Court has been reluctant to condemn rules adopted by professional associations as presumptively unreasonable, *Mass Board*, 110 FTC at 602, 606, the Commission adopted a method of analysis which "is more useful than the traditional use of the *per se* or rule of reason labels but which is consistent with the recent cases that apply a traditional analysis." *Mass Board*, 110 FTC at 603-04.

This structure is readily described as a series of questions to be answered in turn. First, we ask whether the restraint is "inherently suspect." In other words, is the practice the kind that appears likely, absent an efficiency justification, to "restrict competition and reduce output"? . . . If the restraint is not inherently suspect, then the traditional rule of reason, with attendant issues of market definition and power, must be employed. But if it is inherently suspect, we must pose a second question: Is there a plausible efficiency justification for the practice? That is, does the practice seem capable of creating or enhancing competition . . . Such an efficiency

[4] *NCAA v. Board of Regents of the Unv. of Oklahoma*, 468 U.S. 85, 1012 (1984) ("NCAA"); *Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 10, 23-24 (1979).

defense is plausible if it cannot be rejected without extensive factual inquiry. If it is not plausible, then the restraint can be quickly condemned. But if the efficiency justification is plausible, further inquiry -- a third inquiry -- is needed to determine whether the justification is really valid. If it is, it must be assessed under the full balancing test of the rule of reason. But if the justification is, on examination, not valid, then the practice is unreasonable and unlawful under the rule of reason without further inquiry -- there are no likely benefits to offset the threat to competition.

Mass Board, 110 FTC at 604 (emphasis in original).

Since "[a]dvertising plays an indispensable role in the allocation of resources in a free enterprise system" *Bates v. State Board of Arizona*, 433 U.S. 350, 364 (1977), restraints on truthful advertising "are inherently likely to produce anticompetitive effects," *Mass Board*, 110 FTC at 605, *AMA*, 94 FTC at 1005, and are illegal absent a plausible justification.

CDA has a legitimate interest in fostering truthful, informative advertising by its members and has, since 1985, announced an advertising policy which would restrict only those advertisements which are false or misleading in a material respect (F. 246) or which are false or misleading in their entirety (F. 247).

However, CDA has not followed its policy, and has, instead, created confusion among its members as to the meaning of "material respect" (F. 217-221) and what is or is not acceptable in their advertising (F. 250-58).

This confusion is caused by uncertainty about the role of CDA's Judicial Council and the component societies. The result is the lack of a consistent procedure to inform members about changes in CDA's advertising rules (F. 259-64). Thus, CDA has banned not only those advertisements which violate its announced policy but also advertising which is lawful and informative.

CDA's actions are consistent with a mindset which believes that advertising by dentists is demeaning (F. 135-40), a view which the Supreme Court has long condemned. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 765 (1976):

Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price.

See also AMA, 94 FTC at 1026:

The equivocal language of [AMA's] 1976 Statement and its often antagonistic tone toward advertising and solicitation . . . has sent a clear signal to the profession.

As a consequence, CDA has successfully (F. 275-93) withheld from the public information about prices (F. 168-73), discounts (F. 174-82), quality (F. 183-93), superiority of service (F. 194-204), guarantees (F. 205-07), and the use of procedures to allay patient anxiety (F. 208-16).

CDA has also, regardless of their truth, expressed displeasure with claims that are allegedly insulting, offensive to peers, vague or ambiguous, subjective, or do not elevate the esteem of the profession. CDA has also banned advertising listing more than one location or which claims a religious or ethnic affiliation (F. 222). All of these restrictions are inherently suspect. *Mass Board*, 110 FTC at 606 (restrictions on price advertising are "aimed at affecting the market price"); *Mass Board*, 110 FTC at 607: "The fact that [a] ban deprives consumers of information concerning service rather than price in no way diminishes the inherently anticompetitive nature of the restraints."

2. The Restrictions Are Not Justified

CDA has not met its burden of establishing that the inherently suspect advertising restrictions which it has imposed "are capable of creating or enhancing competition," *Mass Board*, 110 FTC at 604.

The reason that CDA adopted its advertising policy may have been, in part, to protect consumers from false or deceptive advertising, but its policy also reflects, in its inception and its implementation, a hostility toward advertising by its members even if it is truthful and nondeceptive.

As a voluntary regulator of its members' advertising, CDA should have enforced its policy so that its restraints were "narrowly directed toward false or deceptive advertising," *AMA*, 94 FTC at 1009. It has not done so. Instead, it has failed to apply "general principles of deceptive advertising law in a . . . context taking into account the substantial body of law construing Section 5 of the FTC Act," *AMA*, 94 FTC at 1030, and has unjustifiably banned whole categories of advertisements which are not false or misleading in a material respect.

Thus, CDA has banned price advertisements which are inexact (F. 168) or which fail to reveal all price information even though the Supreme Court in *Bates v. State Bar of Arizona*, 433 U.S. 350, 381 (1977), recognized that there was no reason for a ban on the phrase "very reasonable fees," because "advertising will permit the comparison of rates among competitors, thus revealing if the rates are reasonable." *Id.* at 382 (F. 169). *See also AMA*, 94 FTC at 1030: "it is especially important that price advertising remain as unfettered as possible." CDA has done the opposite: it has adopted rules for discount advertising which effectively outlaw it by imposing requirements which cannot be met (F. 179-80).

CDA's fears of the deceptive potential of non-price claims has also resulted in unnecessary disputes about and bans on advertising claims of quality or superiority of service on the grounds that they are subjective, unverifiable and incapable of measurement (F. 226-29). *See AMA*, 94 FTC at 1023:

> Respondent's counsel defended the ban on self-laudatory and superiority claims on the grounds that such claims convey no useful information and can only be misleading, since they are not susceptible to any kind of measurement. This characterization of claims on the basis of their utility to consumers or ease of measurement illustrates the potential scope of respondent's ban on "solicitation."

CDA argues that its members have leeway with respect to advertising claims, but the evidence belies its assertion. For example, CDA's requirements for discount claims effectively ban advertising making this claim without regard to their truth and the same is true with respect to other claims: price (F. 170); quality (F. 183, 186); superiority (F. 198); guarantees (F. 205); and, miscellaneous claims (F. 222).

CDA cannot justify its advertising restrictions by pointing to state law (F. 230) as a model for determining what is or is not lawful:

> A state, acting on behalf of the interest of its citizens, is undoubtedly entitled to greater latitude in preventing deceptions and unfair practices than a professional association representing the interests of horizontal competitors, *AMA*, 94 FTC at 1010 n.55.

In any event, CDA has expressed displeasure about members' advertisements which would satisfy state law (F. 234-43).

Finally, CDA's fears that dentists involved in school screenings (F. 295-98), may pressure children or parents into using their services is not supported by any record evidence and its actions have denied schoolchildren the benefits of dental screening.

3. CDA's Members Do Not Have Market Power

Relying on testimony by Dr. Knox, CDA's economic expert, complaint counsel state that "respondent's members collectively have, and can exercise, market power in the dental service market in California" (CB, p. 52).

CDA, its components and its members have illegally conspired to prevent members, and potential members, from using truthful, nondeceptive advertising, and this conspiracy has injured those consumers who rely on advertising to choose dentists.

This conclusion, which is well-documented, does not, however, establish that CDA's members have "market power" -- *i.e.*, the "ability to raise prices above those that would prevail in a competitive market," *United States v. Brown University,* 5 F.3d 658, 668 (3d. Cir. 1993).

Complaint counsel's argument is based on Dr. Knox's agreement on cross-examination that California could be a relevant geographic market, and that dental services could be a relevant product market (F. 328). However, Dr. Knox did not testify that these markets existed.

Complaint counsel also obtained a concession, based on a hypothetical, that CDA members could collectively exercise market power if they acted together (F. 328) but Dr. Knox did not testify that CDA, in fact, could exercise market power and complaint counsel have not produced any convincing evidence that CDA members have acted or could act together to raise prices or reduce output, nor have they established in what geographic market or markets the alleged market power could be exercised.

The problems experienced by dentists in opening a practice in California are real (F. 329-31) but they do not pose an insurmountable obstacle to entry. Since that is the case, CDA could not exercise market power in any relevant geographic market, whether statewide, regional, or local. *See* Langefeld and Morris, Analyzing Agreements Among Corporations: What Does The Future Hold? 36 Antitrust Bull. 651, 677 (1991):

[e]ntry by independent firms prevents voluntary associations from raising prices above the competitive level that would exist without the association.[5]

However, the failure to establish the conditions for satisfaction of a Rule of Reason analysis[6] is not fatal. *See Mass Board,* 110 FTC at 602 n.8:

The Court [in *FTC v. Indiana Dentists,* 476 U.S. 447 (1986)] rejected the dentists' argument that the Commission erred in not making elaborate market power determinations. . . .

IV. SUMMARY

A. The Commission has jurisdiction over the acts and practices of CDA which are challenged in the complaint.

B. CDA, along with its components and members, has engaged in a combination or conspiracy to restrain trade by unreasonably preventing its members or potential members from using truthful, nondeceptive advertising to the injury of its members and to consumers of dental services.

C. CDA's acts and practices unreasonably restrain competition and constitute an unfair method of competition in violation of Section 5 of the FTC Act.

V. ORDER

In view of CDA's violation of Section 5 of the FTC Act, the order proposed by complaint counsel is, with one exception, justified.

Part I defines terms used in the order. The only unusual definition is that of "restricting," which is defined as "taking any action against a dentist based on the advertising practices of the dentist's employer." There is evidence that this has occurred and the prohibition is appropriate (F. 210, 293).

Part II of the order requires CDA to cease and desist from engaging in practices which the complaint challenges, including its restraints on advertisement of price, services, facilities, and equipment.

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[5] Messrs. Langefeld and Morris were, respectively, the Director and Assistant to the Director for Antitrust in the FTC's Bureau of Economics.

[6] "Substantial market power is an essential ingredient of every antitrust case under the Rule of Reason," *Sanjuan v. The American Board of Psychiatry and Neurology, Inc.*, 40 F.3d 247, 251 (7th Cir. 1994).

Part III A of the order requires CDA to remove from its Code of Ethics provisions that are inconsistent with the order. Part III A also requires CDA to remove from its Code of Ethics and Bylaws any other policy statements or guidelines that are inconsistent with Part II of the order.

Part III B of the order requires respondent to ban any component that continues to engage in practices prohibited by Part II of the order.

Part IV A of the order requires CDA to inform its members of the order's provisions.

Part IV D of the order requires CDA, for five years, to mail a copy of the order, complaint and announcement to each new member.

Parts IV B and IV C of the order require CDA to send notices to and reconsider the membership status of certain members who have been disciplined by CDA in the enumerated ways.

Parts V A and V B of the order require CDA, every six months for three years, to maintain a written record for each time it or its component societies take action against a dentist because of his or her advertising practices.

Part VI A of the order requires CDA to establish and maintain, for five years, a program which will ensure its compliance with the order.

Parts VI B-E are standard provisions common to other Commission orders.

CDA objects to certain provisions of the order. It claims that since it has never restricted advertising because it is undignified or unprofessional, Part II of the order which requires it, *inter alia*, not to restrain "representations not contributing to the esteem of the public or the profession" should be stricken. This part of the order is appropriate because CDA and its components have expressed concerns about such advertising (F. 222).

CDA also opposes the requirement in Part IV C that would require it to send notice to, and reconsider the membership applications of, members who were dropped by CDA over the last ten years for non-payment of dues. I agree that this provision has no apparent connection with CDA's illegal acts and it will be stricken.

Finally, CDA argues that Part III of the order is vague. This part requires CDA to remove from its Code and Bylaws any provision which is inconsistent with provisions of Part II. There may be differences of opinion by CDA and Commission staff about

provisions which are inconsistent but they can be resolved without resorting to further litigation.

ORDER

I.

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

A. *"Respondent"* or *"CDA"* means the California Dental Association, its directors, trustees, councils, committees, boards, divisions, officers, representatives, delegates, agents, employees, successors and assigns.

B. *"Component societies"* means those dental societies or dental associations defined as component societies in the June 1986 edition of CDA's Bylaws. In the event that CDA's Bylaws are amended to denominate component societies differently or to define or describe a new category of dental societies or associations that replace or are substantially similar to the component societies defined in the June 1986 edition of CDA's Bylaws, "component societies" means those dental societies or dental associations as well.

C. *"Person"* means any natural person, corporation, partnership, unincorporated association, or other entity.

D. *"Restricting"* includes taking any action against a dentist based on the advertising practices of the dentist's employer.

II.

It is further ordered, That respondent, directly or indirectly, or through any corporate or other device, in or in connection with its activities as a professional association in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, shall forthwith cease and desist from:

A. Prohibiting, restricting, regulating, impeding, declaring unethical, interfering with, or advising against the advertising or publishing by any person of the prices, terms or conditions of sale of dentists' services, or of information about dentists' services, facilities or equipment which are offered for sale or made available by dentists

or by any organization with which dentists are affiliated, including, but not limited to advertising or publishing:

1. Superiority claims;
2. Comparative claims;
3. Quality claims;
4. Subjective claims and puffery;
5. Prices, including discounted prices;
6. Promises to refund money to dissatisfied customers;
7. Exclusive methods or techniques; and
8. Representations that do not contribute to the esteem of the public, or of the profession.

B. Prohibiting, restricting, regulating, impeding, declaring unethical, interfering with, or advising against the solicitation of patients, patronage, or contracts to supply dentists' services by any dentist or by any organization with which dentists are affiliated, through advertising or by any other means, including, but not limited to, the distribution of business cards and forms containing a dentist's name, business address, or telephone number in connection with dental screenings of children at public and private schools.

C. Inducing, requesting, suggesting, urging, encouraging, or assisting any non-governmental person or organization to take any action that if taken by respondent would violate Parts II.A. or II.B. of this order.

Provided, however, that nothing contained in this order shall prohibit respondent from formulating, adopting, disseminating to its component societies and to its members, and enforcing reasonable ethical guidelines governing the conduct of its members with respect to representations that respondent reasonably believes would be false or deceptive within the meaning of Section 5 of the Federal Trade Commission Act, or with respect to uninvited, in-person solicitation of actual or potential patients, who, because of their particular circumstances, are vulnerable to undue influence.

III.

It is further ordered, That respondent shall:

A. Within sixty (60) days after the date this order becomes final, remove from respondent's Code of Ethics and from its Bylaws and any other policy statement or guideline of respondent, any provision, interpretation, or policy statement that is inconsistent with the provisions of Part II of this order, including but not limited to:

1. Sections 7, 10, and 21 of respondent's Code of Ethics; and
2. Advisory Opinions 2(c), 2(d), 3, 4, and 8 to Section 10 of respondent's Code of Ethics.

B. Terminate for a period of one (1) year respondent's affiliation with any component society within one hundred and twenty (120) days after respondent learns or obtains information that would lead a reasonable person to conclude that said component society has, after the date this order becomes final, engaged in any act or practice that if committed by respondent would be prohibited by Part II of this order; unless prior to the expiration of the one hundred twenty (120) day period, said component society informs respondent by a verified written statement of an officer of the society that the component society has eliminated and will not reimpose the restraint(s) in question, and respondent has no grounds to believe otherwise.

IV.

It is further ordered, That respondent shall:

A. Within ninety (90) days after the date this order becomes final, publish in the "Journal of the California Dental Association" ("CDA Journal"), or any successor publication, with such prominence and in the same size type as feature articles are regularly published in the CDA Journal, or any successor publication, and distribute by first class mail to each of its component societies and to each of its members:

1. This order, the accompanying complaint, and an announcement in the form shown in Appendix A to this order; and
2. Any documents revised pursuant to Part III.A. of this order.

B. For each person who, because of the advertising or solicitation practices of the person or the person's employer, currently

is subject to a CDA disciplinary order, or currently is suspended from membership in CDA:

1. Within thirty (30) days after this order becomes final, distribute by first class mail a copy of this order, the accompanying complaint, and an announcement in the form shown in Appendix B to this order;

2. Within forty-five (45) days after the date this order becomes final, (a) review the person's file, and (b) determine whether the suspension or disciplinary order is consistent with Part II of this order; and

3. Within sixty (60) days after the date this order becomes final, send by first class mail a letter notifying the person whether CDA has lifted the suspension and or vacated the disciplinary order, and, if not, detailing the reasons for maintaining the suspension or retaining the disciplinary order.

C. For each person currently not a member of CDA who, because of the advertising or solicitation practices of the person, or of the person's employer:

1. Has been expelled from CDA during the ten (10) year period preceding the date this order becomes final;

2. Has been denied membership in CDA, or any CDA component, during the ten (10) year period preceding the date this order becomes final; or

3. Was contacted by CDA, or any CDA component, during the ten (10) year period preceding the date this order becomes final, and who subsequently resigned from CDA:

a. Within thirty (30) days after this order becomes final, distribute by first class mail a copy of this order, the accompanying complaint, an announcement in the form shown in Appendix C to this order, and an application form for membership in CDA; and

b. Within forty-five (45) days after the date an application from such person for membership is received, (i) review the application, and (ii) send by first class mail a letter notifying the person whether membership has been granted, and, if not, detailing the reasons for the denial.

D. For five (5) years after the date this order becomes final, distribute by first class mail a copy of this order, the accompanying complaint, and an announcement in the form shown in Appendix A to this order to each person who applies for membership in CDA within thirty (30) days after CDA receives an application from such person.

V.

It is further ordered, That respondent shall:

A. For a period of three (3) years after the date this order becomes final, create and maintain a written record in each instance in which respondent or one of its component societies takes action with respect to advertising for the sale of dental services. The record required by this paragraph shall, at a minimum, clearly specify the particular representation that is alleged to be false or deceptive, and the basis for concluding that the particular advertisement is false or deceptive within the meaning of Section 5 of the Federal Trade Commission Act.

B. Within six months after the date that this order becomes final, and every six months thereafter for a period of three years, file with the Federal Trade Commission, Bureau of Competition, Division of Compliance, copies of each and every record created pursuant to Part V.A. of this order.

VI.

It is further ordered, That respondent shall:

A. Establish, within sixty (60) days after the date this order becomes final, and maintain for a period of five years thereafter, a compliance program to aid in ensuring that respondent and its component societies act in conformance with the requirements of Parts II and V of this order. Said compliance program shall include, at a minimum:

1. Establishing a compliance officer or committee that shall supervise review of the activities of respondent and its component societies with respect to advertising; and

2. Establishing procedures to ensure that respondent receives written notice of all action, whether formal or informal, taken by respondent's component societies with respect to advertising.

B. Within one hundred and twenty (120) days after the date this order becomes final, file with the Federal Trade Commission a verified report in writing setting forth in detail the manner and form in which respondent has complied and is complying with this order.

C. Within one (1) year after the date this order becomes final, annually thereafter for a period of five (5) years, and at such other times as the Federal Trade Commission may by written notice to respondent request, file a verified report in writing with the Federal Trade Commission setting forth in detail the manner and form in which respondent has complied and is complying with this order, and setting forth in detail any action taken in connection with the activities covered by this order, including but not limited to any advice or interpretation rendered with respect to advertising or solicitation, and all written communications, all summaries of oral communications, and all disciplinary actions taken with respect to advertising or solicitation.

D. For a period of five (5) years after the date this order becomes final, maintain and make available to the Federal Trade 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 Parts II, III, and V of this order, including but not limited to any advice or interpretation rendered with respect to advertising or solicitation, and all written communications, all summaries of oral communications, and all disciplinary actions taken with respect to advertising or solicitation.

E. Notify the Federal Trade Commission at least thirty (30) days prior to any proposed changes in respondent, 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.

APPENDIX A

[Date]

ANNOUNCEMENT

The Federal Trade Commission has issued an order against the California Dental Association ("CDA"). This order provides that CDA may not prohibit its members from or restrict its members in engaging in truthful, nondeceptive advertising or solicitation.

As a result of the order, CDA may not interfere if its members or their employers wish to:

1. Advertise or publish truthful, nondeceptive:

(a) Superiority claims;
(b) Comparative claims;
(c) Quality claims;
(d) Unsubstantiated or unverifiable claims, including puffery and subjective representation;
(e) Prices, including discounted prices;
(f) Promises to refund money to dissatisfied customers;
(g) Claims that include the use of adjectives or superlatives to describe any offered services;
(h) Exclusive methods or techniques; and
(i) Representations that do not contribute to the esteem of the public, or of the profession.

2. Engage in the solicitation of patients, including by means of distributing business cards and forms containing a dentist's name, business address, and telephone number in connection with dental screenings of children at public or private schools.

The order does not prevent CDA from formulating and enforcing reasonable ethical guidelines prohibiting representations, including unsubstantiated or unverifiable representations, that CDA reasonably believes would be false or deceptive within the meaning of Section 5 of the Federal Trade Commission Act, or guidelines prohibiting the solicitation of actual or potential patients, who, because of their particular circumstances, are vulnerable to undue influence.

In particular, the order means that as long as CDA's members do not engage in falsehood or deception, CDA cannot prevent or discourage them from advertising or otherwise soliciting patients, except with respect to "uninvited, in-person solicitation of actual or potential patients, who,

because of their particular circumstances, are vulnerable to undue influence."

For more specific information, you should refer to the FTC order itself, a copy of which is enclosed.

Bernard L. Allamano
Legal Counsel
California Dental Association

APPENDIX B

[Date]

ANNOUNCEMENT

As you may be aware, the Federal Trade Commission has issued an order against the California Dental Association ("CDA"). This order provides that CDA may not prohibit its members from, or restrict its members in, engaging in truthful, nondeceptive advertising or solicitation. In addition, the order requires CDA, within 45 days after the order became final, to review (a) all current suspensions of CDA membership, and (b) all disciplinary orders, imposed because of the advertising or solicitation practices of a member or the advertising or solicitation practices of the member's employer. The order requires CDA, within 60 days after the order became final, to inform each such member in writing that the suspension has been lifted, or the disciplinary order vacated, or, if not, CDA is required to give detailed reasons for maintaining the suspension or retaining the disciplinary order.

CDA is currently reviewing your case to determine whether the disciplinary action taken against you is in accordance with the FTC order. For more specific information, you should refer to the FTC order itself. A copy of the order is enclosed.

If you have any questions concerning the status of CDA's review of your case, feel free to contact the Association at ( ). You may also contact the Federal Trade Commission.

Bernard L. Allamano
General Counsel
California Dental Association

APPENDIX C

[Date]

ANNOUNCEMENT

As you may be aware, the Federal Trade Commission has issued an order against the California Dental Association ("CDA"). The order provides that CDA may not prohibit its members from, or restrict its members in, engaging in truthful, nondeceptive advertising or solicitation. Pursuant to the order, CDA is sending a membership application form to dentists, such as yourself, who because of their advertising or solicitation practices, or the advertising or solicitation practices of their employers:

1. Have been expelled from CDA during the ten (10) year period preceding the date the order became final;
2. Have been denied membership in CDA, or any CDA component, during the ten (10) year period preceding the date the order became final; or
3. Were contacted by CDA, or any CDA component, during the ten (10) year period preceding the date the order became final, and who subsequently resigned from CDA.

The order requires CDA, within 45 days after it receives an application from any such person, to act on the application and inform the applicant whether membership has been granted and, if not, to detail the reasons for the denial.

CDA encourages you to apply for membership. If you apply for membership, your application will be considered in accordance with the terms of the FTC order. For more specific information, you should refer to the FTC order itself.

If you have any questions concerning application, feel free to contact the Association at ( ). You may also contact the Federal Trade Commission.

Bernard L. Allamano
General Counsel
California Dental Association

OPINION OF THE COMMISSION

BY PITOFSKY, *Chairman*:

This is a case in which a large percentage of dentists located in California, operating through their trade association, the California Dental Association ("CDA"), placed unreasonable restrictions on members' truthful and nondeceptive advertising of the price, quality, and availability of their services. We find such restrictions on competition through regulation of advertising to be a violation of Section 5 of the Federal Trade Commission Act. In reaching that conclusion, we find that CDA is not a "not for profit" organization beyond the reach of FTC authority, that its actions affect interstate commerce, and that CDA and its members are capable of conspiracy and have conspired to impose these advertising restrictions.

The order that we impose leaves CDA free to regulate false and misleading forms of marketing and advertising by its members, but does not allow it to impose broad categorical bans on truthful and nondeceptive advertising of the price, quality, or availability of dental services.

I. BACKGROUND

The complaint in this case, issued on July 9, 1993, charges respondent with restraining competition among dentists in California in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1) (1995) ("FTC Act" or "Act"), by placing unreasonable restrictions on its members' truthful and nondeceptive advertising of the price, quality, and availability of their services. After extensive pretrial discovery, a three-week trial, and post-trial motions, the record was closed on April 20, 1995, and a decision and final order were entered by the administrative law judge ("ALJ"), Lewis F. Parker, on July 17, 1995.

The ALJ first rejected CDA's arguments that the Commission lacks jurisdiction because CDA is not "organized to carry on business for its own profit or that of its members," within the meaning of Section 4 of the FTC Act, 15 U.S.C. 44, and that its activities do not restrain or affect interstate commerce within the meaning of Sections 4 and 5 of the Act, 15 U.S.C. 44 and 45. The ALJ found that CDA's

actions affect interstate commerce, ID at 65-67,[1] and that, notwithstanding CDA's status as a nonprofit corporation, the association confers a substantial pecuniary benefit on its members so as to place it within the Commission's jurisdiction under *Community Blood Bank of Kansas City Area, Inc. v. FTC*, 405 F.2d 1011 (8th Cir. 1969), and *American Medical Association*, 94 FTC 701 (1979), aff'd as modified, 638 F.2d 443 (2d Cir. 1980), aff'd by an equally divided Court, 455 U.S. 676 (1982) ("AMA"), ID at 67-71. The ALJ next rejected CDA's contention that, just as a corporation cannot legally conspire with its wholly owned subsidiary, CDA could not, as a matter of law, conspire with its members and local components. The ALJ determined that unlike a corporation whose economic interests are fused with those of its wholly owned subsidiary, CDA is an association of competing dentists who are legally capable of conspiracy and who, by agreeing to abide by the Code of Ethics, have conspired with one another and with CDA and its local component societies to restrict advertising. ID at 71-72.

Turning to the legality of the individual restraints, the ALJ concluded that the members of CDA by agreement had unreasonably withheld from the public information regarding the prices, discounts, quality, superiority, guarantees, and availability of services of member dentists, as well as information about their use of procedures to diminish patients' anxiety. ID at 74-75. The complaint did not challenge the right of members of CDA through their association to suppress advertising that was misleading or deceptive or otherwise caused unavoidable and unreasonable harm to consumers. Accordingly, the ALJ enjoined CDA from further interference with advertising by member dentists, except insofar as CDA has a reasonable basis for concluding, *i.e.*, reasonably believes, that such advertising is false or deceptive within the meaning of Section 5 of the FTC Act, or with respect to the solicitation of patients who may be particularly vulnerable to undue influence. ID at 80-82.

CDA appeals from the Initial Decision on the grounds that the ALJ erred in concluding that CDA is a corporation within the meaning of Section 4 of the FTC Act, that CDA is capable of

[1] The following abbreviations are used in this opinion:

ID - Initial Decision of the ALJ
IDF - Numbered Findings in the ALJ's Initial Decision
CX - Complaint Counsel's Exhibit
RX - Respondent's Exhibit
T - Transcript of Trial before the ALJ

conspiring with its members and its component societies, and that CDA's actions were unlawful under Section 5 of the Act.[2] Our analysis of the liability issues and assessment of certain facts differ from the ALJ's but we nonetheless reach the same conclusion on liability and, accordingly, affirm the Initial Decision as modified below and adopt the ALJ's findings of fact except insofar as they are inconsistent with this opinion.[3]

II. RESPONDENT

CDA is a professional association, organized under California law as a non-profit corporation, with its principal place of business in Sacramento, California. CDA is composed of 32 local component societies, and is itself a constituent member of the American Dental Association ("ADA") (which is not a party to this suit). IDF 3-4. To qualify for membership at the state level, CDA requires a dentist to be a member of the local component society in the jurisdiction where the dentist practices. Similarly, a California dentist is not eligible for membership in the ADA without membership in CDA. IDF 3-4. Each CDA member must abide by the codes of ethics of the local component to which the dentist belongs, the CDA, and the ADA, CX 1450-Y; IDF 5, and expressly promises to do so in his or her application by signing the following statement:

> "I CERTIFY that I have read the Constitution, Bylaws, Code of Ethics and the Principles of Ethics of the dental society, the California Dental Association, and the American Dental Association and upon submission of this application I will comply with the Constitution, Bylaws, Code of Ethics and the Principles of Ethics of the dental society, the California Dental Association, and the American Dental Association, and I further agree that I will recognize the authorized officers of said society and said associations as the proper and sole authorities to interpret all areas of professional conduct and will at all times abide by and be governed by their interpretations." CX 1258-E.

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[2] CDA does not appear to challenge the ALJ's conclusion that its activities had the requisite nexus to interstate commerce, and, in any event, we affirm the ALJ's conclusion on this score without further elaboration.

[3] Complaint counsel's Motion To Correct The Record And To Supplement A Response Given At The Oral Argument (filed on December 6, 1995), and respondent's Motion For Leave To File CDA's Response To Questions Posed During Oral Argument Regarding Whether CDA Is Responsible For The Actions Of The Components (filed on March 7, 1996) are hereby granted. Respondent's Response To Questions Posed During Oral Argument Regarding Whether CDA Is Responsible For The Actions Of The Components (filed as an attachment to the March 7, 1996 motion), and complaint counsel's Reply To CDA's Response To Certain Questions Posed During Oral Argument (filed on March 18, 1996), have been considered by the Commission, and are disposed of by the Final Order and Opinion of the Commission.

Each organization's code and bylaws must not conflict with those of the association of which it is a part. CX 1450-I; IDF 4.

The CDA has more than 19,000 members. Between 13,500 and 13,700 are in active practice, representing around 75% of the practicing dentists in California. IDF 2. In some communities, CDA may represent an even larger share of the practicing dentists. For example, in 1994 the Mid-Peninsula Dental Society, whose region included Palo Alto, claimed to represent over 90% of practicing dentists in its area. CX 1433.

CDA is run on the principle of parliamentary supremacy. Its House of Delegates, composed of about 200 CDA members, chosen mainly by the components, has the power to amend CDA's articles of incorporation, adopt and amend its Code of Ethics, determine and assess dues, adopt an annual budget, grant or revoke the charters of its component societies, and elect its officers, Council members, and delegates to the ADA House of Delegates. IDF 9; CX 1450-K; CX 1472-A. Aside from a managing Board of Trustees and a number of standing committees, the CDA operates ten Councils, one of which is the Judicial Council, which is charged with interpreting and enforcing CDA's Code of Ethics. IDF 10-23. The Judicial Council's Membership Application Review Subcommittee ("MARS"), in turn, examines whether applicants have complied with the Code of Ethics. IDF 14; IDF 157.

III. JURISDICTION

CDA challenges the ALJ's conclusion that it is a corporation "organized to carry on business for its own profit or that of its members," within the meaning of Section 4 of the FTC Act, 15 U.S.C. 44. First, it maintains that the ALJ applied the wrong legal standard, arguing that the ALJ ignored the two-pronged approach set forth in College Football Association, 5 Trade Reg. Rep. (CCH) ¶ 23,631 (July 8, 1994) ("CFA"), by applying the test laid out in the Commission's earlier decision in *American Medical Association*, 94 FTC 701. Second, CDA argues that dentists do not in fact derive any pecuniary benefit from their membership in CDA and that any activity that might be characterized as for profit is ancillary to its nonprofit mission and therefore does not suffice to confer jurisdiction upon the FTC. We disagree.

Under Section 5, as amended, the Commission is authorized to "prevent persons, partnerships, or corporations," with certain exceptions not relevant here, "from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. 45(a)(2). Section 4, as amended, in turn, defines the term "corporation":

"'Corporation' shall be deemed to include any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, which is organized to carry on business for its own profit or that of its members, and has shares of capital or capital stock or certificates of interest, and any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, without shares of capital or capital stock or certificates of interest, except partnerships, which is organized to carry on business for its own profit or that of its members." 15 U.S.C. 44.

The statute does not further specify the boundary of the for-profit limit to our jurisdiction (or nonprofit exemption as it is alternatively known), and the test we apply was first articulated in *Community Blood Bank of Kansas City Area, Inc. v. FTC*, 405 F.2d 1011 (8th Cir. 1969). In that case, the Eighth Circuit rejected the notion that a corporation's nonprofit organizational form places it beyond the Commission's jurisdiction. An examination of the legislative history of the Act led the court to conclude that "Congress did not intend to provide a blanket exclusion of all non-profit corporations, for it was also aware that corporations ostensibly organized not-for-profit, such as trade associations, were merely vehicles through which a pecuniary profit could be realized for themselves or their members." 405 F.2d at 1017. *See also FTC v. National Commission on Egg Nutrition*, 517 F.2d 485, 487-88 (7th Cir. 1975), *cert. denied*, 426 U.S. 919 (1976). The Eighth Circuit explained that the nonprofit exemption extends only to corporations that are "in law and in fact charitable," 405 F.2d at 1019, and concluded:

"[U]nder Section 4 the Commission lacks jurisdiction over nonprofit corporations without shares of capital which are organized for and actually engaged in business for only charitable purposes, and do not derive any 'profit' for themselves or their members within the meaning of the word 'profit' as attributed to corporations having shares of capital." *Id.* at 1022.

We applied this standard in *AMA*, 94 FTC 701, where we ultimately found that the American Medical Association had violated

Section 5 of the FTC Act by restricting advertising and solicitation by its members. In finding jurisdiction we rejected the AMA's claim that the statutory term "profit" was limited to direct gains distributed to its members. Nor did we accept the organization's claim that the mere existence of substantial, eleemosynary activities would place it beyond the purview of the statute. We agreed, instead, with the ALJ, who had decided that the Commission can "assert jurisdiction over nonprofit organizations whose activities engender a pecuniary benefit to its members if [those] activit[ies are] a substantial part of the total activities of the organization, rather than merely incidental to some non-commercial activity." *Id.* at 983 (citation omitted). We have since adhered to that formulation of the reach of our jurisdiction over nonprofit organizations. *See, e.g., Michigan State Medical Society,* 101 FTC 191, 283-84 (1983).

As the ALJ correctly observed, our subsequent decision in CFA is consistent with AMA. *See ID at 68.* CFA addressed the question whether a nonprofit organization, all of whose members are not for-profit entities, is subject to the Commission's jurisdiction when it engages in commercial activity and distributes the income earned from that activity to its members. As we noted in CFA, our jurisdictional analysis in that case did not call AMA into question. We reiterated that "a finding that a substantial part of an association's activities engender[s] pecuniary benefits for profit-seeking members is sufficient to establish that the association is organized to carry on business 'for the profit' of its members." *Id.* at 23,362. AMA proved insufficient, however, to decide the jurisdictional question in CFA, since "a finding that such activities engender pecuniary benefits for entities that are not for-profit is not [a sufficient basis to establish jurisdiction]." *Id.* We were thus compelled to press on in CFA to ensure that no other aspect of the organization's activities could serve as a jurisdictional predicate.

Drawing on Community Blood Bank and our review of federal tax law, we concluded that Section 4 imposes a two-pronged test that looks to both the source and destination of an organization's income. "The not-for-profit jurisdictional exemption under Section 4," we held, "requires both that there be an adequate nexus between an organization's activities and its alleged public purposes and that its net proceeds be properly devoted to recognized public, rather than private, interests." *Id.* at 23,357. Because CFA's activities bore a sufficient nexus to its charitable purposes and because its income was

distributed entirely to members who were not for-profit entities, we concluded that it met both prongs and, accordingly, was exempt from our jurisdiction.

As is plain from the opinion, an organization that falls short on either prong comes within our jurisdiction. Therefore, rather than undermine our decision in AMA, CFA simply adds an additional step of analysis when an organization satisfies the prong enunciated in AMA.

CDA falls within our jurisdiction for the same reasons the AMA did, and, as a result, we need not examine the nature of its activities in addition to the substantial pecuniary benefits it generates for its members. CDA, like the AMA, is organized as a nonprofit corporation under state law and is exempt from federal income taxes under Internal Revenue Code 501(c)(6), 26 U.S.C. 501(c)(6) (1995), which applies to "business leagues, chambers of commerce, real estate boards and boards of trade" consisting of members that share common business interests. *See* 26 CFR 1.501(c)(6)-1 (1995). It thus apparently does not qualify for exemption under I.R.C. 501(c)(3), 26 U.S.C. 501(c)(3), which exempts organizations that are "organized and operated exclusively for [eleemosynary purposes]... no part of the net earnings of which inures to the benefit of any private . . . individual." This status is pertinent to our jurisdictional analysis, but in applying the AMA test, we nonetheless review for ourselves whether CDA confers pecuniary benefits upon its members as a substantial part of its activities. *See* 94 FTC at 990 n.17.[4]

In deciding that the AMA's activities engendered pecuniary benefits to its members, the Commission pointed to founding documents and promotional literature indicating that one of the AMA's goals was to serve the "material interests" of the medical profession and provide "tangible benefits and services to its members," such as insurance programs, a retirement plan, a physician placement service, publications, authoritative legal information, and practice management programs. *See* 94 FTC at 986-87 (citations omitted). The Commission also cited the AMA's legislative and lobbying efforts on behalf of physicians as an important tangible benefit provided by the organization to its members. *Id.* at 987; *see also Michigan State Medical Society*, 101 FTC at 283-84.

[4] We find no reason at this time to adopt, as complaint counsel urges, a rebuttable presumption "that any trade or professional association with a 501(c)(6) tax classification . . . operate[s] in substantial part for the economic benefit of its members, and therefore [is] subject to Commission jurisdiction." Brief for complaint counsel at 17-18.

CDA offers many similar benefits and bills itself as an organization that "represent[s] dentists in all matters that affect the profession," CX 1546-A; IDF 63, and that "offers far more services to its members than any other state [dental] association," CX 1544; IDF 67. For instance, CDA engages in lobbying activities that have been repeatedly described by CDA's president as saving members significant amounts of money, IDF 72, 74, provides practice management seminars, IDF 92, marketing and public relations services, IDF 86-88, and, through for-profit subsidiaries, offers its members professional liability insurance, business and personal insurance, and financial services, IDF 109-18. Indeed, the last time CDA made a comprehensive accounting of the allocation of its resources, only 7 percent was spent on "[s]ervices to the [p]ublic," while 65 percent funded "[d]irect [m]ember [s]ervices," 20 percent was used for "[a]ssociation [a]dministration & [i]ndirect [m]ember [s]ervices," and 8 percent went to defray the costs of "[m]embership [m]aintenance." CX 1448-C; IDF 69. In sum, without questioning whether CDA engages in activities that benefit the public, we agree with the ALJ that the services CDA provides to its members satisfy the jurisdictional threshold of the Act. *See* ID at 69-71.

IV. CONSPIRACY

CDA next challenges the legal and factual basis of the ALJ's finding that it conspired or combined with its members and component societies to restrict unreasonably the dissemination of information and thereby restrain competition. First, CDA argues that it is legally incapable of conspiring with its members or its component societies, because they form a single economic unit much like a corporation and its wholly owned subsidiary, which generally cannot conspire with one another. Brief for respondent 68-69 (citing *Copperweld Corp. v. Independent Tube Corp.*, 467 U.S. 752 (1984)). Second, it maintains that there exists no requisite, conspiratorial unity of purpose among the component societies or between CDA and its components to restrict advertising or restrain competition, and that each component has instead prohibited what it independently perceived to be false and misleading advertising. *Id.* at 47-53. We disagree with both assertions.

Section 1 of the Sherman Act does not reach the unilateral acts of a single firm, but only restraints of trade achieved by "'contract,

combination . . . or conspiracy' between separate entities." *Copperweld*, 467 U.S. at 768 (emphasis in original).[5] In Copperweld, the Court considered whether a parent company and its wholly owned subsidiary could provide the requisite plurality of actors under Section 1, and it held that they could not:

> "A parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one. . . . If a parent and a wholly owned subsidiary do 'agree' to a course of action, there is no sudden joining of economic resources that had previously served different interests, and there is no justification for Section 1 scrutiny." *Id.* at 771.

In other words, where a group of persons or corporations do not pursue independent economic motives, they are viewed as a single economic entity, akin to a firm and its executives, and are thus deemed incapable of entering into a conspiracy within the meaning of Section 1. This principle is inapposite here, however.

Unlike firms that are acquired by a parent corporation, dentists do not shed their economic identities as competitors in the dental services market upon joining the association. Thus, in contrast to the strategies of a single firm, or a parent and its wholly owned subsidiary, CDA's policies and decisions regarding the market activities of its member dentists embody a continuing agreement among competitors. Indeed, were we to conclude otherwise, a cartel would evade liability under Section 1 simply by organizing itself as a trade association.

Quite properly, then, professional associations are "routinely treated as continuing conspiracies of their members," as Professor Areeda has pointed out. VII Phillip E. Areeda, Antitrust Law ¶ 1477, p. 343 (1986); *see Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500 (1988) (citing same). For example, in *National Society of Professional Engineers v. United States*, 435 U.S. 679, 692 (1978), the Court declared a professional association's ethics rule prohibiting competitive bidding by its members to be in violation of Section 1, noting in passing that "[i]n this case we are presented with

[5] Although the FTC has no independent authority to enforce the Sherman Act, its authority under Section 5 of the FTC Act extends to conduct that violates the Sherman Act. *See, e.g., FTC v. Motion Picture Advertising Serv. Co.*, 344 U.S. 392, 394-95 (1953); *Fashion Originators' Guild v. FTC*, 312 U.S. 457, 463-64 (1941). While the reach of Section 5 is broader than that of the Sherman Act, we need not lay out the precise scope of Section 5 in this case because, as we indicate below, *see infra* Section V, the instant practice makes out a violation of Section 1 of the Sherman Act, 15 U.S.C. 1. *Cf. FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 454-55 (1986).

an agreement among competitors." Similarly, in *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 455 (1986), the Supreme Court found that there was "no serious dispute" that members of the respondent organization had "conspired among themselves" by promulgating a policy restricting the information its members would provide insurance companies. And in one of its more explicit statements on the subject, the Court in *National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma*, 468 U.S. 85, 99 (1984) ("*NCAA*"), expressly rejected a single entity defense when it examined a rule promulgated by an association composed of institutions who were otherwise competitors in the market for "television revenues, . . . fans and athletes," noting that "[b]y participating in an association which prevents member institutions from competing against each other . . . member institutions have created a horizontal restraint." As we said in *Michigan State Medical Society*, 101 FTC at 286 (citations omitted), "[t]here is ample precedent for finding that individual professionals, acting through their organizations, can conspire or combine to violate the antitrust laws."

We also reject CDA's factual contention that complaint counsel has failed to prove that the alleged conspirators shared "'a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement.'" Brief for respondent at 48 (quoting *American Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946)). *See also Monsanto Co. v. Spray-Rite Serv. Corp*, 465 U.S. 752, 764 (1984). CDA clearly promulgated the Code of Ethics, which, as noted in AMA, by itself "implies agreement among the members of [the] organization to adhere to the norms of conduct set forth in the code." *AMA*, 94 FTC at 998 n.33. As part of their application to CDA, members expressly pledge to abide by the Code of Ethics as interpreted by the association's authorized officers. *See* CX 1258-E. And the Judicial Council (together with its Membership Application Review Subcommittee) interprets and enforces the Code of Ethics. IDF 14, 157. Therefore, despite CDA's attempt to portray the resulting restrictions as the product of independent, and often inconsistent, activities on the part of CDA and each component society, there is ample evidence in the record that the restrictions at the heart of this case were promulgated and enforced directly by, or at the direction of, CDA itself.

CDA's Code of Ethics and accompanying Advertising Guidelines require that all price advertising be exact and that discount advertising list the regular fee for each discounted service, the percentage of the discount, the length of time that the discount will be available, verifiable fees, and the specific groups who are eligible for the discount as well as any other limitation. CX 1484-Z-49 to 50; CX 1262-I. In enforcing these provisions, CDA has routinely cited members for using phrases such as "low," "reasonable," or "inexpensive" fees, *see, e.g.*, CX 301-B & -D; CX 118 B, and for failing to include the regular fees for each service covered by across-the-board senior citizen discounts, or coupon discounts for new customers, *see, e.g.*, CX 843-B, CX 585-A. *See* generally IDF 168-82.

CDA restricts nonprice advertising as well. *See* generally IDF 183-216, 294-317. CDA forbids "[a]dvertising claims as to the quality of services," CX 1484-Z-50, which include claims such as "quality dentistry," *see, e.g.*, CX 1083-A; CX 387-C, prohibits dentists from advertising that their services are superior to those of their competitors, *see, e.g.*, CX 671-A; CX 43-B; CX 1026-A, bans the advertising of guarantees, *see, e.g.*, CX 668-C; CX 557-C; CX 497-C, and has, on occasion, imposed burdens on dentists who have advertised their efforts to alleviate patient anxiety, *see* CX 70-A. Finally, CDA prohibits dentists from including information about their practice on forms distributed in connection with public or private school screenings. *See, e.g.*, CX 1115-A; CX 1167-A.[6]

[6] Although the Initial Decision, IDF 168-216, 294-317, relies on statements and enforcement activities by both CDA and its local component societies, our independent review of the record reveals that CDA was specifically involved in numerous enforcement actions so as to make the challenged restraints its own, rather than only unrelated incidents of restrictions by local components. We do not address CDA's specific concerns regarding the ALJ's reliance on complaint counsel's summary document CX 1659, since our own review of the record does not rely on the challenged document.

Since 1990 alone, there have been scores of cases in which CDA actively participated in the enforcement of the various restrictions identified in the text. To name a few examples, in recent years CDA was consulted, issued an opinion, or required that action be taken with regard to the advertising of Dr. Hansa Asher (senior citizen discount, CX 18 A, CX 18 B (1993)), Dr. Walter Rosenkranz (new customer special, CX 865 E, CX 865 C (1993)), Dr. Noel Dorotheo (senior citizen discount, CX 333 F, CX 333 A (1993)), Dr. Joseph Foroosh (representations of superiority, CX 360 A (1986); discounts, CX 366 A (1993); state of the art dentistry, CX 66 A (1993)), Dr. John Baron (superiority claim, CX 43 B (1993)), Dr. Coulter Crowley (new patient discount, CX 248 B (1993)), Dr. Richard Casteen (senior citizen discount, CX 151 B (1993)), Dr. Henry Lerian (affordable costs, superiority claims, CX 605 A (1993)), Drs. Angelique and Katherine Skoulas (infection control standards, CX 963 A (1993)), Dr. Kumar Ramalingam (discount, CX 843 A (1993)), Dr. Russell Coser (pleasant dentistry, CX 232 (1993)), Dr. Gerald Brown (experience, CX 115 A (1993)), Dr. Darral Hiatt (discount, CX 444 A (1993)), Dr. Mark Rocha (discount, CX 855 A, CX 856 (1993)), Dr. Cheryl Johnston (experience, guarantees and discounts, CX 497 A-D (1993)), Dr. Brent Maiden (senior citizen discount, CX 646 C (1992)), Dr. Corey Nicholl (discounts, CX 775 A (1993)), Dr. Steven Williams (superiority and quality of care, CX 1083 A (1992)), Dr. Edward Norzagaray (superiority and senior discount, CX 780 A,

We conclude that the policies adopted and enforced by CDA evidence a horizontal restraint among its members, and therefore constitute an agreement among competitors. We turn, then, to the legality of this agreement.

V. LEGALITY OF RESTRAINTS ON TRADE

Before we examine the specific restrictions on various types of advertising imposed by CDA, it will be useful to say a few words about the role of advertising in a competitive system. Truthful and nondeceptive advertising serves the important function of informing the consumer about "who is producing and selling what product, for what reason, and at what price." *Virginia State Board of Pharmacy*

CX 780 B (1992)), Dr. Roxanne Schleuniger (seniors discounts, CX 913 A (1992)), Dr. Eugene Kita (discounts for cash patients, guarantees, CX 557 B, CX 557 C (1992)), Dr. Gregory Skinner (senior citizen discount, affordable dentistry, and caring dentistry, CX 957 B, CX 957 C, CX 957 D-E (1992)), Dr. Phillip Jenkins (gentle, comfortable and affordable dentistry, CX 478 A (1992)), Dr. Howard Moy (discounts and affordable prices, CX 755 A, CX 755 B (1992)), Dr. Parto Ghadimi (discount for all new patients, sterilized environment, quality of care, CX 387 A, CX 387 C (1992)), Dr. Donald Reid (superiority, CX 848 C (1991)), Mickiewicz & Rye Dental Group (claim of superiority, CX 718 B (1992)), Dr. James Tracy (superiority claim, CX 1026 A (1992)), Drs. Grant and Randall Stucki (senior discount, guarantee, CX 1000 C (1992)), Dr. Christopher Go (superiority claim, CX 394 B (1993)), Dr. Leslie Latner (discount, experience, superiority, CX 583 (1991)), Dr. Farida Butt (discounts, experience, CX 126 A (1991)), Dr. Pargev Davtian (senior citizen discounts, CX 297 B (1991)), Dr. Nazameddin Beheshti (senior citizens discount, CX 49 A (1990); discounts, CX 51 A (1991)), Dr. Jack Dubin (affordable dentistry, CX 335 A (1991)), Dr. Gerald VanderAhe (endorsement and low prices, CX 1042 A, CX 1042 B (1991)), Dr. Thomas Bales (affordable financing, CX 32 A (1991)), Dr. Sean Moran (offer of discount, CX 745 D, E (1991)), Dr. Paige Jeffs (discount, special offer, CX 474 A-B (1990)), Dr. Michael Leizerovitz (quality for less, offers of discounts, special offer for x-rays, CX 602 A, CX 602 C, CX 602 D (1991)), Drs. William Kachele & Andrew Stygar (affordable dentistry, discounts, CX 514 A, CX 516 A, CX 516 C (1991)), Dr. Jack Rosenson (affordable dentistry, fair fees, representations of superiority, CX 866 A, CX 866 C (1991)), Dr. Indravadan Patel (discount, CX 828 D (1990)), Dr. Tarsem Singhal (affordable prices, CX 949 C (1990)), Dr. Daniel Tucker (reasonable fees, CX 1032 A (1990)), Dr. Greg Mardirossian (seniors discount, discount, CX 661 A (1990)), Dr. Mark A. Aguilera (expertise claims, discount, CX 4 A, B, C, (1990)), Dr. Leland Jung (affordable prices, CX 501 B (1990)), and Dr. Joseph Paulsen (low fees, CX 830, CX 830 G (1990)). *See* generally Complaint Counsel's Proposed Findings of Fact, Volume III, Proposed Findings 580-949, and exhibits cited therein.

A cross-section of CDA's involvement is provided by its actions with respect to the advertising of Dr. Kent Buckwalter (reasonable fees, and major savings, CX 118 B (1993)), Dr. Soodabeh Azarmi (coupon discount, CX 27 F (1993)), Dr. Dexter Massa (discounts and guarantee, CX 668 B, CX 668 C (1992)), Dr. Tony Daher (discount, CX 258 C (1993)), Dr. Christine Choi (percentage discount for new patients, CX 206 A (1992)), Valley Presbyterian Hospital (superiority, CX 354 (1992)), Dr. Trang Nguyen (discount, affordable price, CX 772 A, CX 772 C (1992)), and Dr. Eric Debbane (quality, low cost, CX 306 A, CX 306 C (1990)). *Id.* Beyond these numerous incidents, which establish CDA's involvement in the conspiracy to restrict members' advertising, there are hundreds of related enforcement actions by the local component societies, which exacerbates the impact of the restraints on competition. *See id.*

Contrary to the charge made in Commissioner Azcuenaga's dissent, then, our decision in this case does not rest on "a handful" of questionable actions, *see, e.g.*, *post*, at 12, but on ample evidence of pervasive CDA enforcement. CDA stood knee deep in actions restraining the advertising of its members, and the examples noted here and in the text are intended to serve only as illustrations of that practice.

v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976). *See* generally, *AMA*, 94 FTC at 1005. By apprising consumers of the "availability, nature, and prices of products and services," such advertising "performs an indispensable role in the allocation of resources in a free enterprise system." *Bates v. State Bar of Arizona*, 433 U.S. 350, 364 (1977).

We believe in the basic premise, as does the Supreme Court, that by providing information advertising serves predominantly to foster and sustain competition, facilitating consumers' efforts to identify the product or provider of their choice and lowering entry barriers for new competitors. *See* generally, R. McAuliffe, Advertising, Competition, and Public Policy (1987); P. Nelson, Advertising as Information, 82 Journal of Pol. Econ. 729 (1974); J. Langenfeld and J. Morris, Analyzing Agreements among Competitors, 1991 Antitrust Bulletin 651, 667 and n.21; C. Cox and S. Foster, The Costs and Benefits of Occupational Regulation 29-36 (Bureau of Economics: Federal Trade Commission 1990).

Restrictions on truthful and nondeceptive price advertising, on the other hand, "increase the difficulty of discovering the lowest cost seller of acceptable ability[,] . . . [reduce] the incentive to price competitively," and "serv[e] to perpetuate the market position of established [market participants]." *Bates*, 433 U.S. at 377-78. *See also Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 388 (1992) (quoting *Bates*, 433 U.S. at 377). As a result, "where consumers have the benefit of price advertising, retail prices often are dramatically lower than they would be without advertising." *Bates*, 433 U.S. at 377. The importance of advertising, however, attaches not only to price information, but to all material aspects of the transaction. As the Court has indicated, "all elements of a bargain -- quality, service, safety, and durability -- and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers." *Professional Engineers*, 435 U.S. at 695.

Restrictions on broad categories of truthful and nondeceptive advertising, therefore, do place restraints on trade, and our cases have recognized as much. For example, we held in AMA that "[g]iven the integral function of advertising and other forms of solicitation to the workings of competition in our society" the AMA's complete ban on advertising or solicitation "has, by its very essence, significant adverse effects on competition among [its] members," and that "the nature or character of these restrictions is sufficient alone to establish

their anticompetitive quality." 94 FTC at 1005. Subsequently, in *Massachusetts Board of Registration in Optometry*, 110 FTC 549, 605 (1988), we found that "[r]estraints on truthful advertising for professional services are inherently likely to produce anticompetitive effects." Further, we determined that the services at issue in that case were cheaper in states that permitted certain advertising than in states that did not. *Id.* at 606 (citation omitted); *see also id.* at 563 (Initial Decision). And we have entered into a number of consent agreements with associations on the theory that consumers are harmed by restrictions on advertising of the price, quality, or convenience of professional services. *See, e.g., Association of Independent Dentists,* 100 FTC 518 (1982); *Oklahoma Optometric Ass'n*, 106 FTC 556 (1985); *American Inst. of Certified Public Accountants*, 113 FTC 698 (1990). Since it is apparent from the record that advertising is important to consumers of dental services and plays a significant role in the market for dental services, IDF 265-67, 321, the general proposition regarding the importance of advertising to competition carries over to the instant situation.

Restraints on trade have been held unlawful under Section 1 of the Sherman Act either when they fall within the class of restraints that have been held to be unreasonable *per se*, or when they are found to be unreasonable after a case-specific application of the rule of reason. Other "restraints" have been upheld because they enhance competition or create no significant anticompetitive effect. In each situation, however, the ultimate question is whether the challenged restraint hinders, enhances, or has no significant effect on competition. *See NCAA*, 468 U.S. at 104; *Professional Engineers*, 435 U.S. at 691.

Under the rule of reason, a challenged practice is examined in light of all the facts relevant to the particular case at hand. A court will examine the restraint in the totality of the material circumstances in which it is presented in order to assess whether it impairs competition unreasonably. Although many courts have elaborated on the details of this test, Justice Brandeis's classic formulation remains the touchstone for this rule-of-reason analysis:

"The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint,

the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectional regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences." *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918).

This enquiry need not be conducted in great depth and elaborate detail in every case, for sometimes a court may be able to determine the anticompetitive character of a restraint easily and quickly by what has come to be known as a "quick look" review. *See Indiana Federation of Dentists*, 476 U.S. at 459-61; *NCAA*, 468 U.S. at 106-10, 109 n.39.

A *per se* category of violation may emerge as courts gain familiarity with the almost invariably untoward effects of a particular practice across economic actors and circumstances. As the Court said in *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 344 (1982), "once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it, it has applied a conclusive presumption that the restraint is unreasonable." *Per se* categories of unlawful economic activities, in other words, consist of agreements or practices that are almost always harmful to competition and rarely, if ever, accompanied by substantial redeeming virtues. The general conclusion that they are illegal without further analysis of the particular circumstances under which they arise in a given case is thereby justified. *See Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 289-90 (1985). Examples of such practices are horizontal price fixing, *see United States v. Socony-Vacuum Oil Co., Inc.*, 310 U.S. 150 (1940); *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990), territorial divisions among competitors, *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972), and certain group boycotts, *see, e.g., Northwest Wholesale Stationers, supra. See also Northern Pacific R. Co. v. United States*, 356 U.S. 1, 5 (1958).

When an activity falls into a *per se* category, the individual agreement or practice at issue is thought beyond justification in the sense that any argument as to the harmlessness of the restraint, or any proffer of procompetitive justifications for the practice, will generally not be considered. For example, the "reasonableness" of a fixed price will not excuse the attendant interference with the free flow of

competition. *United States v. Addyston Pipe & Steel*, 85 F. 271, 291 (6th Cir. 1898) (dictum), *aff'd as modified* 175 U.S. 211 (1899); *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397-98 (1927). *See also Superior Court Trial Lawyers*, 493 U.S. at 421 ("We may assume that the preboycott rates were unreasonably low, and that the increase has produced better legal representation for indigent defendants.") Nor will a court listen to the argument that the parties lacked the necessary market power to render the agreement effectual. *Superior Court Trial Lawyers*, 493 U.S. at 430-31; *Socony-Vacuum*, 310 U.S. at 224 n.59. The *per se* approach, therefore, condemns certain agreements even in those rare instances in which they may have proved reasonable or harmless under an extended, individualized rule-of-reason analysis, but this occasional injustice is outweighed by the rule's promotion of administrative and judicial economy and its creation of clear guidelines for market actors. *Maricopa*, 457 U.S. at 344 & n.16, 351 (citation omitted).

It is true that there is a converging of the *per se* category (including possible adjustments under the decision in *Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1 (1979)) and a full blown rule of reason (which can take place expeditiously under a "quick look" approach) so that at times the two antitrust approaches do not differ significantly. Phillip E. Areeda, VII Antitrust Law ¶ 1508, p.408 (1986). Although there have been some oblique suggestions in Supreme Court cases that perhaps the categories had merged, the Court later returned to distinguishing between *per se* and rule of reason categories. *See, e.g., FTC v. Superior Court Trial Lawyers, supra; Palmer v. B.R.G. of Georgia*, 498 U.S. 46 (1990) (*per curiam*).[7] We believe these separate categories continue to serve valid enforcement purposes and, in any event, authoritative Supreme Court decisions continue to recognize the distinction. We therefore turn to a discussion of the particular restraints imposed by CDA and consider the proper antitrust treatment that is to be accorded to each.

[7] Commissioner Starek notes in his concurrence that Massachusetts Board of Optometry "set out a 'structure for evaluating horizontal restraints' that is both consistent with the Supreme Court's teaching and, as the Commission observed in that case, 'more useful than the traditional use of the *per se* or rule of reason labels.'" Post, at 2-3 (quoting *Massachusetts Board of Optometry*, 110 FTC at 603-604). Useful or not, however, we believe that it is for the Supreme Court to say whether its traditional analysis is to be abandoned. As recent cases indicate, the Court has not done so.

A. Per Se Illegality -- Restraints on Price Advertising

Although it is well established that a horizontal agreement to eliminate price competition is a *per se* violation of the antitrust laws, *see e.g.*, *Maricopa*, 457 U.S. at 344-48; *Trenton Potteries*, 273 U.S. at 397, the price-related restrictions in this case differ from the classic price fixing conspiracy in that the agreement between CDA and its members burdens only members' advertising, as opposed to prohibiting specific sales transactions. That, however, does not save the restrictions from *per se* condemnation. CDA's restrictions on advertising "low" or "reasonable" fees, and its extensive disclosure requirement for discount advertising, effectively preclude its members from making low fee or across-the-board discount claims regardless of their truthfulness. Such a ban on significant forms of price competition is illegal *per se* regardless of the manner in which it is achieved. *See, e.g.*, *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980).

1. Effective Prohibition of Advertising

Section 10 of CDA's Code of Ethics prohibits advertising that is "false or misleading in any material respect," which, in turn, is defined to include any statement that is "likely to mislead because in context it makes only a partial disclosure of relevant facts" or "[r]elates to fees for specific types of services without fully and specifically disclosing all variables and other relevant factors." CDA Code of Ethics, Section 10, Adv. Ops. 2(b) and (d); CX 1484-Z-49. Further Advisory Opinions provide:

"3. Any communication or advertisement which refers to the cost of dental services shall be exact, without omissions, and shall make each service clearly identifiable, without the use of such phrases as 'as low as,' 'and up,' 'lowest prices,' or words or phrases of similar import.

"4. Any advertisement which refers to the cost of dental services and uses words of comparison or relativity -- for example, 'low fees' -- must be based on verifiable data substantiating the comparison or statement of relativity." *Id.*, Adv. Ops. 3 and 4; CX 1484-Z-49 to Z-50.

CDA has also separately issued detailed Advertising Guidelines, which purport to permit the advertising of "[d]iscounts on regular

fees," CX 1262-D, but explain that any advertisement for discounted dental services must "list all of the following":

(1) "[t]he dollar amount of the nondiscounted fee,"
(2) "[e]ither the dollar amount of the discount fee or the percentage of the discount for the specific service,"
(3) "[t]he length of time, if any, that the discount will be offered,"
(4) "[v]erifiable fees", and
(5) "[s]pecific groups who qualify for the discount or any other terms and conditions or restrictions for qualifying for the discount." CX-1262-I (emphasis in original).

Although this may sound like an innocuous regulation that does no more than enhance the truthfulness of the information conveyed, in its enforcement CDA effectively precluded advertising that characterized a dentist's fees as being low, reasonable, or affordable, as well as advertising of across-the-board discounts.

The silencing effect of CDA's enforcement of the restrictions on advertising of low fees is evident from the record. For example, respondent recommended denial of membership to one dentist because he advertised, among other things, references to "cost that is reasonable," "affordable, quality dental care," "making teeth cleaning . . . inexpensive," and "very reasonable rates," which were objectionable because "fee advertising must be exact." *See* CX 301-B to D. Although CDA ostensibly changed course in 1991 (based on a rediscovered decision of the Judicial Council in 1978 which had approved use of the phrase "reasonable fees"), this alleged retraction does not appear to have been communicated to CDA's components nor did it terminate CDA's practice of citing members for use of that term. *See* IDF 255-57; CX 391; CX 778. Thus, on November 4, 1993, CDA recommended denial of membership to a dentist because, among other things, his employer's advertising included the offers "reasonable fees quoted in advance" and "major savings," and in respondent's view "the above referenced phrases are misleading and would cause an ordinarily prudent person to misunderstand or be deceived." CX 118-B. As occurred frequently in CDA's enforcement actions, the citation gives no indication that the conclusion regarding the misleading nature of the phrases was based upon an allegation that the advertising claim was false or that the advertising dentist

lacked a reasonable basis for the fee representations made. *See also* T. 361-78 (Dr. Miley).[8]

CDA's discount disclosure standards turns out to have been equally prohibitive. The Supreme Court's warning that "'[r]equiring too much information in advertisements can have the paradoxical effect of stifling the information that consumers receive,'" *Morales*, 504 U.S. at 388 (quoting letter from FTC to Christopher Ames, Deputy Attorney General of California, dated Mar. 11, 1988), applies in this case. As even a member of CDA's Judicial Council, Dr. Kinney, acknowledged at trial, across-the-board discount advertising in literal compliance with the requirements "would probably take two pages in the telephone book" and "[n]obody is going to really advertise in that fashion." T. 1372. Although dentists can comply with the disclosure requirement when advertising a discount for a small number of services, the record bears out the conclusion that dentists do not advertise across-the-board discounts that include a complete itemization of the regular fee for each discounted service. *See, e.g.*, Appendix to Brief for Respondent; IDF 179. Dr. Kinney purported to agree that "if they are offering a discount to senior citizens and this is an across the board discount for everything ... you would have to be a little flexible and ... not ... require that ... every single fee [be listed]," T. 1373, but CDA did not ever compromise its demand for full compliance with the panoply of disclosures. For example, it recommended denial of membership to one dentist because she advertised, among other things, "20% off new patients with this ad" without including the dollar amount of the nondiscounted fee for each service. *See* CX 206-A; T. 1063-65. Another was advised that his advertisement of "25% discount for new patients on exam x-ray & cleaning/ 1 coupon per patient/ offer expires 1-30-94/ not good with any other offer" was unacceptable since it did not include the customary fee. CX 843-44. A third was admonished for having offered a "10% senior citizen discount" without the disclosures required by respondent. *See* CX 585-A, 586-E, 588-B.

Thus, regardless of the formal codification of its policy, CDA in fact imposed a broad ban on these forms of price advertising by its members.

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[8] *See* FTC Policy Statement Regarding Advertising Substantiation, 104 FTC 648, 839 (1984), (appended to *Thompson Medical Co., Inc.*) (advertisers must have "a reasonable basis for advertising claims before they are disseminated"). *Cf. infra* note 25.

2. *Per Se* Illegality

This effective prohibition on truthful and nondeceptive advertising of low fees and across-the-board discounts constitutes a naked attempt to eliminate price competition and must be judged unlawful *per se*. That it does so by the indirect means of suppressing advertising does not change that result. Nor is it of consequence that we are faced with a restriction among professionals.

Conspiracies to eliminate price competition come in various forms. For example, in Socony-Vacuum, *supra*, the Supreme Court struck down as *per se* unlawful an agreement among competing oil companies to purchase large amounts of gasoline on the spot market and store it for later sale in an effort to stabilize prices. In *United States v. General Motors Corp.*, 384 U.S. 127, 145-47 (1966), the Court examined concerted activity aimed at preventing discounters from doing business with car dealers and found this practice also to be a *per se* violation of the Sherman Act. And *Catalano*, 446 U.S. 643, held that an agreement among wholesalers to eliminate short-term credit formerly granted to retailers made out a *per se* violation as well. More recently, in *Denny's Marina, Inc. v. Renfro Productions, Inc.*, 8 F.3d 1217 (7th Cir. 1993), the Seventh Circuit held an association of marine dealers to have engaged in a *per se* violation of the Act when it refused to admit a dealer to its annual boat show because of that dealer's publicized policy to "meet or beat" competitors' prices at the shows. And in *Blackburn v. Sweeney*, 53 F.3d 825 (7th Cir. 1995), another case invoking *per se* analysis, the Seventh Circuit held that an agreement among competitors not to advertise in specified territories was tantamount to an outright allocation of markets and thus illegal *per se*. "To fit under the *per se* rule," the court reasoned, "an agreement need not foreclose all possible avenues of competition." *Id.* at 827. The restrictions on advertising sufficed to bring the agreement under the rule.

Indeed, in AMA, we had already noted that "restraints on the advertising of prices have previously been considered *per se* illegal by some courts." 94 FTC at 1003 (citing *United States v. Gasoline Retailers Ass'n, Inc.*, 285 F.2d 688 (7th Cir. 1961), and *United States v. House of Seagram, Inc.*, 1965 Trade Cas. (CCH) ¶ 71,517 (S.D. Fla. 1965)). In the cited Seventh Circuit decision, the court had reviewed a horizontal agreement among gasoline retailers to refrain from advertising or giving premiums, and from advertising the price

of their product in locations other than the gasoline pumps, and the court declared this conspiracy to be a *per se* violation of the Sherman Act. 285 F.2d at 691. Although the agreement was thus coupled with outright price maintenance, the conspiracy in restraint of advertising was no less singled out for *per se* condemnation. *United States v. Parke Davis & Co.*, 362 U.S. 29 (1960), is also instructive. In that case, the Court held that Parke Davis had gone beyond the limits of permissible vertical arrangements by enlisting wholesalers in a conspiracy to deny its products to retailers who sold below the suggested minimum retail price. This conspiracy, which had a distinctive horizontal flavor, was illegal under the Sherman Act. *Id.* at 45-46. Important for our purposes is that the Court went on to address how Parke Davis had similarly brokered a horizontal agreement among retailers to suspend advertising of discounts, concluding that these actions were directed at creating a *per se* unlawful agreement to eliminate price competition. *Id.* at 46-47. Applying Parke Davis, the District Court in Seagram expressly held that horizontal "[a]greements by retailers . . . to discontinue advertising . . . are tantamount to agreements not to compete and constitute *per se* violations . . . of Section 1 of the Sherman Act." 1965 Trade Cas. (CCH) ¶ 71,517 at p.81,275. Finally, the Seventh Circuit confirmed the view that a prohibition on advertising discounts "is functionally a price restriction," *Illinois Corporate Travel, Inc. v. American Airlines, Inc.*, 806 F.2d 722, 724 (7th Cir. 1986), and refrained from applying the *per se* rule only because, as the court noted in a subsequent appeal in that case, "the *per se* rule against this practice does not apply when the vendor is an agent," 889 F.2d 751, 752 (1989), *cert. denied*, 495 U.S. 919 (1990).[9]

Horizontal agreements suppressing broad categories of truthful and nondeceptive price advertising, then, effectively suspend a significant form of price competition. Indeed, such an agreement to eliminate price advertising can be more threatening to competition than a ban on discount sales, since, as Judge Easterbrook noted in Illinois Corporate Travel, a "no-advertising rule . . . is easily enforceable because advertising of discounts is observable." 806 F.2d at 727.

[9] In a case in which automobile dealers conspired to oppose invoice advertising (which is advertising the price as a fixed percentage or sum above the dealer's invoice), the Justice Department recently reached the conclusion that "an agreement by a trade association or its members not to engage in certain types of advertising is a *per se* violation of the antitrust laws." Competitive Impact Statement regarding proposed Final Judgment in *United States v. National Automobile Dealers Ass'n*, Civ. Action No. 95-1804 (D.D.C. filed Sep. 20, 1995) at 6, reprinted in 60 Fed. Reg. 51,491, 51,498 (Oct. 2, 1995).

The professional context of this restraint does not lead to a different conclusion. In AMA, we ultimately refrained from classifying the price advertising restraints as *per se* illegal largely due to our hesitation to speak categorically about restrictions by professional associations, which at the time had "not previously been subject to extensive scrutiny under the antitrust laws." 94 FTC at 1003. *See also White Motor Co. v. United States*, 372 U.S. 253, 263 (1963) ("We do not know enough of the economic and business stuff out of which these arrangements emerge to . . . decide whether they . . . should be classified as *per se* violations."); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 788-89 n.17 (1975) ("It would be unrealistic to view the practice of professions as interchangeable with other business activities."). The Supreme Court had just decided Professional Engineers under a truncated analysis, but without expressly declaring that it was subjecting the association's prohibition against competitive bidding to *per se* treatment. Since then, however, it has become clear that the Court in that case did essentially apply a *per se* rule to the agreement. *See Catalano*, 446 U.S. 643; *In re Detroit Auto Dealers Ass'n, Inc.*, 955 F.2d 457, 471 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 461 (1992); *Michigan State Medical Society*, 101 FTC at 290.[10] And both the Commission and the courts have in the interim gained considerable exposure to anticompetitive activities by professional associations.[11]

[10] Although in Professional Engineers the Supreme Court did not expressly identify the approach it used as *per se*, this now appears to have been merely a matter of terminology, rather than analytical significance. The Court's opinion in Professional Engineers placed both the abbreviated, categorical approach as well as the individualized, contextual examination under the umbrella label "rule of reason." *See* 435 U.S. at 691-692. It explained that the first applies to "agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality -- they are 'illegal *per se*,'" whereas the second encompasses "agreements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed." *Id.* at 692. It then termed the ban on competitive bidding "illegal on its face," noting that "[w]hile this is not price fixing as such, no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement." *Id.* Finally, it noted: "Ethical norms may serve to regulate and promote this competition, and thus fall within the Rule of Reason. But the Society's argument in this case is a far cry from such a position." *Id.* at 696.

Since that case, the Court has returned to applying the label "rule of reason" to the second approach only, as a means to distinguish it from the *per se* category. Although the Court has at times quoted from Professional Engineers as though the case had applied the individualized rule of reason, *see, e.g., Indiana Federation of Dentists*, 476 U.S. at 459, the Court has elsewhere indicated that the approach it used in *Professional Engineers* was indeed what we generally would term *per se*, *see Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 647 (1980). We use the term "rule of reason" when speaking about the individualized analysis, in contradistinction to the categorical, *per se* approach.

[11] *See, e.g., FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990); *FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986); *Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982); *Wilk v. American Medical Ass'n*, 895 F.2d 352 (7th Cir. 1990), *cert. denied*, 496 U.S. 927 (1990); *Massachusetts Board of Registration in Optometry*, 110 FTC 549 (1988); *Michigan*

To be sure, the "'public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently.'" *Maricopa*, 457 U.S. at 348-49 (quoting *Goldfarb*, 421 U.S. at 788 n.17). By the same token, however, in cases involving agreements not "premised on public service or ethical norms," the Supreme Court has repeatedly applied the *per se* rule. *Id.* at 349. *Cf. Wilk v. American Medical Ass'n*, 719 F.2d 207 (7th Cir. 1983) ("an agreement to fix prices will not escape *per se* treatment simply because it is entered into by professionals and accompanied by ethical protestations [, whereas] . . . a canon of medical ethics purporting, surely not frivolously, to address the importance of scientific method gives rise to questions of sufficient delicacy and novelty at least to escape *per se* treatment"), *cert. denied*, 467 U.S. 1210 (1984). Recently, for example, in Superior Court Trial Lawyers, the Court had no trouble deciding that *per se* treatment was called for when lawyers entered into a horizontal agreement to fix prices, the professional context notwithstanding. 493 U.S. 411. Furthermore, our own decision in Michigan State Medical Society, which purportedly refrained from applying the *per se* rule, nonetheless noted that the *per se* standard can apply in the professional setting even where the conspiracy does not set specific prices or fees. 101 FTC at 290. And in Massachusetts Board of Optometry we found that even in the context of professional rules, restraints on truthful advertising "are inherently likely to produce anticompetitive effects," and that a ban on discount advertising for professional services impedes new entry and the efficient use of resources by eliminating a form of price competition. 110 FTC at 605. In that case, we summarily condemned the price advertising restraints. *Id.* at 607.[12] We therefore believe it to be well grounded in this experience and in precedent to strip CDA's price advertising restrictions of their professional garb and declare them *per se* unlawful as naked restraints on price competition.

The examination of a practice, however, does not inevitably come to rest after it has been identified as falling into the category of *per*

State Medical Society, 101 FTC 191 (1983); *National Ass'n of Social Workers*, 58 Fed. Reg. 17,411 (April 2, 1993) (consent order issued March 3, 1993); *American Psychological Ass'n*, 57 Fed. Reg. 46,028 (Oct. 6, 1992) (consent order issued Dec. 16, 1992); *American Inst. of Certified Public Accountants*, 113 FTC 698 (1990) (consent); *Oklahoma Optometric Ass'n*, 106 FTC 556 (1985) (consent); *Association of Independent Dentists*, 100 FTC 518 (1982) (consent).

[12] *Cf. Detroit Auto Dealers*, 955 F.2d at 470-71 ("We believe that the inherently suspect conclusion arises from a *per se* approach by the Commission . . .").

se unlawful bans on price competition. Under *Broadcast Music*, 441 U.S. 1, and *NCAA*, 468 U.S. 85, respondent might attempt to argue that its practice is a restraint on price competition "in only a literal sense." *Maricopa*, 457 U.S. at 355. Arguments that might carry weight under *Broadcast Music*'s characterization approach, however, have not been advanced here.[13] Respondent urges only in the most general sense that its restrictions are procompetitive in that they are intended to protect consumers from unfair and deceptive advertising. But respondent has entirely failed to explain why it is unfair or deceptive to advertise an across-the-board discount without disclosure on the face of the advertisement of the regular fee of each service covered by the discount, or how consumers are harmed by an advertisement that announces with a reasonable basis for its truthfulness (let alone truthfully) that the prices charged are low as compared to other providers in the area.

CDA's restraints on price advertising are thus illegal *per se*. In the course of discussing the nonprice advertising restraints under the rule of reason in the next section, however, we will also reexamine the restraints on price advertising under that more elaborate analysis, but solely as a means of demonstrating that, assuming *arguendo* the restraints had escaped censure under the *per se* approach, they would nonetheless have been condemned under the rule of reason.

B. *Rule of Reason -- Restraints on Price & Non-Price Advertising*

Unlike price advertising restraints, which have in one form or another received ample consideration by the courts and fit squarely within the Sherman Act's core prohibition against the collusive suspension of price competition, CDA's restrictions on nonprice advertising are entitled to an examination under the rule of reason. With regard to these restraints, we cannot say with equal confidence that, as a facial matter, CDA's concerns are unrelated to the public service aspect of its profession, or that "the practice facially appears

[13] We agree with Commissioner Starek that it would be a grave error to chart a course on which "potential competitive benefits of agreements restricting price advertising need never trouble the Commission again." Post, at 2. The *per se* rule as articulated in recent cases by the Supreme Court and as applied by the Commission today, however, runs no such risk. To the contrary, we have been open to arguments that might carry weight under *Broadcast Music*, but CDA has simply failed to assert the requisite competitive benefits that might save it from *per se* condemnation. Commissioner Starek certainly is not suggesting that significant, pro-competitive benefits have been overlooked in this case. The view that the Commission's reasoning foreshadows summary condemnation for a vast array of future cases, *see, e.g.*, Post at 2, 7, therefore, overstates our conclusion here. Only cases involving equivalent conduct will be accorded similar treatment in the future.

to be one that would always or almost always tend to restrict competition and decrease output." *Broadcast Music*, 441 U.S. at 19-20. Thus, mindful of the Court's general reluctance to adopt a *per se* approach in reviewing codes of conduct of professional associations, and heeding the Court's admonition not to expand the *per se* category "until the judiciary obtains considerable rule-of-reason experience with the particular type of restraint challenged," *Maricopa*, 457 U.S. at 349 n.19, we refrain from extending *per se* treatment to the restrictions on nonprice advertising and apply the default, rule-of-reason analysis instead.[14]

The Supreme Court has made clear that the rule of reason contemplates a flexible enquiry, examining a challenged restraint in the detail necessary to understand its competitive effect. *See, e.g.*, *NCAA*, 468 U.S. 103-110. As will be seen, here, application of the rule of reason is simple and short. The anticompetitive effects of CDA's advertising restrictions are sufficiently clear, and the claimed efficiencies sufficiently tenuous, that a detailed analysis of market power is unnecessary to reaching a sound conclusion, and, in any event, CDA clearly had sufficient power to inflict competitive harm.

1. The Likely Anticompetitive Effects of the Restraints

Although the ALJ did not examine the effects of CDA's rules in as much detail as he might have, the record demonstrates that each of the restraints, not only those on price advertising, has anticompetitive effects. The nonprice advertising CDA proscribes is vast. In addition to making general prohibitions against false or deceptive advertising, CDA forbids quality claims. Advisory Opinion 8 to Section 10 of CDA's Code of Ethics urges against quality claims:

> "Advertising claims as to the quality of services are not susceptible to measurement or verification; accordingly, such claims are likely to be false or misleading." CX 1484-Z-50.[15]

In practice, CDA prohibits all quality claims. For example, CDA recommended denial of membership to one dentist because her advertising included the phrase "quality dentistry," which CDA maintained was not susceptible of verification, CX 387-C,

[14] We do not decide, however, whether, as a general matter, restrictions on nonprice advertising will always escape condemnation under the *per se* rule of illegality.

[15] *Cf.* CDA Code of Ethics, Section 10, CX 1484-Z-49 (prohibiting advertising that is "false or misleading in any material respect").

recommended denial of membership to another because he included in his advertising the phrase "we are dedicated to maintaining the highest quality of endodontic care," which CDA cited as being unverifiable, CX 1083-C, and initially denied membership to yet another dentist because his advertisement of "improved results with the latest techniques" and "latest in cosmetic dentistry," was allegedly likely to create false or unjustified expectations of favorable results as to the quality of service and was not subject to verification, CX-306.

Furthermore, albeit without coextensive written regulations, CDA suppresses claims of superiority and the issuance of guarantees.[16] For example, in 1993, when a dentist reapplied for membership, CDA recommended that he be counseled regarding his advertising because of a representation of superiority, *i.e.*, the claim that "all of our handpieces (drills) are individually autoclaved for each and every patient." *See* CX 671-A. CDA also routinely cited applicants or members for implying superiority by use of the phrase "state of art," as in one dentist's advertisement of "state-of-art sterilization," CX 43-B. *See also, e.g.*, CX 1026-A ("state of the art dental services"); CX 394-B ("highest standards in sterilization"). In 1992, CDA found an advertisement containing the phrase "we can provide the uncompromised standards of excellence you demand" to be an impermissible representation of superiority. CX 354. With respect to guarantees, CDA prohibited such claims as "we guarantee all dental work for 1 year," CX 668-C; CX 557-C, or "crowns and bridges that last," CX 497-C.

CDA has also, on occasion, imposed special burdens on dentists claiming that they offer "gentle" care, CX 70-A, although its activities on that score appear to be less sweeping in recent years than those of CDA's component societies. *See* IDF 208-15. And finally, CDA passed a resolution in 1984 (to which the organization still adheres today), providing:

"[I]t is the position of the Judicial Council that solicitation of school children on any private or public school ground(s) is deemed not to elevate the esteem of the dental profession." CX 1115-A.[17]

[16] CDA does have a provision that may be read to address superiority claims, *i.e.* Section 22 of its Code of Ethics which provides that "[t]he dentist has the further obligation of not holding out as exclusive any agent, method or technique." CX 1484-Z-53. CDA's enforcement record, however, reveals a complete prohibition of superiority claims.

[17] *Cf.* CDA Code of Ethics, Section 10, CX 1484-Z-49 ("In order to properly serve the public, dentists should represent themselves in a manner that contributes to the esteem of the public.").

In the course of enforcing that policy statement, CDA informed a component in 1993 that when dentists participate in school screenings and include their name and address on the screening document sent home to the parents, such activity "can be construed to be a form of [prohibited] solicitation . . . ." CX 1167-A.

In addition to the findings in earlier cases regarding the anticompetitive effects of broad restrictions on the truthful and nondeceptive advertising of a service, *see, supra*, discussion at the beginning of Part V, in this case there is substantial evidence that the restrictions imposed by CDA prevented the dissemination of information important to consumers and the advertising of aspects of a dental practice that form a significant basis of competition among California's dentists. For example, the ALJ found that information not only about price of service, but also about quality and sensitivity to fears is important to consumers and determines, in part, a patient's selection of a particular dentist. IDF 265-67. He also credited the testimony of the owner of an advertising agency that specializes in serving dental practices, who testified that advertising the comfort of services will "absolutely" bring in more patients, and that, conversely, restraints on advertising of the quality or discount of dental services would decrease the number of patients a dentist could attract. IDF 265. In one case, the elimination of the phrase "gentle dentistry in a caring environment" meant sacrificing an advertisement that had attracted 300 new patients within six months. IDF 286. The ALJ also found that the prohibition on distributing identifying information during school screenings resulted in a loss of potential customers. IDF 302.[18]

The importance to consumers of advertising of various characteristics of dental services is confirmed by other witnesses as well. For example, Dr. Richard Harder, who closely monitored the results of his various advertising techniques, testified that generic advertising without comparative quality or price claims was rather ineffective, attracting only 15-20 new patients a month, but that a subsequent campaign based on advertising a special fee for new patients, as well as a dedication to quality of service and family dentistry, brought in between 75 and 100 new patients a month.

[18] The manner in which CDA impairs new entry of competitors is particularly well illustrated by price advertising restraints, such as citations for advertising "Grand Opening Special $5 exam x-ray, $15 polishing and 40% off dental treatment," CX 828-D, "as a get acquainted offer, an initial consultation, complete exam, any x-rays and tooth cleaning will be done for only $5 (applies to all members of your family)," CX 657, and "we guarantee all dental work for 1 year," CX 668-C.

After being contacted by the local society and threatened with discipline, Dr. Harder eliminated all references to quality and family, which contributed to an observed reduction in the number of new patients coming into his practice. T. 262-74. Dr. John Miley's practice experienced a similar surge in new customers through advertising that included references to the quality and superiority of his services, as well as to the fact that he offered discounts and low prices. T. 316-457; CX 723.

As is therefore evident from the record, the restraints hamper dentists in their ability to attract patients to their practice and thereby are likely to reduce output. More important for our purposes, the restrictions thus deprive consumers of information they value and of healthy competition for their patronage. Even without quantifying the increase in price or reduction in output occasioned by these restraints, we find the anticompetitive nature of these restraints to be plain. *See AMA*, 94 FTC at 1006.

2. Market Power

Although the ALJ found that the suppression of advertising "has injured those consumers who rely on advertising to choose dentists," he spelled out a second conclusion, rather in tension with the first, that CDA lacked market power. ID at 76. The ALJ concluded that complaint counsel had failed to establish the relevant product and geographic markets, and decided, on the ground that there was no "insurmountable obstacle to entry" into the dental market, that "CDA could not exercise market power in any relevant geographic market, whether statewide, regional, or local." ID at 76. We reject that conclusion.

Market power is part of a rule of reason analysis, but it is important to remember why market power is examined.[19] We consider market power to help inform our understanding of the competitive effect of a restraint. Where the consequences of a restraint are ambiguous, or where substantial efficiencies flow from a restraint, a more detailed examination of market power may be needed. Here, in contrast, the ALJ found, and we agree, that the suppression of advertising "has injured those consumers who rely on

[19] The Supreme Court has indicated that when a court finds actual anticompetitive effects, no detailed examination of market power is necessary to judge the practice unlawful. *See NCAA*, 468 U.S. at 109-10; *Indiana Federation of Dentists*, 476 U.S. at 461.

advertising to choose dentists" (the record indicates that significant numbers of such consumers indeed exist), and none of the practices can rely for support on a valid efficiency justification. To the extent that market power is relevant, it suffices that the association has the power to withhold from consumers the relevant information that they seek.[20] And as we shall explain presently in further detail, CDA has the ability to identify violators of the agreement and the necessary market power to enforce this ban over sufficiently large segments of the market to deprive consumers of valuable information.

When examining the market power of an association's restriction on members who are the primary economic actors, we confront two closely related questions. First, whether viewed as a question of market power or of the existence of an agreement, we must determine whether the association has the ability successfully to impose the restriction on its members. If the association is unable to gain its members' adherence to the rule such that the market continues to function as it had before, the restraint will become an irrelevant formality of little concern to antitrust regulators. If, however, the association is able to induce its current members to follow the rule, and is not reduced significantly by attrition, we must turn to the second question, which asks whether the association has the necessary power to cause harm to consumers by imposing the rule on its members. For if alternative sources for the service offered by the association's members are so prevalent as to permit consumers easily to switch to providers who are unfettered by the rule, even a well-enforced restraint should cause no harm to the efficient functioning of the market. Members will simply lose business, nonmembers' business will surge, and the market will eventually cure itself. If, on the other hand, consumers' abilities to turn elsewhere are limited, the association is in a position to harm consumers by adopting restrictive rules. This turns out to be the case here.

[20] In *Indiana Federation of Dentists*, 476 U.S. at 459, the Court examined "a horizontal agreement among the participating dentists to withhold from their customers a particular service that they desire," and concluded:

"'While this is not price fixing as such, no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement.' National Society of Professional Engineers, *supra*, at 692. A refusal to compete with respect to the package of services offered to customers, no less than a refusal to compete with respect to the price term of an agreement, impairs the ability of the market to advance social welfare by ensuring the provision of desired goods and services to consumers at a price approximating the marginal cost of providing them. Absent some countervailing procompetitive virtue -- such as, for example, the creation of efficiencies . . . such an agreement limiting consumer choice by impeding the 'ordinary give and take of the market place,' National Society of Professional Engineers, *supra*, at 692, cannot be sustained under the Rule of Reason."

There is little doubt that CDA has the ability to police, and entice its members to adhere to, the restrictions on advertising. Unlike an individual sales transaction, advertising is a public, conspicuous event that is easily monitored. *Cf. Illinois Corporate Travel*, 806 F.2d at 727 (finding no-advertising rule "easily enforceable" because advertising "is observable"). Many components review the Yellow Pages phone listings at the behest of CDA, IDF 146, and CDA investigates complaints about dentists' advertising. There is no evidence in the record of rampant advertising that has failed to come to CDA's attention. Next, it is clear that dentists place a high value on the benefits of membership in CDA, whether because of its insurance and educational programs or the reputational advantage that membership may confer. IDF 268-74; *see also, e.g.*, T. 376-92. We need not quantify this benefit econometrically, since in this case the record speaks for itself. When faced with a choice between membership and advertising, dentists overwhelmingly choose the former. Several component Ethics Committee officials testified that their members were in perfect or near-perfect compliance with the advertising code and that they knew of not a single instance in which a member dentist had refused to modify or discontinue the challenged advertising. IDF 275-86. Numerous applicants had, of course, already changed their advertising in order to gain admission to CDA in the first place. *See, e.g.*, CX 670-71, CX 365-66, CX 249.[21] Moreover, this stranglehold on the profession extends well beyond actual members to include employers, employees, and business referral services of members, since these are equally prohibited by CDA from engaging in advertising that violates CDA's Code of Ethics (whenever such advertising indirectly benefits the member). IDF 287-93; *see* CX 1358-B.

[21] Quite contrary to Commissioner Azcuenaga's suggestion that "it seems questionable to infer that dentists feared the CDA instead of the state of California," Post, at 27, the record bears out just that. For example, Dr. Jenkins' capitulation when he "disagree[d] with [CDA's] findings" but decided to "disagree agreeably" and promise that "[t]he statements in question will no longer be used in any mailings from this office," CX 480, evidences that it was this dentist's desire to become a member of CDA, not a concern about state law, that drove him to comply with CDA's Code of Ethics. Similarly, Dr. Foroosh's seven-year battle for admission to CDA, CX 360-366, was clearly motivated by a desire to gain admission to the Association, not to seek continual guidance from CDA about state law. *See also* CX 302-398 (Dr. Eric Debbane, gaining membership with fourth application). Indeed, two dentists who had apparently cleared their advertisement with the Board of Dental Examiners, nonetheless eliminated all references to "uncompromised standards or outstanding success rates" after they were contacted by respondent and informed that respondent is a separate entity from the Board. CX 355, 357, 358. The record thus contains ample confirmation of the importance of membership and its power to compel the alteration of dentists' advertising practices. *See also, e.g.*, IDF 285 (disagreement with CDA's conclusion but promise to cure advertising); IDF 268-274 (members' statements regarding value of membership).

Here, this kind of power goes hand in glove with the second, that is the ability successfully to withhold information from consumers. Without much theoretical analysis, it can be readily concluded from the record, common sense, and the California Business and Professions Code that the services offered by licensed dentists have few close substitutes and that the market for such services is a local one. *See* Cal. Bus. & Prof. Code Sections 1625-1626 (defining dental services that can be performed only by licensed dentists); T. 637 & 655 (Christensen) (testifying that dental market is local); *see also Indiana Federation of Dentists*, 476 U.S. at 461 (noting that "markets for dental services tend to be relatively localized"). Even respondent's expert witness agreed that the provision of dental services "could be" a relevant product market, *see* T. 1689 (Prof. Knox), and his view on the relevant geographic market was that California consists of numerous markets, each "smaller than the [entire] State," since "dental services are bought and sold . . . in a more disaggregated market," T. 1642 (Prof. Knox). CDA commands more than a substantial share of these markets. Around 75 percent of the practicing dentists in California belong to CDA, IDF 2, and, according to one component society, the figure exceeds 90 % in at least one region, CX 1433. Given CDA's success in enforcing its rules, and the extended reach of its prohibition to various associates of member dentists, we can only assume that even these numbers understate CDA's real market share.

While market share alone might not always be a sufficient indicator of market power, it may nonetheless be relied upon at least where there are significant barriers to entry. For example, in *Michigan State Medical Society*, 101 FTC at 292 n.29, we explained that "there is little need for an elaborate market definition analysis in this case, since MSMS' members account for roughly 80% of the physicians in Michigan." We concluded in that case that, as a result, "no matter how the relevant product or geographic markets might be characterized, the potential impact of the agreements in question is substantial." *Id.* The Seventh Circuit has similarly indicated that reliance on market share can be appropriate, and is "especially so where there are barriers to entry and no substitutes from the consumer's perspective." *Wilk v. American Medical Ass'n*, 895 F.2d 352, 360 (7th Cir.), *cert. denied*, 496 U.S. 927 (1990) (citation omitted). In addition to the absence of substitutes, however, in the present case there are entry barriers as well.

Barriers to entry figure prominently in California's market for dental services. As an initial matter, we note that it has never been held, as the ALJ appears to believe, that barriers to entry are cognizable in antitrust analysis only when they are "insurmountable," ID at 76, or, as respondent's expert witness thought, only if they are created by the association accused of engaging in anticompetitive practices, IDF 322. And we disagree with respondent's expert witness that costs incurred to enter the market are irrelevant whenever similar costs were borne by current market participants when they first entered the market. *See* T. 1636-1640.[22]

In our view, the record bears out the conclusion that entry into the California dental market is difficult. In addition to facing the substantial educational requirements, which according to one witness leave students coming out of dental school with between $50,000 and $100,000 of debt, a dentist who seeks to establish a practice must either lease or purchase the necessary space and equipment and hire appropriate personnel, or must purchase an existing practice (the costs of which according to one witness range between $75,000 and $100,000). After setting up the practice, and provided a dentist is able to attract a sufficient clientele, it can take from 18 months to 2 years for a practice to meet current expenses, and between 5 and 10 years to amortize the debt. *See* IDF 329-31; T. 297-300 (Dr. Harder); T. 329-31 (Dr. Miley); T. 756-64 (Dr. Hamann). Thus, new entry into the dental profession in California is difficult. And given these startup costs, a good deal of which even an active dentist who seeks to relocate to California would face, the idea that fully licensed dentists from other states would move in significant numbers to California to take advantage of the opportunity to advertise in competition with members of CDA is implausible at best.

Even easy entry at the level of opening a dental practice would not necessarily mean that the Association could not exercise market power. If the Association membership confers a real economic benefit that cannot be easily replicated, then exclusion from the Association may impose a real economic cost on potential entrants. Here, CDA membership entails significant benefits for the dentist as demonstrated by the fact that no one gives up membership in order

[22] A combination of these three beliefs led the ALJ to credit the testimony by respondent's expert witness that CDA's activities had "no impact on competition in any market in the State of California." IDF 322, 326. As indicated in the text, we reject that conclusion.

to gain the freedom to advertise -- including those inclined to advertise but directed not to by CDA.

We therefore conclude that CDA possesses the necessary market power to impose the costs of its anticompetitive restrictions on California consumers of dental services.

3. Efficiencies

As the third step in our quick look, we examine the efficiency justifications proffered by respondent together with any others that might be raised in support of CDA's restraints on advertising. Respondent contends that insofar as its advertising restraints are not harmless, they are procompetitive because CDA challenges only advertising that is false or misleading. Although the prevention of false and misleading advertising is indeed a laudable purpose, the record will not support the claim that CDA's actions are limited to advancing that goal.

Under Section 5 of the FTC Act, an advertisement is deceptive "if it is likely to mislead consumers acting reasonably under the circumstances in a material respect." *Kraft, Inc. v. FTC*, 970 F.2d 311, 314 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 1254 (1993) (citation omitted); *see also Southwest Sunsites, Inc. v. FTC*, 785 F.2d 1431, 1435-36 (9th Cir. 1986), *cert. denied*, 479 U.S. 828 (1986); *Thompson Medical Co.*, 104 FTC 648, 788 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987). A practice is not considered "unfair" under the Act unless it engenders substantial consumer injury that is not reasonably avoidable by the consumer and not outweighed by countervailing benefits to consumers or competition. *See* FTC Act Amendments of 1994, Section 9, 108 Stat. 1691, 1695, to be codified at 15 U.S.C. 45; Letter from FTC to Hon. Wendell Ford and Hon. John Danforth, Committee on Commerce, Science and Transportation (Dec. 17, 1980), reprinted in Appendix to *International Harvester Co.*, 104 FTC 1070 (1984). Without a significant additional proffer, which CDA has not made, the types of advertising claims categorically prohibited by CDA's stated policies and enforcement efforts could not reasonably be thought to be either deceptive or unfair under Section 5.

First, CDA prohibits even truthful offers of discounts by dentists unless the advertisement states the regular price of the discounted service. Where the discount applies to numerous services (for

example, a senior citizens discount on all services), the practical effect of this requirement has been to forbid the advertising entirely. However, the truthful offer of a discount from the price ordinarily charged by a dentist for services is not deceptive. The offer of a discount can, of course, be misleading if the advertiser selectively inflates the price from which the discount is computed or offers "discounts" to everyone from a fictitious "regular" price. *See, e.g., Encyclopedia Britannica, Inc.*, 100 FTC 500, 505 (1982) (order modifying consent order); *Diener's, Inc.*, 81 FTC 945, 976-78, 980-81 (1972), *modified*, 494 F.2d 1132 (D.C. Cir. 1974); *Paul Bruseloff*, 82 FTC 1090, 1095-96 (1973) (consent). But there is no suggestion here that CDA merely prohibited discount claims by dentists found individually to have engaged in such chicanery, or that CDA had evidence of significant abuse of discount claims that might provide support for a prophylactic ban. Instead, CDA effectively prohibited across-the-board discount offers, whether truthful or not. No purported policy of preventing deception can justify that approach.[23]

Similarly, the law of deception does not prohibit broadly all representations that a seller's prices are "low" or a "bargain" in relation to others, and certainly not where the representations are accurate or can be substantiated. *See Tashof v. FTC,* 437 F.2d 707, 710-11 (D.C. Cir. 1970) (comparing discount offers to prevailing prices). Once again, CDA's policy is to condemn categorically all representations regarding "low" or "affordable" prices, without any enquiry as to how those terms might be construed by consumers and whether, as construed, they are true of the particular practitioner making the claim.

CDA's condemnation of guarantees is likewise overbroad. While a guarantee of a specified medical outcome may well be misleading, a truthful promise to refund money (or to honor scheduled appointments) is certainly not. Commission guidelines identify the obligations of those who advertise guarantees. *See* Guides for the Advertising of Warranties and Guarantees, 16 CFR Part 239 (1985). Barring some information that an advertiser has misrepresented or

[23] CDA suggests that its approach to discount advertising may be justified by reference to the Supreme Court's stated preference for "more disclosure, not less" in dealing with the regulation of deceptive speech under the First Amendment. Brief for respondent 37-38 (citing *Bates v. State Bar of Arizona*, 433 U.S. 350, 375 (1977)). But the Court has expressed its preference for affirmative disclosures only as an alternative to prohibiting otherwise deceptive speech. Moreover, where, as here, speech is truthful and not misleading, the Supreme Court has shown great skepticism towards disclosure mandates that so burden the speech as to preclude it. *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 389-90 (1992).

failed to honor a guarantee, such advertising cannot presumptively be condemned as deceptive.

In the same vein, CDA's broad prohibition on claims relating to the absolute or comparative quality of service finds no support in the law governing deception. Some general claims of quality, of course, are so recognizably statements of personal opinion that no substantiation is either possible or expected by reasonable consumers. Such "mere puffing" deceives no one and has never been subject to regulation. *See* Federal Trade Commission Policy Statement on Deception, 103 FTC 174, 181 (1984) (appended to *Cliffdale Associates*); *Bristol-Myers Co.*, 102 FTC 21, 321 (1983), *aff'd*, 738 F.2d 554 (2d Cir. 1984), *cert. denied*, 469 U.S. 1189 (1985); *Pfizer, Inc.*, 81 FTC 23, 64 (1972).

Respondent refers to the Supreme Court's suggestion in *Bates*, 433 U.S. at 383-84, that "'advertising claims as to the quality of [legal] services . . . are not susceptible of measurement or verification; accordingly such claims may be so likely to be misleading as to warrant restriction.'" Brief for respondent 44 (quoting Bates, *supra*). We do not understand this language, however, to justify broad categorical prohibitions on quality claims of all sorts, without some effort to determine their accuracy or effect upon consumers. As the Court has more recently observed:

> "Our recent decisions involving commercial speech have been grounded in the faith that the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful." *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 478 (1988) (quoting *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 646 (1985)).

Insofar as claims of absolute or comparative professional quality (including claims made to alleviate patient anxiety) do implicate objective standards for which consumers would reasonably expect an advertiser to have proof, they may, of course, be proscribed upon a showing that particular claims are false or unsubstantiated. In our view, the requisite showing requires proof that specified claims are untrue or that advertisers lack "a reasonable basis for advertising claims before they are disseminated." FTC Policy Statement Regarding Advertising Substantiation, 104 FTC 648, 839 (1983) (appended to *Thompson Medical Co., Inc.*). Likewise, even assuming *arguendo* that claims of quality and efficacy may so readily be

equated with claims of superiority as many of CDA's interpretations appear to suggest, *see* IDF 194-204, the Commission "evaluates comparative advertising in the same manner as it evaluates all other advertising techniques," and "industry codes and interpretations that impose a higher standard of substantiation for comparative claims than for unilateral claims are inappropriate." Statement in Regard to Comparative Advertising, 16 CFR 14.15(c)(2).

Departing from its deception rationale, CDA seeks to justify its prohibition against dentists' provision of identifying information in school screening programs as a means of preventing exploitation of youthful consumers. This defense is inapt. While efforts to exploit youthful consumers and other particularly vulnerable groups have been challenged and condemned as deceptive and unfair in a variety of contexts,[24] that rationale is misplaced here, given that the only apparent commercial effect of furnishing the prohibited identifying information to children could be to provide their parents with the means of contacting the dentist.

We do not mean to deny that advertising that would otherwise be permissible might be harmful in the context of promoting dental services. *See, e.g., AMA*, 94 FTC at 1026 ("[W]hat may be false and deceptive for doctors may be permissible for sellers of other products and services. Harmless puffery for a household product may be deceptive in a medical context."); *National Ass'n of Social Workers*, 58 Fed. Reg. 17,411 (April 2, 1993) (consent order issued March 3, 1993) (prohibiting NASW from restricting advertising and solicitation, except insofar as it adopts reasonable principles regarding, *inter alia*, solicitation of testimonial endorsements from current psychotherapy patients); *American Psychological Ass'n*, 57 Fed. Reg. 46,028 (Oct. 6, 1992) (consent order issued December 16, 1992) (same). The advertising that a service is "painless," for example, may be inherently deceptive and harmful when used by a practicing dentist, whereas a similar claim by, say, an institution offering evening courses toward completion of a college diploma probably would not. But CDA has offered no convincing argument, let alone evidence, that consumers of dental services have been, or

[24] *See, e.g., ITT Continental Baking Co., Inc.*, 83 FTC 865, 872 (1973), *aff'd*, 532 F.2d 207 (2d Cir. 1976) (finding advertisements tended to exploit emotional concerns of parents for children); *In re Travel King, Inc.*, 86 FTC 715, 774 (1975) (holding deceptive the sale of "psychic surgery" to terminally ill patients); *Phillip Morris, Inc.*, 82 FTC 16 (1973) (consent) (prohibiting distribution of unsolicited razor blades); *H.W. Kirchner*, 63 FTC 1282, 1290 (1963) ("If, however, advertising is aimed at a specially susceptible group of people (*e.g.* children), its truthfulness must be measured by the impact it will make on them, not others to whom it is not primarily directed.").

are likely to be, harmed by the broad categories of advertising it restricts. *See* ID at 74-75. Indeed, as far as we can tell, advertising complaints typically came from fellow dentists, not from disappointed patients. *See, e.g.*, T. 849 (Dr. Abrahams), T. 926 (Dr. Yee).

We thus see no basis in this case for concluding that the advertising swept aside by CDA with broad strokes is categorically false, deceptive, or unfair.[25]

4. Rule of Reason -- Conclusion

As our quick look under the rule of reason reveals, the advertising restrictions are likely to have anticompetitive effects, CDA has the necessary market power to harm competition by adopting the restraints, and there are no countervailing efficiencies or other business justifications that would justify the imposition of this kind

[25] In the light of CDA's practice, therefore, Commissioner Azcuenaga's insistence on further illumination of the "factual background" of "many of the letters" reprimanding dentists for their advertising is simply misplaced. *See, e.g.*, Post, at 19. The citations discussed in the text do not provide further detail regarding the surrounding circumstances of the reprimand because the factual background against which the advertising claim was made was generally of little concern to CDA when it admonished the dentist involved.

For example, MARS was not concerned with any surrounding factual circumstances when it noted that "use of the words 'Affordable Prices,' is an inexact reference to fees, and therefore, violates . . . the CDA Code and Dental Practice Act," CX 772-A (1991), that "by using the phrase 'High Standards in Sterilization,' [dentists] are advertising in violation [of state law and the CDA Code of Ethics for] advertising the performance of services in a superior manner," CX 394-B (1993), that a dentist "should avoid any statements that imply superiority in any future advertisements published on his behalf," CX 780-A (1992) (emphasis added), that "the phrase ['We Guarantee All Dental Work For 1 Year] is a guarantee of dental services and, therefore, violates [state law and may subject the advertising dentist to disciplinary action by the association]," CX 557-C (1992), that "use of the phrase '10% Senior Citizen Discount,' violates [state law and CDA's Code of Ethics] by failing to list the dollar amount of the nondiscounted fee for each service, and inform the public of the length of time, if any, the discount will be honored," CX 585-A-B (1991), or that an advertisement, "'Call our office before December 31, 1992 and our gift to you and your family will be a Complete Consultation, Exam and X-rays (if needed) ... [for only] a $1.00 charge to you and your entire family with this coupon,'" violated state law and CDA's Code of Ethics because it "fails to list the dollar amount of the non-discounted fee for each service," CX 444-A-B (1993). *See* generally Complaint Counsel's Proposed Findings of Fact, Volume III, Proposed Findings 580-949, and exhibits cited therein.

Furthermore, contrary to the suggestion by the dissent, it is immaterial that any given CDA censure was, perhaps, only one among a series of criticisms CDA issued with regard to that particular dentist. *Cf.* Post, at note 20 ("The reference to 'quality dentistry' is one of several claims discussed in the MARS letter, and it appears that the committee's action was based partly on a finding that the dentist in question advertised that she was a member of the ADA when she was not.") (discussing CX 387-B); *see also, e.g., Id.*, at note 21 (discussing CX 478 and noting Judicial Council's objection to dentist's claim that laser surgery is revolutionary, while neglecting to note that dentist was also discouraged from advertising "gentle, comfortable and affordable" dentistry). The point of our reference to one of the restrictions that are at the heart of this case is that such advertising was held incompatible with membership in CDA. That message, regardless of whether it was coupled with citations for other (truly deceptive, unsubstantiated, false, or unfair) advertising as well, was clearly conveyed by CDA in each letter discussed in this opinion and in numerous others in the record.

of ban on broad categories of truthful and nondeceptive advertising. In short, CDA's advertising restrictions are unreasonable, make out a violation of Section 1 of the Sherman Act, and therefore violate Section 5 of the FTC Act. *See supra* note 5.

The result reached herein is not inconsistent with our earlier decisions in *Massachusetts Board of Registration in Optometry*, 110 FTC 549 (1988), and *Detroit Auto Dealers Ass'n, Inc.*, 111 FTC 417 (1989), *aff'd*, 955 F.2d 457 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 461 (1992), which our holding today does not disturb.[26] In Massachusetts Board of Optometry we viewed the law of horizontal restraints after NCAA and Broadcast Music as presenting a series of questions, beginning with whether the restraint is "inherently suspect," that is, "the practice [is of] the kind that appears likely, absent an efficiency justification, to 'restrict competition and decrease output,'" and, if so, whether the agreement is supported by a plausible and valid efficiency justification. *See* 110 FTC at 604. In that case we found the various advertising bans on discount advertising, affiliation advertising, use of testimonials, and sensational or flamboyant advertising to be inherently suspect, without a plausible efficiency justification, and, therefore, unlawful. *Id.* at 606-08. Following the same analytical steps in Detroit Auto Dealers, we likened an agreement among automobile dealers to limit showroom hours to a restriction on a form of output, found it inherently suspect and without a plausible efficiency justification, and thus declared it unlawful. 111 FTC at 494-99.

If the instant case had been analyzed under the framework of those cases, we would have reached the same conclusion as we do here since, following Massachusetts Board of Optometry, we would find the restraints inherently suspect and without plausible or valid efficiency justification. Conversely, Massachusetts Board of Optometry and Detroit Auto Dealers would have arrived at the same result, had they been analyzed under the more traditional rule of reason/*per se* approach we employ here, since the restrictions in those cases either would have been found *per se* unlawful, such as the ban on discount advertising in Massachusetts Board of Optometry, or

[26] With respect to Commissioner Azcuenaga's assertion that the majority opinion overrules the earlier Commission opinion in *Massachusetts Board of Optometry, see,* Post, at 1, 37, it is true that the majority recognizes the existence of *per se* and rule-of-reason categories -- an approach to antitrust analysis that may have been blurred in the earlier decision. As to the remaining analysis in Massachusetts Board of Optometry, the assertion that we directly or indirectly overrule that decision is not correct.

would have otherwise been shown to be unlawful under the rule of reason. A quick look at Massachusetts Board of Optometry, for example, would have demonstrated that the Board commanded sufficient market power since optometrists could not practice in the State without its approval, 110 FTC at 605, that restraints, such as those on affiliation advertising, were likely to have an anticompetitive effect (and had, in part, a proven effect of raising prices), *id.* at 605-06, and that there was no efficiency or other legitimate business justification for the practice, *id.* at 606-08. In Detroit Auto Dealers, in turn, the Sixth Circuit indeed rejected the Commission's use of the "inherently suspect" approach on the grounds that it appeared to "aris[e] from a *per se* approach," 955 F.2d at 471, but affirmed the Commission's decision nonetheless after satisfying itself that the agreement had actual or potential anticompetitive effects, that the automobile dealers possessed market power, and that there was no valid justification for the practice, see 955 F.2d at 469-72. In this case, then, we have simply applied what we repeatedly recognized as the more "traditional antitrust analysis," *Massachusetts Board of Optometry*, 110 FTC at 604 n.12, which does "not lead to different results" in the cases discussed, *Detroit Auto Dealers*, 111 FTC at 494 n.18.

VI. STATE LAW DEFENSE

Finally, we turn to CDA's argument that its actions are lawful due to the existence of similar restrictions imposed on advertising by the State of California. Ordinarily, a private party may properly invoke the "state action" defense only if first, the State has clearly articulated a policy to permit the allegedly anticompetitive practice, and second, the State is actively supervising the conduct at issue. *See FTC v. Ticor Title Insurance Co.*, 504 U.S. 621, 631 (1992) (citing *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980)); *Parker v. Brown*, 317 U.S. 341, 351-52 (1943). CDA loses under this and any other offered version of a defense based on state law.

CDA originally raised an affirmative defense that "[t]o the extent [the] restrictions alleged . . . [in] the complaint [amount to] conduct which is prohibited by state law, such restrictions are lawful," and CDA expressly disavowed that this contention amounted to assertion of a traditional "state action" defense. *See* Order Striking Affirmative

Defense at 1; Opposition to Motion to Strike Affirmative Defense at 3-4; Answer at 12. Presumably, and wisely we think, it declined to raise the traditional state action defense because CDA could present no argument that its activities were even remotely authorized or supervised by the State. CDA maintained, instead, that antitrust law should yield since California Business and Professions Code Sections 17,200 and 17,204 "authorize CDA to file a private right of action to prohibit violations of the Code,"[27] and more generally, "no anticompetitive effect results if an association's code of ethics incorporates state law, and one who violates state law is deemed to have violated the association's code of ethics." Opposition to Motion at 4. The ALJ struck the defense since, in the ALJ's view, it amounted in substance to a state action defense, which, as a facial matter, was unavailing in this case.

CDA has not entirely abandoned its attempt to find shelter under state law, maintaining this time around:

> "CDA reasonably believes that its interpretation of the Code of Ethics deters fraudulent advertising and advertising which is false or misleading in a material respect. The fact that during the relevant time period the State of California has also regulated advertising along the same lines as CDA in order to protect consumers from advertising that is false or misleading in a material respect further confirms the reasonableness of CDA's belief." Brief for respondent 38.

This argument is less than clear but, indulging respondent for the moment, we will break it down into the following formulations, which at one point or another during the course of this litigation have been advanced by CDA: (1) CDA's actions are immune under the state action doctrine; (2) CDA has a defense under the antitrust laws because its prohibitions are the result of good faith reliance on parallel strictures of California law; (3) CDA's actions are efficient or otherwise reasonable since it is following state law; and (4) CDA's restrictions cannot harm competition because state law already imposes identical (or substantially similar) burdens on advertising for dental services.

Both the California Code and the regulations promulgated by the State Board of Dental examiners do, on their face, impose restrictions

[27] Section 17,200 of the California Business and Professions Code simply defines the term "unfair competition," and Section 17,204 provides that actions for injunctions under that chapter may be prosecuted by, among others, "any person acting for the interest of itself, its members or of the general public." There is no intimation that the statute authorizes prosecutions for unlawful actions before private tribunals.

on advertising. *See* Cal. Bus. & Prof. Code Sections 651, 1680 (1994); Cal. Educ. Code Section 51,520; 16 Cal. Code of Reg. Sections 1050-1053 (1993). Some of these, such as, for example, the Board's regulation regarding discount advertising, mirror the restriction imposed by CDA.[28] Others, as, for example, the State's prohibitions on soliciting public school children, or on making superiority and guarantee claims, are clearly narrower in scope than CDA's policy.[29] CDA's defense, however, is inapt in either case.

The first version of CDA's state action defense comes up strikingly short on the grounds that the law never contemplated

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[28] Title 16, Section 1051 of the California Code of Regulations, promulgated by the Board of Dental Examiners, provides:

"An advertisement of a discount must:
(a) List the dollar amount of the non-discounted fee for the service; and
(b) List either the dollar amount of the discount fee or the percentage of the discount for the specific service; and
(c) Inform the public of length of time, if any, the discount will be honored; and
(d) List verifiable fees pursuant to Section 651 of the Code; and
(e) Identify specific groups who qualify for the discount or any other terms and conditions or restrictions for qualifying for the discount." 16 Cal. Code of Reg. Section 1051.

Although the ALJ appears to have concluded that the Board rescinded its elaborate disclosure requirement around 1985, IDF 237 (citing CX 1622), we are less convinced that the undated document on which the ALJ relied was issued in 1985. In light of the document's summary of Section 1680 of the California Business and Professions Code, we surmise instead that it dates from sometime between 1974 and 1978, and, since it appears that in 1975 the Board had not yet promulgated regulations regarding discount advertising, the document cited by the ALJ could just as well represent an articulation of the Board's view prior to promulgation of the more extensive disclosure standards. If that is indeed the case the document is simply superseded by Section 1051 of the Board's regulations.

In any event, we do not express an opinion on the potential conflict between Section 1051 of the regulations and subsection 651(i) of the California Business Code, which provides a counterbalance to demands for specificity:

"A board or committee shall not, by regulation, unreasonably prevent truthful, nondeceptive price or otherwise lawful forms of advertising of services or commodities, by either outright prohibition or imposition of onerous disclosure requirements."

[29] California Education Code Section 51,520 does not prohibit all distribution of identifying information to public and private students, but more narrowly provides:

"During school hours, and within one hour before the time of opening and within one hour after the time of closing of school, pupils of the public school shall not be solicited on school premises . . . to subscribe or contribute to the funds of, to become members of, or to work for, any organization not directly under the control of the school authorities [with certain exceptions not relevant here]."

Similarly, Section 1680 of the California Business and Professions Code appears on its face to cover some of what CDA prohibits, but it does not prohibit all quality claims, instead defining "unprofessional" conduct to include in relevant part:

"(i) The advertising of either professional superiority or the advertising of performance of professional services in a superior manner. . . .

. . . .

"(l) The advertising to guarantee any dental service, . . . This subdivision shall not prohibit advertising permitted by Section 651."

private enforcement of its standards and that the State does not supervise CDA's enforcement of advertising restrictions. Respondent admitted that it is neither an agent of the State, nor authorized to interpret or enforce state laws on behalf of the State, Answer at 12, and our own review of the law finds no hint that CDA or any private association should be permitted to interpret or enforce these laws on its own. *Cf. Parker*, 317 U.S. at 350. But even mere authorization would not be enough, since, as the Court emphasized in Parker, "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." *Id.* at 351 (citation omitted). Without active supervision of the enforcement, there can be "no realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests." *Patrick v. Burget*, 486 U.S. 94, 101-02 (1988). *See also Ticor*, 504 U.S. at 637-640; *Indiana Federation of Dentists*, 476 U.S. at 465; *Bates*, 433 U.S. at 359-63; *American Medical Ass'n v. United States*, 130 F.2d 233, 249 (D.C. Cir. 1942), *aff'd*, 317 U.S. 519 (1943).[30] Here, there is absolutely no evidence of active state supervision of CDA's disciplinary actions or of the content of its substantive advertising restrictions. CDA's ethical review of applicants' and members' advertising is thus entirely insulated from state supervision, and thus beyond any traditional state action immunity to the antitrust laws.

This case epitomizes the danger of imputing to the State a policy choice when its implementation is not being actively supervised by the State itself. In 1985, and apparently again in 1988, a Deputy Attorney General of California addressed a memorandum to the Board of Dental Examiners, advising it of recent Supreme Court decisions in the First Amendment area and asking the Board to ensure that enforcement of the law be consistent with the Constitution. *See* CX 1425; CX 1621-A. In response, the Legal Services Unit of the Department of Consumer Affairs[31] prepared a discussion paper analyzing the constitutionality and wisdom of limits placed on dentists' advertising. CX 1621.[32] The paper concludes, among other

[30] The question of state action immunity, decided in *American Medical Association v. United States*, by the Court of Appeals, was apparently not raised in the Supreme Court. *See* 317 U.S. at 527-28.

[31] The Board of Dental Examiners is part of the Department of Consumer Affairs. *See* Cal. Bus. and Prof. Code Section 101.

[32] As indicated in the memorandum, it addresses these issues in the context of the Board's investigation of CDA's own advertising practices. Thus, the memorandum also provides the only documented instance in which the Board initiated enforcement of the laws. We do not know whether this enforcement action was abandoned after issuance of the discussion paper.

things, that recent United States Supreme Court decisions "probably invalidate the present California statutes and regulations prohibiting dentists from advertising 'superiority,'" since "[l]ike price and other facts of importance to the consumer, [truthful and nondeceptive] expressions regarding the quality of the advertiser's services are protected by the First Amendment." CX 1621-D. *See also* CX 1621-z-2. The paper also recognizes that to be consistent with the First Amendment, a State ought not to prohibit dentists from making claims that amount to "puffery," CX 1621-E, advertising that their prices are "very reasonable," CX 1621-V, or promoting their services by truthful and nondeceptive guarantees, CX 1621-z-4. Ultimately, it recommends:

> "The statutes and regulations that limit advertising by dentists should probably be amended to eliminate patent conflicts with the federal constitutional provisions. At present, except in the telephone yellow pages, there seems to be relatively little advertising by dentists. . . . It is possible that the California statutes and regulations have made the risk of truthful and non-deceptive advertising too great for most dentists to freely tell the public about the services they provide and the prices they charge. It is also possible that the relative absence of dental advertising has harmed these segments of the public who do not use dental services because they are not conscious of their availability or cost. In any event, any California statutes and regulations that patently conflict with the federal Constitution should be repealed or amended so as to eliminate any disparity between the two sources of law." CX 1621-E. *See also* CX 1621-z-13 to z-15.

To be sure, the discussion paper cannot supersede codified law, and, conversely, its relevance is not limited to the sections that signal a retreat from the written code.[33] But the document provides a rather dramatic indication of the perils of private enforcement in the absence of active state supervision. Behind the scenes, officials were reexamining the legality and wisdom of the previously charted course. This might even explain the lack of enforcement. Holding that CDA's restrictions are shielded by the state action doctrine in this case would amount to imposing a continued policy choice upon the State when it has rarely, if ever, pursued it actively.[34]

Beyond the traditional state action defense, antitrust law does not, to our knowledge, recognize a "good faith" defense for a private

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[33] Indeed the document took the position that the disclosure requirements for discount advertising were consistent with recent Supreme Court decisions. *See* CX 1621-z-7.

[34] Due to the lack of Board enforcement, state judicial review has been limited as well. *See Ticor*, 504 U.S. at 638-39 ("[b]ecause of the state agencies' limited role and participation, state judicial review was likewise limited").

conspiracy formed to enforce state law. It might be unobjectionable if CDA were to exclude members who had been found by the state Board to have violated the state statute or Board rules. That is not what CDA did. Instead, CDA appointed itself as an extra-judicial administrator of the law. We have long rejected the argument that "Congress intended for federal antitrust laws to give way when private parties, by conduct that would otherwise violate the antitrust laws, take it upon themselves to enforce their interpretation of the provisions of any state law." *Indiana Federation of Dentists*, 101 FTC 57, 181 (1983), *rev'd on other grounds*, 745 F.2d 1124 (7th Cir. 1984), *rev'd*, 476 U.S. 447 (1986). As we indicated in that case, "[n]o Supreme Court decision articulating the state action doctrine can be read to endorse such an interpretation of congressional intent." *Id.* at 181-82.

In the 1942 case involving the AMA, for example, the Justice Department challenged the association's attempt to prevent physicians from affiliating with a prepaid health plan. The Court of Appeals rejected the AMA's argument that its conduct was not in violation of the antitrust laws because such affiliations were illegal:

"Appellants are not law enforcement agencies; they are charged with no duties of investigating or prosecuting, to say nothing of convicting and punishing. . . . Except for their size, their prestige and their otherwise commendable activities, their conduct in the present case differs not at all from that of any other extra-governmental agency which assumes power to challenge alleged wrongdoing by taking the law into its own hands." *American Medical Ass'n*, 130 F.2d at 249.

In *Indiana Federation of Dentists*, the Supreme Court was even more explicit. The state law appeared to prevent the lay screening of dental x-rays by lay employees of insurers, and the Court held that, even assuming the association's boycott was consonant with the state law, it was not protected:

"That a particular practice may be unlawful is not, in itself, a sufficient justification for collusion among competitors to prevent it. *See Fashion Originators' Guild of America, Inc. v. FTC*, 312 U.S. 457, 468 (1941). Anticompetitive collusion among private actors, even when its goal is consistent with state policy, acquires antitrust immunity only when it is actively supervised by the state. *See Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 57 (1985). There is no suggestion of any such active supervision here; accordingly, whether or not the policy the Federation has taken upon itself to advance is consistent with the policy

of the State of Indiana, the Federation's activities are subject to Sherman Act condemnation." 476 U.S. at 465.

In short, absent active state supervision, private enforcement by CDA cannot be protected from antitrust challenge.

Even entertaining the theoretical viability of the weaker claim that the state law furnishes corroboration for CDA's belief that its practice is pro-competitive, such an argument fails on the facts of this case. Although CDA urges that it enforced what it reasonably perceived to be state law, it does not point to a single instance in which the State enforced its advertising proscriptions against a dentist. To the contrary, CDA was acutely aware that the Board had virtually abandoned its advertising regulations; indeed, CDA perceived itself as filling an enforcement void. *See* IDF 231-33. Moreover, CDA did not seriously attempt to ascertain the Board's views of the proper scope of state law. *See, e.g.*, T. 1034, 1046 (Dr. Lee); T. 1537 (Dr. Nakashima); *see* generally, IDF 241-42. As a result, CDA lacks any real basis for understanding the true extent of the restrictions imposed by the State and cannot realistically claim that it is furthering the State's current policy choice.

Finally, and for much the same reason, we reject the argument that respondent's advertising restrictions were harmless because of the existence of similar, or even identical, state laws. Given the absence of state enforcement, it was CDA, not California, that tampered with the workings of the market for dental services. *Sessions Tank Liners, Inc. v. Joor Manufacturing, Inc.*, 17 F.3d 295 (9th Cir.), *cert. denied*, 115 S. Ct. 66 (1994), illustrates the point. In *Sessions*, the defendant had caused a private standard setting association to change its model fire code so as to disapprove of plaintiff's method of renovating leaking storage tanks for hazardous fluids. As a result, many fire officials refused to issue the necessary permit for plaintiff to perform its services. The court ruled for defendant on the theory that the harm was not caused by defendant's anticompetitive activity, but by the refusal of the fire officials to issue the permits, that is, by valid governmental action. The Ninth Circuit found:

"[Plaintiff] has never proved that it sustained injuries from anything other than the actions of municipal authorities. . . . [Plaintiff] has not shown that any potential . . . customer in jurisdictions that were not enforcing the . . . [model fire code] decided not to engage [plaintiff]'s services because of the [association]'s adoption

of [the provision in dispute]. Nor has [plaintiff] adduced any evidence that [defendant]'s actions caused independent marketplace harm in jurisdictions that continued to permit [the procedure offered by plaintiff]. . . . The injuries for which [plaintiff] seeks recovery flowed directly from government action." 17 F.3d at 299.

CDA would not be protected even by this broad view of the state action shield. For in our case, in contrast to Sessions, California apparently did not independently enforce the written law, and certainly was not alleged to have done so with regard to any of the individual dentists censured by CDA. In other words, here the sole source of enforcement was CDA, not the State. The anticompetitive harm is thus not the result of government action, but that of the private conspiracy alone.

Gambrel v. Kentucky Board of Dentistry, 689 F.2d 612 (6th Cir. 1982), further illuminates how the instant case differs from one in which dentists are merely following the law as authoritatively and actively interpreted and enforced by state authorities. In Gambrel, consumers filed an action against the Kentucky Board of Dentistry, the Kentucky Dental Association, and individual dentists alleging a conspiracy to withhold denture prescriptions from patients with the result that patients were precluded from shopping around to find the least expensive means of filling the order. Respondent Board of Dentistry argued that state law prohibited dentists from handing work orders over to patients. The court found that the Board's view was the right interpretation of state law and that the dentists were compelled by state law to deliver work orders directly to dental technicians. *Id.* at 619. In explaining that this policy was actively supervised by the State, the court noted:

"First, the policy emanates directly from the language of a state statute and not from any agreements by private individuals . . . . Secondly, the powers of enforcement are expressly conferred upon the Board of Dentistry, and it appears that historically the Board has indeed acted to uphold and enforce the regulatory scheme. In fact, the enforcement of the statute by the Board against plaintiff Gambrel and others has been one of the impelling reasons for the commencement of this action." 689 F.2d at 620.

CDA has done more than transcribe applicable state law into its Code of Ethics and urge its members to respect the law. First, the state law upon which it relied was, to its knowledge, not being actively enforced by state authorities, and second, CDA was itself

actively policing its version of state law. We are aware of no antitrust exemption that would shield such activity.

VII. FINAL ORDER

An order prohibiting respondent from continuing to restrict truthful and nondeceptive advertising and, in particular, from further enforcing its current unreasonable restraints is necessary and in the public interest. The order we impose is similar to those entered in other cases in which we had found unlawful interference with advertising by professional associations, but crafted to reflect the respondent's particular circumstances. *See, e.g., Massachusetts Board of Optometry*, 110 FTC at 632-35; *American Dental Ass'n*, 100 FTC 448, 449-53 (1982); *AMA*, 94 FTC at 1036-41. We believe this remedy to have a "reasonable relation to the unlawful practices found to exist," and therefore to be within our authority to impose. *See Jacob Siegel Co. v. FTC*, 327 U.S. 608, 613 (1946).

Our order that respondent cease and desist from interfering with such truthful and nondeceptive advertising, order Part II, leaves respondent free to act against member advertising that it reasonably believes would be false or misleading within the meaning of Section 5 of the Federal Trade Commission Act, and against its members' uninvited, in-person solicitation of actual or potential patients who, because of their particular circumstances, are vulnerable to undue influence. The order also leaves respondent free to encourage its members to obey state law and to discipline members who have been reprimanded, disciplined, or sentenced by any court or any state authority of competent jurisdiction.[35]

Respondent must, however, cease and desist from the unlawful suppression of advertising, and from urging others to engage in such actions, order Part II, as well as eliminate unlawful provisions from any policy statement and terminate affiliation with components that would continue to engage in behavior that would be contrary to the order if engaged in by respondent, order Part III. The disaffiliation provision, particularly with its grace period to permit continued

[35] The ALJ's order prohibited CDA from restricting representations that do not contribute to the public esteem of the profession. *See* ID at 81 (Order at II.A.8). Our order omits that provision. Although CDA cited the goal of protecting the public esteem of the profession in prohibiting dentists from distributing certain information during school screenings, *see, e.g.*, CX 1115-A, we find that our order adequately addresses CDA's unlawful activity and refrain from including the broader provision at this time. Of course, to the extent that respondent were to use this as an excuse to reinstitute any of the practices that we have found to violate Section 5, such actions would violate the order.

affiliation with components that will discontinue practices that, if engaged in by the respondent, would be unlawful, Part III.B., reflects the approach of the Commission order issued in *American Psychological Ass'n*, 57 Fed. Reg. 46,028 (Oct. 6, 1992) (consent order issued December 16, 1992). Part III.A.1, which contained an erroneous reference to Section 21 of CDA's Code of Ethics, has been changed to reflect the proper section of CDA's code (Section 22) that deals with claims of exclusivity.

To publicize its change in long-held policy, respondent must inform current members of this action and the resulting change in policy. Order Part IV.A. Notification requirements have long been recognized as falling within our remedial authority. *See, e.g., Massachusetts Board of Optometry*, 110 FTC at 619. Respondent asks that we not require it to distribute its Journal via first class mail. We see no reason to do so, and neither does complaint counsel. Accordingly, we have amended Judge Parker's order on this point to reflect unambiguously that we require only the complaint, order, and announcement, as well as any documents revised pursuant to Part III.A, but not the CDA Journal itself, to be distributed via first class mail. Respondent also objects to the requirement that it distribute the complaint on the grounds that complaint counsel failed to prove all the allegations therein. Since we find that complaint counsel has proved all the allegations in the complaint, respondent's objection on this point is denied.

Because respondent's restraints have been successfully imposed over an extended period of time dating back well over a decade, we find it necessary and reasonable to include further remedial provisions aimed at reversing the suppression of advertising (and, thereby, of competition) respondent has achieved over the years. Respondent must therefore inform persons, who are currently subject to disciplinary order or suspended from membership by reason of their or their employers' advertising or solicitation practices, of the complaint and order in the required manner, reconsider the disciplinary or other proceeding, and inform the person of its decision upon reconsideration. Part IV.B. Respondent has asked that we extend the time under Parts IV.B.2 and IV.B.3 to one hundred and twenty days, due to the alleged difficulty of locating and reviewing relevant old files. Although complaint counsel correctly notes that respondent's arguments regarding its need for time are rather conclusory, we do not see the public interest compromised in this

case by permitting respondent to conduct the review and final notification of this group of persons within one hundred and twenty days, provided the persons described in Part IV.B (*i.e.* those who are currently subject to discipline or suspension due to their advertising or solicitation practices) are notified and informed in the manner described in Part IV.B.1 within thirty days.

Next, respondent is to distribute similar information, including an application form for membership, to those whose membership over the last ten years was not approved or was discontinued as a result of CDA's objections to advertising or solicitation practices. Respondent is to review any application for membership received in response and inform persons of their acceptance or of the reasons for denial of their application. Part IV.C. Respondent has asked that we strike this provision, arguing that "applications are received, processed, and stored at the component level and the components are not respondents in this action; moreover, complete records covering a ten year period may not exist." Brief for respondent 82. In reviewing the record in this case, we have found significant cooperation between respondent and its component societies in the course of hundreds of disciplinary proceedings, leading us to believe that respondent can count on the usual and customary cooperation of its affiliated components in this matter. Finally, respondent has not even alleged, let alone provided any evidence, that complete records covering the last ten years do not, in fact, exist. We therefore see no reason, at this time, to alter Judge Parker's order on this point.

Respondent must also distribute certain information to every new applicant for the next five years, Part IV.D, keep, and file with the FTC, records of each action taken with respect to the advertising of the sale of dental services for three years, Part V, establish an internal compliance procedure for the next five years to ensure that the order is complied with at all levels of the organization and file progress reports at specified times, Part VI.A-C, maintain and make available for inspection records of specified actions relevant to this order, Part VI.D., and notify the FTC of specified organizational changes, Part VI.E. These record-keeping provisions are essential given respondent's continued assertion that the unreasonable restraints were imposed only in an effort to suppress untruthful or deceptive advertising, or such advertising that would cause unreasonable, unavoidable harm to consumers. In order to permit proper review of respondent's actions in the future, particularly in light of the safe

harbor carved out by the order, the record-keeping and reporting requirements are, in our view, reasonable and reflect similar requirements imposed in other cases. *See, e.g., American Psychological Ass'n*, 57 Fed. Reg. at 46,030; *Medical Staff of Memorial Medical Center*, 110 FTC 541, 547 (1988); *Tarrant County Medical Society*, 110 FTC 119, 123 (1987).

Finally, we have added to Judge Parker's order a sunset provision reflecting the Commission's recently adopted policy in that regard. Federal Trade Commission, Duration of Existing Competition and Consumer Protection Orders, 60 Fed. Reg. 42,481 (Aug. 16, 1995).

VIII. CONCLUSION

The California Dental Association has declared itself the arbiter of good advertising by member dentists and, in so doing, has restrained competition among its members in violation of Section 5 of the FTC Act. Without impugning CDA's general efforts to serve the public, we find that the Association's core activities provide its members sufficient pecuniary benefits to bring it squarely within our jurisdiction. We find further that CDA is at the hub of an agreement among its members to restrict competition in the market for dental services, and it is legally quite capable of serving that role. The combination has suppressed advertising of the prices, quality, and availability of dental services in California, thereby impairing the dissemination of information that is important to consumers and forms a basis of rivalry among competing service providers. The attack on price competition, long recognized as the lifeblood of a free economy, is inexcusable in principle and must be categorically condemned even in the professional setting before us here. The restrictions on advertising of the quality and availability of professional services, on the other hand, are entitled to a quick look under an individualized examination of the competitive benefits and burdens they entail. Since CDA's restraints fall far short of being justified even under this approach, however, we find that they are unlawful as well.

DISSENTING OPINION OF COMMISSIONER MARY L. AZCUENAGA

As described in the opinion of the majority, the conduct at issue in this case carries a patina of unlawfulness that few could disregard.

Restraints on advertising long have been suspect under the law. Those who would practice such restraints have been pressed increasingly to justify their conduct, and rightly so. But the gloss applied by the majority to the evidence in this case, although mesmerizing, proves chimerical on examination, like the glow of a firefly that captivates us for a time but does not withstand the hard light of day. Certainly there is evidence in the record on which to base suspicion, but it is exceedingly meager and falls short of establishing liability when viewed in context with other evidence and the law. I cannot join my colleagues in finding liability on this record. Also, I cannot join my colleagues in overruling *Massachusetts Board of Registration in Optometry*, 110 FTC 549 (1988)("Mass. Board").

Although I do not join the Commission in overruling Mass. Board, I have analyzed the case using the same traditional analysis as the majority, and there is much in the majority's opinion with which I agree. I concur in the conclusion that the Commission has jurisdiction over the California Dental Association ("CDA"). In addition, I agree that a categorical and complete ban on price advertising, imposed by a trade or professional association, would be *per se* unlawful and that before condemning an association's restrictions on nonprice advertising under Section 5 of the FTC Act, the Commission should perform a rule of reason analysis. Finally, I agree that the CDA has not made out a state action defense.

Despite these areas of agreement, I must dissent. In reviewing the record, the Commission has not come to grips with the true nature and extent of CDA's restrictions on advertising. The facts are hotly contested by the parties. CDA insists that it prohibits only false and misleading advertising, as defined by the state law of California, and attributes incidents of excessive restraints to local dental societies that were not named in the complaint. Complaint counsel argue that CDA bans a wide range of useful and informative advertising that would not be considered deceptive under Section 5 of the FTC Act.

The theory of liability is that CDA enforced facially legitimate rules against false and deceptive advertising in such a way as to limit truthful advertising. Such a finding should rest on evidence of a pattern of enforcement decisions. I question whether the evidence cited in the Commission opinion supports finding such a pattern. This is particularly true given the strong indications in the record that

CDA's enforcement did not have the sweeping impact suggested by the majority.

With respect to restraints on price advertising, I question whether CDA in fact imposed such a clear ban as to bring its conduct within the *per se* rule, and the prudent course would be to remand for additional findings of fact. Restraints on price advertising that do not constitute such a ban, such as disclosure requirements that may have some informational benefit to consumers and impose some burden on advertisers, also may be unlawful[1] but should be addressed under the rule of reason. The effect of restraints on nonprice advertising on the price and output of the advertised product may be more attenuated and also should be addressed under the rule of reason. The evidence that CDA imposed restraints on nonprice advertising by its members is weak, but even assuming such conduct occurred, the analysis of the majority does not support a holding of liability.

I disagree with the conclusion of the majority that CDA has market power. In presenting their case, complaint counsel relied on a theory of virtual *per se* illegality and did not offer evidence, even in the form of testimony of an expert economist, on fundamental elements of a rule of reason analysis, such as market definition, barriers to entry and anticompetitive effects. CDA did introduce economic evidence that it has no market power, and the Administrative Law Judge agreed. The majority reverses, entering a *de novo* finding of market power. Slip Op. at 32. Some persuasive evidence of market power is essential to a finding of liability under the rule of reason. The evidence of market power here is so sparse and superficial as to be virtually nonexistent. Imposing liability on this record for restraints on nonprice advertising is functionally equivalent to condemning them under the *per se* rule.

I disagree with the conclusion of the majority that entry into the California dental market is difficult. The majority's analysis of the evidence on entry seems highly inconsistent with the Commission's usual analysis and, absent explanation, appears to suggest that the Commission has significantly relaxed its standard for establishing that entry is difficult. A quick look analysis based on a limited record has much to recommend it, but only if that record is held to the same standards of analysis as in a more extensive review. No

[1] "Restrictions on price advertising are unlawful because they are aimed at 'affecting the market price.'" *Massachusetts Board of Registration in Optometry*, 110 FTC 549, 606 (1988) quoting *United States v. Gasoline Retailers Ass'n*, 285 F.2d 688, 691 (7th Cir. 1961).

anticompetitive effects having been shown, the complaint should be dismissed with respect to the conduct judged under the rule of reason.

I.

The opinion of the majority implicitly overrules the method of analysis set forth in *Massachusetts Board of Registration in Optometry*, 110 FTC 549, 602-04 (1988). Whatever the reason for failing to use the word "overrule," it will be clear to any reasonable lawyer that that is what the majority has done. Instead of adhering to Mass. Board, the Commission endorses the traditional dichotomy between *per se* and rule of reason analysis. Slip Op. at 16.

It will be unfortunate if the Commission's decision signals a return to the analysis of old in which the significance of competitive effects and efficiencies was sometimes obscured by efforts to fit conduct in either the *per se* or rule of reason pigeonhole. In 1988, when the Commission decided Mass. Board, Supreme Court decisions had opened the door to an antitrust analysis that focuses more on competitive effects and efficiencies than on labels.[2] Mass. Board was a considered attempt to further that trend. Because there have been few opportunities for the Commission to explain Mass. Board in the context of a fully developed record, no body of precedent implementing its focus on competitive effects and efficiencies has evolved.[3]

The analytical framework set forth in Mass. Board, properly applied, has much to recommend it. This case presents an excellent opportunity to clarify and build on Mass. Board.[4] One particularly disappointing aspect of the opinion of the majority is the absence of a satisfactory discussion of efficiencies, the omission of which would have been more glaring if the Commission had used a Mass. Board

[2] *See NCAA v. Board of Regents of the University of Oklahoma*, 468 U.S. 85 (1984); *Broadcast Music, Inc. v. CBS*, 441 U.S. 1 (1979).

[3] Perhaps not surprisingly, Mass. Board, a precedent-setting case in terms of the Commission's analytical approach, created a number of analytical difficulties that were left for resolution in future cases. *See, e.g.*, Azcuenaga, "Market Power as a Screen in Evaluating Horizontal Restraints," 60 Antitrust L.J. 935, 939 (1992).

[4] The Administrative Law Judge misapplied the Mass. Board analysis in his Initial Decision, and the opinion has been widely misconstrued elsewhere.

analysis.[5] The decision of the majority to cast Mass. Board aside before exploring its potential is cavalier and premature and sends the wrong signal about the importance of careful economic analysis, particularly the consideration of efficiencies.[6]

II.

At this point in an administrative proceeding, the nature and extent of CDA's restrictions on advertising should be well defined and substantiated, but they remain remarkably murky in this case. One difficulty in reviewing the record is that complaint counsel evidently assumed that actions by local dental societies are attributable to CDA, although the complaint did not name the local dental societies and the record does not establish that the local societies acted under the direction and control of CDA. Although complaint counsel submitted numerous exhibits relating to enforcement over a period of many years, most of those exhibits relate to enforcement by local dental societies, not by CDA. Some of the exhibits, which go back to the early 1980's, apparently do not reflect current or even recent CDA practice. Tr. 851. The majority seems to agree with CDA's argument that it cannot be condemned on the basis of acts by local societies without some evidence linking CDA to the challenged conduct.

The majority does not adopt the findings of fact in the Initial Decision and, disclaiming reliance on those findings, relies instead on its "independent review of the record." Slip Op. at 10 n.6.[7] The majority characterizes the CDA's actions, but despite its independent

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[5] One source of confusion under Mass. Board is that the term "efficiencies" as used in that opinion and in antitrust analysis generally encompasses much more than simple savings in terms of dollars and cents. In the antitrust lexicon, "efficiencies" includes valid business justifications such as explanations of why a particular product or service could not be brought to market absent the conduct that is subject to examination, the need to differentiate a product, or other circumstances consistent with a procompetitive rationale.

[6] Although I do not join Commissioner Starek's separate opinion, his discussion of the virtues of the analytical approach in Mass. Board over that employed by the majority has a good deal of merit.

[7] On appeal, the Commission conducts a *de novo* review. 16 CFR 3.54(a)("Upon appeal from or review of an initial decision, the Commission * * * will, to the extent necessary or desirable, exercise all the powers which it could have exercised if it had made the initial decision."); The Coca Cola Bottling Co. of the Southwest, 5 Trade Reg. Rep. (CCH) ¶ 23,681 at 23,405 (FTC 1994)("Our review of this matter is *de novo*.").

review, offers little in the way of findings of fact to resolve important disagreements between the parties.[8]

The opinion of the majority fails to reconcile, or otherwise dispose of, conflicting evidence on a number of significant issues. A fundamental question is whether and to what extent CDA has restricted advertising by California dentists. On this record, it is difficult to find that CDA's restrictions adversely affected dentists who want to advertise or that the restrictions caused anticompetitive effects. Although CDA discouraged specific advertisements (usually advertisements that violated state statutes or regulations defining and prohibiting deception), there is no empirical evidence in the record that CDA members advertise less frequently than dentists in California who are not members of CDA or that dentists in California advertise less than dentists in other states.

In fact, the preponderance of the evidence suggests that some advertising by dentists is flourishing in California. CDA, in a very graphic demonstration, filed a one and one-half inch thick appendix of telephone yellow pages advertising by California dentists. Mr. Christensen, a witness called by complaint counsel, who owns an advertising agency in Corte Madera, California, testified about his fifteen years of experience specializing in advertising and marketing by dentists. Tr. 545, 571. He said that most incidents of advertising restrictions by CDA occurred in the early 1980's. Tr. 609. Mr. Christensen testified that since 1988, he had heard of only one or two letters from dental societies regarding advertising. Tr. 616-17. His "Manual," which is furnished to clients of his advertising agency to apprise them of his approach to marketing and advertising by dentists, advises that a dentist can say what he wants as long as it is not false or misleading. Tr. 616-17; RX 72 at 111. Another of complaint counsel's witnesses testified about building a dental practice with a marketing campaign that was the "[m]ost aggressive

[8] To rebut this dissent, the majority offers note 6 at page 10, a footnote of impressive length, that cites CDA actions relating to sixty-two dentists. On examination, the examples cited fail to match the promise of rebuttal presaged by the length of the note. Thirty-eight of the sixty-two examples support a finding of the majority with which I agree, *i.e.*, "[t]he record supports the majority's finding that CDA enforces the disclosure requirements imposed by the California State Board of Dental Examiners." *See* text accompanying note 16, *infra*. Eleven examples of claims related to fees are not inconsistent with my view that the broad characterizations of the majority regarding restraints on fees cannot stand in light of probative, conflicting evidence. *See* note 15, *infra*. Seven more examples of superiority claims based on sterilization practices fail to answer the fundamental question I have raised whether this particular interpretation may be justified. *See* note 23 and accompanying text, *infra*. The same can be said for four examples of CDA actions based on a theory of unjustified expectations. *See* note 21, *infra*. Other examples cited in note 6 are discussed in the text of the majority opinion and in the text of this dissent.

I've ever seen," while remaining an active member of CDA. Tr. 790, 765-66. On balance, given the absence of evidence showing a reduction in advertising, the record suggests that CDA has not deterred dentists in California from advertising.

I cannot join the majority's expansive characterizations of CDA's actions. *See* Slip Op. at 17. With respect to price and discount advertising, the majority draws unqualified conclusions regarding the "effective prohibition of advertising," the "silencing effect" of CDA and the imposition of a broad ban on price advertising. Slip Op. at 17-19. With respect to nonprice claims, the majority draws broad conclusions that the nonprice advertising proscribed by CDA is vast and that CDA effectively bans all quality claims. Slip Op. at 25. As discussed below, I believe that these characterizations overstate the evidence.

1. Alleged Restraints on Price Advertising

I agree with the majority that a private conspiracy to prohibit price advertising is *per se* unlawful. Under the *per se* rule, the first and ultimate question in deciding liability is whether CDA in fact prohibits price advertising. CDA has no rule or other explicit prohibition against price advertising.

It is possible, however, that the association in effect prohibits price advertising by the manner in which it interprets and enforces facially legitimate rules. Does CDA do so? The evidence is conflicting. CDA officials testified that its standard for evaluating advertisements is whether the advertisement is false or misleading, but a few CDA actions cited by the majority, particularly letters by CDA's membership application review committee, are not easily reconciled with the testimony. On balance, I question whether the record provides a sufficient basis to find that CDA prohibits price advertising.

Members of CDA must agree to abide by the association's constitution, bylaws and Code of Ethics. Slip Op. at 3. Section 10 of CDA's Code of Ethics provides:

> Although any dentist may advertise, no dentist shall advertise or solicit patients in any form of communication in a manner that is false or misleading in any material respect. In order to properly serve the public, dentists should represent themselves in a manner that contributes to the esteem of the public. Dentists should not

misrepresent their training and competence in any way that would be false or misleading in any material respect. (CX-1484-Z-49.)

On its face, Section 10 of the CDA Code seems unobjectionable,[9] and the majority fails to identify specific language in Section 10 that explicitly or implicitly prohibits truthful advertising.

The majority also refers to several CDA advisory opinions. Advisory opinions are not part of the Code of Ethics, and a dentist does not necessarily subscribe to the advice by joining CDA, although he or she agrees to abide by the official rulings of the organization.[10] The only prohibition in the CDA's ethical code is against false and misleading advertising. The difficult question is whether CDA in effect prohibited price advertising.

Advisory Opinions 2(b), 2(d), 3 and 4 are singled out by the majority for particular attention.[11] Slip Op. at 17. The majority neither analyzes the specific language of these advisory opinions nor holds them unlawful on their face.[12] These CDA advisory opinions appear to derive from and not extend beyond the scope of the California state law of deception. Section 651 of the California Business and Professions Code prohibits the dissemination of false

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[9] The first and third sentences of Section 10 merely prohibit false and misleading advertising. The second sentence relating to "the esteem of the public" is somewhat ambiguous, but the CDA enforcement actions cited in the opinion of the majority do not rely on this sentence.

[10] The preamble to the Code of Ethics states:

The CDA Judicial Council may, from time to time, issue advisory opinions setting forth the council's interpretations of the principles set forth in this Code. Such advisory opinions are 'advisory' only and are not binding interpretations and do not become a part of this Code, but they may be considered as persuasive by the trial body and any disciplinary proceedings under the CDA Bylaws.(CX-1484-Z-47.)

[11] They provide:

2. A statement or claim is false or misleading in any material respect when it:

(b) Is likely to mislead or deceive because in context it makes only a partial disclosure of relevant facts;

. . .

(d) Relates to fees for specific types of services without fully and specifically disclosing all variables and other relevant factors; . . .

3. Any communication or advertisement which refers to the cost of dental services shall be exact, without omissions, and shall make each service clearly identifiable, without the use of such phrases as "as low as," "and up," "lowest prices," or words or phrases of similar import.

4. Any advertisement which refers to the cost of dental services and uses words of comparison or relativity--for example, "low fees"--must be based on verifiable data substantiating the comparison or statement of relativity. The burden shall be on the dentist who advertises in such terms to establish the accuracy of the comparison or statement of relativity. (CX-1484-Z-49-50).

[12] Section III(A)(2) of the order requires CDA to remove Advisory Opinions 2(c), 2(d), 3, 4, and 8. Opinion 2(c) states that a statement is misleading when it "is intended or is likely to create false or unjustified expectations of favorable results and/or costs."

or misleading information by health care professionals, including dentists.[13]

The language of the CDA advisory opinions is very close, but not identical, to that of the statutes. Opinion 2(b) defines as false and misleading a statement that "[i]s likely to mislead or deceive because in context it makes only a partial disclosure of relevant facts," and Section 651(b)(2) of the statute covers a statement that "[i]s likely to mislead or deceive because of a failure to disclose material facts." Opinion 2(d) defines as false and misleading a statement that "[r]elates to fees for specific types of services without fully and specifically disclosing all variables and other relevant factors," and Section 651(b)(4) includes a statement that "[r]elates to fees, other than a standard consultation fee or a range of fees for specific types of services, without fully and specifically disclosing all variables and other material factors."

Opinion 3 provides that price advertisements "shall be exact, without omissions, and shall make each service clearly identifiable, without the use of such phrases as 'as low as,' 'and up,' 'lowest prices,' or words or phrases of similar import." Section 651(c) provides that price advertising "shall be exact, without the use of phrases as 'as low as,' 'and up,' 'lowest prices' or words or phrases of similar import," and also that "[t]he price for each product or service shall be clearly identifiable."

Advisory Opinion 4 provides "[a]ny advertisement which refers to the cost of dental services and uses words of comparison or relativity -- for example, 'low fees' -- must be based on verifiable data substantiating the comparison or statement of relativity. The burden

[13] The statute, which was amended in 1992, with the changes effective January 1, 1993, provides, in part:

(b) A false, fraudulent, misleading, or deceptive statement or claim includes a statement or claim which does any of the following:

(2) Is likely to mislead or deceive because of a failure to disclose material facts.

(3) Is intended or is likely to create false or unjustified expectations of favorable results.

(4) Relates to fees, other than a standard consultation fee or a range of fees for specific types of services, without fully and specifically disclosing all variables and other material factors . . . .

(c) Any price advertisement shall be exact, without the use of such phrases as "as low as," "and up," "lowest prices" or words or phrases of similar import. Any advertisement which refers to services, or costs for services, and which uses words of comparison must be based on verifiable data substantiating the comparison. Any person so advertising shall be prepared to provide information sufficient to establish the accuracy of that comparison. Price advertising shall not be fraudulent, deceitful, or misleading, including statements or advertisements of bait, discount, premiums, gifts, or any statements of a similar nature. In connection with price advertising, the price for each product or service shall be clearly identifiable. The price advertised for products shall include charges for any related professional services, including dispensing and fitting services, unless the advertisement specifically and clearly indicates otherwise. (1 Deering's Business and Professions Code Annotated of the State of California Section 651 (1995 Supp.).)

shall be on the dentist who advertises in such terms to establish the accuracy of the comparison or statement of relativity." Section 651(c) provides that "[a]ny advertisement which refers to services, or costs for services, and which uses words of comparison must be based on verifiable data substantiating the comparison. Any person so advertising shall be prepared to provide information sufficient to establish the accuracy of that comparison."

The close parallel between the CDA advisory opinions and the statute strongly suggests that the association simply followed the California statutory definition of false and misleading advertising by health professionals. A side-by-side comparison of the language does not suggest that CDA extended or attempted to extend the coverage of the statute.

The substantiation and disclosure requirements in Section 651(b) and (c) of the California statute reflect a concern about misleading advertisements making price comparisons. By issuing guides relating to deceptive price comparisons, the Commission has indicated that the concern is legitimate and that disclosure and substantiation rules are an appropriate way to address the concern. 16 CFR 233. For example, the Commission requires:

". . .whenever a 'free,' '2-for-1,' 'half price sale,' '1-cent sale,' '50% off,' or similar type of offer is made, all the terms and conditions of the offer should be made clear at the outset." (16 CFR 233.4(c).)

The majority suggests that although the CDA rules on their face may seem "innocuous," CDA enforced the rules in an anticompetitive fashion, Slip Op. at 17, citing a handful of CDA actions to support this conclusion. Some of the CDA actions appear questionable, but the incidents cited are too limited in number to show a pattern of enforcement sufficient to establish a CDA policy to prohibit price advertising. One of the most questionable CDA actions is Exhibit CX-118, which is a 1993 letter from CDA's Membership Application Review Committee (MARS) to the Tri-County Dental Society, recommending denial of membership to Dr. Buckwalter, because he advertised "Reasonable Fees Quoted in Advance," "No Cost to You," and "Major Savings." Although the MARS letter cited and ostensibly relied on Section 651 of the California Code, no clear parallel to the statute is apparent.

The majority also cites an April 1988 MARS letter that appears to prohibit claims that fees are "reasonable," CX-301, but the majority acknowledges that CDA abandoned this position in 1991. CX 1223-D; Tr. 1453 (Dr. Nakashima).[14] In summary, there is conflicting evidence about claims of "reasonable" or "affordable" fees, but this is hardly a persuasive showing of a pattern of conduct that effectively prohibited fee advertising.[15]

The record supports the majority's finding that CDA enforces the disclosure requirements imposed by the California State Board of Dental Examiners.[16] The objective of a disclosure requirement is to place more information in the hands of consumers. A disclosure requirement is not a prohibition on price advertising, although required disclosures may in some circumstances be so extensive and burdensome that price advertising is effectively prohibited. Although the majority hypothesizes about the burden of the state Board's regulation, a witness with broad experience in advertising by California dentists, called by complaint counsel, testified that the disclosure rules did not burden price advertising. Tr. 628, 648-50.

The majority quotes the disclosure requirements as they appear in the 1988 "Advertising Guidelines" issued by the CDA, but without

[14] Some local dental societies may not have gotten word of the 1991 action. *See* CX-391 (October 19, 1993, letter from the Tri-County Dental Society); CX-778 (May 27, 1993, letter from the Tri-County Dental Society). Abandonment does not moot the case, but it may be relevant in assessing whether the evidence establishes a pattern of conduct.

[15] In footnote 6 at page 10, the majority cites thirteen additional CDA letters related to price advertising. Ten of the letters relate to claims that fees are "affordable." CX-335 (Dr. Dubin 1991); CX-32 (Dr. Bales 1991); CX514 (Dr. Stygar 1991); CX-866 (Dr. Rosenson); CX-50 (Dr. Jung 1990); CX-602 (Dr. Leizerovitz 1991); CX-772 (Dr. Nguyen 1991); CX-755 (Dr. Moy 1992); CX-957 (Dr. Skinner 1992); and CX-949 (Dr. Singhal 1990). One relates to the use of the word "reasonable." CX-1042 (Dr. Bales 1991). It certainly would be questionable for an association to prohibit all such claims, but the evidence is conflicting, and CDA may prohibit only unsubstantiated claims. A number of CDA ethics officials testified that CDA's Code prohibits only unsubstantiated claims. Tr. 865-66 (Dr. Abrahams testified that the claim is "meaningless" and does not violate the Code of Ethics and is "so prevalent that we would spend a lot of time enforcing it . . . ."); Tr. 1347 (Dr. Kinney testified that claims of reasonable or affordable prices are acceptable if verifiable); Tr.1479 (Dr. Nakashima testified that such a claim is acceptable "if it can be substantiated"); Tr. 1574 (Dr. Cowan); Tr. 1044-45 (Dr. Lee testified that a claim of reasonable or affordable fees is acceptable if verifiable).

[16] Footnote 6 at page 10 of the majority opinion provides additional examples. CX-18 (Dr. Asher 1993); CX-444 (Dr. Hiatt 1993); CX-387 (Dr. Ghadimi 1992); CX-366 (Dr. Foroosh 1993); CX-333 (Dr. Dorotheo 1993); CX-126 (Dr. Butt 1991); CX-51 (Dr. Beheshti 1991); CX-49 (Dr. Beheshti 1990); CX-27 (Dr. Azarmi 1993); CX-4 (Dr. Aguilera 1990); CX-297 (Dr. Davtian 1991); CX-258 (Dr. Daher); CX-248 (Dr. Crowley); CX-206 (Dr. Choi 1992); CX-151 (Dr. Casteen 1993); CX-516 (Dr.Kachele); CX-514 (Dr. Stygar 1991); CX-497 (Dr. Johnston 1993); CX-474 (Dr. Jeffs 1990); CX-602 (Dr. Leizerovitz 1991); CX-557 (Dr. Kita 1992); CX-668 (Dr. Massa 1992); CX-661 (Dr. Mardirossian 1990); CX-646 (Dr. Maiden 1992); CX-830 (Dr. Paulsen 1990); CX-828 (Dr.Patel 1990); CX-780 (Dr. Norzagaray 1992); CX-775 (Dr. Nicholl 1993); CX-772 (Dr. Nguyen 1991); CX-755 (Dr. Moy 1992); CX-745 (Dr. Moran 1991); CX-1000 (Dr. Stuki 1992); CX-957 (Dr. Skinner 1992); CX-913 (Dr.Schleuniger 1992); CX-865 (Dr. Rosenkranz 1993); CX-856 (Dr. Rocha 1993); CX-855 (Dr. Rocha 1993); CX-843 (Dr. Ramalingam 1993).

identifying the source of the disclosure requirement. CX-1262. Slip Op. at 17. The disclosure requirements were promulgated by the California Board of Dental Examiners, not CDA. Preceding the disclosure requirements quoted by the majority, CDA's Advertising Guidelines make this clear by stating that "the Rules and Regulations of the State Board of Dental Examiners require you to list all of the following in your advertisement(s)" and then listing the disclosures quoted at page 17 of the majority opinion. CX-1262-I. The CDA Advertising Guidelines appear accurately to recite Section 1051 of the rules of the California Board of Dental Examiners. 16 Barclays California Code of Regulations 1051, RX-136-E.

The majority concludes that the disclosures required by the California Board of Dental Examiners stifle discount advertising. The disclosures required by the Board include the nondiscounted fee, the discount in dollars or percentage terms, the duration of the discount offer, and the group that qualifies for the discount, plus any other conditions or restrictions on the offer. CX-1262-I.

The record shows that, as a practical matter, these disclosure requirements do not preclude discount advertising. For example, the Advertising Guidelines illustrate the disclosures required for a discount on a cleaning: "$10 off (regularly $25.00) Good through June 1, 1985." CX-1262-I. The disclosures in this illustration do not make the offer unmanageable or ineffective and, indeed, the majority does not articulate a concern about such discount advertising. Rather, the majority is concerned about the possibility that a dentist might want to advertise an across-the-board discount on fees for many or all services. Slip Op. at 18.

The majority relies on the testimony of Dr. Barry Kinney, a member of CDA's Judicial Council, to infer that CDA might require an advertising dentist to include disclosures that would fill two pages in a telephone book. Slip Op. at 18, quoting Tr. 1372. Dr. Kinney testified that if a dentist wanted to offer an across-the-board discount, then "you would have to be a little flexible" and not require disclosure of every fee. Slip Op. at 19, quoting Tr. 1373. Indeed, Dr. Kinney indicated that CDA interpreted the California Board of Dentistry rules to avoid oppressive disclosure requirements. He said that in the event of an across-the-board discount advertisement, the CDA Judicial Council would verify that the dentist was, in fact, doing what he advertised and that "I don't think that we would hold

somebody to these restrictions if in fact they were going to do across-the-board advertising." Tr. 1375.

It is unclear whether CDA has adopted Dr. Kinney's flexible view. The majority finds that CDA insisted on a "full panoply of disclosures," citing several exhibits. For example, Exhibit CX-206-A, a September 3, 1992, letter from CDA's MARS to the San Gabriel Valley Dental Society, recommends denial of a dentist's membership application because her advertisement, "20% off New Patients with this Ad," violated Section 1051 of the rules of the Board of Dental Examiners "by failing to list the dollar amount of the nondiscounted fee for each service."[17] This 1992 letter seems inconsistent with the flexible view of Dr. Kinney. The majority also cites a 1991 instance in which the MARS committee recommended that a dentist be admitted but counseled about advertising a "10% senior citizen discount" without disclosing the nondiscounted fee and the duration of the offer. CX-585-A. Given the testimony of two CDA officials that advertising senior citizen discount would be acceptable, Tr. 872, 1351, it is unclear whether the association's view has changed since 1991. Overall, the evidence appears to be conflicting on the manner in which CDA approaches this Board rule.

The record does not establish that the disclosures required under Section 1051 and derivatively by CDA constituted a prohibition of discount advertising. Indeed, complaint counsel's own witness seriously undercut the theory that CDA's enforcement of Section 1051 of the Board rules suppressed discount advertising. Although Mr. Christensen, whose experience in the market is described above, said in response to hypothetical questions by complaint counsel that excessive disclosures might reduce the effectiveness of a discount advertisement, Tr. 598-600, he testified on cross-examination that as a matter of marketing strategy, his agency recommends that specific discount advertisements be directed to a limited number of people for a limited time and that the ads show the usual and customary charge from which the discount is taken. Tr. 625-26, 648. The disclosures recommended by Mr. Christensen's advertising agency appear to coincide with the disclosures required by the California Board, but his reason for the recommendation was based on the marketplace not the rule. He recommends disclosure because "[w]e don't want to

[17] The record contains little explanation of the factual background or the reasons for the conclusion in the MARS letter. It is unclear whether the 20% discount was for all dental work needed by new patients or just for the initial consultation.

mislead anyone." Tr. 628. Mr. Christensen also recommended against advertisements of across-the-board discounts because an across-the-board discount might be construed as a price reduction, and an insurance company might reduce the "usual and customary rate" to the lower rate for the purposes of reimbursement. Tr. 629.

Mr. Cristensen testified that "there is no burden whatsoever" in disclosing the UCR charges (usual and customary rate), an expiration date and the discounted offer price in an advertisement. Tr. 628, 648-50. Mr. Christensen also offered explanations of the relative scarcity of across-the-board discount advertisements in the yellow pages or elsewhere. As to the yellow pages, he said that PacBell generally does not allow across-the-board discount advertisements. Tr. 645. With respect to the marketplace in general, he said that across-the-board discounts "won't work as a marketing tool." Tr. 645. In his opinion, such advertisements are ineffective and would disappear from the marketplace on their own. *Id.* Mr. Christensen said that the one situation in which across-the-board advertisements appear to be effective is for senior citizen discounts. Tr. 651. In that situation, he recommends that his clients include a statement saying to call for details regarding the offer. *Id.* Dr. Kinney testified that senior citizen discount advertisements are acceptable. Tr. 1351. *See also* Tr. 872 (Dr. Abrahams). In fact, according to Dr. Kinney, the CDA sponsored a "Senior Dent" program that offered a 15 percent discount to seniors. *Id.*

I cannot join the opinion of the majority insofar as it concludes that CDA effectively prohibited price advertising for dental services. Rather than extracting sweeping conclusions from the conflicting evidence and testimony, I would remand for findings of fact regarding the restrictions on price advertising imposed by CDA (not local societies). I would require specific findings on whether the disclosure requirements are, in effect, a prohibition on price advertising. If the disclosure requirements impose no real burden on price advertising, as Mr. Christensen testified, I would be unlikely to find that they constitute a prohibition on price advertising. To the extent CDA does not effectively prohibit price advertising, an analysis under the rule of reason should address benefits to consumers, if any, of its requirements for price advertising and the extent to which the disclosures impose a burden on advertisers. Additional factual findings on these issues would be helpful in that analysis.

Under the *per se* rule, all we need find for liability to attach is that the conduct occurred. On this record, I cannot reach that threshold and ultimate finding of fact. The *per se* rule is a harsh rule. The Commission would be well advised not only to exercise caution in extending the rule to new forms of conduct, but also to exercise a high degree of care to apply the rule only when the subject conduct has been well established to have occurred.

2. Alleged Restraints on Nonprice Advertising

With respect to restrictions on nonprice advertising, I agree with the majority that CDA's actions must be evaluated under the rule of reason, which requires a showing of anticompetitive effects. Applying the rule of reason, I find no liability, even assuming that CDA does restrain nonprice advertising. An analysis of the evidence, however, puts even that assumption in question.

The basic CDA prohibition on nonprice as on price advertising is against false and misleading advertising, and again CDA relies on California statutes to define what is false and misleading. Although a pattern of enforcement actions might demonstrate that an association has twisted a legitimate rule to anticompetitive purposes, the examples cited by the majority are not sufficient to show such a pattern.

The majority asserts that CDA proscribes a "vast" range of nonprice advertising, Slip Op. at 25, but does not support this conclusion with a vast array of evidence. As we saw earlier, the restriction on advertising appears to be Section 10 of the CDA Code of Ethics, which on its face prohibits only false and deceptive advertising. The issue is whether CDA applied the facially valid rule in such a way as to stifle truthful and nondeceptive advertising.

Testimony by CDA officials is consistent with the goal of discouraging deception.[18] According to Dr. Kinney, a member of the CDA Judicial Council, the council "look[s] at the total ad, and attempt[s] to determine whether the ad in its entirety would be misleading to a prudent person or not." Tr. 1335, 1339. In doing so, he said: "We rely on the state's Dental Practice Act, the Business & Professions Code to help us determine whether or not the ad is misleading in any material respect." *Id.* A second CDA official, Dr.

[18] Their testimony also is consistent with the Commission's policy on deception. *See* Commission Policy Statement on Deception, *Cliffdale Associates, Inc.*, 103 FTC 110 (1984)(Appendix, at 176).

Nakashima, provided a similar account of CDA's enforcement standards. He also said that CDA's Judicial Council "look[s] at the whole ad in its entirety" to make a determination whether it is "false and misleading in any material respect." Tr. 1444. He also said that the organization relies on state law for guidance in determining whether an ad is false or misleading and confirmed that Section 1051 of the California Code of Regulations and Sections 651 and 1680 of the California Business and Professions Code were the state laws on which it relied. Tr. 1447.

It is not clear how the majority reconciles this testimony with its conclusion that "[t]he nonprice advertising CDA proscribes is vast." Slip Op. at 25. Before leaping to such a conclusion, the Commission should make at least minimal findings of fact regarding the scope of the advertising prohibitions imposed by CDA (as distinguished from the component societies, which were not charged in the complaint, and with appropriate reference to the basis in state law for any such restrictions).

The majority cites Advisory Opinion 8 to Section 10 of CDA's Code of Ethics, which provides:

> Advertising claims as to the quality of services are not susceptible to measurement or verification; accordingly, such claims are likely to be false or misleading in any material respect.[19] (Emphasis added.) (CX 1484-Z-49.)

The majority does not parse the language of the advisory opinion, but asserts that "[i]n practice, CDA prohibits all quality claims." Slip Op. at 25. It cites a 1992 letter from MARS to the Orange County Dental Society, in which the committee recommended denial of an application for membership in part because of the use of the words "quality dentistry." CX 387-C. As with many of the letters from MARS regarding an application, the factual background is not fully explained. For example, it is unclear whether the dentist in question had an opportunity to provide information to substantiate the claim.[20] If the dentist was given the opportunity to substantiate the claims but was unable to do so, the action might be seen in a different light. Unexplained, this decision is subject to serious question.

[19] Section 1052 of the Regulations issued by the California Board of Dental Examiners provides: Any advertisement must be capable of substantiation, particularly that the services offered are actually delivered and at the fees advertised. RX 136-E.

[20] The reference to "quality dentistry" is one of several claims discussed in the MARS letter, and it appears that the committee's action was based partly on a finding that the dentist in question advertised that she was a member of the ADA when she was not. CX-387-B.

The majority cites two other MARS letters discussing the definition of falsity in Advisory Opinion 2(c) of the CDA Code and Section 651(b)(3) of the California Code (defining as false a statement that "[i]s intended or is likely to create false or unjustified expectations of favorable results"). RX-138A. In a 1992 letter to the Southern Alameda County Dental Society, MARS stated that the advertising claim that "[w]e are dedicated to maintaining the highest quality of endodontic care . . . ." appeared to be inconsistent with Section 2(c). CX-1083-C. Similarly, in a letter to the San Francisco Dental Society, MARS said that the claims "improved results with the latest techniques" and "latest in cosmetic dentistry" were inconsistent with 2(c) and unverifiable. CX-306-C. [21] It is not clear whether the dentists in question were given the opportunity to substantiate the claims. For example, the claim of "improved results with the latest techniques" might be proved with statistical evidence. If such a claim were made by a dentist without such evidence, the advertisement might well be deceptive. Unexplained, these two letters are open to serious question.[22]

The majority also concludes that CDA suppresses claims of superiority or guarantees. Slip Op. at 26. The majority does not address the role of the state legislature of California in prohibiting such claims. Slip Op. at 26. Section 1680(i) of the California Code defines "unprofessional conduct" by a person holding a dental license to include the following:

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[21] In footnote 6 at page 10, the majority cites four other CDA actions based on this provision, all of which raise the same substantiation questions. Indeed, one of the letters is much like a Commission deceptive advertising decision, and it demonstrates that preventing unsubstantiated, indeed, in this case, false claims was precisely CDA's concern. Exhibit CX-478, cited by the majority, reflects a decision of the CDA Judicial Council that the claim "laser dentistry is revolutionizing dental care" was false because "laser dentistry is not revolutionary" and created unjustified expectations. *See also* CX-932(claim of "the latest techniques"); CX-115(claim of "lots of" experience); CX-963(claim of "highest infection control standards").

[22] In footnote 25 at page 36, the majority suggests that my interest in further factual inquiry is misplaced, citing six examples to show that "MARS was not concerned with any surrounding circumstances" when it wrote to the individuals. The record as a whole contains enough evidence of CDA's concern with surrounding circumstances to justify further factual inquiry. I do not quarrel with the evidence the majority cites, only with their failure to weigh explanatory and probative conflicting testimony and with their failure to consider the possible benefits of CDA's conduct. I have identified a number of such instances, observing, for example, in the discussion below that an implied claim of more effective sterilization may be deceptive. *See, e.g.*, CX-394 (claim of "highest standards in sterilization"); CX-780 (claim of "modern sterilization"); and CX-557 (claim that "we guarantee all dental work for 1 year"). Common sense and the Commission's policy regarding deceptive advertising provide a basis for anticipating that these particular interpretations may prove to be justified. Because such claims account for a significant number of CDA enforcement actions, further inquiry would not be out of line. Indeed, it appears to be the more responsible course of action.

The advertising of either professional superiority or the advertising of performance of professional services in a superior manner. This subdivision shall not prohibit advertising permitted by subdivision (h) of Section 651.

CDA has interpreted this statutory ban on claims of professional superiority to prohibit advertising implying that a dentist practices superior sterilization practices. *See* CX-671-A (claim that "all of our handpieces (drills) are individually autoclaved for each and every patient" said to violate Section 1680); CX-43-B (claim of "state-of-art sterilization" said to violate Section 1680).[23] Enforcement of a prohibition against truthful superiority claims certainly can pose competitive dangers, because comparison among competitors is well recognized as a useful function of advertising.[24] It is possible, perhaps even likely, that these CDA letters crossed the line, but it would be useful to explore the issue somewhat further before condemning CDA.

For example, a claim that a dentist sterilizes drills for each patient may be literally true, but it also may imply a claimed distinction from other dentists (*i.e.*, other dentists do not do so).[25] If all dentists routinely sterilize their drills between patients, as one might hope, such an implied claim might be deceptive. Similarly, the "state of the art sterilization" claim might be read to imply that other dentists use ineffective or less effective sterilization techniques, and that may not be true.[26] A review of some of the Commission's own deceptive advertising cases reveals that these interpretations are not far-fetched.[27] It might be useful to explore the issues in greater depth.

[23] In footnote 6 at page 10, the majority note a number of additional claims of the same sort. *See* CX-394 (Dr. Go, 1993); CX-360 (Foroosh 1986); CX-43 (Dr. Baron 1993);CX-780 (Dr. Norzagaray 1992); CX-718 (Mickiewicz and Rye, 1992); CX-1026 (Dr. Tracy 1992); CX-605 (Dr. Lerian 1993).

[24] *See* FTC Statement of Policy in Regard to Comparative Advertising, FTC News Summary No. 38 (August 3,1979)("Comparative advertising encourages product improvement and innovation, and can lead to lower price in the marketplace.").

[25] The Commission has held that truthful statements regarding the attributes of a product or the nature of services may convey implied claims. *See* Commission Policy Statement on Deception, *Cliffdale Associates, Inc.*, 103 FTC 110 (1984) (Appendix, at 176).

[26] Similar interpretations appear in Commission cases. For example, the Commission has alleged that implied superiority claims were made for hearing aids that were advertised as incorporating technological advances. *United States v. Dahlberg*, Civ. No. 4-94-CV-165 (D. Minn. Nov. 14, 1995) (consent decree); *United States v. Beltone Electronics Corporation*, Civ. No. 94-C-7561 (N.D. Ill. Dec. 21, 1994) (consent decree).

[27] The Commission has found or alleged in a variety of contexts that express and truthful claims have conveyed implied claims of superiority and that some of these implied claims were deceptive. *See e.g., Kraft, Inc.*, 114 FTC 40, 121, 128-32 (1991), *aff'd sub nom., Kraft, Inc. v. FTC*, 970 F.2d 311 (7th Cir. 1992); *Bristol-Myers Co.*, 102 FTC 21, 328-48 (1983), *aff'd sub nom., Bristol-Myers Co. v. FTC*, 738 F.2d 554 (2d Cir. 1984), *cert. denied*, 469 U.S. 1189 (1985); *see also, e.g., United States v. Egglands Best, Inc.*, (E.D. Pa. Mar. 12, 1996)(consent decree); Archer-Daniels-Midland, Docket C-3492 (Apr. 20, 1994) (final decision and order).

Section 1680(l) of the California Code defines unprofessional conduct by dentists to include the following:

> The advertising to guarantee any dental service, or to perform any dental operation painlessly. This subdivision shall not prohibit advertising permitted by Section 651.[28]

CDA has enforced this statutory prohibition against guarantees. *See* CX-668-C and CX-557-C (claim that "we guarantee all dental work for 1 year" said to violate Section 1680(l)); CX-497-C (claim of "crowns and bridges that last" said to imply guarantee in violation of Section 1680(l)). The claim that "[w]e guarantee all dental work for 1 year" appears to violate Section 1680(l) of the Dental Practice Act, which defines "unprofessional conduct" to include "the advertising to guarantee any dental service." CX-668. It is not clear whether the claim was a money-back offer if the dental work failed within one year, which might be true, or whether the claim was that all dental work will be perfect for at least one year, which seems unlikely. If the claim is limited to a money-back offer, then prohibiting such advertising may be anticompetitive. The majority does not discuss whether there might be a reason to require disclosure of the nature or terms of the guarantee.

The majority suggests that CDA has restricted advertising claims such as an offer of "gentle" care, although its restriction may be less sweeping than those of local societies. CDA witnesses said that CDA does not restrict claims such as "gentle" dentistry. Tr. 1343-46 (Dr. Kinney, member of CDA Judicial Council). Indeed, in 1993, CDA advised the local societies that the state Board regarded "gentle" as acceptable advertising. Tr. 1466 (Mr. Nakashima); RX-56. Because local societies were not charged in the complaint and because their conduct cannot be attributed to CDA, the reliance by the Administrative Law Judge and by the majority on those actions is misplaced.

Finally, the majority finds that in 1984, CDA adopted a resolution that "solicitation of school children on any private or public school ground(s) is deemed not to elevate the esteem of the dental profession." CX 1115-A. My initial reaction to the CDA resolution

[28] Someone more flippant than I might suggest that prohibiting claims of painless dental operation is clearly justified because such claims are so obviously deceptive. To its credit, the majority does not challenge this provision.

is to question whether it expresses a point of view over which the majority really wants to quibble.[29] Second, in adopting the resolution, CDA cited and relied on Section 51520 of the California Education Code, which prohibits teachers or others from soliciting contributions from school children for organizations not under the school's control.[30] Perhaps CDA has enforced the resolution in a manner that is overly broad, but the evidence to that effect is also thin.

After considering the evidence, I cannot join the majority's broad characterizations of CDA's actions. CDA's Code of Ethics on its face prohibits only false and deceptive advertising, and the case turns on how CDA has applied this legitimate principle. In evaluating CDA's actions, I would explore more fully the benefits to consumers, if any, of each of CDA's requirements and weigh the countervailing burden on advertisers. In turn, I do not offer a blanket endorsement of CDA's actions, the competitive effects of which merit examination, but rather suggest that the analysis of those actions should be based on a recognition that prevention of deceptive advertising may benefit consumers.

III.

CDA's restrictions on advertising appear to be parallel to and no broader than restrictions imposed by the California legislature by statute. The majority does not compare CDA's actions to the state code nor does it suggest that CDA attempted to expand the statutory definitions. Instead, the majority suggests that because CDA did not "seriously attempt" to ascertain the California Board of Dentistry's interpretation of the "proper scope of state law," CDA lacks a basis for understanding state law and cannot claim that CDA is "furthering the State's current policy choice." Slip Op. at 46. To the extent that a statute or regulation is clear on its face, concern about dubious or incorrect interpretations seems misplaced. The majority does not identify any lack of clarity in the state law, nor can I. Any suggestion

[29] Even assuming the resolution refers only to solicitation of dental business, to join the majority's implicit endorsement of such behavior would not be a decision I would like to explain to my mother.

[30] Section 51520 provides:

During school hours, and within one hour before the time of opening and within one hour after the time of closing of school, pupils of the public school shall not be solicited on school premises by teachers or others to subscribe or contribute to the funds of, to become members of, or to work for, any organization not directly under the control of the school authorities, [excluding charitable organizations approved by the school board] . . . .

that CDA acted inconsistently with the state laws also is unsupported. CDA frequently relied on the plain language of state statutes and regulations in its enforcement actions, and CDA officials testified that the association modified its code of ethics to maintain consistency with state law.[31]

The majority speculates that the Board may not be enforcing its rules because of concern about a 1989 memorandum prepared by a supervising attorney in the Legal Services Unit of the California Department of Consumer Affairs and discusses that memorandum at considerable length. Slip Op. at 43-44. This inference is highly questionable given that the California state legislature amended Section 651 of the California Code (quoted in part in footnote 4 above) in 1990 and again in 1992. If the legislators had wanted to adopt the contents of the memorandum, they had the opportunity and apparently did not choose to do so.

The majority's speculation that the Board of Dental Examiners has decided not to enforce its regulations is undercut by evidence from the Board itself. Specifically, in 1992, the state Board prohibited the use of the word "gentle" in advertising, RX-54-A, until the CDA persuaded it that such advertising was appropriate. RX-55. In acknowledging the change to CDA, the state Board of Dental Examiners attached a document summarizing its enforcement position on several issues, revised as of March 8, 1993. RX-56A,B. That 1993 summary does not support the view of the majority that the 1989 memorandum caused the Board of Dental Examiners to refrain from enforcement. In addition, Dr. Nakashima testified that he called Dr. Yuen, the president of the California State Board of Dental Examiners, the night before his testimony and confirmed that the Board considers its rules to be valid and enforceable, but that it operates under tight budgetary constraints. Tr. 1468-69. Of course, this is hearsay, but no objection was made to Dr. Nakashima's testimony, which appears on point and probative. Nor did complaint counsel introduce testimony or other evidence contradicting the hearsay.

I agree with the majority that CDA is not protected by the state action doctrine. Quite apart from the state action doctrine, however, a factual question arises that deserves at least to be addressed regarding what effect CDA actions, as distinct from state law, had on competition in the market for dental services. The majority states

[31] According to the testimony of Dr. Abrahams, who served on CDA's Judicial Council, the CDA amended its code of ethics frequently to keep it consistent with the state dental practice act. Tr. 851.

that in the absence of state enforcement of state statutes, it was "CDA, not California, that tampered with the workings of the market for dental services." Slip Op. at 46.[32]

The record, however, does not establish that CDA, as opposed to the state of California, influenced the advertising of dentists. Some dentists who advertised were told by CDA that their advertisements violated state law. The record simply does not reflect whether those dentists changed their advertising and, if so, whether it was because they did not want to offend CDA or because they did not want to violate state law.

State laws may have had an *in terrorem* effect even in the absence of vigorous state enforcement. Section 652 of the California Code provides that violations are punishable by revocation of the violator's professional license by the relevant licensing board, and Section 652.5 provides that any violation is a misdemeanor and is punishable by "imprisonment in the county jail not exceeding six months, or by a fine not exceeding two thousand five hundred dollars ($2,500), or by both the imprisonment and fine." 1 Deerings California Code Section 652.5 (1995 Supp.). A 1994 amendment makes clear that punishment can include both imprisonment and fine, which suggests that this was not some long forgotten law. *Id.*

Respect for the law and a willingness to conduct oneself in accordance with the law can be powerful incentives regardless of the resources devoted to law enforcement. In the absence of evidence regarding the relative impact of state law versus CDA, it seems questionable to infer that dentists feared the CDA instead of the state of California.

Arguably, the majority could find liability under Section 5 of the FTC Act based on conclusions that the California law has anticompetitive effects and that CDA has encouraged compliance with California law, without finding that CDA's conduct alone had anticompetitive effects. The majority has not so held or even suggested such a theory of liability. In view of the absence in the record of evidence showing adverse effects on competition, I do not address the merits of such a theory either.

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[32] The Commission cites *Sessions Tank Liners, Inc. v. Joor Manufacturing, Inc.*, 17 F.3d 295 (9th Cir.), *cert. denied*, 115 S.Ct. 66 (1994). In that case, the court found that the only anticompetitive injuries resulted from government action and hence that a private party could not be held liable. That factual conclusion on causation of injury does nothing to establish that CDA was the source of the advertising restriction here. The second case the Commission cites, *Gambrel v. Kentucky Board of Dentistry*, 689 F.2d 612 (6th Cir. 1982), held that the actions of a state dental board were protected by the state action doctrine. Again, that holding provides little insight into the resolution of this case.

IV.

Even assuming that the preponderance of the evidence establishes that CDA engaged in each and every variation of an advertising restraint analyzed under the rule of reason and that each such restraint is unjustified, I still would dissent from the opinion of the majority because of the even greater weaknesses in the remaining elements of the case. The Commission reverses the finding of the Administrative Law Judge that CDA has no market power and concludes instead that CDA has market power. The fundamental difficulty with this conclusion is that it is not supported by evidence. Complaint counsel made no effort to try the case on a rule of reason theory and did not introduce testimony or documents to establish the elements of a rule of reason case. To put the matter in perspective, complaint counsel proposed 949 findings of fact and conclusions of law with respect to this proceeding, but they proposed only one finding, Proposed Finding 570, relating to market power.[33] The Administrative Law Judge correctly rejected this proposed finding. I agree with the finding of the Administrative Law Judge that CDA lacks market power.[34]

Complaint counsel's Proposed Finding 570 ("CDA has market power") is based entirely on the testimony of Dr. Knox, CDA's expert economist. According to Proposed Finding 570, because CDA members as a group face a downward sloping demand curve for dental services and assuming hypothetically that CDA members act together, they could exercise some degree of market power.[35] Complaint counsel's hypothetical does not suffice to rebut Dr. Knox's economic testimony that CDA's enforcement of its Code of Ethics "has no impact on competition in any dental market in California." Tr. 1633.

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[33] Complaint counsel's Proposed Findings 540 to 578 purport to set forth complaint counsel's full economic analysis of the case.

[34] The conclusion of the Administrative Law Judge that CDA lacks market power rests on the finding that there are no barriers to entry. ID at 76. The Administrative Law Judge also concluded that complaint counsel failed to introduce evidence sufficient to show that CDA members could act together to raise prices or reduce output and failed to introduce evidence of relevant geographic markets. ID at 76.

[35] Dr. Knox testified that market power is the ability to raise prices above the competitive level. Tr. 1689. He suggested that with a downward sloping demand curve, by definition, a group of suppliers with market power could raise prices above a competitive level. Tr. 1690. Complaint counsel elicited from him the statement that dentists individually and collectively face a downward sloping demand curve. Tr. 1691. In response to a hypothetical question by complaint counsel, he said that assuming that CDA members collectively raised the price of their services, the total quantity of services provided by CDA members would decline. Tr. 1694.

The ALJ found that dental patients are relatively price sensitive because patients pay for their own care, and most dental care is not urgent. IDF 321. To demonstrate that CDA members profitably could impose a price increase, it would be necessary to show that other dentists could not increase their output and that new dentists could not enter in sufficient numbers to defeat such a price increase. Complaint counsel made no such showing, and the proposed finding was correctly rejected.

To establish market power, relevant antitrust product and geographic markets must be identified. Respondent's expert economist, Dr. Knox, testified that dental services could constitute a relevant product market. Tr. 1689. The majority adopts the dental services product market and defines dental services as those services provided by dentists licensed under the California Code. Slip Op. at 31. I agree that the relevant product market appears to be the provision of dental services.

The record provides relatively little information on the relevant geographic market(s) for dental services in California. Some evidence suggests that the relevant geographic markets are local. Respondent's expert, Dr. Knox, testified that in his opinion, the entire state is not a market and that the relevant markets are smaller than the state. Tr. 1642. Mr. Christensen, whose experience in the California dental advertising market is discussed above, said that a single dental practice draws from the closest 20,000 or 30,000 households. Tr. 655. In his view, people do not travel far to visit a dentist. Tr. 637.

Although the record suggests that the relevant geographic markets are smaller than the state, no specific geographic markets were urged by complaint counsel, and none is adopted or discussed in the majority opinion. The record evidence suggests that individual dentists draw most of their patients from the area immediately surrounding their offices, but that does not conclusively establish the size of the relevant geographic markets. For example, in urban areas, the practice areas of some dentists may overlap with those of other dentists, which in turn overlap with still others. In this fashion, small competitive zones may be linked into a larger geographic market. These geographic market issues, however, were not developed in the record.

The majority says that over 90 percent of the dentists "in at least one region" are members of CDA, citing CX-1433. Slip Op. at 31. Let us consider this single piece of evidence about a single possible

geographic market. Exhibit CX-1433 is a letter not from CDA but rather from the executive secretary of the Mid-Peninsula Dental Society, which includes the California cities of Menlo Park, Palo Alto, Portola Valley, Los Altos and Mountain View. The letter, which appears to be a form letter with which to send out membership applications, says nothing about whether the dentists in the region compete with one another. Nothing in the record establishes the author's expertise in defining competitive markets, and nothing in the letter suggests that the area covered by the Mid-Peninsula Dental Society is a relevant antitrust market. In sum, although dental services appears to be a product market, there is no basis in the record for defining any geographic area as a relevant market. Complaint counsel's failure to prove a relevant antitrust market alone is sufficient to dispose of the allegations of market power.[36] *See* Adventist Health System/West, 5 Trade Reg. Rep. (CCH) ¶ 23, 591 (April 1, 1994); *Capital Imaging Associates v. Mohawk Valley Medical Ass'n*, 996 F.2d 537, 547 (2d Cir.), *cert. denied*, 114 S.Ct. 388 (1993)(defining local radiology market in rule of reason analysis).

The majority concludes that "where there are significant barriers to entry," market share alone may be relied on as an indicator of market power. Slip Op. at 31. Since no geographic markets have been defined, it is not possible to develop any market share data or other pertinent concentration statistics. Nonetheless, I agree with the general proposition that the presence or absence of impediments or barriers to entry is important to, and may be dispositive of, the competitive analysis. *See, e.g., United States v. Baker Hughes, Inc.*, 908 F.2d 981, 987 (D.C. Cir. 1990); *United States v. Waste Management, Inc.*, 743 F.2d 976, 983 (2d Cir. 1984); *United States v. Gillette Co.*, 828 F. Supp. 78 (D.D.C. 1993).

Dr. Knox, the respondent's economic expert, testified that the basis for his opinion that CDA's enforcement activities have no impact on competition in any dental market in California is that "CDA cannot erect any barrier to entry to any dental market in the state of California." Tr. 1633-34. He said that in his view, the only barrier to entry in this market is the need to acquire a license issued by the California Board of Dental Examiners. Tr. 1634. In his

[36] It is even more elementary that once a market has been established, some conduct affecting competition in that market must be identified before liability can attach. Even assuming that the evidence is sufficient to show that the area served by the Mid-Peninsula Dental Society is a relevant geographic market, none of the alleged restraints on nonprice advertising discussed in the opinion of the majority (Slip Op. at 25-27) was directed to dentists in this area.

opinion, the facts that a dentist must attend dental school to sit for the exam or that he or she must acquire or lease an office and equipment do not amount to entry barriers. Tr. 1636-40.[37] The Administrative Law Judge adopted Dr. Knox's view that there are no barriers to entry in the provision of dental services in California.[38] ID at 76.

The majority concludes that entry into the California dental market is difficult. Slip Op. at 32. The majority finds that "it can take 18 months to 2 years for a practice to meet current expenses, and between 5 and 10 years to amortize the debt." Slip Op. at 32. Contrary to the inference drawn by the majority, these findings suggest that entry into a California dental services market is possible because lenders are ready, willing and able to extend the credit needed to enter.[39]

A dentist who enters the market has an impact on competition when he or she starts serving patients, not when current expenses are met and not when debt has been amortized. Indeed, if the majority intends to set a new standard to this effect for evaluating the difficulty of entry, we can expect some radical changes in enforcement. Nor does a dentist need to open a separate practice to enter the market. A new graduate from dental school who works as an associate in an established practice contributes to the output of dental services and has entered the relevant market.

The majority cites the testimony of three dentists (Dr. Harder, Dr. Miley, and Dr. Hamann) to support its finding that entry is difficult. Slip Op. at 32. Dr. Richard Harder, a witness called by complaint counsel, said that the first step in establishing a new practice is to identify a suitable area in which to practice and that an entrant then needs to lease or buy equipment. Tr. 297-98. He said that a dental equipment supplier "was helpful in teaching me some of the ropes" and that the cost to equip an office was $15,000. Tr. 297-99. He estimated that it takes at least 18 months to break even. Tr. 300. Dr. John Miley, another witness called by complaint counsel, thought

[37] A dentist opening a practice must buy equipment, and Dr. Hamann pointed out that it is possible to equip an operatory with used equipment for as little as $2500. A dental school graduate with access to significant capital, such as Dr. Hamann, may purchase two established practices at the start of a career, but nothing in the record suggests that every graduate needs to take that high-cost approach to entry. Used equipment or rental equipment is available. Office space can be leased.

[38] The majority criticizes the Administrative Law Judge for his finding that there are no "insurmountable" barriers to entry in dental services. Slip Op. at 31-32. Although the rhetorical flourish of the Administrative Law Judge is an overstatement of the elements necessary for liability, the Initial Decision does not appear to state or rely on a novel entry standard. Rather, it appears appropriately to focus on whether CDA dentists profitably could raise prices without attracting new entry.

[39] The record contains testimony that it is less expensive to enter the dental services market than to buy a franchise hamburger restaurant. Tr. 1234-35.

that entry was difficult because in his opinion the state was "over supplied with dentists." Tr. 329. He said that many young dentists graduate from school with debts of $50,000 to $100,000 and that it costs an additional $50,000 to $75,000 to establish a practice. Tr. 330-331. A third witness called by complaint counsel, Dr. Hamann, testified that he and his wife borrowed $400,000 for her to acquire two established dental practices and to provide the "working capital" to operate them. Tr. 760. He testified that he acquired used dental equipment to furnish six operatories for the practice, at a cost of $2500 to $4000 per operatory (although new equipment might cost $15,000 to $20,000 per operatory). Tr. 761.

Drs. Harder, Miley and Hamann all testified that they (or in Dr. Hamann's case, his wife) successfully entered the California dental services market. Their experiences suggest that entry is not difficult. None of the three witnesses provided even one anecdote about a licensed dentist who wanted to practice in California but was deterred by the difficulty of entry.

Dr. Hamann's testimony indicates that entry is not only possible, but also that it can be highly lucrative. Dr. Hamann is a physician who managed the practice for his wife, Dr. Hamann, who is a dentist. After purchasing two dental practices for about $400,000, they undertook an "aggressive" marketing program. Tr. 806. Although Dr. Hamann did not use price or comparative advertising in her practice, her husband said that her marketing campaign was the "[m]ost aggressive I've ever seen." Tr. 790. The Hamanns sold the practice after eight years, by which time it was earning $1,500,000 per year in gross revenues. Tr. 808. Dr. Hamann testified that after the fifth and sixth year, his wife was earning from $300,000 to $500,000 in profits after paying him $100,000 per year to manage the practice. Tr. 808. It should be observed that this marketing success story apparently was achieved well within the bounds of CDA's rules. Dr. Hamann was an active member of the CDA and the Tri-County Dental Society and served as a delegate to the CDA. Tr. 765-66.

Dr. Harder graduated from dental school in 1979 and worked as an associate dentist for Dr. Senise in Glendora, California. Tr. 245. Because of the long commute, he left that practice in 1981 to establish his own practice in Laguna Hills. Tr. 247. In 1986, he stopped practicing in Laguna Hills and opened an office in Irvine, California. Tr. 250. Dr. Harder's success in opening and subsequently

moving a practice provides evidence that the cost of opening an office is not a barrier to entry.

Dr. Miley's concern was that students graduate from dental school with debts. That alone does not prevent entry. If anything, the availability of credit to dental students suggests that a steady flow of new entrants into the profession will continue. Dr. Miley's testimony that California is oversupplied with dentists supports the conclusion that the cost of education has not choked off the flow of potential entrants. If anything, it supports the view that entry is easy. No doubt, entry into the dental services market takes talent, hard work and perserverance. But that is not the kind of difficulty cognizable in an antitrust analysis.

The majority suggests that there is "little doubt" that CDA can enforce its rules because advertising is observable and because dentists place a high value on CDA membership. Slip Op. at 30. The majority states that there is no need to "quantify this benefit econometrically," because when faced with the choice of membership or advertising, dentists "overwhelmingly chose the former." Slip Op. at 30.

Econometrics is not necessary to establish anticompetitive effects; simple evidence would do. The majority's rhetoric glosses over the absence of evidence concerning the actual competitive effect of CDA's activities. The phrasing of the choice as one between membership and advertising assumes, without supporting evidence, that dentists in California, including members of CDA, do not advertise. It further assumes, again without benefit of evidence, that the cause of any reluctance to advertise is CDA. The testimony of Dr. Hamann that his wife undertook the "most aggressive" marketing campaign that he had ever seen, while remaining a member in good standing of CDA, and the testimony of Mr. Christensen about advertising by clients of his advertising agency raise a question whether dentists do face a choice between advertising and membership. The hypothesis that some or even many dentists do not advertise, even if true, does not establish a link between lack of advertising and membership in CDA.[40]

[40] The majority responds to my questioning on this point with more citations to CDA documents. *See* Slip Op. 30 n.21. Even if a dentist agrees to comply with a letter suggesting that an advertisement violates state law, the CDA documents do not show what motivated the change of heart. For that, we must look to documents or testimony from the dentist. The majority cites one such letter. Exhibit CX-480 is a letter from Dr. Jenkins agreeing to change an advertisement that the CDA Judicial Council found to be misleading, stating his disagreement with that position. The letter does not illuminate why he decided to comply.

CDA membership is not essential to a successful dental practice in California. CDA offers benefits to its members, but those benefits are readily available from other sources. The Initial Decision identifies CDA's two annual scientific sessions as the "most visible and tangible membership benefit." IDF 101. These sessions are a convenient way for dentists to satisfy their state-imposed continuing education requirement. IDF 105. CDA members attend for free; nonmembers must pay a registration fee to attend. IDF 104. Continuing education also is available from other sources. Tr. 803. CDA members receive CDA publications at a lower subscription rate than nonmembers. IDF. 107.

CDA lobbies the California legislature. IDF 70-85. To the extent that CDA lobbies the state successfully on behalf of dentists, the benefits apparently would flow to members and nonmembers alike. Some other benefits of CDA membership include a marketing program to enhance the image of CDA and dentists, a program promoting direct reimbursement instead of insurance company plans, twice-a-year seminars on the non-clinical aspects of dental practice, and a peer review program as an alternative to litigation to resolve customer complaints. IDF 106, 89, 92, 98.

CDA operates several for-profit subsidiaries. One subsidiary offers professional liability insurance to CDA members. IDF 109. Another for-profit subsidiary is an insurance broker for CDA members and offers CDA members a revolving line of credit, financing for dental office equipment, discounts on long distance telephone rates, a VISA gold card and so forth. IDF 117. Dr. Martin Craven, a past president of CDA, testified that the primary benefit of association membership was social, not financial. Tr. 1400. He testified that other insurance companies offer professional malpractice insurance at lower rates than CDA's subsidiary. Tr. 1401.

It is one thing to conclude that CDA offers its members some benefits (presumably no one joins unless value is perceived), but it is quite another to conclude that CDA membership is so valuable that the association has a "stranglehold on the profession," as the majority suggests. Slip Op. at 30. The benefits that CDA offers to its members are significant enough to persuade them to pay their dues and perhaps to participate in the association's activities. None of the benefits offered by CDA appears to be uniquely available from the association, and none appears to be essential to the successful

practice of dentistry. One telling point about the commercial importance of CDA membership is how infrequently it is used in dentists' advertisements. The CDA filed a one and one-half inch thick appendix of dentists' ads in the yellow pages, very few of which announce CDA membership.

The evidence does not support the conclusion that CDA can control the price and output of dental services in California. The majority relies on the single fact that approximately 75 percent of California dentists are members of CDA to support its finding of market power. Almost certainly, the state of California is not a relevant geographic market for dental services. But even hypothesizing a relevant geographic market with membership similar to that statewide, entry could undercut any claimed ability to exercise market power, and the evidence suggests that entry is, in fact, easy.

The weakness of the majority's anticompetitive effects story is reflected in the majority's final observation that it is "implausible at best" that dentists would move to California to advertise. Slip Op. at 32. If CDA has successfully restrained competition in California by limiting advertising, why would not the usual economic incentives of the free market work in this market? If CDA had successfully controlled its members to halt advertising, why would not the other 25 percent of dentists in California who are not CDA members expand their practices by advertising, and why would not newly licensed dentists or dentists from other areas step in to take advantage of the fact that CDA members had voluntarily tied their own hands in competition to attract patients? The Commission finds it "implausible at best" that this would happen. A better conclusion is that it is "implausible at best" that CDA has had any significant adverse effect on competition.

The opinion of the majority has troubling implications that go well beyond this case. The first of these is its use of the *per se* rule. There is good reason to apply the *per se* rule more sparingly than the majority has in this case. Although I would apply the *per se* rule to prohibitions on price advertising, I would evaluate under the rule of reason disclosure and substantiation requirements for price as well as nonprice advertising to ascertain whether those requirements are reasonable efforts to cure deception. The majority's failure seriously to attend to the possible justifications for CDA's requirements may operate to the detriment of consumers. As recognized in the analytical approach embodied in the Commission's late opinion in

Mass. Board, consideration of efficiencies is vital to good antitrust analysis. The *per se* rule, which dispenses with consideration of efficiencies, should be circumscribed accordingly.

Even assuming that CDA's advertising policies are broader or more burdensome than necessary to prevent deceptive advertising, the majority's rule of reason analysis is troubling. The startling failure to identify a geographic market before finding liability is one cause for concern. The majority's treatment of the entry issue is another. The case can be disposed of on ease of entry alone. Not only is the evidence offered to suggest barriers to entry minute, but more importantly, the analysis the majority employs implicitly suggests the adoption of a new standard for evaluating barriers to entry. Unless the analysis of entry in this case is treated as an aberration, we reasonably can assume that the majority would find barriers to entry in almost any market we might imagine. It seems unlikely that the majority would apply the same loose test to barriers to entry in all cases, including merger cases under Section 7 of the Clayton Act, but only time will tell.

I dissent.

OPINION OF COMMISSIONER ROSCOE B. STAREK, III, CONCURRING IN PART AND DISSENTING IN PART

I concur in the Commission's determination that respondent California Dental Association ("respondent" or "CDA") has violated Section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. 45, by promulgating and enforcing restrictions on truthful, nondeceptive advertising by its members. I concur as well in the Commission's findings that (1) CDA is subject to FTC jurisdiction; (2) CDA's adoption and enforcement of its policies restricting advertising by its members constitutes an agreement among competitors; (3) CDA's "state law" defense must be rejected; and (4) the order appended to the majority opinion provides an appropriate remedy for respondent's unlawful acts. Despite my conclusion that CDA's restrictions on both price and non-price advertising unreasonably restrain trade, I cannot join in the majority's startling decision to extend *per se* treatment to all agreements among competitors to restrain truthful, nondeceptive price advertising. Finally, what the majority styles as its "quick look" rule of reason approach to CDA's restraints on both price and non-price advertising[1]

[1] Slip op. at 32.

contains unnecessary and potentially confusing departures from the analytical structure set forth in *Massachusetts Board of Registration in Optometry*, 110 FTC 549 (1988) ("Mass. Board").

Instead of applying the framework established in Mass. Board for the systematic review of all horizontal restraints, the majority applies to CDA's price advertising restrictions a *per se* analysis, somewhat euphemistically labeling it "traditional."[2] Although the Supreme Court and the Commission have generally moved away from summary *per se* condemnation of horizontal restraints without some consideration of potentially relevant rule of reason factors,[3] my colleagues today breathe new life into the rigid and often overinclusive application of the *per se* rule. Mass. Board analysis, which faithfully synthesizes and applies the Court's post-BMI horizontal restraints jurisprudence, has been bypassed and marginalized so that even the most truncated consideration of relevant market conditions and potential competitive benefits of agreements restricting price advertising need never trouble the Commission again.

As the majority acknowledges, had it followed a horizontal restraints analysis based on Mass. Board, the result in the present case would have been the same: CDA's advertising restrictions would have been condemned as unreasonable restraints of trade without an elaborate "full" rule of reason inquiry.[4] That result, however, would not have entailed the diminution in the relative clarity and coherence of FTC horizontal restraints analysis that we may surely expect to follow from the majority's reasoning in this case.

I.

The majority's decision not to rely on Mass. Board analysis in this case is puzzling. In Mass. Board, the Commission condemned a state optometry board's regulations restricting several types of truthful,

[2] *Id.* at 39 (citing *Mass. Board*, 110 FTC at 604 n.12).

[3] *See, e.g., Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985); *National Collegiate Athletic Assn. v. Board of Regents of Univ. of Oklahoma*, 468 U.S. 85 (1984) ("*NCAA*"); *Broadcast Music, Inc. v. Columbia Broadcasting Sys.*, 441 U.S. 1 (1979) ("BMI"); *cf. Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977) ("*GTE Sylvania*") (establishing the primacy of economic effects in the analysis of non-price vertical restraints).

[4] It is well established that the rule of reason may be expeditiously applied in appropriate cases. *See* generally *NCAA*, 468 U.S. at 109-10 n.39 ("the rule of reason can sometimes be applied in the twinkling of an eye" (quoting P. Areeda, The "Rule of Reason" in Antitrust Analysis: General Issues 37-38 (Federal Judicial Center, June 1981))).

nondeceptive advertising, including the advertising of price discounts.[5] The factual and legal issues analyzed in that matter are therefore similar to those now before the Commission. Moreover, in Mass. Board the Commission set out a "structure for evaluating horizontal restraints" that is both consistent with the Supreme Court's teaching and, as the Commission observed in that case, "more useful than the traditional use of the *per se* or rule of reason labels."[6] Nevertheless, the majority sidesteps Mass. Board analysis in favor of the *per se* and rule of reason "labels" it found wanting not that many years ago.

Presented with a challenge to a trade association's promulgation and enforcement of restrictions on price advertising among the association's members, the majority first selects a serviceable *per se* category: "[I]t is well established that a horizontal agreement to eliminate price competition is a *per se* violation of the antitrust laws."[7] The majority finds that CDA's restrictions amount to the prohibition of truthful and nondeceptive price advertising[8] and equates that behavior with "a naked attempt to eliminate price competition."[9] The opinion's classification of the restraints imposed by CDA effectively brings the horizontal restraints analysis to an end. Rather than inquire into the actual competitive effect of CDA's advertising restrictions, the core of the majority's *per se* analysis reviews in general the evils associated with restraints on price advertising[10] and leads to the authoritative conclusion that "CDA's restraints on price advertising are thus illegal *per se*."[11] Thus is born a new category of *per se* unlawful restraints.

The opinion then proceeds to demonstrate that the same price advertising restrictions would have been condemned under the rule of reason.[12] Although I presume that this demonstration is for the

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[5] 110 FTC at 604-07. Although the horizontal restraints at issue in Mass. Board were promulgated by a state board, the Commission found the state action doctrine inapplicable because the Commonwealth of Massachusetts had not clearly articulated a policy to displace competition with state regulation. *Id.* at 614. The Commission condemned the challenged advertising restrictions under Section 5 of the FTC Act because they met Sherman Act Section 1's definition of a "contract, combination . . . , or conspiracy, in restraint of trade . . ." *Id.* at 606-08, 610-11.

[6] *Id.* at 603-04.

[7] Slip op. at 16.

[8] *Id.* at 17-19.

[9] *Id.* at 19.

[10] *Id.* at 19-23.

[11] *Id.* at 24.

[12] *Id.* at 24-38.

benefit of benighted adherents of the Mass. Board approach,[13] the exercise in fact tends to vindicate the use of Mass. Board in the first place.

II.

The majority should have applied Mass. Board analysis in the present case not simply because it is apposite, but also because it -- and not the reinvigoration of the *per se* rule -- is consistent with the broad outlines of the past two decades of Supreme Court antitrust jurisprudence. The Commission's opinion in Mass. Board developed from a line of cases in which the Supreme Court sent the clear message that the analysis of a particular restraint of trade should be based on an understanding of the restraint's effect on competition. In cases including *BMI*, *NCAA*, and *Federal Trade Commission v. Indiana Federation of Dentists*, 476 U.S. 447 (1986) ("*IFD*"), the Court signaled its dissatisfaction with the use of rigid, outcome-determinative categories.[14]

As the majority correctly notes, for purposes of determining the legality of a restraint under Section 1 of the Sherman Act, "the ultimate question is whether the challenged restraint hinders, enhances, or has no significant effect on competition."[15] The rule of reason is the "prevailing standard" for assessing the effect on competition of most restraints.[16] Moreover, the Supreme Court has stated in the clearest possible terms that any "departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than . . . upon formalistic line drawing."[17] The rule of reason approach prevails because whenever antitrust analysis is too far

[13] Whatever support a literal reading of one isolated sentence in *Mass. Board*, 110 FTC at 607, lends to the majority's statement that the Commission "summarily condemned the price advertising restraints" at issue in that case, slip op. at 23, I cannot agree with my colleagues' conclusion that CDA's price advertising restrictions can therefore be declared *per se* illegal. The Commission did not reach its conclusion in Mass. Board by mechanically applying a *per se* rule to the Board's restrictions; rather, it proceeded through the truncated rule of reason approach set out earlier in that opinion. Mass. Board's "summary" condemnation thus included an assessment of whether the restrictions were inherently suspect and an examination of efficiency justifications. 110 FTC at 606-07.

[14] Just as BMI, NCAA, and IFD indicated the need for economic depth in the treatment of horizontal restraints of trade, so the earlier decision in GTE Sylvania, *supra*, announced the Supreme Court's abandonment of its rigid *per se* treatment of non-price vertical restraints. GTE Sylvania, BMI, and succeeding cases demonstrate the evolution of the Court's approach away from bright-line categories and toward the application of sophisticated economic inquiry.

[15] Slip op. at 14 (citing *NCAA*, 468 U.S. at 104; *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 691 (1982)).

[16] *GTE Sylvania*, 433 U.S. at 49.

[17] *Id.* at 58-59.

removed from an inquiry into actual effects upon actual markets, the risks of overdeterrence rise dramatically. For this reason, *per se* rules are to be applied with the utmost circumspection.

As noted earlier, over the past two decades the Supreme Court has steadily diminished the scope of *per se* analysis in antitrust jurisprudence.[18] This evolution reflects the Court's increasing disposition to ground determinations of antitrust "harm" on actual effects on competition. The Commission's truncated rule of reason analysis in Mass. Board is quite consistent with that trend. Whatever the restraint, under Mass. Board there is at least some inquiry into its likely economic effect and into whether a plausible efficiency might merit a fuller weighing of the restraint's procompetitive benefits against its anticompetitive consequences.[19]

There is no basis for concluding that the Supreme Court has swerved from the path charted in BMI and NCAA of requiring analysis -- even the "truncated" variety -- rather than the use of categories.[20]

III.

The majority opinion asserts that "[a] *per se* category of violation may emerge as courts gain familiarity with the almost invariably untoward effects of a particular practice across economic actors and circumstances."[21] Then, quoting from *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 344 (1982), the majority states that "'once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it, it has applied a conclusive presumption that the restraint is unreasonable'"[22] -- *i.e.*, it has declared the restraint *per se* unlawful.

[18] *See, e.g.*, Northwest Wholesale Stationers (rule of reason inquiry appropriate for some group boycott claims); NCAA (rule of reason analysis applied to agreement among competing college football teams to fix prices for all television broadcasts of their games); BMI (rule of reason analysis for agreement among thousands of competing songwriters to contract with a single entity to fix prices for performance rights to their songs); GTE Sylvania (rule of reason analysis to be applied to all vertical non-price restraints in the absence of market power).

[19] *Mass. Board*, 110 FTC at 604.

[20] My reluctance to apply a *per se* approach to respondent's restrictions on price advertising is only heightened by the Supreme Court's "general reluctance" -- recognized by the majority, slip op. at 24 -- to apply a *per se* approach to codes of conduct of professional associations. *See, e.g., IFD*, 476 U.S. at 458; *United States v. Brown Univ.*, 5 F.3d 658, 671 (3d Cir. 1993).

[21] Slip op. at 15.

[22] *Id.* Maricopa is a textbook example of why structured case-by-case analysis is usually preferable to a *per se* rule. As one distinguished commentator put it:

The courts have repeatedly invoked the *per se* label without the faintest comprehension of the commercial functionality of the practice they were condemning. One need only go back as far as the

But on what foundation rests the majority's conviction that CDA's restrictions on price advertising belong in the narrow group of practices that can be declared illegal without at least an initial inquiry into their reasonableness? If "*[p]er se* categories of unlawful economic activities . . . consist of agreements or practices that are almost always harmful to competition and rarely, if ever, accompanied by substantial redeeming virtues,"[23] how can the majority be confident that it has properly placed CDA's restraints on price advertising in such a category? Doesn't *per se* condemnation of CDA's price advertising restrictions sidestep the need to answer "the ultimate question" raised by each restraint of trade, *viz.*, "whether the challenged restraint hinders, enhances, or has no significant effect on competition"?[24]

If a determination of *per se* illegality means that a restraint has "almost invariably untoward effects . . . across economic actors and circumstances,"[25] then presumably one consequence of today's ruling is that the Commission will feel no obligation to perform an analysis of particular market circumstances before condemning other restrictions on truthful, nondeceptive price advertising in a wide array of future cases. One court of appeals has observed that the Supreme Court has been more hesitant to apply a *per se* rejection to competitive restraints imposed in contexts where the economic impact of such practices is neither immediately apparent nor one with which the Court has dealt previously.[26] Thus, I question whether the Commission should establish a rule in future cases that restraints on truthful, nondeceptive price advertising -- even in markets to which the Commission has had no prior exposure -- are "beyond justification in the sense that any argument as to the harmlessness of the restraint, or any proffer of procompetitive justifications for the

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Maricopa County case . . . . As this case demonstrates, if *per se* condemnation is made before understanding is achieved, understanding may never be achieved; the legal classification precludes the development of a trial record that would elucidate the challenged practice.

William F. Baxter, The Viability of Vertical Restraints Doctrine, 75 Calif. L. Rev. 933, 936 (1987) (citation omitted).

Although Maricopa involved unreasonable restraints of trade, its broad application of the *per se* rule to physician agreements regarding price has frustrated an informed reexamination of provider combinations in an era of burgeoning managed care. It has been persuasively suggested that Maricopa's unnecessarily broad *per se* rhetoric has contributed to the current overdeterrence of many potentially efficient combinations of health care providers. *See, e.g.*, Clark C. Havighurst, Are the Antitrust Agencies Overregulating Physician Networks?, 8 Loy. Consumer L. Rep. (forthcoming 1996).

[23] Slip op. at 15.

[24] *Id.* at 14.

[25] *Id.* at 15.

[26] *United States v. Brown Univ.*, 5 F.3d at 671.

practice, will generally not be considered."[27] If CDA's restrictions on price advertising are unlawful -- as they have appropriately been held to be -- it is not because some of them fit into a "category." Rather, it is because a properly framed competition analysis, however truncated, shows that they -- together with CDA's restraints on non-price advertising -- lessen competition.

IV.

The majority also treats CDA's restraints on price and non-price advertising under a dubious variant of the "truncated" rule of reason.[28] Instead of asking the structured series of questions posed by Mass. Board[29] -- a set of questions that lends itself flexibly to the appraisal of horizontal restraints -- the majority imports into its analysis issues that may or may not be relevant under a properly conducted Mass. Board approach.

The flexibility afforded by the Mass. Board framework serves, among other goals, the ends of judicial economy. In certain cases, evidence sufficient to support the condemnation of a horizontal restraint may fall short of what would have appeared in the record of a "full" rule of reason trial. For example, if the challenged restraint "appears likely, absent an efficiency justification, to 'restrict competition and decrease output,'"[30] and if there is no plausible efficiency justification for the practice, then a finding of illegality is appropriate even if market power (and other elements of "the full balancing test of the rule of reason"[31]) have not been established. On the other hand, in cases in which the restraint's likely anticompetitive effect is not apparent, or in which a proffered efficiency justification deserves a detailed examination, the full rule of reason approach -- including scrutiny of market power in many cases -- is necessary.

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[27] Slip op. at 15. Cases such as BMI and, for that matter, the case in which the Supreme Court set forth the classic articulation of the rule of reason -- *Chicago Board of Trade v. United States*, 246 U.S. 231 (1918) -- illustrate the Court's longstanding reluctance to condemn uncritically arrangements that on their face more closely resemble "naked" price-fixing than do CDA's price advertising restrictions. *See also* cases cited *supra* note 18.

[28] Slip op. at 24-39.

[29] 110 FTC at 604.

[30] *Id.* (quoting *BMI*, 441 U.S. at 20).

[31] *Mass. Board*, 110 FTC at 604.

Nevertheless -- and despite language to the contrary in the opinion[32] -- the approach that the majority uses in place of Mass. Board makes a fairly elaborate assessment of market power a key element of its "quick look" approach. Although the Administrative Law Judge's anomalous determination with respect to market power[33] may have impelled the majority to discuss the issue at length, I am concerned that the majority opinion may be read to imply that an assessment of market power is a necessary part of the truncated rule of reason approach.

Let me be clear that I am by no means saying that the issue of market power should never play a role in truncated rule of reason analysis of horizontal restraints. Frequently the answers to the initial questions in the Mass. Board sequence will show that evaluation of market power is required. But in some cases those answers -- that the challenged restraint is likely to restrict competition, and that it lacks a plausible efficiency rationale -- will indicate that a restraint can be fairly condemned without a potentially elaborate and expensive inquiry into market power.

V.

It is only fair to note that Mass. Board is not without its faults and its critics. But if the majority considers Mass. Board beyond repair, why has it not overruled the case? If the majority has identified specific weaknesses in Mass. Board analysis that might be remedied, why not apply Mass. Board in this and other appropriate cases so that the process of case-by-case adaptation and improvement can occur?

As I stated at the outset, the problem with the majority's decision today is not the result. It is the reasoning that tends to determine the lasting significance of an opinion. The majority's reasoning, which amounts to a return to the conclusory labeling that the Commission sought to supplant in Mass. Board, is likely to cause confusion in future cases. How will the majority's analysis in *CDA* apply in the next price-related advertising case? Will the Commission summarily condemn any restraint hampering price-related advertising, or only those restraints that effectively prohibit price-related advertising? Without some type of rule of reason inquiry, how will we know

[32] Slip op. at 25 ("The anticompetitive effects of CDA's advertising restrictions are sufficiently clear, and the claimed efficiencies sufficiently tenuous, that a detailed analysis of market power is unnecessary to reaching a sound conclusion . . .").

[33] Initial Decision at 76.

whether restrictions on price advertising "effectively prohibit" price advertising in a given case? Will the Commission use today's newly-minted *per se* rule alone or in combination with the backup rule of reason analysis it employs in the present case? Or, since the majority has not seen fit to overrule or modify Mass. Board in any way, can we expect to see the Commission apply Mass. Board analysis in the future, notwithstanding today's opinion? Unfortunately, all of these are now open questions.

FINAL ORDER

The Commission has heard this matter on the appeal of respondent California Dental Association 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 of the Commission, the Commission has determined to affirm the Initial Decision, and to issue this Final Order. Accordingly, the Commission enters the following order.

I.

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

A. *"Respondent"* or *"CDA"* means the California Dental Association, its directors, trustees, councils, committees, boards, divisions, officers, representatives, delegates, agents, employees, successors and assigns.

B. *"Component societies"* means those dental societies or dental associations defined as component societies in the June 1986 edition of CDA's Bylaws. In the event that CDA's Bylaws are amended to denominate component societies differently or to define or describe a new category of dental societies or associations that replace or are substantially similar to the component societies defined in the June 1986 edition of CDA's Bylaws, "component societies" means those dental societies or dental associations as well.

C. *"Person"* means any natural person, corporation, partnership, unincorporated association, or other entity.

D. *"Restricting"* includes taking any action against a dentist based on the advertising practices of the dentist's employer.

II.

It is further ordered, That respondent, directly or indirectly, or through any corporate or other device, in or in connection with its activities as a professional association in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, shall forthwith cease and desist from:

A. Prohibiting, restricting, regulating, impeding, declaring unethical, or interfering with the advertising or publishing by any person of the prices, terms or conditions of sale of dentists' services, or of information about dentists' services, facilities or equipment which are offered for sale or made available by dentists or by any organization with which dentists are affiliated, including, but not limited to, advertising or publishing:

1. Superiority claims;
2. Comparative claims;
3. Quality claims;
4. Subjective claims and puffery;
5. Prices, including discounted prices;
6. Promises to refund money to dissatisfied customers;
7. Claims that include the use of adjectives or superlatives to describe any offered service; and
8. Exclusive methods or techniques.

B. Prohibiting, restricting, regulating, impeding, declaring unethical, or interfering with the solicitation of patients, patronage, or contracts to supply dentists' services by any dentist or by any organization with which dentists are affiliated, through advertising or by any other means, including, but not limited to, the distribution of business cards and forms containing a dentist's name, business address, or telephone number in connection with dental screenings of children at public and private schools.

C. For a period of ten (10) years after the date this order becomes final, inducing, requesting, suggesting, urging, encouraging, or assisting any non-governmental person or organization to take any action that if taken by respondent would violate Part II.A. or II.B. of this order.

Provided, however, that nothing contained in this order shall prohibit respondent from formulating, adopting, disseminating to its component societies and to its members, and enforcing reasonable ethical guidelines governing the conduct of its members with respect to representations that respondent reasonably believes would be false or deceptive within the meaning of Section 5 of the Federal Trade Commission Act, or with respect to uninvited, in-person solicitation of actual or potential patients who, because of their particular circumstances, are vulnerable to undue influence.

Provided further, that nothing in this order shall prohibit respondent from encouraging its members to obey state law or from disciplining any member as a result of that member's reprimand, discipline, or sentence by any court or any state authority of competent jurisdiction.

III.

It is further ordered, That respondent shall:

A. Within sixty (60) days after the date this order becomes final, remove from respondent's Code of Ethics and from its Bylaws and any other policy statement or guideline of respondent, any provision, interpretation, or policy statement that is inconsistent with the provisions of Part II of this order, including but not limited to:

1. Sections 10 and 22 of respondent's Code of Ethics; and
2. Advisory Opinions 2(c), 2(d), 3, 4, and 8 to Section 10 of respondent's Code of Ethics.

B. Terminate for a period of one (1) year respondent's affiliation with any component society within one hundred and twenty (120) days after respondent learns or obtains information that would lead a reasonable person to conclude that said component society has, after the date this order becomes final, engaged in any act or practice that if committed by respondent would be prohibited by Part II of this order; unless prior to the expiration of the one hundred twenty (120) day period, said component society informs respondent by a verified written statement of an officer of the society that the component society has eliminated and will not reimpose the restraint(s) in question, and respondent has no grounds to believe otherwise.

IV.

It is further ordered, That respondent shall:

A. Within ninety (90) days after the date this order becomes final, publish in the "journal of the California Dental Association" ("CDA Journal"), or any successor publication, with such prominence and in the same size type as feature articles are regularly published in the "CDA Journal," or any successor publication, and with customary form and scope of distribution of the "CDA Journal," or any successor publication, and separately distribute by first class mail to each of its component societies and to each of its members:

1. This order, the accompanying complaint, and an announcement in the form shown in Appendix A to this order; and
2. Any documents revised pursuant to Part III.A. of this order.

B. For each person who, because of the advertising or solicitation practices of the person or the person's employer, currently is subject to a CDA disciplinary order, or currently is suspended from membership in CDA:

1. Within thirty (30) days after this order becomes final, distribute by first class mail a copy of this order, the accompanying complaint, and an announcement in the form shown in Appendix B to this order;
2. Within one hundred and twenty (120) days after the date this order becomes final, (a) review the person's file, and (b) determine whether the suspension or disciplinary order is consistent with Part II of this order; and
3. Within one hundred and twenty (120) days after the date this order becomes final, send by first class mail a letter notifying the person whether CDA has lifted the suspension and or vacated the disciplinary order, and, if not, detailing the reasons for maintaining the suspension or retaining the disciplinary order.

C. For each person currently not a member of CDA who, because of the advertising or solicitation practices of the person, or of the person's employer:

1. Has been expelled from CDA during the ten (10) year period preceding the date this order becomes final; or

2. Has been denied membership in CDA, or any CDA component, during the ten (10) year period preceding the date this order becomes final; or

3. Was contacted by CDA, or any CDA component, during the ten (10) year period preceding the date this order becomes final, and who subsequently resigned from CDA;

Take the following steps:

Within one hundred and twenty (120) days after this order becomes final, distribute by first class mail a copy of this order, the accompanying complaint, an announcement in the form shown in Appendix C to this order, and an application form for membership in CDA; and

Within forty-five (45) days after the date an application from such person for membership is received, (i) review the application, and (ii) send by first class mail a letter notifying the person whether membership has been granted, and, if not, detailing the reasons for the denial.

D. For five (5) years after the date this order becomes final, distribute by first class mail a copy of this order, the accompanying complaint, and an announcement in the form shown in Appendix A to this order to each person who applies for membership in CDA within thirty (30) days after CDA receives an application from such person.

V.

It is further ordered, That respondent shall:

A. For a period of three (3) years after the date this order becomes final, create and maintain a written record in each instance in which respondent or one of its component societies takes action with respect to advertising for the sale of dental services. The record required by this paragraph shall, at a minimum, clearly specify the particular representation that is alleged to be false or deceptive, and the basis for concluding that the particular advertisement is false or deceptive

within the meaning of Section 5 of the Federal Trade Commission Act.

B. Within six (6) months after the date that this order becomes final, and every six (6) months thereafter for a period of three (3) years, file with the Federal Trade Commission, Bureau of Competition, Division of Compliance, copies of each and every record created pursuant to Part V.A. of this order.

VI.

It is further ordered, That respondent shall:

A. Establish, within sixty (60) days after the date this order becomes final, and maintain for a period of five (5) years thereafter, a compliance program to aid in ensuring that respondent and its component societies act in conformance with the requirements of Parts II through V of this order. Said compliance program shall include, at a minimum:

1. Establishing a compliance officer or committee that shall supervise review of the activities of respondent and its component societies with respect to advertising; and

2. Establishing procedures to ensure that respondent receives written notice of all action, whether formal or informal, taken by respondent's component societies with respect to advertising.

B. Within one hundred and twenty (120) days after the date this order becomes final, file with the Federal Trade Commission a verified report in writing setting forth in detail the manner and form in which respondent has complied and is complying with this order.

C. Within one (1) year after the date this order becomes final, annually thereafter for a period of five (5) years, and at such other times as the Federal Trade Commission may by written notice to respondent request, file a verified report in writing with the Federal Trade Commission setting forth in detail the manner and form in which respondent has complied and is complying with this order, and setting forth in detail any action taken in connection with the activities covered by this order, including, but not limited to, any advice or interpretation rendered with respect to advertising or solicitation, and all written communications, all summaries of oral

communications, and all disciplinary actions taken with respect to advertising or solicitation.

D. For a period of five (5) years after the date this order becomes final, maintain and make available to the Federal Trade 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 Parts II, III, IV, and V of this order, including but not limited to any advice or interpretation rendered with respect to advertising or solicitation, and all written communications, all summaries of oral communications, and all disciplinary actions taken with respect to advertising or solicitation.

E. Notify the Federal Trade Commission at least thirty (30) days prior to any proposed changes in respondent, 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.

VII.

It is further ordered, That this order will terminate twenty (20) years from the date it becomes final, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later;

Provided, however, that the filing of such a complaint will not affect the duration of:

A. Any paragraph in this order that terminates in less than twenty (20) 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.

Commissioner Azcuenaga dissenting.

IN THE MATTER OF

SAFE BRANDS CORPORATION, ET AL.

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

Docket C-3647. Complaint, March 26, 1996--Decision, March 26, 1996

This consent order requires the respondents, among other things, to have reliable scientific evidence to substantiate certain claims regarding the environmental benefits, the level of engine protection and the safety of any antifreeze, coolant or deicer. The consent order also requires the respondents to provide a disclosure statement cautioning consumers that Sierra antifreeze may be harmful if swallowed. In addition, the consent order prohibits the respondents from misrepresenting the recyclability of such products and their packages.

Appearances

For the Commission: *Joel Winston, Michael Dershowitz, C. Lee Peeler* and *Michael Ostheimer.*

For the respondents: *Robert Magielnicki, Kutak & Rock,* Washington, D.C. *V. Peter Wynne*, in-house counsel for *ARCO Chemical Co.*, Newton Square, PA.

COMPLAINT

The Federal Trade Commission, having reason to believe that Safe Brands Corporation, a corporation, Warren Distribution, Inc., a corporation, and ARCO Chemical Company, a corporation ("respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent Safe Brands Corporation ("Safe Brands") is a Nebraska corporation which is a wholly owned subsidiary of respondent Warren Distribution, Inc. ("Warren Distribution"), a Nebraska corporation. Respondents Safe Brands and Warren Distribution have their principal offices or places of business at 727 South 13th Street, Omaha, Nebraska.

Respondent ARCO Chemical Company ("ARCO Chemical") is a Delaware corporation with its principal office or place of business at 3801 West Chester Pike, Newtown Square, Pennsylvania.

PAR. 2. Respondents Safe Brands and Warren Distribution have advertised, labeled, offered for sale, sold, and distributed a propylene glycol-based automobile antifreeze, under the trade name "Sierra Antifreeze-Coolant" (hereinafter "Sierra antifreeze"), and other products to the public. Respondent ARCO Chemical sold the propylene glycol used in the manufacture of Sierra antifreeze.

PAR. 3. Respondent ARCO Chemical has furnished the means and instrumentalities to respondents Safe Brands and Warren Distribution to engage in the acts and practices alleged in paragraphs five through twenty-one herein by providing information for, participating in the preparation of, paying for, and reviewing and/or approving Sierra antifreeze advertising and promotional materials, including but not limited to the attached Exhibits A through G. In addition, respondent ARCO Chemical has itself disseminated advertisements under its own name for propylene glycol-based antifreeze generally, including but not limited to the attached Exhibit H. Respondents Safe Brands and Warren Distribution have also disseminated ARCO Chemical advertisements for propylene glycol-based antifreeze generally, including but not limited to the attached Exhibit H.

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

PAR. 5. Respondents have disseminated or have caused to be disseminated advertisements, including television advertisements, product labeling, and other promotional materials, for Sierra antifreeze, and propylene glycol-based antifreeze generally, including but not necessarily limited to the attached Exhibits A through H. These advertisements contain the following statements and depictions:

A. If you care about this big beautiful world, show me.
Depiction of clouds, sky, trees.
Don't give me another toxic antifreeze.
Give me something different. Depiction of containers of Sierra antifreeze.
Don't just tell me it protects to seventy below. And guards against rust.
Any antifreeze can do that. Depiction of sunlight through the trees.
Tell me it's safer. For my dog. Depiction of dog and car.

My family. Depiction of father with child and mother in background.
The kids. Depiction of family walking together holding hands.
Tell me nothing protects better.
And it's biodegradable. Depiction of a field with flowers.
That's what I want to know. Depiction of body of water with green plants in foreground.
That's what I want to hear.
New Sierra. It's not just antifreeze. Super: It's not just Antifreeze.
It's safety freeze. Depiction of adult holding little girl.
Super: It's Safety Freeze.™
(Exhibit A, television advertisement).

B. Depiction of house with sky and trees in background. They care about the world these days. They just don't want me to put another toxic antifreeze in their car. I mean, who needs toxic. Depiction of girl on tire swing. So what if it protects to seventy below. Depiction of tree branches. Any antifreeze can do that. Tell me it's different. Depiction of container of Sierra antifreeze. Safer. Depiction of little girl with dog.
Tell me nothing protects better. Depiction of boy looking under car hood as man pours Sierra into car radiator. Depiction of woman with girl and dog. And it's biodegradable. Depiction of lake and trees. I mean, what if their dog gets into it? Depiction of dog with man by garage. Or their kids? Depiction of little girl with a barrel. This is serious. Depiction of little girl looking into barrel. It's a changing world. Poison's out.
New Sierra. It's not just antifreeze. Super: It's not just Antifreeze. It's safety freeze. Depiction of little girl with cat. Super: It's Safety Freeze.™
(Exhibit B, television advertisement).

C. Depiction of man and boy working on car. People care these days. They just don't want me to put another toxic antifreeze in their car. I mean, who needs something that toxic. Depiction of girl on tire swing. So what if it protects to seventy below. Depiction of man and boy working on car. Any antifreeze can do that. Give me something different. Depiction of container of Sierra antifreeze. Something safer. Depiction of little girl with dog. That's essentially non-toxic. Depiction of dog with bucket of clear liquid.
I mean, what if their dog gets into it? Depiction of dog with man by garage.
Or their kids? Depiction of girl and woman with dog. This is serious. Depiction of family with dog. Sierra. Its not just antifreeze. Super: Parents: Store safely. Not for drinking. It's safety freeze. Depiction of girl with cat. Super: It's Safety Freeze.™ Parents: Store safely. Not for drinking.
(Exhibit C, television advertisement).

D. 1. S I E R R A
Antifreeze * Coolant
* Essentially Non Toxic
* Safer For People & Pets
* Superior Engine Protection
. . .
B I O D E G R A D A B L E
(Exhibit D.1, former product label - front).

Exhibit D.1 also included on the front a product logo that included the statement "ENVIRONMENTALLY SAFER" and depicted trees, mountains, water, and sky.

D.2. THE ULTIMATE IN AUTOMOTIVE PROTECTION AND ENVIRONMENTAL SAFETY

ULTIMATE AUTOMOTIVE PROTECTION:

SIERRA protects cars from freeze-ups during the harshest winter conditions and from boil-overs in extreme summer temperatures....

ESSENTIALLY NON-TOXIC

ENVIRONMENTALLY SAFER

SIERRA's essentially non-toxic formula guards against poisonings of children and pets. All other leading brands of antifreeze contain ethylene glycol which is highly toxic.

SIERRA is naturally biodegradable and is converted to harmless components in activated treatment systems.

. . . However, mixing SIERRA

with ethylene glycol antifreeze eliminates the toxicity and performance advantages of SIERRA.

SIERRA contains propylene glycol and although it is not "toxic" as defined by the regulations of the Consumer Product Safety Commission at 16 CFR 1500.3(c)(2), it is not for human consumption and should be kept out of reach of children.

(Exhibit D.2., former product label - back).

Exhibit D.2 also included on the back the statement "Recyclable Plastic Container" below a depiction of a three chasing arrow symbol.

E.1. **SIERRA**

Antifreeze * Coolant

* Essentially Non Toxic
To People & Pets

SAFETY FREEZE

(Exhibit E.I., subsequent product label - front).

Exhibit E.1. also includes on the front a product logo that includes the statement "SAFER PROTECTION" and depicts a man, a girl, a dog, and a bird.

E.2. SAFER AND PHOSPHATE FREE - SIERRA PROTECTS YOUR FAMILY . . .

ENVIRONMENTAL BENEFITS

* Toxicity -- Because it is essentially non toxic, SIERRA is safer for people, pets, and wildlife in the environment than other leading brands. Many poisonings of animals are caused by their drinking conventional antifreeze that has spilled or leaked from cars. SIERRA greatly reduces this risk.

* Biodegradability -- Sierra biodegrades readily in the natural environment and in activated sewage treatment systems as may other brands. All antifreeze can become contaminated with trace amounts of lead or other metals and should be disposed of properly and in accordance with local regulations. Even if contaminated with trace metals, used SIERRA is far less poisonous to animal life than conventional antifreeze.

* Recyclability -- Used SIERRA can be mixed with conventional antifreeze in collection systems and recycling processes. This SIERRA container . . . can be further recycled. Recycling may not be available in all areas.

CAUTIONARY INFORMATION

SIERRA contains propylene glycol and although it is not "toxic" as defined by the regulations of the Consumer Product Safety Commission, SIERRA is NOT INTENDED FOR HUMAN OR ANIMAL CONSUMPTION so:
KEEP OUT OF REACH OF CHILDREN.
(Exhibit E.2., subsequent product label - back).

F. Safety & Environmental Advantages
ANTIFREEZE - A TOXIC PROBLEM
SIERRA - THE SAFER ANTIFREEZE
With its mission being to develop effective but environmentally safer products for the automotive market, Safe Brands Corporation initiated research to find a non-toxic, environmentally safer alternative to existing EG based antifreeze brands. We discovered that it was possible to formulate a highly effective, heavy duty antifreeze from essentially non-toxic components -- completely omitting ethylene glycol. The results of this research is SIERRA -The Safer Antifreeze.
Sierra is formulated with propylene glycol. Unlike EG, propylene glycol (PG) is safe. It is so safe that it is used in the formulation of many consumer products such as cosmetics including lipstick and medicines such as Children's Tylenol. It is also a key moisturizing ingredient used in . . . pet foods. Pharmaceutical grade PG has received a "generally recognized as safe" designation from the Food and Drug Administration. . . .
SIERRA IS BIODEGRADABLE
PG does not persist in the environment. It is readily consumed by microorganisms. In addition to its natural biodegradability, it is fully degraded within 24 hours in activated sludge treatment plants operating at 65°F.
Performance Advantages
COOLING SYSTEM
PERFORMANCE ADVANTAGES
OF SIERRA
SUPERIOR FREEZE PROTECTION
. . . Unlike EG based antifreeze solutions which begin expanding soon after their initial freezing point is reached, SIERRA solutions do not begin to expand until the temperature becomes considerably lower than the initial freezing point. This characteristic of SIERRA adds a margin of safety against the expansion breakage of engines and cooling systems components.
SUPERIOR CORROSION PROTECTION
. . . In a paper presented at the 1990 Society of Automotive Engineers (SAE) Convention in Detroit, representatives of Cummins Engine Fleetguard Division and Arco Chemical Company presented data which demonstrated the superior corrosion protection characteristics of propylene glycol over ethylene glycol based coolants. (Exhibit F, former neck tag pamphlet).

G. Depiction of products including Dolly Madison Bakery Zingers, Wyler's Bouillon Cubes, Vicks Children's NyQuil, Infant's Tylenol, Chubs Baby Wipes, Maybelline Great Lash Mascara, ALPO Beef Jerky Bits, and Ken-L Ration Kibbles 'n Bits.
In addition to consumer safety, these trusted products have one thing in common... They all contain propylene glycol.
So does ...

Depiction of the front of a Sierra antifreeze container including the statements, "Essentially Non Toxic," "Safer For People & Pets," "Superior Engine Protection," "BIODEGRADABLE," and "ENVIRONMENTALLY SAFER" and the depiction of trees, mountains, water, and sky.
It's Not Just Antifreeze.
It's Safety Freeze.
(Exhibit G, promotional material).

H. PG Antifreeze Safety and Environmental Advantages
Although EG is effective as a car and truck antifreeze, it is toxic to humans and animals if ingested. EG is metabolized to oxalic acid, which crystallizes in the kidney, causing death.
There Is A Safer Alternative...
PG has received a "generally recognized as safe" designation from the Food and Drug Administration. PG has been used safely for many years as an ingredient in foods, cosmetics, and medicinal products.
Pet and Animal Exposure
Dogs and cats are naturally attracted to EG because of its sweet taste and smell, but EG-based antifreeze can be lethal to pets and other animals if ingested. . . . By contrast, PG is harmless. In fact, it is used as a moisturizing ingredient in many pet foods.
EG also can be toxic to poultry. PG on the other hand is used in many animal feed formulations to keep the feed moist and palatable.
Biodegradability
PG does not persist in the environment. It is readily consumed by microorganisms. In an activated sludge treatment plant operating at 65 degrees Fahrenheit, PG is fully degraded within 24 hours.
(Exhibit H, promotional material).

PAR. 6. Through the use of the statements and depictions contained in the advertisements referred to in paragraph five, including but not necessarily limited to the advertisements attached as Exhibits A, B, D, E, F, G, and H, respondents have represented, directly or by implication, that:

a. Compared to conventional, ethylene glycol-based antifreeze, Sierra antifreeze, and other propylene glycol-based antifreezes, are safer for the environment generally;

b. Sierra antifreeze, and other propylene glycol-based antifreezes, are absolutely safe for the environment after ordinary use; and

c. Because Sierra antifreeze, and other propylene glycol-based antifreezes, are biodegradable, they are absolutely safe for the environment after ordinary use.

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

PAR. 8. In truth and in fact, at the time respondents made the representations set forth in paragraph six, while they possessed and relied upon a reasonable basis to substantiate that when compared to conventional, ethylene glycol-based antifreeze, Sierra antifreeze, and other propylene glycol antifreezes, are less toxic, and therefore safer for that part of the environment that is composed of humans, pets, and wildlife that may accidentally ingest it, respondents did not possess and rely upon a reasonable basis to substantiate that (a) compared to conventional, ethylene glycol-based antifreeze, Sierra antifreeze, or other propylene glycol-based antifreezes, are safer for the environment generally, *e.g.*, the air, water, soil, plants, or aquatic life; or (b) Sierra antifreeze, or other propylene glycol-based antifreezes, are absolutely safe for the environment after ordinary use; or (c) because Sierra antifreeze, and other propylene glycol-based antifreezes, are biodegradable, they are absolutely safe for the environment after ordinary use. One reason for this is that used antifreeze, whether ethylene glycol-based or propylene glycol-based, may contain lead and/or other substances that are hazardous to the environment. Therefore, the representation set forth in paragraph seven was, and is, false and misleading.

PAR. 9. Through the use of the statements and depictions contained in the advertisements referred to in paragraph five, including but not necessarily limited to the advertisements attached as Exhibits A through H, respondents have represented, directly or by implication, that:

a. Sierra antifreeze, and other propylene glycol-based antifreezes, are absolutely safe for people and pets; and

b. Because Sierra antifreeze, and other propylene glycol-based antifreezes, contain the same ingredient designated by the FDA as "generally recognized as safe" and found in foods, drugs, cosmetics, and pet foods, they are absolutely safe for people and pets.

PAR. 10. Through the use of the statements and depictions contained in the advertisements referred to in paragraph five, including but not necessarily limited to the advertisements attached as Exhibits A through H, respondents have represented, directly or by implication, that at the time they made the representations set forth in paragraph nine, respondents possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 11. In truth and in fact, at the time respondents made the representations set forth in paragraph nine, while they possessed and relied upon a reasonable basis to substantiate that when compared to conventional, ethylene glycol-based antifreeze, Sierra antifreeze, and other propylene glycol-based antifreezes, are less toxic and therefore safer for people and pets if accidentally ingested, respondents did not possess and rely upon a reasonable basis to substantiate that Sierra antifreeze, or other propylene glycol-based antifreezes are absolutely safe for people and pets. Therefore, the representation set forth in paragraph ten was, and is, false and misleading.

PAR. 12. Through the use of the statements contained in the advertisements referred to in paragraph five, including but not necessarily limited to the advertisements attached as Exhibits D, F, and G, respondents have represented, directly or by implication, that compared to conventional, ethylene glycol-based antifreeze, Sierra antifreeze provides superior automotive protection from freezing temperatures, boil-overs, and corrosion.

PAR. 13. Through the use of the statements contained in the advertisements referred to in paragraph five, including but not necessarily limited to the advertisements attached as Exhibits D, F, and G, respondents have represented, directly or by implication, that at the time they made the representation set forth in paragraph twelve, respondents possessed and relied upon a reasonable basis that substantiated such representation.

PAR. 14. In truth and in fact, at the time they made the representation set forth in paragraph twelve, respondents did not possess and rely upon a reasonable basis that substantiated that when compared to conventional, ethylene glycol-based antifreeze, Sierra antifreeze provides superior automotive protection from freezing temperatures, boil-overs, and corrosion. Therefore, the representation set forth in paragraph thirteen was, and is, false and misleading.

PAR. 15. Through the use of the statements contained in the advertisements referred to in paragraph five, including but not

necessarily limited to the advertisement attached as Exhibit E, respondents have represented, directly or by implication, that Sierra antifreeze is recyclable.

PAR. 16. In truth and in fact, while Sierra antifreeze is capable of being recycled, the vast majority of consumers cannot recycle it because there are few collection facilities nationwide that will accept propylene glycol-based antifreeze for recycling. Therefore, the representation set forth in paragraph fifteen was, and is, false and misleading.

PAR. 17. Through the use of the statements and depictions contained in the advertisements referred to in paragraph five, including but not necessarily limited to the advertisements attached as Exhibits D and E, respondents have represented, directly or by implication, that the container in which Sierra antifreeze is sold is recyclable.

PAR. 18. In truth and in fact, while the plastic container in which Sierra antifreeze is sold is capable of being recycled, the vast majority of consumers cannot recycle it because there are few collection facilities nationwide that will accept high-density polyethylene plastic antifreeze containers for recycling. Therefore, the representation set forth in paragraph seventeen was, and is, false and misleading.

PAR. 19. Through the use of the statements and depictions contained in the advertisements referred to in paragraph five, including but not necessarily limited to the advertisements attached as Exhibits D and E respondents have represented, directly or by implication, that at the time they made the representations set forth in paragraphs fifteen and seventeen, respondents possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 20. In truth and in fact, at the time they made the representations set forth in paragraphs fifteen and seventeen, respondents did not possess and rely upon a reasonable basis that substantiated such representations. 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 in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

Commissioner Starek recused.

EXHIBIT A

RADIO TV REPORTS

41 East 42nd Street, New York, NY 10017 (212) 309-1500

PRODUCT: SIERRA ANTIFREEZE
TITLE: "ENVIRONMENTALLY SAFE"
PROGRAM: NOTRE DAME FOOTBALL
STATION: NBC
NEW YORK
30
1:56PM

(MUSIC) 1st MAN: If you care about this big beautiful world show me.

WOMAN: Don't give me another toxic antifreeze. 2nd MAN:Give me something

different.

3rd MAN: Don't just tell me how it protects to seventy below. WOMAN:And guards against rust.

(MUSIC)

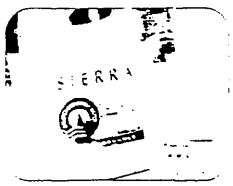
2nd MAN: Any antifreeze can do that.

1st MAN: Tell me it's safer for

my dog, my family, The kids. WOMAN:Tell me nothing protects better.

1st MAN: And its biodegradable.

WOMAN: That's what I want to know. 2nd MAN That's what I want to hear



MALE ANNCR: New Sierra it's not just antifreeze

it's safety freeze. (MUSIC OUT)

Exhibit A

ALSO AVAILABLE IN COLOR VIDEO-TAPE CASSETTE

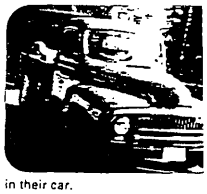
EXHIBIT B

RADIO
TV REPORTS

41 East 42nd Street New York, NY 10017 (212) 867-1420

(MUSIC) MAN: They care about the world these days.

They just don't want me to put another toxic antifreeze



in their car.

I mean, who needs toxic?

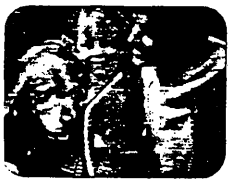
So what if it protects to 70 below; any antifreeze can do that.

Tell me that it's different, safer. Tell me nothing protects better

and it's biodegradable.

I mean, what if their dog gets into it.

or their kids? This is serious.



It's a changing world. Poison's out.

ANNCR: New Sierra. It's not just ant freeze

It's safety freeze. (MUSIC OUT

Exhibit B

ALSO AVAILABLE IN COLOR VIDEO-TAPE CASSETTE

EXHIBIT C

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

PRODUCT: SIERRA ANTIFREEZE 94-12730 EI
TITLE: "PEOPLE CARE THESE DAYS"
PROGRAM: NOTRE DAME FOOTBALL 9/24/94 :30
STATION: NBC (NEW YORK) 3:10PM
REVISION OF COMMERCIAL 93-10469

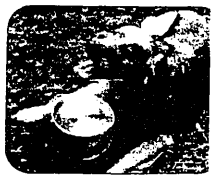

(MUSIC)


LARRY: *People care these days.*


They just don't want me to put another toxic antifreeze in their ca


I mean, who needs something that toxic?

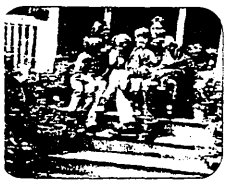

So what if it protects to 70 below?


Any antifreeze can do that.


Give me something different, *something safer that's essentially* non-toxic.


I mean, what if their dog gets into it?


Or their kids?


This is serious.


ANNCR: Sierra. It's not just antifreeze.

It's safety freeze. (MUSIC OUT)

Exhibit C

ALSO AVAILABLE IN COLOR VIDEO-TAPE CASSETTE

EXHIBIT D.1

Exhibit D.1.

EXHIBIT D.2

1256 10-10

THE ULTIMATE IN AUTOMOTIVE PROTECTION AND ENVIRONMENTAL SAFETY

ULTIMATE AUTOMOTIVE PROTECTION:
SIERRA protects cars from freeze-ups during the harshest winter conditions and from boil-overs in extreme summer temperatures. SIERRA has passed the industry's most demanding corrosion tests including those of ASTM D 3306 and General Motors Specification GM 1899M.
- Protects against freeze-ups.
- Protects against boil-overs.
- Prevents corrosion of all engine metals.

ESSENTIALLY NON-TOXIC ENVIRONMENTALLY SAFER
SIERRA's essentially non-toxic formula guards against poisonings of children and pets. All other leading brands of antifreeze contain ethylene glycol which is highly toxic.
SIERRA is naturally biodegradable and is converted to harmless components in activated treatment systems.

INSTALLATION DIRECTIONS:
1. Drain out old antifreeze.
2. Thoroughly flush cooling system with water.
3. Inspect cooling system. Tighten clamps and replace hoses if necessary.
4. Install SIERRA using a 50/50 mix with water for a freezing point of -27°F (-32°C). Consult the SIERRA protection chart for other desired freeze point protection.
5. SIERRA is compatible with leading brands of conventional antifreeze. However, mixing SIERRA with ethylene glycol antifreeze eliminates the toxicity and performance advantages of SIERRA.
6. Used antifreeze frequently contains toxic metallic compounds which leach out of cooling systems and is particularly toxic if it is ethylene glycol based. For information regarding the proper disposal of used antifreeze contact your local waste disposal or environmental control authorities or contact SafeBrands.

SIERRA PROTECTION CHART

Sierra	Water	Protects against freeze-ups down to	Protects against boil-overs up to
50%	50%	-27°F	256°F*
60%	40%	-54°F	261°F*
67%	33%	-76°F	262°F*

*14 psi radiator cap

TESTING SIERRA COOLANT
Sierra freeze point protection cannot be accurately measured with conventional antifreeze testers. Special testers are available from SafeBrands. If you would like to order SIERRA testers, or if you have other questions about SIERRA, contact SafeBrands; P.O. Box 3007; Omaha, NE 68103; phone 800-289-7234.

SIERRA contains propylene glycol and although it is not "toxic" as defined by the regulations of the Consumer Product Safety Commission at 16 CFR1500.3(c)(2), it is not for human consumption and should be kept out of reach of children.

0 71621 13091 9

Recyclable Plastic Container

Distributed by
SafeBrands Corporation
P.O. Box 3007
Omaha, NE 68103

Part No. 091

Exhibit D.2.

EXHIBIT E.1

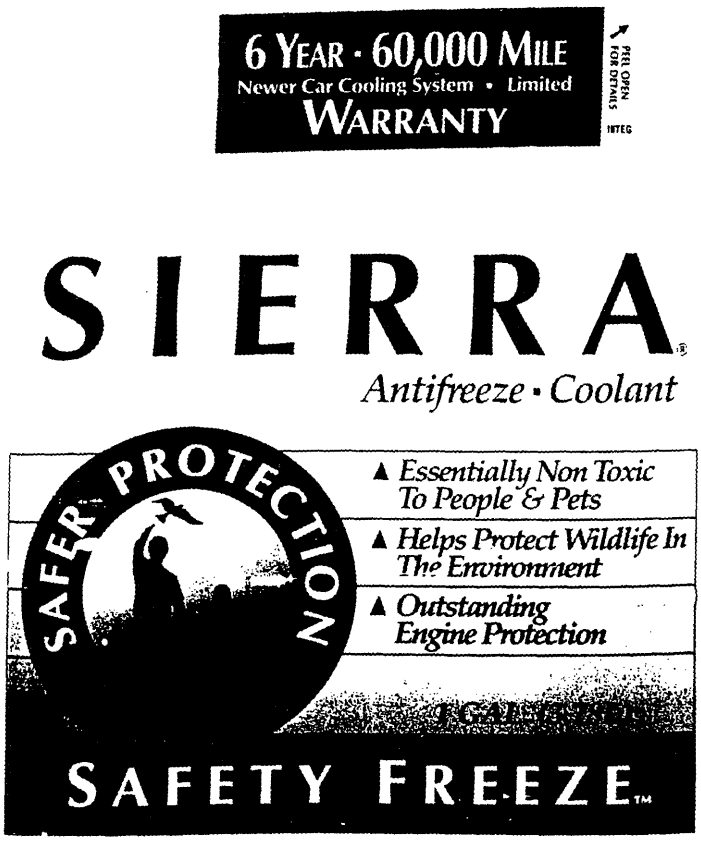


Exhibit E.1.

EXHIBIT E.2

SAFER AND PHOSPHATE FREE - SIERRA PROTECTS YOUR FAMILY AND YOUR CAR

COOLING SYSTEM BENEFITS

In addition to quality freeze up and boil over protection, SIERRA contains no phosphates and provides outstanding cooling system corrosion protection. SIERRA passes the ASTM D 5216 tests for propylene glycol coolants and the key performance requirements of ASTM D 3306. SIERRA meets many important car maker requirements including the Ford Dynamometer BL2-2 test and ASTM D 1384, D 2570, D 2809 and D 4340 tests specified in GM's standards GM 1825M and GM 1899M. No conventional antifreeze prevents corrosion better.

ENVIRONMENTAL BENEFITS

- Toxicity - Because it is essentially non toxic, SIERRA is safer for people, pets and wildlife in the environment than other leading brands. Many poisonings of animals are caused by their drinking conventional antifreeze that has spilled or leaked from cars. SIERRA greatly reduces this risk.
- Biodegradability - SIERRA biodegrades readily in the natural environment and in activated sewage treatment systems as may other brands. All antifreeze can become contaminated with trace amounts of lead or other metals and should be disposed of properly and in accordance with local regulations. Even if contaminated with trace metals, used SIERRA is far less poisonous to animal life than conventional antifreeze.
- Recyclability - Used SIERRA can be mixed with conventional antifreeze in collection systems and recycling processes. This SIERRA container contains at least 25% recycled plastic and can be further recycled. Recycling may not be available in all areas.

INSTALLATION

Install SIERRA like any antifreeze, [illegible] careful not to remove the radiator cap when engine is hot. While SIERRA is compatible with conventional antifreeze, its safety benefit is eliminated if mixed, so thoroughly flush out old coolant with water. As not all fluid will drain from a cooling system, check car owners manual for system capacity to determine the proper amount of SIERRA to install to achieve desired protection.

SIERRA	Water	Protects against freeze-ups down to	Protects against boil-overs up to*
50%	50%	-26°F	256°F
60%	40%	-54°F	261°F
67%	33%	-76°F	262°F

*14 psi radiator cap

To maintain optimum corrosion protection, replace SIERRA annually

TESTING SIERRA COOLANT

SIERRA freeze point protection cannot be measured with conventional antifreeze [illegible]s. SIERRA testers are available from SIERRA retailers or may be purchased from Safe Brands at the address below.

CAUTIONARY INFORMATION

SIERRA contains propylene glycol and although it is not "toxic" as defined by regulations of the Consumer Product Safety Commission, SIERRA is NOT INTENDED FOR HUMAN OR ANIMAL CONSUMPTION so:

KEEP OUT OF REACH OF CHILDREN.

Part No. 091

Do not store in open or unlabeled containers

Safe Brands
Corporation
P.O. Box 3007
Omaha, NE 68103
800-289-7234

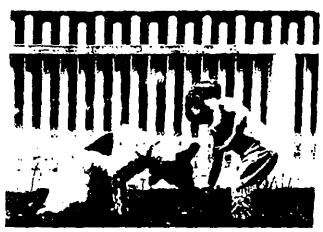
Exhibit E.2.

EXHIBIT F

SIERRA

Antifreeze

THE SAFER ONE

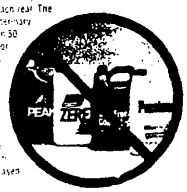


Safety & Environmental Advantages

ANTIFREEZE — A TOXIC PROBLEM

Each year there are over 200 million gallons of toxic antifreeze purchased, installed and disposed of in the United States. This antifreeze is manufactured with ethylene glycol (EG), and includes all major brands such as Prestone, Peak, Zerex and Texaco. Although EG based antifreeze provides freeze protection for automobiles, it has a serious environmental problem because it is highly toxic to people and animals. The danger of such EG based antifreeze is magnified by its sweet taste to which children and animals are attracted. Each year a significant number of children and pets are poisoned by antifreeze and require emergency medical treatment for antifreeze ingestion.

Household pets and wild animals are attracted to drink the sweet tasting pools of antifreeze formed by drippings from the cooling systems of cars and trucks as well as to pools of improperly disposed of used antifreeze. Many are poisoned each year. The Colorado State University Veterinary Hospital reported that more than 50 percent of all poisoning deaths of dogs and cats were caused by antifreeze. The lethal dose of EG is as little as 2 teaspoons for cats and 2 tablespoons for a child weighing 50 pounds.



The toxicity of EG has led to one of the most environmentally concerned Environmental Protection Agency and state and local regulations to restrict consumer sales of EG based antifreeze.

SIERRA — THE SAFER ANTIFREEZE

With its mission being to develop effective but environmentally safer products for the automotive market, Safe Brands Corporation initiated research to find a non-toxic, environmentally safer alternative to existing EG based antifreeze brands. We discovered that it was possible to formulate a highly effective heavy duty antifreeze from essentially non-toxic components — completely omitting ethylene glycol. The results of this research is SIERRA — The Safer Antifreeze.

SIERRA is formulated with propylene glycol. Unlike EG, propylene glycol (PG) is safe. It is so safe that it is used in the formulation of many consumer products such as cosmetics including lipstick and medicines such as Children's Tylenol. It is also a key moisturizing ingredient used in tobacco products and pet foods. Pharmaceutical grade PG has received a "generally recognized as safe" designation from the Food and Drug Administration. The United States Occupational Safety and Health Administration (OSHA) has established and upper exposure limit of 50 parts per million for EG. OSHA has not found it necessary to set an exposure limit for PG because of its inherent non-toxicity.

SIERRA IS BIODEGRADABLE

PG does not persist in the environment. It is readily consumed by microorganisms. In addition to its natural biodegradability, it is fully degraded within 24 hours in activated sludge treatment plants operating at 65 F.

Performance Advantages

COOLING SYSTEM PERFORMANCE ADVANTAGES OF SIERRA

SUPERIOR FREEZE PROTECTION

A 50-50 blend of SIERRA and water has a freezing point of -27 F, more than enough protection for most regions. For low temperature protection required, it can readily be increased by increasing the concentration of SIERRA — for example a 66-34 blend of SIERRA and water gives freeze protection to -76 F.

Unlike EG based antifreeze solutions, which begin expanding soon after their initial freezing point is reached, SIERRA solutions do not begin to expand until the temperature becomes considerably lower than the initial freezing point. This characteristic of SIERRA adds a margin of safety against the expansion breakage of engines and cooling systems components.

40%	60%	-4 F	-60 F
50%	50%	-27 F	-72 F
60%	40%	-54 F	-100 F
66%	34%	-76 F	-107 F

SUPERIOR CORROSION PROTECTION

SIERRA has passed the automotive industry's most demanding corrosion tests including those of ASTM D 3306 and General Motors specification GM 1899M. It provides corrosion protection to all cooling system components including aluminum, copper, cast iron, steel and solder. Additionally, SIERRA's propylene glycol base has been shown to reduce cavitation corrosion in heavy duty Diesel engines common with ethylene glycol based coolants. In a paper presented at the 1990 Society of Automotive Engineers (SAE) Convention in Detroit, representatives of Cummins Engine Fleetguard Division and Arco Chemical Company presented data which demonstrated the superior corrosion protection characteristics of propylene glycol over ethylene glycol based coolants.

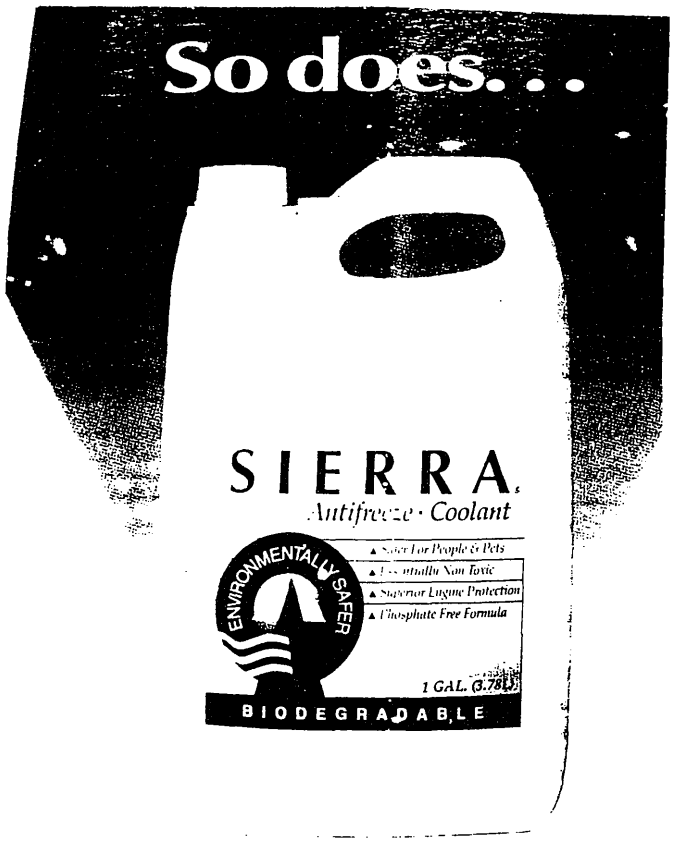
Exhibit F

EXHIBIT G

In addition to consumer safety, these trusted products have one thing in common . . .

Exhibit G

EXHIBIT G



It's Not Just Antifreeze.

It's Safety Freeze.

Exhibit G

EXHIBIT G

They all contain propylene glycol.

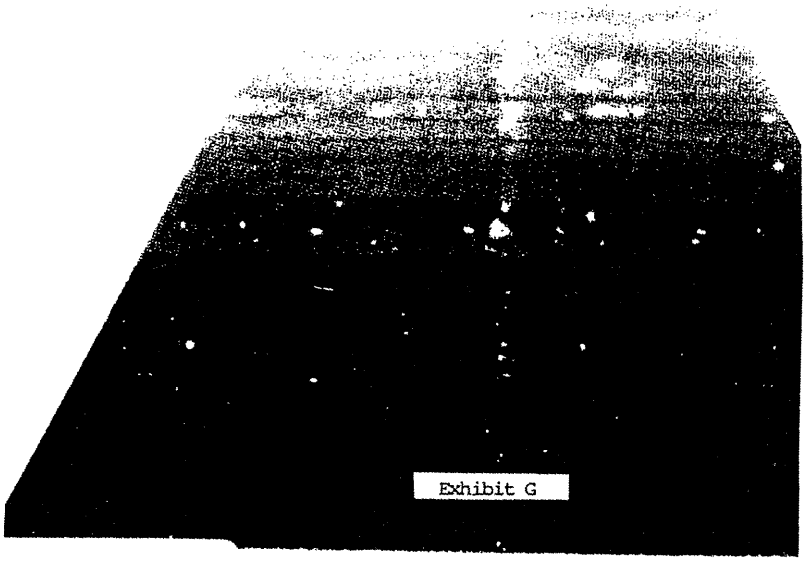


EXHIBIT H

PG Antifreeze Safety and Environmental Advantages

Although EG is effective as a car and truck antifreeze, it is toxic to humans and animals if ingested. EG is metabolized to oxalic acid, which crystalizes in the kidney, causing death.

There Is A Safer Alternative...

PG has received a "generally recognized as safe" designation from the Food and Drug Administration. PG has been used safely for many years as an ingredient in foods, cosmetics, and medicinal products.

The United States Occupational Safety and Health Administration (OSHA) has established an exposure limit of 50 parts per million (ppm) for EG. OSHA has not found it necessary to set an exposure limit for PG because of PG's inherent low toxicity.

Concern over the handling of EG has led to the search for alternatives. Bus maintenance workers in the city of Copenhagen, Denmark, for example, have refused to handle EG-based antifreeze due to health and safety concerns. As a result, Copenhagen has switched to the safer PG antifreeze.

Pet and Animal Exposure

Dogs and cats are naturally attracted to EG because of its sweet taste and smell, but EG-based antifreeze can be lethal to pets and other animals if ingested. The Colorado State University Veterinary Hospital reported that more than 50 percent of all poisoning deaths of dogs and cats were linked to EG. By contrast, PG is harmless. In fact, it is used as a moisturizing ingredient in many pet foods.

EG also can be toxic to poultry. PG, on the other hand, is used in many animal feed formulations to keep the feed moist and palatable.

Biodegradability

PG does not persist in the environment. It is readily consumed by microorganisms. In an activated sludge treatment plant operating at 65 degrees Fahrenheit, PG is fully degraded within 24 hours.

Recyclability

As with all spent engine coolants, PG antifreeze should be disposed of properly or recycled after use. Although biotreatment can be used effectively to dispose of spent coolants, many firms are moving to recycling. PG antifreeze is fully recyclable, and ARCO Chemical is working through the ASTM to develop specifications for recycled antifreeze.

For more information please call our toll free number, 1 800 321 7000.

DECISION AND ORDER

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

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft complaint, a statement that the signing of the agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, 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 Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, and having modified the order in one respect, 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 Safe Brands Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Nebraska. It is a wholly-owned subsidiary of respondent Warren Distribution, Inc. Respondent Warren Distribution, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Nebraska. Respondents Safe Brands Corporation and Warren Distribution, Inc. have their principal offices or places of business at 727 South 13th Street, Omaha, Nebraska.

Respondent ARCO Chemical Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its principal office or place of business at 3801 West Chester Pike, Newtown Square, Pennsylvania.

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

ORDER

DEFINITION

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

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

I.

It is ordered, That respondents, Safe Brands Corporation, a corporation, Warren Distribution, Inc., a corporation, and ARCO Chemical Company, a corporation, their successors and assigns, and their officers, representatives, agents, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, labeling, promotion, offering for sale, sale, or distribution of any antifreeze, coolant, or deicer 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 any such product will not harm the environment, is less harmful to the environment than other products, or offers any environmental benefit, unless at the time of making such representation, respondents possess and rely upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates such representation.

II.

It is further ordered, That respondents, Safe Brands Corporation, a corporation, Warren Distribution, Inc., a corporation, and ARCO Chemical Company, a corporation, their successors and assigns, and their officers, representatives, agents, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, labeling, promotion, offering for sale, sale, or distribution of any antifreeze, coolant, or deicer product 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, about the safety or relative safety of such product for humans or animals unless, at the time of making such representation, respondents possess and rely upon competent and reliable scientific evidence that substantiates such representation.

III.

It is further ordered, That respondents, Safe Brands Corporation, a corporation, Warren Distribution, Inc., a corporation, and ARCO Chemical Company, a corporation, their successors and assigns, and their officers, representatives, agents, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the labeling, offering for sale, sale, or distribution of any propylene glycol-based antifreeze or coolant product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall disclose on the front of the container of all such products the following:

"See Back Panel for CAUTIONARY INFORMATION"

and shall disclose on the back of the container of all such products the following:

"CAUTIONARY INFORMATION: This Product MAY BE HARMFUL IF SWALLOWED. STORE SAFELY AWAY FROM CHILDREN AND PETS. Do not store in open or unlabeled containers."

Each disclosure shall be in a conspicuous and prominent place on the container, in conspicuous and legible type in contrast by typography,

layout, or color with all other printed material on the container. The disclosure on the back of the container shall be surrounded by a one (1) point rule. The disclosure on the front of the container and the first two sentences of the disclosure on the back of the container shall be in type at least as large as the largest print type on the back of the container, except for the brand name, but, in any case, no smaller than ten (10) point type. The words "CAUTIONARY INFORMATION" on the front and back of the container shall be in bold type. The last sentence of the disclosure on the back of the container shall be in type at least as large as the type in which the majority of the printed material on the back of the container is printed.

The back of the container shall also contain the following statement, printed in type at least as large as the type in which the majority of the printed material on the back of the container is printed:

"Clean up any leaks or spills."

IV.

It is further ordered, That respondents, Safe Brands Corporation, a corporation, Warren Distribution, Inc., a corporation, and ARCO Chemical Company, a corporation, their successors and assigns, and their officers, representatives, agents, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, labeling, promotion, offering for sale, sale, or distribution of any antifreeze, coolant, or deicer 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 level of vehicular engine protection provided by any such product, unless at the time of making such representation, respondents possess and rely upon competent and reliable scientific evidence that substantiates such representation.

V.

It is further ordered, That respondents, Safe Brands Corporation, a corporation, Warren Distribution, Inc., a corporation, and ARCO

Chemical Company, a corporation, their successors and assigns, and their officers, representatives, agents, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, labeling, promotion, offering for sale, sale, or distribution of any antifreeze, coolant, or deicer 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 extent to which:

A. Any such product or its package is capable of being recycled; or,

B. Recycling collection programs for such product or its package are available.

VI.

It is further ordered, That the provisions of this order shall not apply to any label or labeling printed prior to the date of service of this order and shipped by respondents to distributors or retailers prior to one hundred (100) days after the date of service of this order.

VII.

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.

VIII.

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

IX.

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

X.

This order will terminate on March 26, 2016, 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.

XI.

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

Commissioner Starek recused.

IN THE MATTER OF

PRAXAIR, 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-3648. Complaint, April 1, 1996--Decision, April 1, 1996

This consent order requires, among other things, Praxair, Inc., a Connecticut corporation, to divest, within 12 months to Commission-approved acquirers, four CBI atmospheric gases production plants, located in Vacaville and Irwindale, California; Bozrah, Connecticut; and Madison, Wisconsin. If the transaction is not completed in the prescribed time, a trustee may be appointed to divest the four plants.

Appearances

For the Commission: *Ann B. Malester, James Holden* and *William Baer.*

For the respondent: *Nathan Eimer, Sidley & Austin,* Chicago, IL.

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that respondent, Praxair, Inc. ("Praxair"), a corporation subject to the jurisdiction of the Commission, has agreed to acquire all of the common shares of CBI Industries, Inc. ("CBI"), a corporation subject to the jurisdiction of the Commission, in violation of Section 5 of the Federal Trade Commission Act ("FTC 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 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, stating its charges as follows:

I. RESPONDENT

1. Respondent Praxair is a corporation organized and existing under and by virtue of the laws of the United States, with its principal

executive offices located at 39 Old Ridgebury Road, Danbury, Connecticut.

2. For purposes of this proceeding, respondent is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is or affecting commerce as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

II. ACQUIRED COMPANY

3. CBI is a corporation organized and existing under and by virtue of the laws of the United States, with its principal executive offices located at 800 Jorie Boulevard, Oak Brook, Illinois.

4. CBI is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the FTC act, as amended, 15 U.S.C. 44.

III. THE ACQUISITION

5. On November 3, 1995, Praxair commenced a cash tender offer valued at approximately $2 billion for all of the issued and outstanding common shares of CBI. On December 22, 1995, Praxair and CBI entered into a definitive agreement whereby Praxair will acquire all of the issued and outstanding common shares of CBI.

IV. THE RELEVANT MARKETS

6. For purposes of this complaint, the relevant lines of commerce in which to analyze the effects of the acquisition are the manufacture and sale of merchant nitrogen, merchant oxygen, and merchant argon, whether sold in liquid form or in cylinders.

7. For purposes of this complaint, the relevant geographic areas in which to analyze the effects of the acquisition on the merchant nitrogen and merchant oxygen markets are:

a. Northern California;

b. Southern California; and

c. The Northern Midwest and Northeast United States, and narrower markets contained therein, including the Eastern Connecticut area and the Western Wisconsin/Southeastern Minnesota area.

8. For purposes of this complaint, the relevant geographic area in which to analyze the effects of the acquisition on the merchant argon market is the United States, and narrower markets contained therein, including the Eastern Connecticut area and the Western Wisconsin/Southeastern Minnesota area.

9. The relevant markets are highly concentrated whether measured by Herfindahl-Hirschmann Indices ("HHI") or two-firm and four-firm concentration ratios. In addition, CBI's Madison, Wisconsin and Bozrah, Connecticut plants are the closest competing facilities, geographically, to Praxair's Minneapolis, Minnesota and Suffield, Connecticut plants, respectively.

10. New entry into the merchant nitrogen, merchant oxygen, and merchant argon markets would be time consuming, costly and unlikely.

11. Praxair and CBI are actual competitors in the relevant markets.

V. EFFECTS OF THE ACQUISITION

12. The effects of the acquisition may be substantially to lessen competition and to tend to create a monopoly in the relevant markets set forth above in violation of Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, in the following ways, among others:

a. By eliminating direct actual competition between Praxair and CBI;

b. By enhancing the likelihood of collusion or coordinated action between or among the remaining firms in Northern and Southern California;

c. By eliminating competition between the two closest competitors, geographically, in Eastern Connecticut, and the two closest competitors, geographically, in Western Wisconsin and Southeastern Minnesota;

d. By increasing the likelihood that Praxair would unilaterally exercise market power in Eastern Connecticut, and in Western Wisconsin and Southeastern Minnesota; and

e. By increasing the likelihood that consumers would be forced to pay higher prices for merchant nitrogen, merchant oxygen, and merchant argon in the relevant geographic areas.

VI. VIOLATIONS CHARGED

13. The acquisition agreement described in paragraph five constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

14. The acquisition described in paragraph five, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of the proposed acquisition by respondent of all of the assets and businesses of CBI Industries, Inc. ("CBI"), and the respondent having been furnished thereafter with a copy of a draft of complaint that the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. 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, 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 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 Praxair, Inc. ("Praxair") is a corporation organized, existing and doing business under and by virtue of the laws of the United States, with its principal executive offices located at 39 Old Ridgebury Road, Danbury, Connecticut.

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

ORDER

I.

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

A. *"Respondent"* or *"Praxair"* means Praxair, Inc., its directors, officers, employees, agents and representatives, predecessors, successors and assigns; its subsidiaries, divisions, and groups and affiliates controlled by Praxair, Inc., and the respective directors, officers, employees, agents, and representatives, successors, and assigns of each.

B. *"CBI"* means CBI Industries, Inc., its directors, officers, employees, agents and representatives, predecessors, successors and assigns; its subsidiaries, divisions, and groups and affiliates controlled by CBI, and the respective directors, officers, employees, agents, and representatives, successors, and assigns of each.

C. *"Commission"* means the Federal Trade Commission.

D. *"Acquisition"* means Praxair's acquisition of issued and outstanding common shares of CBI, pursuant to a cash tender offer dated November 3, 1995.

E. *"Merchant atmospheric gases"* means oxygen, nitrogen and argon sold in liquid form or packaged in cylinders.

F. *"Atmospheric gases plant"* means a facility that produces Merchant atmospheric gases.

G. *"Merchant Divestiture Assets and Businesses"* means, the Vacaville Plant, Irwindale Plant, Bozrah Plant, and Madison Plant, whether divested individually or in some combination, including the assets, properties, business and goodwill, tangible and intangible, used in the manufacture and sale of merchant atmospheric gases at those plants, including, without limitation, the following:

1. All real property interests, including rights, title and interest in and to owned or leased property, together with all buildings, improvements, appurtenances, licenses and permits;

2. All machinery, fixtures, equipment, vehicles, transportation facilities, furniture, tools and other tangible personal property, including distribution equipment and cylinders;

3. All customer lists, vendor lists, catalogs, sales promotion literature, advertising materials, research materials, technical information, management information systems, software, software licenses, inventions, patents, technology, know-how, specifications, designs, drawings, processes and quality control data;

4. Rights to and in contracts, including customer, dealer, distributor, supply and utility contracts;

5. Inventory, supplies and storage capacity, including storage vessels;

6. All rights under warranties and guarantees, express or implied;

7. All books, records, and files; and

8. All items of prepaid expense.

H. *"Vacaville Plant"* means CBI's atmospheric gases plant located in Vacaville, California, together with all associated Merchant Divestiture Assets and Businesses.

I. *"Irwindale Plant"* means CBI's atmospheric gases plant located in Irwindale, California, together with all associated Merchant Divestiture Assets and Businesses.

J. *"Bozrah Plant"* means CBI's atmospheric gases plant located in Bozrah, Connecticut, together with all associated Merchant Divestiture Assets and Businesses.

K. *"Madison Plant"* means CBI's atmospheric gases plant located in Madison, Wisconsin, together with all associated Merchant Divestiture Assets and Businesses.

II.

It is further ordered, That:

A. Praxair shall divest, absolutely and in good faith, within twelve (12) months of the date this order becomes final, the Merchant Divestiture Assets and Businesses, and shall also divest such additional ancillary CBI assets and effect such arrangements as are necessary to assure the marketability, viability and competitiveness of the Merchant Divestiture Assets and Businesses.

B. Praxair shall divest the Merchant Divestiture Assets and Businesses, either individually or in some combination, 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 is to ensure the continuation of the Merchant Divestiture Assets and Businesses as an ongoing, viable operation or operations, engaged in the same business in which the Merchant Divestiture Assets and Businesses are engaged at the time of the proposed divestiture, and to remedy the lessening of competition resulting from the proposed acquisition as alleged in the Commission's complaint.

C. Pending divestiture of the Merchant Divestiture Assets and Businesses, Praxair shall take such actions as are necessary to maintain the viability, marketability, and competitiveness of the Merchant Divestiture Assets and Businesses, and to prevent the destruction, removal, wasting, deterioration or impairment of the Merchant Divestiture Assets and Businesses except for ordinary wear and tear.

D. Praxair 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 divested all of the Merchant Divestiture Assets and Businesses as required by this order.

III.

It is further ordered, That:

A. If Praxair has not divested, absolutely and in good faith, and with the prior approval of the Commission, the Merchant Divestiture

Assets and Businesses within twelve (12) months of the date this order becomes final, the Commission may appoint a trustee to divest the Merchant Divestiture Assets and Businesses. In the event that the Commission or the Attorney General brings an action pursuant to Section 5(1) of the Federal Trade Commission Act, 15 U.S.C. 45(l), or any other statute enforced by the Commission, Praxair 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 III 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 Praxair to comply with this order.

B. If a trustee is appointed by the Commission or a court pursuant to paragraph III.A., Praxair 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 Praxair, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures. If Praxair 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 Praxair of the identity of any proposed trustee, Praxair 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 Merchant Divestiture Assets and Businesses.

3. Within ten (10) days after appointment of the trustee, Praxair 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 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 Merchant Divestiture Assets and Businesses, or to any other relevant information, as the trustee may request. Praxair shall develop such financial or other information as the trustee may request and shall cooperate with the trustee. Praxair shall take no action to interfere with or impede the trustee's accomplishment of the divestiture(s). Any delays in divestiture caused by Praxair 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 Praxair's absolute and unconditional obligation to divest at no minimum price. The divestiture(s) 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 for any of the plants to be divested from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest that particular plant to the acquiring entity or entities selected by Praxair from among those approved by the Commission.

7. The trustee shall serve at the cost and expense of Praxair, without bond or other security unless paid for by Praxair, 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 Praxair, 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 Praxair, 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 Merchant Divestiture Assets and Businesses.

8. Praxair shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of any claim, whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.

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

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

11. The trustee shall have no obligation or authority to operate or maintain the Merchant Divestiture Assets and Businesses.

12. In the event that the trustee determines that he or she is unable to divest the Merchant Divestiture Assets and Businesses in a manner consistent with the Commission's purpose as described in paragraph II, the trustee may divest additional ancillary CBI assets of Praxair and effect such arrangements as are necessary to satisfy the requirements of this order.

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

IV.

It is further ordered, That within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until Praxair has fully complied with paragraphs II and III of this order, Praxair 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. Praxair 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 including a description of all substantive contacts or negotiations for the divestiture(s) required by this order, including the identity of all parties contacted. Praxair shall include in its compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning the divestiture(s).

V.

It is further ordered, That, for the purpose of determining or securing compliance with this order, Praxair 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 Praxair, relating to any matters contained in this order; and

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

VI.

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

VII.

It is further ordered, That respondent shall not be obligated to comply with this order if Praxair abandons the proposed acquisition of CBI. For purposes of this order, Praxair will be deemed to have abandoned the proposed acquisition of CBI after it provides written

notice to the Commission that it has abandoned its proposed acquisition and has withdrawn any related notifications filed pursuant to Section 7A of the Clayton Act, as amended, 15 U.S.C. 18a.

APPENDIX I

AGREEMENT TO HOLD SEPARATE

This Agreement to Hold Separate ("Hold Separate") is by and between Praxair, Inc. ("Praxair"), a corporation organized, existing, and doing business under and by virtue of the laws of the state of Delaware, 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.* (collectively, the "Parties").

PREMISES

Whereas, on November 3, 1995, Praxair offered to purchase all of the outstanding common shares of CBI Industries, Inc. ("CBI"); and

Whereas, CBI, with its principal office and place of business located at 800 Jorie Boulevard, Oak Brook, Illinois, manufactures and markets, among other things, Merchant atmospheric gases; and

Whereas, Praxair, with its principal office and place of business located at 39 Old Ridgebury Road, Danbury, Connecticut, manufactures and markets, among other things, Merchant Atmospheric Gases; and

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

Whereas, if the Commission accepts the Agreement Containing Consent Order ("Consent Agreement"), the Commission must place it on the public record for a period of at least sixty (60) days and may subsequently withdraw such acceptance pursuant to the provisions of Section 2.34 of the Commission's Rules; and

Whereas, the Commission is concerned that if an understanding is not reached, preserving the *status quo ante* of the Merchant Divestiture Assets and Businesses, as defined in paragraph I.G. of the Consent Agreement, during the period prior to the final acceptance

and issuance of the Consent Agreement by the Commission (after the 60-day public comment period), divestiture resulting from any proceeding challenging the legality of the Acquisition might not be possible, or might be less than an effective remedy; and

Whereas, the Commission is concerned that if the Acquisition is consummated, it will be necessary to preserve the Commission's ability to require the divestiture of the Merchant Divestiture Assets and Businesses and the Commission's right to have the Merchant Divestiture Assets and Businesses continue as viable competitors; and

Whereas, the purposes of this Hold Separate and the Consent Agreement are:

A. To preserve the Merchant Divestiture Assets and Businesses as viable, competitive, and independent businesses pending divestiture of the Merchant Divestiture Assets and Businesses, and

B. To remedy any anticompetitive effects of the Acquisition; and

Whereas, Praxair's entering into this Hold Separate shall in no way be construed as an admission by Praxair that the Acquisition is illegal; and

Whereas, Praxair 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, at the time it accepts the Consent Agreement for public comment, it will grant early termination of the Hart-Scott-Rodino waiting period, as follows:

1. Praxair agrees to execute and be bound by the Consent Agreement.

2. Praxair agrees that from the date this Hold Separate is accepted until the earliest of the times listed in subparagraphs 2.a. - 2.b., it will comply with the provisions of paragraph 3. of this Hold Separate:

a. Three (3) business days after the Commission withdraws its acceptance of the Consent Agreement Pursuant to the provisions of Section 2.34 of the Commission's Rules; or

b. The time that divestiture of the Merchant Divestiture Assets and Businesses as required by paragraph II of the Consent Agreement is completed.

3. To assure the complete independence and viability of the Merchant Divestiture Assets and Businesses, and to assure that no material confidential information is exchanged between Praxair and the Merchant Divestiture Assets and Businesses, Praxair shall hold the Merchant Divestiture Assets and Businesses separate and apart on the following terms and conditions:

a. Within 30 days from the date this Hold Separate becomes final Praxair shall cause all of its rights, title and interest in the Merchant Divestiture Assets and Businesses, as defined in paragraph I.G. of the Consent Agreement, as well as all such necessary personnel, including but not limited to, payroll and marketing personnel, to be transferred to a separate corporation ("Nucorp"), and effect any other arrangements as are necessary to ensure that Nucorp has complete viability and independence from Praxair (meaning here and hereinafter, Praxair excluding the Merchant Divestiture Assets and Businesses, personnel connected with the Merchant Divestiture Assets and Businesses, and Nucorp as of the date this Agreement is signed, but including all other portions of CBI).

b. Nucorp shall be held separate and apart and shall be managed and operated independently of Praxair, except to the extent that Praxair must exercise direction and control over Nucorp to assure compliance with this Hold Separate or the Consent Agreement.

c. Praxair shall maintain the marketability, viability, and competitiveness of Nucorp, including the Merchant Divestiture Assets and Businesses, 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 it shall not sell, transfer, encumber (other than in the normal course of business), or otherwise impair the marketability, viability or competitiveness of Nucorp including the Merchant Divestiture Assets and Businesses.

d. Praxair shall appoint a knowledgeable person among the top management of CBI's Merchant Atmospheric Gases Business to manage and maintain Nucorp on a day to day basis during the term of the Hold Separate. The manager shall have exclusive management and control of Nucorp, and shall manage Nucorp independently of Praxair's other businesses.

e. The Manager shall report exclusively to the Nucorp Management Committee ("Management Committee"). The Management Committee shall consist of the Manager; two other knowledgeable persons from among the top management of CBI's Merchant Atmospheric Gases Business; and two Praxair financial officers or a comparable, knowledgeable persons from Praxair's financial office who have no direct involvement with Praxair's Merchant Atmospheric Gases Business ("Praxair Management Committee Members"). The Chairman of the Management Committee shall be the Manager. Except for the Praxair Management Committee Members serving on the Management Committee, Praxair shall not permit any officer, employee, or agent of Praxair also to be an officer, employee or agent of Nucorp. Each Management Committee Member shall enter into a confidentiality agreement agreeing to be bound by the terms and conditions set forth in Attachment A, appended to this Hold Separate. The Management Committee shall meet monthly during the course of the Hold Separate, and as otherwise necessary. Meetings of the Management Committee during the term of the Hold Separate shall be audio recorded, and the recording shall be retained for two (2) years after the termination of the Hold Separate.

f. All material transactions, out of the ordinary course of business and not precluded by paragraph three hereof, shall be subject to a majority vote of the Management Committee.

g. Praxair shall not exercise direction or control over, or influence directly or indirectly, Nucorp, including the Merchant Divestiture Assets and Businesses, the Management Committee, or the Manager of Nucorp, any of their operations, assets, or businesses; provided, however, that Praxair may exercise only such direction and control over Nucorp as is necessary to assure compliance with this Hold Separate, the consent order and with all applicable laws and except as otherwise provided in this Hold Separate.

h. Except as required by law, and except to the extent that necessary information is exchanged in the course of evaluating and

consummating the Acquisition, defending investigations or litigation, obtaining legal advice, complying with this Hold Separate or the consent order or negotiating agreements to divest assets, Praxair shall not receive or have access to, or the use of, any material confidential information of Nucorp or the activities of the Manager or Management Committee not in the public domain, nor shall Nucorp, the Manager, or the Management Committee receive or have access to, or the use of, any material confidential information about Praxair. Praxair may receive on a regular basis from Nucorp aggregate financial information necessary and essential to allow Praxair to file financial reports, tax returns, and personnel reports. Any such information that is obtained pursuant to this subparagraph shall be used only for the purposes set forth in this subparagraph. ("Material confidential information," as used herein, means competitively sensitive or proprietary information, including, but not limited to, customer lists, price lists, marketing methods, patents, technologies, processes, or other trade secrets, not independently known to:

1. Praxair, with regard to Nucorp, including the Merchant Divestiture Assets and Businesses, from sources other than Nucorp or its employees or the Management Committee; or

2. The Management Committee or Nucorp or its employees, with regard to Praxair, from sources other than Praxair.)

i. Except as is permitted by this Hold Separate, the Praxair Management Committee Members shall not receive any Nucorp material confidential information and shall not disclose any such information obtained through their involvement with Nucorp to Praxair or use it to obtain any advantage for Praxair. The Praxair Management Committee Members shall participate in matters that come before the Management Committee only for the limited purpose of considering any capital investment of over $250,000, approving any proposed budget and operating plans, authorizing dividends and repayment of loans consistent with the provisions hereof, reviewing material transactions described in subparagraph 3.f, and carrying out Praxair's responsibilities under the Hold Separate and the Consent Agreement. Except as permitted by the Hold Separate, the Praxair Management Committee Members shall not participate in any matter, or attempt to influence the votes of the other directors on the Management Committee with respect to matters that would involve

a conflict of interest between Praxair and Nucorp, including the Merchant Divestiture Assets and Businesses.

j. Praxair shall not change the composition of the Management Committee unless a majority of the Management Committee consents. The Chairman of the Management Committee shall have the power to remove members of the Management Committee for cause and to require Praxair to appoint replacement members to the Management Committee in the same manner as provided in paragraph 3.e. of this Hold Separate. Praxair shall not change the composition of the management of the Merchant Divestiture Assets and Businesses, except that the Management Committee shall have the power to remove management employees for unsatisfactory performance or for cause.

k. If the Chairman of the Management Committee ceases to act or fails to act diligently, a substitute Chairman shall be appointed in the same manner as provided in paragraphs 3.d. and 3.e.

l. CBI personnel connected with Nucorp or the Merchant Divestiture Assets and Businesses or providing support services to Nucorp or the Merchant Divestiture Assets and Businesses as of the date this Hold Separate is signed shall continue, as employees of Praxair, to provide such services as of the date of this Hold Separate. Such Praxair personnel must retain and maintain all material confidential information relating to Nucorp, including the Merchant Divestiture Assets and Businesses on a confidential basis and, except as is permitted by this Hold Separate, such persons shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any such information to or with any other person whose employment involves any other Praxair business.

Such Praxair personnel shall also execute a confidentiality agreement prohibiting the disclosure of any material confidential information concerning Nucorp, including the Merchant Divestiture Assets and Businesses, or Praxair information.

m. Nucorp shall be staffed with sufficient employees to maintain the viability and competitiveness of the Merchant Divestiture Assets and Businesses, which employees shall be the Nucorp employees and may also be hired from sources other than Praxair. Each management employee of Nucorp shall execute a confidentiality agreement prohibiting the disclosure of any material confidential information concerning Nucorp.

n. Praxair shall circulate to the management employees of Nucorp and appropriately display a notice of this Hold Separate and consent order in the form attached hereto as Attachment A.

o. Praxair shall cause Nucorp to expend funds for research and development, quality control, manufacturing and marketing of the products produced at Nucorp at a level not lower than that budgeted for the 1994 fiscal year, and shall increase such spending as deemed reasonably necessary in light of competitive conditions. Within thirty (30) days of the date of this Hold Separate, the Chairman of the Management Committee shall develop a budget and operating plan for the 1996 fiscal year that complies with the provisions of this paragraph and present it to the Management Committee for approval. If necessary, Praxair shall provide Nucorp with any funds to accomplish the foregoing. Praxair shall provide to Nucorp such support services as provided by CBI prior to the Acquisition.

p. Praxair shall provide Nucorp with sufficient working capital to operate at a level not less than the rate of operation in effect during the twelve (12) months preceding the date of this Hold Separate.

q. The Management Committee shall serve at the cost and expense of Praxair. Praxair shall indemnify the Management Committee 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 Management Committee members.

r. The Management Committee shall have access to and be informed about all companies who inquire about, seek or propose to buy the Merchant Divestiture Assets and Businesses.

s. Notwithstanding the provisions of paragraph 3.i., companies who undertake a due diligence process in the course of negotiations to purchase Nucorp, or any part thereof, may be accompanied and assisted by either or both of the Praxair Management Committee Members, in addition to appropriate Nucorp employees selected by the Management Committee. The Praxair Management Committee Members may delegate tasks relating to such due diligence to attorneys, accountants and/or other financial employees of Praxair who are not directly engaged in the Praxair Merchant Atmospheric Gases Business; provided, however, that such Praxair employees, accountants and attorneys shall execute a confidentiality agreement prohibiting the disclosure of any Nucorp material confidential information.

4. Should the Federal Trade Commission seek in any proceeding to compel Praxair to divest itself of Nucorp, or any additional assets, as provided in the Consent Agreement, or to seek any other injunctive or equitable relief, Praxair 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. Praxair shall also waive all rights to contest the validity of this Hold Separate.

5. To the extent that this Hold Separate requires Praxair to take, or prohibits Praxair from taking, certain actions that otherwise may be required or prohibited by contract, Praxair shall abide by the terms of this Hold Separate or the Consent Agreement, and shall not assert as a defense such contract requirements in any action brought by the Commission to enforce the terms of this Hold Separate or the Consent Agreement.

6. For the purpose of determining or securing compliance with this Hold Separate, subject to any legally recognized privilege or provision of applicable law, and upon written request with reasonable notice to Praxair made to its General Counsel, Praxair shall permit any duly authorized representative or representatives of the Commission:

a. Access during the office hours of Praxair 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 Praxair or relating to compliance with this Hold Separate;

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

7. This Hold Separate shall not be binding until approved by the Commission.

ATTACHMENT A

NOTICE OF DIVESTITURE AND
REQUIREMENT FOR CONFIDENTIALITY

Praxair, Inc. ("Praxair") and CBI Industries, Inc. have entered into a Consent Agreement and Agreement to Hold Separate with the Federal Trade Commission ("Commission") relating to the divestiture of the Merchant Divestiture Assets and Businesses. Until after the Commission's order becomes final and the Merchant Divestiture Assets and Businesses are divested, the Merchant Divestiture Assets and Businesses must be managed and maintained as a separate company, independent of all other Praxair businesses. All competitive information relating to The Merchant Divestiture Assets and Businesses must be retained and maintained by the persons involved in the Merchant Divestiture Assets and Businesses 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 or agency involves any other Praxair business. Similarly, all such persons involved in any other Praxair business shall be prohibited from providing, discussing, exchanging, circulating or otherwise furnishing competitive information about such business to or with any person whose employment or agency involves the Merchant Divestiture Assets and Businesses.

Any violation of the Consent Agreement or the Agreement to Hold Separate, incorporated by reference as part of the consent order, may subject Praxair to civil penalties and other relief as provided by law.

IN THE MATTER OF

THE STOP & SHOP COMPANIES, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3649. Complaint, April 2, 1996--Decision, April 2, 1996

This consent order requires, among other things, the respondents to divest 17 supermarkets, within nine months, to Commission-approved acquirers. If the respondents fail to satisfy any of the divestiture provisions, the Commission may appoint a trustee to divest the supermarkets.

Appearances

For the Commission: *Ronald B. Rowe, James Fishkin* and *William Baer.*

For the respondents: *Richard Weisberg, Simpson, Thacher & Bartlett*, New York, N.Y. and *David Beddow, O'Melveny & Myers,* 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 respondents, The Stop & Shop Companies, Inc. ("Stop & Shop"), a corporation, and SSC Associates, L.P. ("SSC Associates"), a limited partnership, both subject to the jurisdiction of the Commission, have entered into an agreement to acquire Purity Supreme, Inc. ("Purity") in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

DEFINITIONS

1. For the purposes of this complaint:

"Supermarket" means a full-line retail grocery store with annual sales of at least two million dollars that carries a wide variety of food and grocery items in particular product categories, including bread and dairy products; refrigerated and frozen food and beverage products; fresh and prepared meats and poultry; produce, including fresh fruits and vegetables; shelf-stable food and beverage products, including canned and other types of packaged products; staple foodstuffs, which may include salt, sugar, flour, sauces, spices, coffee, and tea; and other grocery products, including nonfood items such as soaps, detergents, paper goods, other household products, and health and beauty aids.

THE STOP & SHOP COMPANIES, INC.

2. Respondent The Stop & Shop Companies, 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 1385 Hancock Street, Quincy, MA.

3. Respondent Stop & Shop is, and at all times relevant herein has been, engaged in the operation of supermarkets in Massachusetts and Connecticut.

4. Respondent Stop & Shop is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

SSC ASSOCIATES, L.P.

5. Respondent SSC Associates, L.P. ("SSC Associates") is a limited partnership 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 c/o Kohlberg, Kravis, Roberts & Co., 9 West 57th Street, New York, NY.

6. Respondent SSC Associates is, and at all times relevant herein has been, controlling the operations of Stop & Shop.

7. Respondent SSC Associates is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

ACQUISITION

8. On or about April 21, 1995, Stop & Shop and SSC Associates entered into an agreement with Purity Supreme to acquire all of the supermarkets and other related assets owned and operated by Purity Supreme.

TRADE AND COMMERCE

9. Relevant lines of commerce in which to analyze the acquisition described herein are the retail sale of food and grocery products in supermarkets, and narrower markets contained therein.

10. Stores other than supermarkets do not have a significant price-constraining effect on food and grocery products sold at supermarkets. Most consumers shopping for food and grocery products at supermarkets are not likely to shop elsewhere in response to a small price increase by supermarkets. In addition, supermarkets do not regularly price-check food and grocery products sold at other types of stores and do not typically change their food and grocery prices in response to prices at other types of stores.

11. Food stores other than supermarkets, such as convenience stores, "mom & pop" stores, and specialty food stores (*e.g.*, seafood markets, bakeries, etc.), typically offer far fewer items than the average supermarket and charge higher prices for many of the same or similar items. Other types of stores that sell some food and grocery products, such as large drug stores and mass merchandisers, offer only a limited number of items sold in the typical supermarket. The small number of upscale food stores emphasizing organically grown fruits and vegetables, hormone-free meat and poultry products, and other more expensive food products, and club stores that offer

only a limited number of food and grocery products in bulk sizes, do not have a significant effect on market concentration.

12. Relevant sections of the country in which to analyze the acquisition described herein are the following:

a. Barnstable County, Massachusetts (a/k/a Cape Cod), and narrower markets contained therein, including Falmouth, Mashpee, Hyannis, Yarmouth, Harwich, and Orleans;

b. The South Shore area of Massachusetts, which consists of parts of Suffolk and Plymouth counties, and narrower markets contained therein, including Marshfield and Kingston;

c. The Boston, Massachusetts metropolitan area, which consists of the city of Boston and parts of Essex, Middlesex, Norfolk, and Suffolk counties, and narrower markets contained therein, including Saugus, Medford, Watertown, Brookline, the Roslindale neighborhood in Boston, and Weymouth;

d. Brockton, Massachusetts; and

e. Bedford, Massachusetts.

MARKET STRUCTURE

13. The retail sale of food and grocery products in supermarkets in the relevant sections of the country is concentrated, whether measured by the Herfindahl-Hirschmann Index (commonly referred to as "HHI") or by two-firm and four-firm concentration ratios.

14. The post-acquisition HHI in Barnstable County, Massachusetts (a/k/a Cape Cod) would increase by approximately 2,778 points, from approximately 3,541 to approximately 6,319. The post-acquisition HHI in Falmouth, Mashpee, and Hyannis would increase to 10,000 or near 10,000 in each of these markets. The post-acquisition HHI in Yarmouth, Harwich, and Orleans would significantly increase already highly concentrated markets.

15. The post-acquisition HHI in the South Shore area of Massachusetts would increase by approximately 3,866 points, from approximately 3,930 to approximately 7,795. The post-acquisition HHI in Marshfield and Kingston would increase to 10,000 or near 10,000 in each of these markets.

16. The post-acquisition HHI in the Boston, Massachusetts metropolitan area would increase by approximately 512 points, from approximately 1,381 to approximately 1,893. The post-acquisition

HHI exceeds 2,000 when club stores and upscale food stores are not included in the market. The post-acquisition HHI in Saugus, Medford, Watertown, Brookline, the Roslindale neighborhood in Boston, and Weymouth would significantly increase already highly-concentrated markets.

17. The post-acquisition HHI in Bedford, Massachusetts would increase by approximately 4,702 points, from approximately 5,298 to approximately 10,000.

18. The post-acquisition HHI in Brockton, Massachusetts would increase by approximately 497 points, from approximately 5,162 to approximately 5,659.

ENTRY CONDITIONS

19. Entry into the retail sale of food and grocery products in supermarkets in the relevant sections of the country is difficult and would not be timely, likely, or sufficient to prevent anticompetitive effects in the relevant sections of the country.

20. Entry that would prevent the anticompetitive effects in the relevant sections of the country is generally difficult because there are few available sites suitable for supermarkets and the time necessary to receive state and local regulatory approval for a new supermarket is typically quite long.

ACTUAL COMPETITION

21. Stop & Shop and Purity Supreme are actual competitors in the relevant lines of commerce and sections of the country.

EFFECTS

22. The effect of the acquisition, if consummated, may be substantially to lessen competition in the relevant lines of commerce in the relevant sections of the country 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. By eliminating direct competition between supermarkets owned or controlled by Stop & Shop and supermarkets owned or controlled by Purity Supreme;

b. By increasing the likelihood that Stop & Shop will unilaterally exercise market power; or

c. By increasing the likelihood of, or facilitating, collusion or coordinated interaction,

each of which increases the likelihood that the prices of food, groceries or services will increase, and the quality and selection of food, groceries or services will decrease, in the relevant sections of the country.

VIOLATIONS CHARGED

23. The proposed acquisition by Stop & Shop of assets of Purity Supreme violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and 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.

Commissioner Azcuenaga concurring in part and dissenting in part.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition of Purity Supreme, Inc. by The Stop & Shop Companies, Inc. ("Stop & Shop") and SSC Associates, L.P. ("SSC Associates"), and Stop & Shop and SSC Associates (collectively, "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 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

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

such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that 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 The Stop & Shop Companies, 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 1385 Hancock Street, Quincy, MA.

2. Respondent SSC Associates, L.P. is a limited partnership 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 c/o Kohlberg, Kravis, Roberts & Co., 9 West 57th Street, New York, New York.

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. *"Respondent"* or *"Stop & Shop"* means The Stop & Shop Companies, Inc., its predecessors, subsidiaries, divisions, and groups and affiliates controlled by The Stop & Shop Companies, Inc., their successors and assigns, and their directors, officers, employees, agents, and representatives.

B. *"Respondent"* or *"SSC Associates, L.P."* means SSC Associates, L.P., its predecessors, subsidiaries, divisions, and groups

and affiliates controlled by SSC Associates, L.P., their successors and assigns, and their directors, officers, employees, agents, and representatives.

C. *"Assets to be divested"* means the supermarket assets described in paragraph II.A. of this order.

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

E. *"Supermarket"* means a full-line retail grocery store that carries a wide variety of food and grocery items in particular product categories, including bread and dairy products; refrigerated and frozen food and beverage products; fresh and prepared meats and poultry; produce, including fresh fruits and vegetables; shelf-stable food and beverage products, including canned and other types of packaged products; staple foodstuffs, which may include salt, sugar, flour, sauces, spices, coffee, and tea; and other grocery products, including nonfood items such as soaps, detergents, paper goods, other household products, and health and beauty aids.

F. The term *"Eastern Massachusetts"* means the area in Massachusetts consisting of the counties of Barnstable, Bristol, Essex, Middlesex, Norfolk, Plymouth, and Suffolk, and all cities and towns therein.

II.

It is further ordered, That:

A. Respondents shall divest, absolutely and in good faith, within nine (9) months from the date this order becomes final:

1. The following supermarkets located in Barnstable County, Massachusetts (a/k/a Cape Cod) to one acquirer who shall own and operate them:

a. Purity store no. 67 located at 137 Main St. (Route 28 - Falmouth Mall), Falmouth, MA;

b. Purity store no. 79 located at Mashpee Circle (Routes 28 and 151 - Mashpee Commons Shopping Center), Mashpee, MA;

c. Purity store no. 63 located at 625 West Main St., Hyannis, MA;

d. Purity store no. 72 located at 1070 Iyanough Road (Route 132), Hyannis, MA;

e. Purity store no. 66 located at 1080 State Road (Route 28 and Forest Street), Yarmouth, MA;

f. Purity store no. 65 located at 18 Sisson Road, Harwich, MA; and

g. Purity store no. 86 located at Cranberry Highway (Route 6A) and West Road, Orleans, MA.

If respondents are unable to divest all of the supermarkets listed to one acquirer who shall own and operate them, respondents may divest all of the supermarkets listed, to no more than two acquirers who shall own and operate them.

2. The following supermarkets located in Plymouth County, Massachusetts:

a. Purity store no. 89 located at 182 Summer St. (Routes 3A and 53 - Kingsbury Square Shopping Center), Kingston, MA;

b. Purity store no. 74 located at Ocean and Webster Sts. (Routes 139 and 3A -- Webster Square), Marshfield, MA; and

c. Purity store no. 25 located at 240 East Ashland St. (Cary Hill Shopping Center), Brockton, MA.

3. The following supermarket located in Suffolk County and in the city of Boston, Massachusetts:

a. Purity store no. 41 located at 630 American Legion Highway, Roslindale, MA.

4. The following supermarkets located in Middlesex County, Massachusetts:

a. Purity store no. 03 located at 170 Great Road (Routes 4 and 225), Bedford, MA;

b. Purity store no. 44 located at 2151 Mystic Valley Parkway, Medford, MA; and

c. Stop & Shop store no. 436 located at 550 Arsenal Street (Watertown Mall), Watertown, MA.

5. The following supermarket located in Essex County, Massachusetts:

a. Purity store no. 01 located at 400 Lynn Fells Parkway, Saugus, MA.

6. The following supermarkets located in Norfolk County, Massachusetts:

a. Purity store no. 20 located at 525 Harvard St., Brookline, MA; and

b. Purity store no. 24 located at 10 Pleasant Valley Street, South Weymouth, MA.

The assets to be divested shall include the supermarket business operated, and all assets, leases, properties, business and goodwill, tangible and intangible, utilized in the supermarket operations at the locations listed above, but shall not include those assets consisting of or pertaining to Stop & Shop or Purity trade names, trade dress, trade marks, service marks, and such other intangible assets that respondents also utilize in their business at locations other than those listed above.

B. Respondents shall divest the assets to be divested only to an acquirer or acquirers that receive the prior approval of the Commission and only in a manner that receives the prior approval of the Commission. The purpose of the divestiture is to ensure the continuation of the assets to be divested as ongoing viable enterprises engaged in the supermarket business and to remedy the lessening of competition resulting from the acquisition alleged in the Commission's complaint.

C. Pending divestiture of the assets to be divested, respondents shall take such actions as are necessary to maintain the viability, competitiveness, and marketability of the assets to be divested to comply with paragraphs II. and III. of this order and to prevent the destruction, removal, wasting, deterioration, or impairment of the assets to be divested except in the ordinary course of business and except for ordinary wear and tear.

D. Respondents shall comply with all the terms of the Asset Maintenance Agreement attached to this order and made a part hereof as Appendix I. The Asset Maintenance Agreement shall continue in effect until such time as all assets to be divested have been divested as required by this order.

III.

It is further ordered, That:

A. If respondents have not divested, absolutely and in good faith and with the Commission's prior approval, the assets to be divested within nine (9) months from the date this order becomes final, the Commission may appoint a trustee to divest any of the assets to be divested. In the event that the Commission or the Attorney General brings an action pursuant to Section 5(l) of the Federal Trade Commission Act, 15 U.S.C. 45(l), or any other statute enforced by the Commission, respondents shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to Section 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the respondents to comply with this order.

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

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

2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest the assets to be divested.

3. Within ten (10) days after appointment of the trustee, respondents 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 divestitures required by this order.

4. The trustee shall have twelve (12) months from the date the Commission or court approves the trust agreement described in paragraph III.B.3. to accomplish the divestitures, 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 12-month period only one (1) time for one (1) year.

5. The trustee shall have full and complete access to the personnel, books, records, and facilities related to the assets to be divested or to any other relevant information, as the trustee may request. Respondents shall develop such financial or other information as such trustee may reasonably request and shall cooperate with the trustee. Respondents shall take no action to interfere with or impede the trustee's accomplishment of the divestitures. Any delays in divestiture caused by respondents shall extend the time for divestiture under this paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed trustee, by the court.

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 respondents' absolute and unconditional obligation to divest at no minimum price. The divestitures 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 for an asset to be divested from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest such asset to the acquiring entity or entities selected by respondents from among those approved by the Commission.

7. The trustee shall serve, without bond or other security, at the cost and expense of respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have the authority to employ, at the cost and expense of respondents, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and

assistants as are 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 respondents, and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's divesting the assets to be divested to satisfy paragraph II. of this order.

8. Respondents shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of any claim, whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.

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

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

11. The trustee shall have no obligation or authority to operate or maintain the assets to be divested.

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

IV.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, respondents shall not, without providing advance written notification to the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise:

A. Acquire any ownership or leasehold interest in any facility that has operated as a supermarket within six (6) months of the date of such proposed acquisition in Eastern Massachusetts.

B. Acquire any stock, share capital, equity, or other interest in any entity that owns any interest in or operates any supermarket or owned any interest in or operated any supermarket within six (6) months of such proposed acquisition in Eastern Massachusetts.

Provided, however, that advance written notification shall not apply to the construction of new facilities by respondents or the acquisition of or leasing of a facility that has not operated as a supermarket within six (6) months of respondents' offer to purchase or lease.

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 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. 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 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.

V.

It is further ordered, That, for a period of ten (10) years commencing on the date this order becomes final:

A. Respondents shall neither enter into nor enforce any agreement that restricts the ability of any person (as defined in Section 1(a) of the Clayton Act, 15 U.S.C. 12(a)) that acquires any supermarket, any leasehold interest in any supermarket, or any interest in any retail location used as a supermarket on or after July 1, 1995, to operate a supermarket at that site if such supermarket was formerly owned or operated by Purity in Eastern Massachusetts, or was owned or operated by respondents either in Barnstable County, Massachusetts (a/k/a Cape Cod) or not more than two miles from any other supermarket formerly owned or operated by Purity in Eastern Massachusetts. Provided, however, respondents shall not be prevented from entering into or enforcing any agreement (1) requiring their approval of any sublease, assignment, or change in occupancy, which approval shall not be unreasonably withheld; provided further that use of a site for the operation of a supermarket shall not be a basis for withholding such approval; or (2) affecting any existing supermarket owned or operated by respondents and located not more than one mile from a replacement supermarket owned or operated by respondents and opened within six months of the date of such agreement.

B. Respondents shall not remove any equipment from a supermarket owned or operated by respondents in Eastern Massachusetts prior to a sale, sublease, assignment, or change in occupancy, except for replacement or relocation of such equipment in or to any other supermarket owned or operated by respondents in the ordinary course of business, or as part of any negotiation for a sale, sublease, assignment, or change in occupancy of such supermarket.

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 respondents have fully complied with the provisions of paragraphs II. or III. of this order, respondents shall submit to the Commission verified written reports setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with paragraphs II. and III. of this order. Respondents shall include in their compliance

reports, among other things that are required from time to time, a full description of the efforts being made to comply with paragraphs II. and III. of the order, including a description of all substantive contacts or negotiations for divestitures and the identity of all parties contacted. Respondents shall include in their compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning divestiture.

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, respondents shall file verified written reports with the Commission setting forth in detail the manner and form in which they have complied and are complying with this order.

VII.

It is further ordered, That respondents shall notify the Commission at least thirty (30) days prior to any proposed change in respondents 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 respondents 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, respondents shall permit any duly authorized representative of the Commission:

A. Upon five days' written notice to respondents, 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' written notice to respondents and without restraint or interference from respondents, to interview respondents or officers, directors, or employees of respondents in the presence of counsel.

Commissioner Azcuenaga concurring in part and dissenting in part.

APPENDIX I

ASSET MAINTENANCE AGREEMENT

This Asset Maintenance Agreement ("Agreement") is by and between The Stop & Shop Companies, Inc. ("Stop & Shop"), 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 1385 Hancock Street, Quincy, MA; SSC Associates, L.P. ("SSC Associates"), a limited partnership 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 c/o Kohlberg, Kravis, Roberts & Co., 9 West 57th Street, New York, New York; 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.* (collectively "the Parties").

PREMISES

Whereas, Stop & Shop and SSC Associates, pursuant to an agreement dated April 21, 1995, agreed to acquire all of Purity Supreme, Inc. (hereinafter "Acquisition"); and

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

Whereas, if the Commission accepts the attached Agreement Containing Consent Order, the Commission is required to place it on the public record for a period of sixty (60) days for public comment 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 agreement is not reached preserving the *status quo ante* of the assets to be divested as described in II.A. of the attached Agreement Containing Consent Order ("Assets") during the period prior to their divestitures, when those Assets will be in the hands of Stop & Shop and SSC Associates, that any divestiture resulting from any administrative

proceeding challenging the legality of the Acquisition might not be possible, or might produce a less than effective remedy; and

Whereas, the Commission is concerned that prior to divestiture to the acquirer, it may be necessary to preserve the continued viability and competitiveness of the Assets; and

Whereas, the purpose of this Agreement and of the consent order is to preserve the Assets pending the divestiture to the acquirer approved by the Federal Trade Commission under the terms of the order, in order to remedy any anticompetitive effects of the Acquisition; and

Whereas, Stop & Shop and SSC Associates entering into this Agreement shall in no way be construed as an admission by Stop Shop and SSC Associates that the Acquisition is illegal; and

Whereas, Stop & Shop and SSC Associates understand that no act or transaction contemplated by this Agreement shall be deemed immune or exempt from the provisions of the antitrust laws, or the Federal Trade Commission Act by reason of anything contained in this Agreement;

Now, therefore, in consideration of the Commission's agreement that, unless the Commission determines to reject the consent order, it will not seek further relief from the parties with respect to the Acquisition, except that the Commission may exercise any and all rights to enforce this Agreement and the consent order annexed hereto and made a part thereof, and, in the event the required divestiture is not accomplished, to appoint a trustee to seek divestiture of the Assets, the Parties agree as follows:

TERMS OF AGREEMENT

1. Stop & Shop and SSC Associates agree to execute, and upon its issuance to be bound by, the attached consent order. The Parties further agree that each term defined in the attached consent order shall have the same meaning in this Agreement.

2. Unless the Commission brings an action to seek to enjoin the proposed Acquisition pursuant to Section 13(b) of the Federal Trade Commission Act, 15. U.S.C. 53(b), and obtains a temporary restraining order or preliminary injunction blocking the proposed Acquisition, Stop & Shop and SSC Associates will be free to close the Acquisition after 3:00 p.m., October 31, 1995.

3. Stop & Shop and SSC Associates agree that from the date this Agreement is accepted until the earlier of the dates listed in subparagraphs 3.a - 3.b, they will comply with the provisions of this Agreement:

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

b. On the day the divestiture set out in the consent order has been completed.

4. From the time Stop & Shop and SSC Associates acquire the Assets until the divestiture set out in the consent order has been completed, Stop & Shop and SSC Associates shall maintain the viability, competitiveness and marketability of the Assets, and shall not cause the wasting or deterioration of the Assets, nor shall they sell, transfer, encumber or otherwise impair their marketability or viability.

5. Should the Commission seek in any proceeding to compel Stop & Shop and SSC Associates to divest themselves of the Assets or to seek any other injunctive or equitable relief, Stop & Shop and SSC Associates 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 not sought to enjoin the Acquisition. Stop & Shop and SSC Associates also waive all rights to contest the validity of this Agreement.

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

a. Access during the office hours of Stop & Shop and SSC Associates, 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 Stop & Shop and SSC Associates relating to compliance with this Agreement; and

b. Upon five (5) days' notice to Stop & Shop and SSC Associates and without restraint or interference from them, to interview officers

or employees of Stop & Shop and SSC Associates, who may have counsel present, regarding any such matters.

7. This Agreement shall not be binding until approved by the Commission.

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

I concur in the Commission's decision to approve and issue its final decision and order to the extent that the order requires divestiture of supermarkets on Cape Cod and the South Shore but dissent to the extent that the order requires divestiture of stores in the Boston metropolitan area. Although serious questions may be raised about some of the allegations in the complaint that relate to the product market, I find reason to believe that the law has been violated even if the product market includes sales of food and groceries in stores other than traditional supermarkets. Assuming either the product market alleged in the complaint or a broader product market, I concur in the decision to accept the order as to Cape Cod and the South Shore. I dissent from the decision to require divestiture of stores in the Boston metropolitan area. Although a small geographic market theoretically may exist within a broad metropolitan area, at this time, the information before the Commission is not sufficient to support a finding of reason to believe that the communities of Saugus, Medford, Brookline, Rosindale, Watertown, Weymouth, Brockton and Bedford, Massachusetts, are relevant antitrust markets.

IN THE MATTER OF

DEVRO INTERNATIONAL PLC, 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-3650. Complaint, April 3, 1996--Decision, April 3, 1996

This consent order requires, among other things, the respondents to divest, within three months to a Commission-approved acquirer, the assets they use to produce collagen sausage casings in the United States and Canada. If the transaction is not completed in the prescribed time, the Commission may appoint a trustee to divest the assets.

Appearances

For the Commission: *Ronald B. Rowe* and *Joseph S. Brownman.*

For the respondents: *Bertram M. Kantor, Wachtell, Lipton, Rosen & Katz*, New York, N.Y. and *James A. Rhodes, ICA International*, New York, N.Y.

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 Devro International plc ("Devro International") and Teepak International, Inc. ("Teepak") have entered into an agreement in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and that the terms of such agreement, were they to be satisfied, would result in a violation of Section 5 of the Federal Trade Commission Act and Section 7 of the Clayton Act, 15 U.S.C. 18, 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 DEVRO INTERNATIONAL PLC

1. Respondent Devro International is a corporation organized, existing, and doing business under and by virtue of the laws of

Scotland, with its headquarters office and principal place of business located at Moodiesburn, Chryston, G69 OJE, Scotland.

2. Respondent Devro International manufactures collagen sausage casings at plants located in Somerville, New Jersey; Moodiesburn, Scotland; and Bathhurst and Kelso, Australia. Devro International uses these and other facilities to finish the collagen sausage casings produced at its three plants.

3. Respondent Devro International had $140.1 million in sales in 1994. All these sales were of collagen sausage casings.

4. Respondent Devro International is, and at all times relevant herein has been, engaged in the manufacture and sale of collagen sausage casings in the relevant geographic markets.

5. Respondent Devro International is, and at all times relevant herein has been, engaged in commerce, or in activities affecting commerce, within the meaning of Section 1 of the Clayton Act, 15 U.S.C. 12, and Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

II. RESPONDENT DEVRO INC.

6. Respondent Devro Inc. is a corporation 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 Southside Avenue, Somerville, New Jersey.

7. Respondent Devro Inc. is a wholly-owned subsidiary of, and is operated under the direction and control of, respondent Devro International.

8. Respondent Devro Inc. manufactures collagen sausage casings at a plant located in Somerville, New Jersey. Collagen sausage casings produced by Devro Inc. are finished at facilities located in its Somerville facility and in Markham, Ontario, Canada. Most of the sausage casings produced by Devro Inc. are sold in the United States, Canada, and Japan.

9. Respondent Devro Inc. had $29.4 million in sales in 1994. All these sales were of collagen sausage casings.

10. Respondent Devro Inc. is, and at all times relevant herein has been, engaged in the manufacture and sale of collagen sausage casings in the relevant geographic markets.

11. Respondent Devro Inc. is, and at all times relevant herein has been, engaged in commerce, or in activities affecting commerce,

within the meaning of Section 1 of the Clayton Act, 15 U.S.C. 12, and Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

III. THE ACQUISITION

12. Teepak 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 Three Westbrook Corporate Center, Suite 1000, Westchester, Illinois. Teepak is a wholly-owned subsidiary of Hillside Industries, Inc. Total sales in 1994 were more than $300 million.

13. On or about December 14, 1994, respondent Devro International, Hillside Industries, and Teepak executed a letter of intent for Devro International to acquire Teepak. On or about June 14, 1995, Devro International and Teepak entered into a formal agreement for Devro International to acquire Teepak. The price is approximately $135 million.

14. Among other things, Teepak manufactures and sells fibrous sausage casings, cellulose sausage casings, and collagen sausage casings. Teepak produces and finishes collagen sausage casings at a plant located in Sandy Run, South Carolina.

15. In 1994, Teepak had $25.1 million in sales of collagen sausage casings in the United States and $60.9 million in sales of collagen sausage casings worldwide.

16. Teepak is, and at all times relevant herein has been, engaged in the manufacture and sale of collagen sausage casings in the relevant geographic markets.

17. Teepak is, and at all times relevant herein has been, engaged in commerce, or in activities affecting commerce, within the meaning of Section 1 of the Clayton Act, 15 U.S.C. 12, and Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

IV. TRADE AND COMMERCE

A. Relevant Product Markets

18. Relevant product markets in which it is appropriate to assess the effects of the proposed acquisition are the manufacture of (a) all collagen sausage casings and (b) edible collagen sausage casings.

19. Sausage casings of all types are used by sausage makers and other meat processors to form, size, and hold together ingredients used to manufacture or process smoked meat or poultry products such as frankfurters, sausages, hams, salami and jerky. The distinctive property of a sausage casing is its ability to allow smoke to pass through the casing to the meat while not allowing the meat inside the casing to lose its moisture during the smoking process.

20. Synthetic sausage casings have replaced animal sausage casings in most commercial applications: cellulose sausage casings, used in part to make skinless frankfurters; fibrous sausage casings, used in part to make salami and other large sausages; and collagen sausage casings, used in part to make breakfast sausages and beef jerky.

21. There are four types of sausage casings: animal casings, produced primarily from sheep and goat intestines; cellulose sausage casings, produced from cellulose; fibrous sausage casings, produced from paper impregnated with cellulose; and collagen sausage casings, produced from the corium or collagen inner layer of cattle hides. Originally, all sausage casings were made from animal intestines.

22. What distinguishes collagen sausage casings from cellulose sausage casings and fibrous sausage casings is that most collagen sausage casings are edible. Edible collagen sausage casings impart a "bite" taste to the sausage products they are made with.

23. Because the various casing types are not substitutes for one another, the prices of the different casings types are determined independently of one another. There are no commercial substitutes for collagen sausage casings at or anywhere near the prevailing prices of collagen sausage casings.

B. Relevant Geographic Markets

24. Relevant geographic markets in which it is appropriate to assess the effects of the proposed acquisition are (a) the United States and (b) the world.

C. Conditions of Entry

25. Entry into the relevant markets is difficult, and would not be timely, likely or sufficient to prevent anticompetitive effects in the relevant markets.

26. A new entrant into the manufacture of collagen sausage casings would need to devote at least five years to learning and developing the technology, expertise, and knowhow that are essential to producing and finishing collagen sausage casings in a form that would be acceptable for commercial sale, and there is no guarantee that such a venture would be successful. After the technology is developed, an additional period of approximately two years would be necessary to construct manufacturing facilities to produce the collagen sausage casings.

27. Most of the major purchasers of collagen sausage casings also purchase cellulose and fibrous sausage casings. There are efficiencies associated with the selling, marketing, and distributing of more than one type of sausage casing. A new entrant would need to have, or be able to develop, the capability of producing or distributing other sausage casings in order to distribute and sell collagen sausage casings in the most efficient manner.

V. MARKET STRUCTURE

28. The relevant markets are highly concentrated, whether measured by the Herfindahl-Hirschmann Index (or "HHI") or by two-firm and four-firm concentration ratios. The proposed acquisition, if consummated, will substantially increase that concentration.

29. In the United States all-collagen and edible collagen product markets, there are only four firms, and Devro and Teepak are the top two firms. In the world all-collagen and edible collagen markets, only four firms, including Devro and Teepak, account for approximately 98% of all sales. In each relevant market, the proposed acquisition would convert a market now comprised only of four significant firms to a market that would be comprised only of three significant firms.

30. In the United States all-collagen sausage casings market, the proposed acquisition would increase the HHI by approximately 2000 points and produce an industry concentration of approximately 4700 points. In the United States edible collagen sausage casings market, the proposed acquisition would increase the HHI by approximately 3300 points and produce an industry concentration of approximately 6800 points. In the world all-collagen sausage casings market, the proposed acquisition would increase the HHI by approximately 1600 points and produce an industry concentration of approximately 4700

points. In the world edible collagen sausage casings market, the proposed acquisition would increase the HHI by approximately 3700 points and produce an industry concentration of approximately 5100 points.

VI. EFFECTS OF THE ACQUISITION

31. The acquisition may substantially lessen competition in the relevant markets in the following ways, among others:

(a) By eliminating direct competition between respondents and Teepak;

(b) By increasing the likelihood that respondents will unilaterally exercise market power; and

(c) By increasing the likelihood of, or facilitating, collusion or coordinated interaction;

each of which increases the likelihood that the prices of collagen sausage casings will increase, and services to customers of collagen sausage casings are likely to decrease.

VII. VIOLATIONS CHARGED

32. The letter of intent, and the subsequent agreement, entered into between respondent Devro International and Teepak, for Devro International to acquire Teepak, constitute a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45. Further, if the acquisition is consummated, Devro International and Devro Inc. would be in violation of Section 5 of the Federal Trade Commission Act and Section 7 of the Clayton Act, 15 U.S.C. 18.

DECISION AND ORDER

The Federal Trade Commission ("Commission") having initiated an investigation of the proposed acquisition by Devro International plc and Devro Inc. of the outstanding voting securities of Teepak International, Inc. ("Teepak"), and it now appearing that Devro International plc and Devro Inc., hereinafter sometimes referred to as "respondents," have 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 of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that 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, 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 Devro International plc is a corporation organized, existing, and doing business under and by virtue of the laws of Scotland, with its office and principal place of business at Moodiesburn, Chryston, G69 OJE, Scotland.

2. Respondent Devro Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business at Southside Avenue, Somerville, New Jersey.

3. Teepak International, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business at Three Westbrook Corporate Center, Suite 1000, Westchester, Illinois.

4. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and over 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. *"Devro International plc"* means that company and its predecessors, subsidiaries, divisions, groups and affiliates controlled by Devro International plc, and its respective directors, officers, employees, agents, and representatives, and the respective successors and assigns of each.

B. *"Devro Inc."* means that company and its predecessors, subsidiaries, divisions, groups and affiliates controlled by Devro Inc. and its respective directors, officers, employees, agents, and representatives, and the respective successors and assigns of each.

C. *"Devro Canada"* means DCI Devro Canada Inc., and its predecessors, subsidiaries, divisions, groups and affiliates controlled by DCI Devro Canada Inc. and its respective directors, officers, employees, agents, and representatives, and the respective successors and assigns of each.

D. *"Teepak"* means Teepak International, Inc., and its predecessors, subsidiaries, divisions, groups and affiliates controlled by Teepak International, Inc. and its respective directors, officers, employees, agents, and representatives, and the respective successors and assigns of each. The definition of "Teepak" specifically excludes Devro International plc, Devro Inc., and Devro Canada. For purposes of Parts VII and VIII of this order, after the Acquisition, Teepak will be regarded as part of respondent Devro International plc.

E. *"Respondents"* means Devro International plc and Devro Inc.

F. *"Acquisition"* means the proposed acquisition by Devro International plc of the outstanding voting securities of Teepak International, Inc.

G. *"Assets To Be Divested"* means:

1. All assets related to the collagen sausage casings business of Devro Inc. and Devro Canada, including, but not limited to:

a. All production and finishing facilities, plant, and equipment of Devro Inc., including the plant located at Somerville, New Jersey,

and, wherever located, all machinery, fixtures, equipment, kitchen facilities, laboratory testing equipment and facilities, research and development facilities and programs, vehicles, transportation facilities, furniture, tools and other tangible personal property, customer lists, vendor lists, catalogs, sales promotion literature, advertising materials, technical information, and management information systems;

b. All production and finishing facilities, plant, and equipment of Devro Canada, including the plant located in Markham, Ontario, Canada, and, wherever located, and to the extent they exist, all machinery, fixtures, equipment, kitchen facilities, laboratory testing equipment and facilities, research and development facilities and programs, vehicles, transportation facilities, furniture, tools and other tangible personal property, customer lists, vendor lists, catalogs, sales promotion literature, advertising materials, technical information, and management information systems;

c. All intellectual property, including product and process patents, patent rights, patent improvements, process improvements, trademarks, service marks, copyrights, technology, knowhow, basic research, trade secrets, goodwill, or trademarks that Devro Inc. or Devro Canada use, license, have rights to, or otherwise have an interest in; provided, however, that Devro International may retain all rights to the trademark Devro®, trade name "Devro", and the stylized letter "D";

d. All Devro Inc. and Devro Canada inventory and storage capacity;

e. All rights, titles, and interest in and to real property owned or leased by Devro Inc. and Devro Canada, together with all appurtenances, licenses, and permits;

f. All rights, titles, and interests in and to contracts entered into in the ordinary course of business between Devro Inc. and Devro Canada with customers, suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors, and consignees;

g. All rights of Devro Inc. and Devro Canada, under warranties and guarantees, express or implied;

h. All books, records, and files of Devro Inc. and Devro Canada;

i. All items of prepaid expense to Devro Inc. and Devro Canada; and

2. From Devro International plc:

a. On a non-exclusive basis, with no right to sub-license to a third party, all rights to any information or intellectual property relating to Devro International (but not any information or intellectual property of Teepak in existence at the time of the Acquisition) in development or already developed by Devro International at the time of the divestiture, plus all enhancements, improvements or perfections thereof within twenty-four (24) months of the divestiture, including information or intellectual property relating to product and process patents, patent rights, patent improvements, technology, knowhow, basic research, or trade secrets regarding any research and development programs or activities, wherever located, to the extent that such information or intellectual property relate to the manufacture, finishing, distribution, or sale of collagen sausage casings; and

b. All additional tangible and intangible assets of Devro International, wherever located, reasonably necessary to enable the acquirer of the Assets To Be Divested to manufacture, finish, distribute, and market collagen sausage casings in substantially the same manner, quality, and quantity achieved by Devro Inc. and Devro Canada prior to the divestiture, other than any tangible or intangible assets of Teepak in existence at the time of the Acquisition.

H. *"Excluded Assets"* means the following entities: Devro Limited, Devro Holdings Limited, Devro Pty Limited, Devro BV, Devro Asia Limited, Devro GmbH, and Devro KK, and Teepak and its tangible and intangible assets in existence at the time of the Acquisition. The term "Excluded Assets" does not include (that is, the following assets are not Excluded Assets) specifically identifiable tangible and intangible assets of these excluded entities (other than those of Teepak at the time of the divestiture) related to the manufacture and finishing of collagen sausage casings.

I. *"Commission"* means the Federal Trade Commission.

II.

It is further ordered, That:

A. Within three (3) months of the date the order becomes final, respondents shall divest, absolutely and in good faith, at no minimum price, the Assets To Be Divested.

B. The purpose of the divestiture of the Assets To Be Divested is to ensure the continued use of the Assets To Be Divested as a viable, competitive, and independent business, in the same business in which the Assets To Be Divested are engaged at the time of the Acquisition, and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's complaint.

C. The proposed acquirer shall not be a firm that has been engaged in the manufacture of collagen sausage casings for sale, other than to itself, in the United States.

D. The Assets To Be Divested shall be divested 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.

III.

It is further ordered, That:

A. If respondents have not divested the Assets To Be Divested, absolutely and in good faith, with the Commission's prior approval, within three (3) months of the date this order becomes final, the Commission may appoint a trustee to divest the Assets To Be Divested. In the event that the Commission or the Attorney General brings an action pursuant to Section 5(1) of the Federal Trade Commission Act, 15 U.S.C. 45(l), or any other statute enforced by the Commission, respondents shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, 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 respondents to comply with this order.

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

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

2. Subject to the prior approval of the Commission, and consistent with the provisions of paragraphs II. B. - D. of this order, the trustee shall have the exclusive power and authority to divest the Assets To Be Divested.

3. Within ten (10) days after appointment of the trustee, respondents 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 six (6) months from the date the Commission approves the trust agreement described in paragraph III. B. 3. to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the six-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 for up to an additional twelve (12) months each time.

5. The trustee shall, to the extent not prohibited by United States or Canadian law, have full and complete access to the personnel, books, records and facilities related to the Assets To Be Divested or to any other relevant information, as the trustee may reasonably request. Respondents shall develop such financial or other information as such trustee may request and shall cooperate with the trustee. Respondents shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays in divestiture caused by respondents shall extend the time for divestiture under this paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed trustee, by the court.

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 respondents' absolute and unconditional obligation to divest at no minimum price. The divestiture shall be made in the manner and to the acquirer as set out in Part II of this order; provided, however, if the trustee receives *bona fide* offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest to the acquiring entity or entities selected by respondents from among those approved by the Commission.

7. The trustee shall serve, without bond or other security, at the cost and expense of respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have the authority to employ, at the cost and expense of respondents, and at reasonable fees, 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 the respondents, and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's divesting the Assets To Be Divested.

8. Respondents shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the 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. In the event the trustee is unable to divest the Assets To Be Divested, the trustee may divest such additional assets of respondent Devro International, other than the Excluded Assets, as may be reasonably necessary to enable the trustee to divest the Assets To Be Divested.

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

12. The trustee shall have no obligation or authority to operate or maintain the Assets To Be Divested.

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

IV.

It is further ordered, That:

A. Upon reasonable notice to respondents from the acquirer approved by the Commission pursuant to this order, respondents shall provide such assistance to the acquirer as is reasonably necessary to enable the acquirer to manufacture, finish, distribute and market collagen sausage casings in substantially the same manner, quality, and quantity achieved by Devro Inc. and Devro Canada prior to the divestiture. Such assistance shall include reasonable consultation with knowledgeable employees of respondents and training at the acquirer's facility for a period of time sufficient to ensure that the acquirer's personnel are appropriately trained in the manufacture, finishing, distribution, and marketing of collagen sausage casings in the manner carried on by Devro Inc. and Devro Canada prior to the divestiture. Respondents, however, shall not be required to continue providing such assistance for more than two (2) years from the date of the divestiture. Respondents may charge the acquirer at a rate no greater than their direct costs for providing such technical assistance.

B. Respondents shall facilitate and not interfere with the hiring by the acquirer approved by the Commission of employees of Devro Inc. and Devro Canada who may desire to undertake employment.

C. Pending divestiture of the Assets To Be Divested, respondents shall take such actions as are reasonably necessary to maintain the

viability and marketability of the Assets To Be Divested and to prevent their destruction, removal, wasting, deterioration or impairment of any kind, except for ordinary wear and tear.

V.

It is further ordered, That respondents shall continue to comply with all terms of the Agreement to Hold Separate attached to this order and made a part hereof as Appendix II. Said Agreement shall remain in force and effect until the Assets To Be Divested have been divested as required by this order.

VI.

It is further ordered, That:

Within thirty (30) days after the date this order becomes final and every thirty (30) days thereafter until respondents have fully complied with the provisions of Parts II, III, and IV of this order, respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, or have complied with this order. Respondents shall include in their compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with the order, and their compliance with the terms and conditions of the Agreement To Condition Acquisition and the Agreement To Hold Separate, and set forth the monthly sales of Devro Inc. and Devro Canada during the preceding two months and compared to the monthly sales during the same months in the preceding calendar year. Respondents shall include in their compliance reports copies of all written communications, internal memoranda, and reports and recommendations concerning divestiture and the manner in which the Assets To Be Divested are being held separate.

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 reasonable notice,

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 respondent relating to any matters contained in this order; and

B. Upon five (5) days' notice to the appropriate respondent, and without restraint or interference, to interview officers, directors, or employees of the respondent, who may have counsel present.

VIII.

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, sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change in the corporations that may affect compliance obligations arising out of the order.

APPENDIX I

AGREEMENT TO CONDITION ACQUISITION ON SHAREHOLDER APPROVAL OF DIVESTITURE AND RETROACTIVE INDEMNIFICATION

This Agreement to Condition Acquisition on Shareholder Approval of Divestiture and Retroactive Indemnification ("Agreement to Condition Acquisition") is by and between Devro International plc, a corporation organized, existing, and doing business under and by virtue of the laws of Scotland, with its office and principal place of business at Moodiesburn, Chryston, Scotland; Devro Inc., 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 Somerville, New Jersey; and the Federal Trade Commission ("Commission"), an independent agency of the United States Government, established under the Federal Trade Commission Act of 1914, 15 U.S.C. 41, *et seq.*

Whereas, Devro International plc entered into an agreement with Hillside Industries Incorporated for Devro International plc to acquire the outstanding voting securities of Teepak International Inc. ("Teepak"), a Delaware corporation (hereinafter "the Acquisition");

Whereas, Devro International plc and Devro Inc. manufacture, finish, distribute, and sell collagen sausage casings, and DCI Devro Canada Inc. ("Devro Canada") finishes, distributes, and sells collagen sausage casings;

Whereas, Teepak, with principal offices located at Westchester, Illinois, among other things, also manufactures, finishes, distributes, and sells collagen sausage casings;

Whereas, the Commission is investigating the Acquisition to determine whether it would violate any statute enforced by the Commission;

Whereas, Devro International plc and Devro Inc. are willing (a) to enter into an Agreement Containing Consent Order requiring them to divest certain Assets To Be Divested, as defined in Part I of the proposed consent order of the Agreement Containing Consent Order, which include the collagen sausage casings business of Devro Inc., Devro Canada, and assets of Devro International plc related thereto (hereinafter "the Divestiture"); (b) to enter into an Agreement To Hold Separate requiring that the Assets To Be Divested be held separate and apart from the remainder of the assets of Devro International pending their divestiture; and (c) to arrange and provide for the unlimited indemnification for the independent auditor/manager, retroactive as of the date of the appointment of the auditor/manager, pursuant to this Agreement to Condition Acquisition and the Agreement to Hold Separate (hereinafter "the Retroactive Indemnification");

Whereas, if the Commission accepts the attached Agreement Containing Consent Order, which would require the divestiture of the Assets To Be Divested, the Commission is required to 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 Rule 2.34 of the Commission's Rules of Practice and Procedure, 16 CFR 2.34;

Whereas, the Commission is advised and concerned that, under the applicable law of the United Kingdom, Devro International will be unable to commit to, or be bound by, certain of the terms of the Agreement Containing Consent Order and the Agreement to Hold

Separate unless and until those terms are approved by the shareholders of Devro International plc;

Whereas, the Commission is advised that, under the applicable law of the United Kingdom, Devro International plc will not be able to seek shareholder approval for (a) the Divestiture or (b) the Retroactive Indemnification, until after all of the terms of the Agreement Containing Consent Order, the Agreement to Hold Separate, and this Agreement to Condition Acquisition are made known to the shareholders of Devro International plc, which can only happen after the Commission accepts the Agreement Containing Consent Order for public comment, and the Agreement to Hold Separate and the Agreement To Condition Acquisition;

Whereas, the Commission will not accept for public comment an Agreement Containing Consent Order or an Agreement to Hold Separate that is not binding on the proposed respondents;

Whereas, the undersigned officials of Devro International plc and Devro Inc. and their attorneys at this time are authorized to make the following binding commitments:

1. Devro International plc and Devro Inc. will seek shareholder approval for, at the same time, as part of a single package, and as a mutually contingent matter, (a) the Acquisition, (b) the Divestiture, and (c) the Retroactive Indemnification;

2. The shareholder approval will be sought, and if unconditionally obtained, (a) the Acquisition, (b) the Divestiture, and (c) the Retroactive Indemnification will be fully authorized, no less than seven (7) days prior to the completion of the sixty (60) day public comment period during which the Agreement Containing Consent Order will have been placed on the public record;

3. Devro International plc and Devro Inc. will advise the Commission's Bureau of Competition in writing, within twenty-four (24) hours, of all actions taken by the shareholders in connection with the effort to obtain approval for (a) the Acquisition, (b) the Divestiture, and (c) the Retroactive Indemnification; and

4. Devro International plc, Devro Inc., and all entities controlled by either of them will not acquire, directly or indirectly, Teepak or any of its assets without unconditional shareholder approvals having been obtained and fully authorized for (a) the Divestiture and (b) the Retroactive Indemnification;

Whereas, Devro International plc represents to the Commission that (1) the directors of Devro International plc will officially recommend to the shareholders of Devro International plc that they approve (a) the Acquisition, (b) the Divestiture, and (c) the Retroactive Indemnification; (2) Devro International plc will use its best efforts to obtain shareholder approval for (a) the Acquisition, (b) the Divestiture, and (c) the Retroactive Indemnification; (3) in light of (1) and (2) above, it would be highly unusual if the shareholders of Devro International plc were to reject (a) the Acquisition, (b) the Divestiture, and (c) the Retroactive Indemnification; and (4) Devro International plc fully expects the shareholders of Devro International plc to approve (a) the Acquisition, (b) the Divestiture, and (c) the Retroactive Indemnification;

Whereas, shareholder approval of (a) the Acquisition, (b) the Divestiture, and (c) the Retroactive Indemnification will be presented to the shareholders for their approval as part of a single resolution, to be voted upon as a package only, and Devro International plc and Devro Inc. will not be authorized to consummate the Acquisition unless and until they are also authorized (a) to make the Divestiture and (b) to grant the Retroactive Indemnification;

Whereas, shareholder approval for (a) the Acquisition, (b) the Divestiture, and (c) the Retroactive Indemnification will be sought, and determined, prior to the time that the Commission will consider whether to accept the final Agreement Containing Consent Order under the Commission's Rules;

Whereas, the Commission is concerned that if an agreement is not reached regarding the nature and timing of the shareholder approval and the commitment on the part of Devro International and Devro Inc. not to consummate the acquisition unless and until the requisite shareholder approvals are obtained, appropriate divestiture resulting from any proceeding challenging the Acquisition might not be possible or might produce a less than 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 and the continued viability and competitiveness of the Assets To Be Divested;

Whereas, Devro International plc and Devro Inc.'s entering into this Agreement shall in no way be construed as an admission by them that the Acquisition is illegal;

Whereas, Devro International plc and Devro Inc. understand that no act or transaction contemplated by this Agreement shall be deemed immune or exempt from the provisions of the antitrust laws or the Federal Trade Commission Act by reason of anything contained in this Agreement;

Now, therefore, the parties agree, upon understanding that the Commission has not yet determined whether the Acquisition will be challenged, and in consideration of the Commission's agreement that, unless the Commission determines to reject the consent order, it will not seek further relief from Devro International plc or Devro Inc. with respect to the Acquisition, except that the Commission may exercise any and all rights to enforce this Agreement, the Agreement to Hold Separate, and the consent order to which this Agreement is annexed and made a part thereof, as follows:

1. The Acquisition by Devro International plc or Devro Inc. of Teepak is contingent upon shareholder approval.

2. Devro International plc and Devro Inc. will not seek shareholder approval for the Acquisition without, at the same time, and as part of the same package, also seeking mutually contingent shareholder approval for (a) the Divestiture and (b) the Retroactive Indemnification.

3. Unconditional shareholder approval will be sought, and if obtained, be fully authorized, no less than seven (7) days prior to the completion of the sixty (60) day public comment period during which the Agreement Containing Consent Order will have been placed on the public record.

4. In no event will Devro International plc or Devro Inc. or any entity controlled by either acquire, directly or indirectly, Teepak or any of its assets without unconditional shareholder approvals having been obtained and fully authorized for (a) the Divestiture and (b) the Retroactive Indemnification.

5. Unless and until unconditional shareholder approval is obtained for (a) the Acquisition, (b) the Divestiture, and (c) the Retroactive Indemnification, Devro International plc and Devro Inc., or any entity controlled by either, will not acquire, directly or indirectly, Teepak or any of its assets.

6. At such time as the shareholders of Devro International may unconditionally approve (a) the Acquisition, (b) the Divestiture, and (c) the Retroactive Indemnification, Devro International and Devro

Inc., by and through their authorized representatives, shall notify the Commission's Bureau of Competition, in writing, within twenty-four (24) hours, of the action taken.

7. Devro-International and Devro Inc., by and through their signatories, warrant that they are fully-authorized to enter into the terms of this Agreement to Condition Acquisition and to bind Devro International plc and Devro Inc. to all of its terms and conditions.

8. This Agreement shall be binding when approved by the Commission.

APPENDIX II

AGREEMENT TO HOLD SEPARATE

This Agreement to Hold Separate ("Agreement") is by and between Devro International plc, a corporation organized, existing, and doing business under and by virtue of the laws of Scotland, with its office and principal place of business at Moodiesburn, Chryston, Scotland; Devro Inc., 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 Somerville, New Jersey; and the Federal Trade Commission ("Commission"), an independent agency of the United States Government, established under the Federal Trade Commission Act of 1914, 15 U.S.C. 41, *et seq.*

Whereas, Devro International plc entered into an agreement with Hillside Industries Incorporated for Devro International plc to acquire the outstanding voting securities of Teepak International, Inc. ("Teepak"), a Delaware corporation (hereinafter "Acquisition");

Whereas, Devro International plc and Devro Inc. manufacture, finish, distribute, and sell collagen sausage casings, and DCI Devro Canada Inc. ("Devro Canada") finishes, distributes, and sells collagen sausage casings;

Whereas, Teepak, with principal offices located at Westchester, Illinois, among other things, also manufactures, finishes, distributes, and sells collagen sausage casings;

Whereas, the Commission is investigating the Acquisition to determine whether it would violate any statute enforced by the Commission;

Whereas, if the Commission accepts the attached Agreement Containing Consent Order, which would require the divestiture of certain Assets To Be Divested, as defined in Part I of the consent order, which include the collagen sausage casings business of Devro Inc., Devro Canada, and assets of Devro International plc related thereto, the Commission is required to 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 of Practice and Procedure, 16 CFR 2.34;

Whereas, the Commission is concerned that if an understanding is not reached preserving the *status quo ante* of the Assets To Be Divested during the period prior to the acceptance of the final consent order by the Commission, after the 60-day notice period, divestiture resulting from any proceeding challenging the Acquisition might not be possible or might produce a less than 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 Assets To Be Divested and the continued viability and competitiveness of the Assets To Be Divested;

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

1. Preserve and maintain the Assets To Be Divested as a viable, competitive and independent business engaged in the manufacture, finishing, distribution and sale of collagen sausage casings pending divestiture;

2. Limit the potential for interim competitive harm during the period between the Acquisition and the required divestiture; and

3. Remedy any anticompetitive effects of the Acquisition;

Whereas, Devro International plc and Devro Inc.'s entering into this Agreement shall in no way be construed as an admission by them that the Acquisition is illegal;

Whereas, Devro International plc and Devro Inc. understand that no act or transaction contemplated by this Agreement shall be deemed immune or exempt from the provisions of the antitrust laws or the Federal Trade Commission Act by reason of anything contained in this Agreement;

Now, therefore, the parties agree, upon understanding that the Commission has not yet determined whether the Acquisition will be challenged, and in consideration of the Commission's agreement that, unless the Commission determines to reject the consent order, it will not seek further relief from Devro International plc or Devro Inc. with respect to the Acquisition, except that the Commission may exercise any and all rights to enforce this Agreement, the Agreement to Condition Acquisition, and the consent order to which this Agreement is annexed and made a part thereof, as follows:

1. Devro International plc and Devro Inc. agree to execute the Agreement Containing Consent Order and be bound by the consent order.

2. Devro International plc and Devro Inc. agree to execute and be bound by the Agreement To Condition Acquisition.

3. Devro International plc and Devro Inc. agree that until the earlier of the dates listed in subparagraphs 3 (a) and 3 (b) of this paragraph, they will comply with the provisions of paragraph 4 of this Agreement:

(a) Three (3) business days after the Commission withdraws its acceptance of the consent order pursuant to the provisions of Commission Rule 2.34, 16 CFR 2.34; or

(b) The day after the divestiture required by the consent order has been completed.

4. To ensure the complete independence and viability of Devro Inc., Devro Canada, and the Assets To Be Divested, and to further ensure that no competitive information is exchanged between Devro International plc and Devro Inc., Devro Canada, and the persons responsible for maintaining and operating the Assets To Be Divested, Devro International plc shall hold Devro Inc., Devro Canada, and the Assets To Be Divested, as defined in the consent order, separate and apart from all of its other operations, on the following terms and conditions:

(a) Devro International plc will appoint three persons to manage and maintain the business and assets of Devro Inc., Devro Canada, and the Assets To Be Divested. These persons ("the Management Team") shall agree to be bound by this Agreement and shall manage

Devro Inc., Devro Canada, and the Assets To Be Divested independent of the management of Devro International plc's other business operations, including those of Teepak, after Devro International plc acquires Teepak. The persons on the Management Team shall not be involved in any way in the manufacture, finishing, distribution, or sale of sausage casings by Devro International plc or Teepak. The management team shall conduct the business operations of Devro Inc., Devro Canada, and the Assets To Be Divested.

(b) The Management Team, in its capacity as such, shall report directly and exclusively to an independent auditor/manager, to be appointed by Devro International plc. The independent auditor/manager, who shall not be an employee or agent of Devro International plc or a person likely to be an employee or agent of Devro International plc within two years of the divestiture, shall have expertise in the manufacture, finishing, distribution, or sale of collagen sausage casings. The independent auditor/manager shall agree to be bound by this Agreement and shall have exclusive control over the operations of Devro Inc., Devro Canada, and the Assets To Be Divested, with responsibility for their management and maintaining their independence. The independent auditor/manager shall not be involved in any way in the business of manufacturing, finishing, distribution, or sale of sausage casings by Devro International plc or Teepak.

(c) Devro International plc shall not exercise direction or control over, or influence directly or indirectly, the independent auditor/manager, or the Management Team, or Devro Inc., Devro Canada, or the Assets To Be Divested, other than as may reasonably be necessary to assure compliance with this Agreement and with all applicable laws.

(d) Devro International plc shall not change the composition of the Management Team without the consent of the independent auditor/manager.

(e) Devro International plc shall maintain the viability, competitiveness, and marketability of the Assets To Be Divested and shall neither cause nor permit the destruction, removal, wasting, deterioration, or impairment of the Assets To Be Divested, except as may occur in the ordinary course of business and except for ordinary wear and tear, and shall not sell, transfer, encumber (other than in the normal course of business), or otherwise impair their viability, competitiveness, or marketability.

(f) Except for the Management Team, Devro International plc shall not permit any Devro International plc Board Member, officer, director, employee, or agent to be involved in the business operations of the Assets To Be Divested.

(g) Except as required by law, and except to the extent that necessary information is exchanged in the course of evaluating the Acquisition, complying with requirements of the London Stock Exchange and independent auditors, defending investigations or defending or prosecuting litigation, negotiating agreements to divest assets, or complying with this Agreement or the consent order, Devro International plc shall not receive or have access to, or use or continue to use, any material confidential information about Devro Inc., Devro Canada, or the Assets To Be Divested, in connection with the operation of Devro International plc or its operation of the Teepak business. "Material confidential information" means competitively sensitive or proprietary information not in the public domain, including, but not limited to, customer lists, price lists, marketing methods, patent rights, knowhow, technologies, processes, process improvements or other trade secrets or confidential business information.

(h) Devro International plc, Devro Inc. and Devro Canada shall circulate to all employees of Devro Inc. and Devro Canada, and display in a conspicuous place at Devro Inc. and Devro Canada manufacturing facilities, notice of this Agreement to Hold Separate and the proposed consent order in the form attached hereto as Attachment A.

(i) Devro International plc shall give funds to the Management Team for all capital expenditures relating to Devro Inc. and Devro Canada previously planned or approved by Devro International plc to the extent Devro Inc. does not generate sufficient cash flow to fund such capital expenditures. The Management Team shall expend the funds for these previously planned capital expenditures.

(j) The Management Team shall take all steps reasonably necessary to optimize the profitable operations and continued viability of Devro Inc., Devro Canada, and the Assets To Be Divested, including, but not limited to:

(1) Paying all direct costs and indirect overheads relating to the business of Devro Inc., Devro Canada, and the Assets To Be Divested;

(2) Making available funds for advertising and other marketing and promotional activities at no less than the level for the comparable period in the preceding calendar year;

(3) Providing no less than the same level of sales commissions or incentives for sales personnel as were provided for the comparable period in the preceding calendar year;

(4) Maintaining the same level of resources involved in sales and marketing as was the case in the normal course of business prior to the Acquisition; and

(5) Expending funds sufficient to perform all reasonably necessary routine maintenance to, and replacements of, the Assets To Be Divested.

In the event that Devro Inc., Devro Canada, and the Assets To Be Divested do not generate sufficient cash flow to fund the activities reasonably necessary to optimize the profitable operations and viability of Devro Inc., Devro Canada, and the Assets To Be Divested, Devro International plc shall advance such sums as are reasonably necessary to pay for same, to be repaid by the acquirer at no interest within two (2) years.

(k) The compensation and expenses of the independent auditor/manager shall be the responsibility of Devro International plc. Devro Inc., Devro Canada, and the Assets To Be Divested shall not be charged by Devro International plc with those costs and expenses.

(1) Devro International plc shall indemnify the independent auditor/manager against any losses or claims of any kind that might arise out of his or her involvement under this Agreement, not to exceed $5 million, except to the extent that such losses or claims result from misfeasance, gross negligence, willful or wanton acts or bad faith; provided however, upon shareholder approval of the unlimited indemnification of the auditor/manager, retroactive as of the date of the appointment of the auditor/manager, the $5 million liability limitation shall become null and void, under the terms of the Agreement to Condition Acquisition.

(m) If the independent auditor/manager fails to act, or ceases to act, diligently, a substitute auditor/manager shall be appointed by Devro International plc in the manner provided in paragraph 4 (b) of this Agreement.

(n) The independent auditor/manager shall have access to, and be informed about, the names of the companies who may inquire about,

or seek or propose to buy, Devro Inc., Devro Canada, or the Assets To Be Divested. Devro International plc may require the independent auditor/manager to sign a confidentiality agreement prohibiting the auditor/manager from disclosing any material confidential information obtained as a result of his or her role as independent auditor/manager, to anyone other than the Commission.

(o) All material transactions other than those in the ordinary course of business, if not precluded by this paragraph, shall be subject to a majority vote of the Management Team. In the event of a tie vote, the independent auditor/manager shall cast the deciding vote.

5. Should the Federal Trade Commission seek in any proceeding to compel Devro International plc or Devro Inc. to divest any of the Assets To Be Divested, or any additional 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, as defined in the draft complaint attached to the Agreement Containing Consent Order, Devro International plc and Devro Inc. 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 permitted the Acquisition. Devro International plc and Devro Inc. also waive all their rights to contest the validity of this Agreement.

6. To the extent that this Agreement requires Devro International plc or Devro Inc. to take, or prohibits them from taking, certain actions that otherwise may be required or prohibited by contract, Devro International plc and Devro Inc. shall abide by the terms of this Agreement and 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.

7. For the purpose of determining or securing compliance with this Agreement, subject to any legally recognized privilege, and upon written request with reasonable notice to counsel, Devro International plc and Devro Inc. shall permit any duly authorized representative or representatives of the Commission:

(a) Access during the office hours of Devro International plc and Devro Inc., and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and other

records and documents in their possession or under their control relating to compliance with this Agreement; and

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

8. This Agreement shall not be binding until approved by the Commission. Devro International plc and Devro Inc. acknowledge that from the date they sign this Agreement until such time as the Commission may approve this Agreement, they will undertake to maintain the Assets To Be Divested in a viable condition.

9. Subsequent to acceptance for public comment of the Agreement Containing Consent Order by the Commission and after the unconditional approval by the shareholders of Devro International obtained not less than seven (7) days prior to the end of the 60-days public comment period, of (a) the Acquisition, (b) the divestiture of the Assets To Be Divested under the terms of the Agreement Containing Consent Order, and (c) the retroactive indemnification, under the definitions and terms of the Agreement To Condition Acquisition and this Agreement to Hold Separate, with written notice having been given to the Commission's Bureau of Competition, in writing, within twenty-four (24) hours, of the unconditional approval by the shareholders, Devro International plc may consummate the Acquisition.

10. This Agreement shall be binding when approved by the Commission.

11. Devro International plc and Devro Inc., by and through their signatories, warrant that they are fully authorized to enter into the terms of this Agreement to Hold Separate and to bind Devro International plc and Devro Inc. to all of its terms and conditions.

ATTACHMENT A

IMPORTANT NOTICE

As you know, Devro International plc has entered into an agreement with the Federal Trade Commission ("FTC") in connection with the proposed acquisition of Teepak International, Inc. Under the terms of the agreement with the FTC, Devro International must sell

Devro Inc. and DCI Devro Canada Inc. to a third party that is acceptable to the FTC. We anticipate that this will occur within the next several months.

The agreement with the FTC also requires that, until Devro Inc. and Devro Canada are sold, Devro International must preserve and maintain them as competitive and independent businesses separate from Devro International.

To ensure that Devro Inc. and Devro Canada are kept separate from Devro International, a three-person management team, composed of_____, _____, and _____, will assume the management of Devro Inc. and Devro Canada. This management team, which will operate totally independently of Devro International, will report directly and exclusively to _____, an independent auditor/manager.

The effect of Devro International's agreement with the FTC is that, for all intents and purposes, Devro International will no longer be playing any role in the management and operation of Devro Inc. and Devro Canada. Until such time as the future owners of Devro Inc. and Devro Canada are determined, it is the responsibility of every employee of Devro Inc. and Devro Canada to cooperate with the new management team and to help to preserve Devro Inc. and Devro Canada as competitive and independent businesses.

CONCURRING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

Although I have voted to accept the consent order requiring divestiture, I have reservations about the provision of the order that excludes some incumbent firms from eligibility to acquire the assets to be divested.[1] According to the Notice To Aid Public Comment that accompanied the proposed order when it was published for comment, the "purpose of this exclusion is to preclude Devro from attempting to divest Devro North America to a competitor where there are likely to be further anticompetitive effects." Since any proposed divestiture under the order must be approved by the Commission,[2] an attempt by Devro to make an anticompetitive divestiture likely would be fruitless. In addition, Devro would risk appointment under the order

[1] Order paragraph II.C states that the acquirer of the assets to be divested "shall not be a firm that has been engaged in the manufacture of collagen sausage casings for sale, other than to itself, in the United States."

[2] Order paragraph II.D.

of a trustee to accomplish divestiture and incurring civil penalties for failure to make a timely divestiture.

Attempts to define in advance the field of eligible acquirers under a divestiture order are unnecessary, at best, potentially inefficient and possibly even anticompetitive. It is an inefficient use of resources to attempt to assess in advance the competitive effects of a transaction that Devro might or might not propose (especially if the exclusion covers more than one firm), even if the transaction-specific information necessary to our merger analysis were available. As a practical matter, any such exclusions will be based on something less than an adequate factual examination of the various possible proposed divestitures and will necessarily involve the risk of excluding firms that might have been acceptable and even procompetitive acquirers. That risk is unnecessary and should be unacceptable in view of the requirement to obtain the Commission's approval before any divestiture can take place and the availability of other sanctions for failing to make a timely divestiture.

IN THE MATTER OF

T&N PLC

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-3312. Consent Order, Nov. 8, 1990--Modifying Order, April 23, 1996

This order reopens a 1990 consent order -- that permitted the Manchester, England, corporation to acquire J.P. Industries, Inc., and required the respondent, for ten years, to obtain Commission approval before acquiring any engine bearing assets in the United States -- and this order modifies the consent order by terminating the provision requiring T&N to obtain prior Commission approval.

ORDER REOPENING AND MODIFYING ORDER

On January 4, 1996, T&N plc ("T&N" or "respondent"), the respondent named in the consent order issued by the Commission on November 8, 1990, in Docket No. C-3312 ("order"), filed its Request to Vacate Prior Approval Provision ("Request") in this matter.[1] T&N asks that the Commission reopen and modify the order 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 on June 21, 1995 ("Prior Approval Policy Statement" or "Statement").[2] Paragraph XI of the order requires T&N to seek prior Commission approval to acquire certain entities engaged in the design, manufacture or sale in or to the United States of engine bearings. T&N requests that the Commission reopen and modify the order to vacate the prior approval provision of paragraph XI of the order, or, in the alternative, to substitute a prior notice provision for the prior approval provision of paragraph XI.[3] The thirty-day public comment period on T&N's Request expired on February 26, 1996. No comments were received.

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[1] T&N is a United Kingdom corporation that manufactures and sells automotive components, including thinwall engine bearings for sale in the United States aftermarket.

[2] 60 Fed. Reg. 39745-47 (Aug. 3, 1995); 4 Trade Reg. Rep. (CCH) ¶ 13,241.

[3] Request at 1.

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.*

The Commission stated that it will continue to fashion remedies as needed in the public interest, including ordering narrow prior approval or prior notification requirements in certain limited 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. 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 also announced, in its Prior Approval Policy Statement, 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 this order is in the public interest. Nothing to overcome the presumption has been presented, and nothing in the record suggests that the respondent would engage in the same acquisition as alleged in the complaint. Accordingly, the Commission has determined to reopen the proceedings and modify the order to set aside the prior approval requirement.

The record in this case shows a credible risk that respondent could engage in future anticompetitive acquisitions that would not be reportable under the HSR Act. The complaint in this matter ("complaint") alleged that T&N's acquisition of J. P. Industries Inc. ("JPI") would substantially lessen competition within the United States in the manufacture and sale of thinwall engine bearings and tri-metal heavywall engine bearings in violation of Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. The relevant geographic market is United States.

The complaint alleged that a substantial lessening of competition would result from the elimination of actual competition in the relevant markets; the enhancement of the likelihood of collusion or interdependent coordination between or among firms in the relevant markets; the elimination of potential competition in the relevant markets; and the elimination of JPI as a substantial independent competitive force.

There has been no showing that the competitive conditions that gave rise to the complaint and the order no longer exist. Moreover, the size of relevant transactions indicates that future acquisitions that would currently be covered by the provisions of paragraph XI of the order might not be subject to the premerger notification and waiting period requirements of the HSR Act.[4] Accordingly, pursuant to the Prior Approval Policy Statement, the Commission has determined to modify paragraph XI of the order to substitute a prior notification requirement for the prior approval requirement.

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

[4] The divestitures made pursuant to the order were for prices well below the HSR filing thresholds.

It is further ordered, That paragraph XI of the order be, and it hereby is, modified, as of the effective date of this order, to read as follows:

XI.

It is further ordered, That, for a period of ten (10) years from the date on which this order becomes final, T&N shall not, directly or indirectly, acquire any stock, share capital, assets or equity interest in any concern, corporate or non-corporate, engaged in the design, manufacture or sale in or to the United States of any engine bearings without Prior Notification to the Commission, if such concern:

A. Is incorporated in one of the United States or organized under the laws of the United States or has its principal offices within the United States; or

B. At the time of the acquisition designs or manufactures plain engine bearings in the United States; or

C. Had net sales of thinwall plain engine bearings in or to the United States of one and one-half (1.5) million dollars or more in any of the three (3) calendar years preceding the date of the acquisition, or had net sales of tri-metal heavywall engine bearings in or to the United States of three hundred thousand (300,000) dollars or more in any of the three (3) calendar years preceding the date of the acquisition.

Provided, however, that nothing in this paragraph shall prohibit T&N from acquiring used machinery or equipment associated with or related to the manufacture of plain engine bearings from an entity that continues, to substantially the same extent as before the acquisition, in the business of manufacturing such bearings and selling them in or to the United States; and provided, further, that nothing in this paragraph shall prohibit T&N from purchasing from any such entity any plain engine bearings for resale in the United States in the ordinary course of business.

On the anniversary of the date on which this order becomes final, and on every anniversary thereafter for the following nine (9) years, T&N shall file with the Commission a verified written report of its compliance with this paragraph.

"Prior Notification to the Commission" 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 Form"), 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 respondent and not of any other party to the transaction. Respondent shall provide the Notification Form to the Commission at least thirty (30) 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, respondent shall not consummate the transaction until twenty (20) 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.

IN THE MATTER OF

ILLINOIS TOOL WORKS 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-3651. Complaint, April 23, 1996--Decision, April 23, 1996

This consent order requires Illinois Tool Works, among other things, to divest all of Hobart Brothers' assets and businesses relating to industrial power sources and industrial engine drives to Prestolite Electric Inc. or another Commission-approved acquirer.

Appearances

For the Commission: *Ann B. Malester, Christine Perez, Steven K. Bernstein* and *William Baer.*

For the respondent: *James Wooten* and *Stewart Hudnut*, in-house counsel, Glenview, IL.

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that respondent, Illinois Tool Works Inc., a corporation subject to the jurisdiction of the Commission, has agreed to acquire all of the capital stock of Hobart Brothers Company ("Hobart"), a corporation subject to the jurisdiction of the Commission, in violation of Section 5 of the Federal Trade Commission Act ("FTC Act"), as amended, 15 U.S.C. 45, and that such an acquisition, if consummated, would violate 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; 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 Illinois Tool Works Inc. ("ITW") is a corporation organized and existing under and by virtue of the laws of the state of Delaware, with its office and principal place of business located at

3600 West Lake Avenue, Glenview, Illinois. Respondent ITW is engaged in, among other things, the research, development, manufacture and sale of industrial power sources and industrial engine drives.

2. For purposes of this proceeding, respondent is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

II. ACQUIRED COMPANY

3. Hobart is a corporation organized and existing under and by virtue of the laws of Ohio, with its principal office and place of business located at 600 West Main Street, Troy, Ohio. Hobart is engaged in, among other things, the research, development, manufacture and sale of industrial power sources and industrial engine drives.

4. Hobart is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

III. THE ACQUISITION

5. On or about May 2, 1995, ITW agreed to acquire all of the issued and outstanding capital stock of Hobart, by means of a statutory merger between Hobart and ITW Acquisition Corp., a Delaware corporation which is a wholly-owned subsidiary of ITW. The transaction is valued at approximately $225 million.

IV. THE RELEVANT MARKETS

6. For purposes of this complaint, the relevant lines of commerce in which to analyze the effects of the acquisition are:

a. The research, development, manufacture and sale of industrial power sources, which are static arc welding power sources rated at 250 amperes and above; and

b. The research, development, manufacture and sale of industrial engine drives, which are rotating arc welding power sources rated at 250 amperes and above.

7. For purposes of this complaint, the United States is the relevant geographic area in which to analyze the effects of the acquisition in all the relevant lines of commerce.

8. The relevant markets set forth in paragraphs six and seven are highly concentrated whether measured by Herfindahl-Hirschmann Indices ("HHI") or by two-firm and four-firm concentration ratios.

9. Entry into the relevant markets set forth in paragraphs six and seven would not occur in a timely manner to deter or counteract the adverse competitive effects described in paragraph eleven because of, among other things, the difficulty of establishing a distribution and service network and gaining brand name recognition and customer acceptance in the markets.

10. ITW and Hobart are actual significant competitors in the relevant markets set forth in paragraphs six and seven.

V. EFFECTS OF THE ACQUISITION

11. The effects of the acquisition may be substantially to lessen competition and to tend to create a monopoly in the relevant markets set forth above in violation of Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, in the following ways, among others:

a. By enhancing the likelihood of collusion or coordinated interaction between or among the remaining firms in the relevant markets;

b. By eliminating direct actual competition between ITW and Hobart in the relevant markets;

c. By increasing the likelihood that consumers in the United States would be forced to pay higher prices for industrial power sources and industrial engine drives; and

d. By increasing the likelihood that quality and technological innovation in the industrial power source and industrial engine drive markets would be reduced.

VI. VIOLATIONS CHARGED

12. The acquisition agreement described in paragraph five constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

13. The acquisition described in paragraph five, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of the proposed acquisition by respondent of all of the assets and businesses of Hobart Brothers Company ("Hobart"), and the respondent having been furnished thereafter with a copy of a draft of complaint that the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and

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, 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 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 Illinois Tool Works Inc. ("ITW") 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 3600 West Lake Avenue, Glenview, Illinois.

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

ORDER

I.

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

A. *"Respondent"* or *"ITW"* means Illinois Tool Works Inc., its directors, officers, employees, agents and representatives, predecessors, successors and assigns; its subsidiaries, divisions, groups and affiliates controlled by Illinois Tool Works Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. *"Hobart"* means Hobart Brothers Company, an Ohio corporation, with its principal office and place of business located at 600 West Main Street, Troy, Ohio, its directors, officers, employees, agents and representatives, predecessors, successors and assigns; its subsidiaries, divisions, groups and affiliates controlled by Hobart Brothers Company, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. *"Commission"* means the Federal Trade Commission.

D. *"Acquisition"* means the acquisition by respondent of all of the issued and outstanding Hobart capital stock, by means of a statutory merger between Hobart and ITW Acquisition Corp., a Delaware corporation which is a wholly-owned subsidiary of ITW.

E. *"Industrial power sources"* means static arc welding power sources rated at 250 amperes or higher, including, but not limited to, any such power sources using inverter technology.

F. *"Industrial engine drives"* means rotating arc welding power sources rated at 250 amperes or higher.

G. *"Battery chargers"* means devices used to charge industrial batteries.

H. *"Aircraft ground power units"* means power conversion devices that provide power to aircraft that are on the ground.

I. *"Assets and Businesses"* means all assets, businesses and goodwill, tangible and intangible, including, without limitation, the following:

1. All machinery, fixtures, equipment, vehicles, transportation facilities, furniture, tools and other tangible personal property;

2. All customer lists, vendor lists, catalogs, sales promotion literature, advertising materials, research materials, technical information, management information systems, software, software licenses, inventions, copyrights, trademarks, trade names (excluding the Hobart trade name), trade secrets, intellectual property, patents, technology, know-how, specifications, designs, drawings, processes and quality control data;

3. The exclusive right to use the Hobart trade name in connection with the research, development, manufacture and sale of industrial power sources and industrial engine drives.

4. Inventory;

5. 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.

J. *"Hobart Industrial Welding Equipment Business"* means of all of the Assets and Businesses used in the research, development, manufacture and sale by Hobart of:

1. Industrial power sources;
2. Industrial engine drives;
3. Battery chargers; and
4. Aircraft ground power units.

K. *"Hobart Power Conversion Operations"* means all of the Assets and Businesses used in the research, development, manufacture and sale by Hobart of:

1. Static arc welding power sources;
2. Rotating arc welding power sources;
3. Battery chargers; and
4. Aircraft ground power units.

L. *"Prestolite"* means Prestolite Electric Incorporated, a Delaware corporation, with its principal office and place of business located at 2100 Commonwealth Blvd., Ann Arbor, Michigan.

M. *"Marketability, viability and competitiveness"* of the Hobart Industrial Welding Equipment assets means that the assets when used in conjunction with the assets of the acquirer are capable of operating a business which is substantially similar to the Hobart Industrial Welding Equipment Business at the time of the acquisition, with substantially similar sales levels and product lines.

II.

It is further ordered, That:

A. ITW shall divest, absolutely and in good faith, the Hobart Industrial Welding Equipment Business. The Hobart Industrial Welding Equipment Business shall be divested either:

1. Within one (1) month of the date this order becomes final, to Prestolite, pursuant to the January 17, 1996, Asset Purchase Agreement between Hobart and Prestolite as modified by the January 24, 1996, undertaking, as Confidential Appendix I. If divested to Prestolite, the Hobart Industrial Welding Equipment Business shall exclude Aircraft Ground Power Units; or

2. Within twelve (12) months of the date this order becomes final, to an acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission. In the event that the acquirer does not choose to acquire the battery charger or ground power unit assets and businesses, because the acquirer does not need such assets in order to engage in the industrial

power source and industrial engine drive businesses, respondent shall not be required to divest such assets.

B. The purpose of the divestiture is to ensure the continuation of the Hobart Industrial Welding Equipment Business as an ongoing, viable operation, engaged in the research, development, manufacture and sale of industrial power sources and industrial engine drives, and to remedy the lessening of competition resulting from the proposed acquisition as alleged in the Commission's complaint.

C. Until the Hobart Industrial Welding Equipment Business has been divested, ITW shall:

1. Maintain the marketability, viability, and competitiveness of the Hobart Industrial Welding Equipment 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 it shall not sell, transfer, encumber or otherwise impair the marketability, viability or competitiveness of the Hobart Industrial Welding Equipment Business; and

2. Expend funds for research and development, quality control, manufacturing and marketing of each of the Hobart Industrial Welding Equipment Business products at a level not lower than that budgeted for the 1995 fiscal year, and shall increase such spending as is deemed reasonably necessary in light of competitive conditions.

D. Upon reasonable notice from the acquirer to respondent, respondent shall provide, at no cost, such assistance to the acquirer as is reasonably necessary to enable the acquirer to design and manufacture industrial power sources and industrial engine drives in substantially the same manner and quality employed or achieved by Hobart prior to the Acquisition. Such assistance shall include reasonable consultation with knowledgeable employees of respondent and training at the acquirer's facility for a period of time sufficient to satisfy the acquirer's management that its personnel are appropriately trained in the design and manufacture of industrial power sources and industrial engine drives. Respondent shall convey all know-how necessary to design and manufacture industrial power sources and industrial engine drives in substantially the same manner and quality employed or achieved by Hobart prior to the Acquisition. However,

respondent shall not be required to continue providing such assistance for more than nine (9) months.

III.

It is further ordered, That:

A. If ITW has not divested, absolutely and in good faith and with the Commission's prior approval, the Hobart Industrial Welding Equipment Business within twelve (12) months of the date this order becomes final, the Commission may appoint a trustee to divest the Hobart Industrial Welding Equipment Business. In the event that the Commission or the Attorney General brings an action pursuant to Section 5(1) of the Federal Trade Commission Act, 15 U.S.C. 45(1), or any other statute enforced by the Commission, ITW 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 III. 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 ITW 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, ITW 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 ITW, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in mergers and divestitures. If ITW 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 ITW of the identity of any proposed trustee, ITW 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 Hobart Industrial Welding Equipment Business.

3. Within ten (10) days after appointment of the trustee, ITW shall execute a trust agreement that, subject to the prior approval of

the Commission and, in the case of a court-appointed trustee, of the court, transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestiture required by this order.

4. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in paragraph III.B.3. to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve month period, the trustee has submitted a plan of divestiture or believes that divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or, in the case of a court-appointed trustee, by the court; provided, however, the Commission may extend this period only two (2) times.

5. The trustee shall have full and complete access to the personnel, books, records and facilities related to the Hobart Industrial Welding Equipment Business, or to any other relevant information, as the trustee may request. ITW shall develop such financial or other information as the trustee may request and shall cooperate with the trustee. ITW shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays in divestiture caused by ITW 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 ITW's absolute and unconditional obligation to divest at no minimum price. The divestiture shall be made in the manner and to the acquirer as set out in paragraph II. of this order; provided, however, if the trustee receives *bona fide* offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest to the acquiring entity selected by the ITW from among those approved by the Commission.

7. The trustee shall serve, without bond or other security, at the cost and expense of ITW, 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 ITW, 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 ITW, 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 Hobart Industrial Welding Equipment Business.

8. ITW shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of any claim, whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.

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

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

11. The trustee may also divest such additional ancillary assets and businesses of the Hobart Power Conversion Operations and effect such arrangements as are necessary to assure the marketability, viability and competitiveness of the Hobart Industrial Welding Equipment Business.

12. The trustee shall have no obligation or authority to operate or maintain the Hobart Industrial Welding Equipment Business.

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

IV.

It is further ordered, That consistent with ITW's obligation to maintain the marketability, viability and competitiveness of the

Hobart Industrial Welding Equipment Business, ITW may engage in any business other than the Hobart Industrial Welding Equipment Business, including without limitation, the welding equipment business it is currently operating through its wholly-owned subsidiary, Miller Electric Mfg. Co.

V.

It is further ordered, That within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until ITW has fully complied with paragraphs II. and III. of this order, ITW 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. ITW 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. including a description of all substantive contacts or negotiations for the divestiture required by this order, including the identity of all parties contacted. ITW shall include in its compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning the divestiture.

VI.

It is further ordered, That ITW 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 emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change in the corporation that may affect compliance obligations arising out of the order.

VII.

It is further ordered, That, for the purpose of determining or securing compliance with this order, ITW 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 ITW, relating to any matters contained in this order; and

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

IN THE MATTER OF

HUGHES DANBURY OPTICAL SYSTEMS, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3652. Complaint, April 30, 1996--Decision, April 30, 1996

This consent order prohibits, among other things, the respondents from enforcing the exclusivity provisions contained in a teaming agreement -- between Hughes Danbury Optical Systems, Inc. and Xinetics, Inc. -- thereby ensuring that the Boeing Corp. team has a source for deformable mirrors other than Itek Optical Systems, once Itek is acquired by Hughes. The order also prohibits the respondents from accessing proprietary information from Itek regarding the Boeing team's airborne laser technical design or the cost of its adaptive optics system.

Appearances

For the Commission: *Ann B. Malester, John Scribner* and *William J. Baer.*

For the respondents: *Bill Slowey* and *Steven Cernak,* in-house counsel, Detroit, MI.

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 Hughes Danbury Optical Systems, Inc. ("HDOS"), Hughes Electronics Corporation, and General Motors Corporation, hereinafter sometimes referred to collectively as respondents, all corporations subject to the jurisdiction of the Commission, have agreed to purchase the business and selected assets of the Itek Optical Systems Division of Litton Systems, Inc., a wholly-owned subsidiary of Litton Industries, Inc., a corporation subject to the jurisdiction of the Commission, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended ("FTC Act"), 15 U.S.C. 45; and it appearing to the Commission that a proceeding in respect thereof

would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. DEFINITIONS

1. *"Airborne Laser System"* means a system that will utilize a 747 aircraft, equipped with a high energy laser projector, to fly at high altitudes near the forward edge of a battle area to locate and destroy incoming short-range missiles.

2. *"Boeing-Lockheed Martin Team"* means the team including The Boeing Company, Lockheed Martin Corporation and Itek Optical Systems, a division of Litton Systems, Inc., among others, that currently holds a Phase I concept design contract for the Phillips Laboratory Airborne Laser Program.

3. *"HDOS/Xinetics Letter of Intent"* means the Letter of Intent entered into on September 21, 1995, between HDOS and Xinetics in which HDOS expresses its intention to use Xinetics as a supplier of any Deformable Mirror which may be required for the Phillips Laboratory Airborne Laser Program.

4. *"Phillips Laboratory Airborne Laser Program"* is a United States Air Force Advanced Technology Demonstration Program to develop and then demonstrate the necessary technologies to acquire, track, and destroy theater ballistic missiles during the boost phase of flight.

5. *"Respondents"* means Hughes Danbury Optical Systems, Inc., Hughes Electronics Corporation, and General Motors Corporation.

6. *"Rockwell-Hughes Team"* means the team including Rockwell International Corporation, Hughes Electronics Corporation, Hughes Danbury Optical Systems, Inc., and Xinetics Incorporated, among others, that currently holds a Phase I concept design contract for the Phillips Laboratory Airborne Laser Program.

7. *"Xinetics"* means Xinetics Incorporated, a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Massachusetts, with its office and principal place of business located at 410 Great Road #A6, Littleton, Massachusetts.

II. RESPONDENTS

8. Respondent Hughes Danbury Optical Systems, Inc. ("HDOS"), 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 100 Wooster Road, Danbury, Connecticut.

9. Respondent Hughes Electronics Corporation ("Hughes") 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 7200 Hughes Terrace, Los Angeles, California.

10. Respondent General Motors Corporation ("GM") is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office located at 3044 W. Grand Blvd., Detroit, Michigan.

11. For purposes of this proceeding, respondents are, and at all times relevant herein have been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and are corporations whose businesses are in or affecting commerce as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

III. ACQUIRED COMPANY

12. Itek Optical Systems ("Itek") is a division of Litton Systems, Inc., a wholly-owned subsidiary of Litton Industries, Inc., 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 10 Maguire Blvd. Lexington, Massachusetts.

13. For purposes of this proceeding, Itek is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

IV. THE ACQUISITION

14. On or about September 26, 1995, HDOS entered into a letter of intent to purchase the business and selected assets of Itek ("the Acquisition").

V. THE RELEVANT MARKET

15. For purposes of this complaint, the relevant line of commerce in which to analyze the effects of the Acquisition is the research, development, manufacture and sale of an Airborne Laser System for use in the Phillips Laboratory Airborne Laser Program.

16. For purposes of this complaint, the United States is the relevant geographic area in which to analyze the effects of the Acquisition in the relevant line of commerce.

17. The relevant market set forth in paragraphs fifteen and sixteen is highly concentrated as measured by the Herfindahl-Hirschmann Index ("HHI") or the two-firm and four-firm concentration ratios ("concentration ratios"), as there are only two teams competing in this market.

18. Entry into the research, development, manufacture and sale of an Airborne Laser System for the Phillips Laboratory Airborne Laser Program would not occur in a timely manner to deter anticompetitive effects because the bids for that program are due in July 1996.

19. Because Itek is exclusively teamed with Lockheed Martin on the Boeing-Lockheed Martin Team and HDOS is exclusively teamed with Rockwell on the Rockwell-Hughes Team for the Phillips Laboratory Airborne Laser Program, HDOS and Itek are actual competitors in the relevant market set forth in paragraphs fifteen and sixteen.

VI. EFFECTS OF THE ACQUISITION

20. The effects of the Acquisition, if consummated, may be substantially to lessen competition or to tend to create a monopoly in the relevant market in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. 45, in the following ways, among others:

a. Actual, direct and substantial competition between the Boeing-Lockheed Martin Team and the Rockwell-Hughes Team in the research, development, manufacture and sale of an Airborne Laser System for use in the Phillips Laboratory Airborne Laser Program will be reduced;

b. Respondents may disadvantage the Boeing-Lockheed Martin Team competing for the Phillips Laboratory Airborne Laser Program in a manner that raises the costs of that competing team; and

c. Respondents may gain access to competitively sensitive non-public information concerning the Boeing-Lockheed Martin Team for the Phillips Laboratory Airborne Laser Program competition, whereby:

(1) Actual competition between the Boeing-Lockheed Martin Team and the Rockwell-Hughes Team for the Phillips Laboratory Airborne Laser Program will be reduced; and

(2) Advancements in Airborne Laser System research, development, innovation and quality for the Phillips Laboratory Airborne Laser Program will be reduced.

VII. VIOLATIONS CHARGED

21. The acquisition agreement described in paragraph fourteen constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

22. The acquisition described in paragraph fourteen, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of the proposed acquisition by respondents of the assets and businesses of the Itek Optical Systems Division of Litton Systems, Incorporated ("Itek"), and the respondents having been furnished thereafter with a copy of a draft of complaint that the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18,

and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and

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

1. Respondent Hughes Danbury Optical Systems, Incorporated ("HDOS"), 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 100 Wooster Road, Danbury, Connecticut.

2. Respondent Hughes Electronics Corporation ("Hughes") 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 7200 Hughes Terrace, Los Angeles, California.

3. Respondent General Motors Corporation ("GM") 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 3044 W. Grand Blvd., Detroit, 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. *"HDOS"* means Hughes Danbury Optical Systems, Inc., its officers, employees, agents and representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups and affiliates controlled by HDOS, and the respective officers, employees, agents, and representatives, successors and assigns of each.

B. *"Hughes"* means Hughes Electronics Corporation, its officers, employees, agents and representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups and affiliates controlled by Hughes, and the respective officers, employees, agents, and representatives, successors and assigns of each.

C. *"GM"* means General Motors Corporation, its officers, employees, agents and representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups and affiliates controlled by GM, and the respective officers, employees, agents, and representatives, successors and assigns of each.

D. *"Itek"* means Itek Optical Systems Division of Litton Systems, Incorporated, its officers, employees, agents and representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups and affiliates controlled by Itek, and the respective officers, employees, agents, and representatives, successors and assigns of each.

E. *"Respondents"* means HDOS, Hughes and GM.

F. *"Commission"* means the Federal Trade Commission.

G. *"Xinetics"* means Xinetics Incorporated, a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Massachusetts, with its office and principal place of business located at 410 Great Road #A6, Littleton, Massachusetts.

H. *"Person"* means any natural person, corporate entity, partnership, association, joint venture, government entity, trust or other business or legal entity.

I. *"HDOS/Xinetics Letter of Intent"* means the Letter of Intent entered into on September 21, 1995, between HDOS and Xinetics in which HDOS expresses its intention to use Xinetics as a supplier of any Deformable Mirror which may be required for the Phillips Laboratory Airborne Laser Program.

J. *"Phillips Laboratory Airborne Laser Program"* is a United States Air Force Advanced Technology Demonstration program to develop and then demonstrate the necessary technologies to acquire, track, and destroy theater ballistic missiles during the boost phase of flight.

K. *"Non-Public ABL Information"* means any information not in the public domain received or developed by Itek in its capacity as a subcontractor to Lockheed Martin Corporation for the Phillips Laboratory Airborne Laser Program. Non-Public ABL Information shall not include: (i) information which subsequently falls within the public domain through no violation of this order by respondents, or (ii) information which subsequently becomes known to respondents not in breach of a confidential disclosure agreement.

II.

It is further ordered, That respondents shall not enforce or attempt to enforce any provision contained in the HDOS/Xinetics Letter of Intent, or take any other action, that would inhibit Xinetics from teaming or otherwise contracting with any other person for the purpose of bidding on, designing, developing, manufacturing, or supplying any part of the Phillips Laboratory Airborne Laser Program.

III.

It is further ordered, That:

A. Respondents shall not receive, gain access to or in any manner obtain any Non-Public ABL Information without the express written permission of Lockheed Martin Corporation.

B. Upon request from Lockheed Martin Corporation, respondents shall provide to Lockheed Martin Corporation any Non-Public ABL Information in a timely fashion not to exceed seven (7) days from the

receipt of such request. Respondents may require payment for their own direct costs in providing such information.

IV.

It is further ordered, That respondents shall comply with all terms of the Interim Agreement, attached to this order and made a part hereof as Appendix I.

V.

It is further ordered, That within sixty (60) days of the date this order becomes final and every sixty days thereafter for the first year after this order becomes final, and at such other times as the Commission may require, respondents shall file a verified written report with the Commission setting forth in detail the manner and form in which they have complied and are complying with this order. Respondents shall include in their compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with paragraph II and paragraph III of the order. Respondents shall include in their compliance reports copies of all written communications, all internal memoranda, and all reports and recommendations concerning compliance with the provisions in paragraph II and paragraph III of the order.

VI.

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, sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change in the corporate respondents that may affect compliance obligations arising out of the order.

VII.

It is further ordered, That, for the purpose of determining or securing compliance with this order, respondents shall permit any duly authorized representative of the Commission:

A. Access, during office hours and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of any respondent relating to any matters contained in this order; and

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

APPENDIX I

INTERIM AGREEMENT

This Interim Agreement is by and between Hughes Danbury Optical Systems, Incorporated ("HDOS"), Hughes Electronics Corporation ("Hughes"), and General Motors Corporation ("GM"), three corporations organized and existing under the laws of the State of Delaware (collectively referred to as "proposed respondents"), and the Federal Trade Commission (the "Commission"), an independent agency of the United States Government, established under the Federal Trade Commission Act of 1914, 15 U.S.C. 41, *et seq.* (collectively, the "Parties").

PREMISES

Whereas, HDOS has proposed to acquire the Itek Optical systems Division of Litton Systems, Incorporated ("Itek"); and

Whereas, the Commission is now investigating the proposed acquisition to determine if it would violate any of the statutes the Commission enforces; and

Whereas, if the Commission accepts the Agreement Containing Consent Order ("Consent Agreement"), the Commission will place it on the public record for a period of at least sixty (60) days and subsequently may either withdraw such acceptance or issue and serve its complaint and decision in disposition of the proceeding 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 competition during the period prior to the final acceptance of the Consent Agreement by the Commission (after

the 60-day public notice period), there may be interim competitive harm and divestiture or other relief resulting from a proceeding challenging the legality of the proposed acquisition might not be possible, or might be less than an effective remedy; and

Whereas, proposed respondents entering into this Interim Agreement shall in no way be construed as an admission by proposed respondents that the proposed acquisition constitutes a violation of any statute; and

Whereas, proposed respondents understand that no act or transaction contemplated by this Interim 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 Interim Agreement.

Now, therefore, the Parties agree, upon the understanding that the Commission has not yet determined whether the proposed acquisition will be challenged, and in consideration of the Commission's agreement that, at the time it accepts the Consent Agreement for public comment, it will grant early termination of the Hart-Scott-Rodino waiting period, as follows:

1. Proposed respondents agree to execute and be bound by the terms of the order contained in the Consent Agreement, as if it were final, from the date the Consent Agreement is accepted for public comment by the Commission.

2. Proposed respondents agree to deliver within three (3) days of the date the Consent Agreement is accepted for public comment by the Commission, a copy of the Consent Agreement and a copy of this Interim Agreement to the United States Department of Defense, The Boeing Company, Lockheed Martin Corporation and Xinetics Incorporated.

3. Proposed respondents agree to submit within thirty (30) days of the date the Consent Agreement is signed by the proposed respondents, an initial report, pursuant to Section 2.33 of the Commission's Rules, signed by the proposed respondents setting forth in detail the manner in which the proposed respondents will comply with paragraph II and paragraph III of the Consent Agreement.

4. Proposed respondents agree that, from the date the Consent Agreement is accepted for public comment by the Commission until

the first of the dates listed in subparagraphs 4.a and 4.b, they will comply with the provisions of this Interim Agreement:

a. Ten (10) business days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Section 2.34 of the Commission's Rules;

b. The date the Commission issues its complaint and decision and order.

5. Proposed respondents waive all rights to contest the validity of this Interim Agreement.

6. For the purpose of determining or securing compliance with this Interim Agreement, proposed respondents shall permit any duly authorized representative of the Commission:

a. Access during office hours and in the presence of counsel to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of any proposed respondent relating to any matters contained in this Interim Agreement; and

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

7. This Interim Agreement shall not be binding until accepted by the Commission.

IN THE MATTER OF

AZRAK-HAMWAY INTERNATIONAL, INC., ET AL.

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

Docket C-3653. Complaint, May 2, 1996--Decision, May 2, 1996

This consent order prohibits, among other things, the New York-based manufacturers and distributors of toys from using deceptive demonstrations and certain other misrepresentations. In addition, the consent order requires the respondents to offer full refunds to consumers who bought Steel Tec toy vehicles, and to notify television stations that ran the challenged advertisements of the Commission action, and of the availability of guidelines for screening children's advertising.

Appearances

For the Commission: *Toby M. Levin* and *Dean Forbes.*

For the respondents: *Aaron Locker, Locker, Greenberg & Brainin*, New York, N.Y.

COMPLAINT

The Federal Trade Commission, having reason to believe that Azrak-Hamway International, Inc., a corporation, and Marvin Azrak and Ezra Hamway, 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 Azrak-Hamway International, Inc. is a New York corporation, with its principal office or place of business at 1107 Broadway, New York, New York.

Respondent Marvin Azrak is the Senior Executive Vice President, and an owner and director of Azrak-Hamway International, Inc. Individually or in concert with others, he formulates, directs, and controls the acts and practices of Azrak-Hamway International, Inc., including the acts and practices alleged in this complaint. His

principal office or place of business is the same as that of Azrak-Hamway International, Inc.

Respondent Ezra Hamway is the President, and an owner and director of Azrak-Hamway International, Inc. Individually or in concert with others, he formulates, direct, and controls the acts and practices of Azrak-Hamway International, Inc., including the acts and practices alleged in this complaint. His principal office or place of business is the same as that of Azrak-Hamway International, Inc.

PAR. 2. Respondents have manufactured, advertised, labeled, promoted, offered for sale, sold, and distributed toys, including the Steel Tec Steel Construction System line of toys ("Steel Tec toys"), through Azrak-Hamway International, Inc.'s Remco Toys Division, to consumers.

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 packages for Steel Tec toys, including but not necessarily limited to the attached Exhibits A-G. These advertisements and packages contain the following statements and depictions:

A. [Exhibit A, Television Advertisement]

[Audio] "Born out of steel and forging the way, the Steel Tec Construction System. Get a grip on the Power Wrench, feel the magnetic force. Because no matter how high, no matter how fast, no matter how powerful, or no matter how monstrous your imagination might be, Steel Tec is the beginning of creation."

This television advertisement contains depictions of the Steel Tec motorized helicopter, "Formula 1" race car, and "Off Road Super Sport" vehicle operating on their own power without human assistance, including the following scenes:

1. One sequence depicts an assembled Steel Tec motorized helicopter hovering, with propellers and rear rotors spinning, then ascending. The audio portion simulates the sound of a helicopter in flight, including the sound of propellers spinning.

2. Another sequence depicts an assembled Steel Tec Formula 1 race car driving at a rapid pace on a grated surface.

3. Another sequence depicts a rear wheel of an assembled Steel Tec Off Road Super Sport vehicle spinning and peeling out from a pile of dirt or sand. The ad then cuts to a scene of the Steel Tec Off Road Super Sport vehicle driving and bounding over a dirt or sand covered surface.

B. [Exhibit B, Television Advertisement]

[Audio] "Born out of steel and forging the way, the Steel Tec Construction System. Get a grip on the Power Wrench, feel the magnetic force.... Steel Tec powerful. Steel Tec cool as chrome. With Harley-Davidson. Steel Tec, the beginning of creation."

This television advertisement contains depictions of the Steel Tec "Sand Buggy" vehicle and "Harley-Davidson® Electra Glide" motorcycle operating on their own power without human assistance, including the following scenes:

1. One sequence depicts a rear wheel of an assembled Steel Tec Sand Buggy vehicle spinning and peeling out from a pile of dirt or sand. The ad then cuts to a scene of the Steel Tec Sand Buggy vehicle driving over a dirt or sand covered surface and leaving a cloud of dust behind.

2. Another sequence depicts the rear wheel of an assembled Steel Tec Harley-Davidson® Electra Glide motorcycle spinning and peeling out from a pile of dirt or sand. The audio portion simulates the sound of a motorcycle revving up. The ad then cuts to a scene showing the Steel Tec Harley-Davidson® Electra Glide motorcycle driving on two wheels on a dirt or sand covered surface. The audio portion of the ad simulates the sound of a motorcycle being driven.

C. [Exhibit C, Television Advertisement]

[Audio] "Now for a limited time, Steel Tec's Value Packed Power Command Workshop. Complete with a Steel Tec Power Wrench, storage case and all the tools and parts you need to get your dreams off the ground."

This television advertisement contains depictions of the Steel Tec "Hypersonic Fighter" plane operating on its own power without human assistance, including the following scene:

1. One sequence depicts an assembled Steel Tec Hypersonic Fighter plane flying across the television screen. The audio portion simulates the sound of a jet plane in flight.

2. A small print video-only disclosure states, "Product Does Not Fly Without Assistance."

D. [Exhibit D, Television Advertisement]

[Audio] "Born out of steel and forging the way, the Steel Tec Construction System. Get a grip on the Power Wrench, feel the magnetic force. Because no matter how fast, no matter how powerful, no matter how massive, or no matter how high your imagination might be, Steel Tec is the beginning of creation."

This television advertisement contains depictions of the Steel Tec "Off Road Super Sport," "Dozer," "Dump Truck," and motorized helicopter operating on their own power without human assistance, including the following scenes:

1. One sequence depicts a rear wheel of an assembled Steel Tec Off Road Super Sport vehicle spinning and peeling out from a pile of dirt or sand. The ad then cuts to a scene of the Steel Tec Off Road Super Sport vehicle driving and bounding over a dirt or sand covered surface.

2. Another sequence depicts an assembled Steel Tec Dozer vehicle driving forward and pushing a pile of dirt or sand on a dirt or sand covered surface.

3. Another sequence depicts an assembled Steel Tec Dump Truck vehicle driving in reverse and then stopping, and its dump body raising, tilting back, and dumping a full load of miniature canisters.

4. Another sequence depicts an assembled Steel Tec motorized helicopter hovering, with propellers and rear rotors spinning, then ascending. The audio portion simulates the sound of a helicopter in flight, including the sound of propellers spinning.

E. Exhibit E, a product package, depicts, *inter alia*, nine models, including the Steel Tec motorized helicopter, Formula 1 race car, Off Road Super Sport vehicle, and Sand Buggy vehicle. The nine models appear side-by-side in two rows in a large photograph, which makes up more than two-thirds of the front panel of the package. Copy on the package states:

1. "ROAD & AIR VEHICLES PLUS WALKING ROBOT" [appears on 5 of 6 panels];

2. "BATTERY POWERED MOTOR INCLUDED" [appears on 5 of 6 panels]; and,

3. "Requires 2 AA Alkaline Batteries (Not Included)" [appears on front panel].

F. Exhibit F, a product package, depicts, *inter alia*, three Harley-Davidson® motorcycles, including the Electra Glide. Copy on the package states:

1. "BATTERY POWERED MOTOR INCLUDED" [appears on 5 of 6 panels];

2. "BATTERY POWERED MOTOR INCLUDED" [appears on front panel directly above circle containing a photograph of a motor, a battery holder, and batteries];

3. "Requires 2 AA Alkaline Batteries (Not Included)" [appears on front panel]; and,

4. "THE HARLEY-DAVIDSON® MOTORCYCLES IN THIS SET OPERATE ON 2-AA ALKALINE BATTERIES (NOT INCLUDED)" [appears on back panel].

G. Exhibit G, a product package, depicts, *inter alia*, nine models, including the Steel Tec Dozer and Dump Truck vehicles. Copy on the package states:

1. "HEAVY MACHINERY PLUS WALKING DINOSAUR" [appears on 5 of 6 panels];

2. "BATTERY POWERED MOTOR INCLUDED" [appears on 5 of 6 panels];

3. "Requires 2 AA Alkaline Batteries (Not Included)" [appears on front panel]; and,

4. "THE STEEL TEC™ VEHICLES IN THIS SET OPERATE ON 2-AA ALKALINE BATTERIES (NOT INCLUDED)" [appears on back panel].

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

A. Motorized helicopter hovering, with propellers and rear rotors spinning, then ascending;

B. Formula 1 race car driving at a rapid pace on a grated surface;

C. Off Road Super Sport vehicle peeling out from a pile of dirt or sand and then driving and bounding over a dirt or sand covered surface;

D. Sand Buggy vehicle peeling out from a pile of dirt or sand and then driving over a dirt or sand covered surface, leaving a cloud of dust behind;

E. Harley-Davidson® Electra Glide motorcycle peeling out from a pile of dirt or sand, and driving on two wheels on a dirt or sand covered surface;

F. Hypersonic Fighter plane flying;

G. Dozer vehicle driving forward and pushing a pile of dirt or sand on a dirt or sand covered surface; and,

H. Dump Truck vehicle driving in reverse and then stopping, and its dump body raising, tilting back, and dumping a full load of miniature canisters

were unaltered and the results shown accurately represent the performance of the actual, unaltered Steel Tec motorized helicopter, Formula 1 race car, Off Road Super Sport vehicle, Sand Buggy vehicle, Harley-Davidson® Electra Glide motorcycle, Hypersonic Fighter plane, Dozer vehicle, and Dump Truck vehicle toys under the depicted conditions.

PAR. 6. In truth and in fact, the demonstrations in the television advertisements of the Steel Tec:

A. Motorized helicopter hovering, with propellers and rear rotors spinning, then ascending;

B. Formula 1 race car driving at a rapid pace on a grated surface;

C. Off Road Super Sport vehicle peeling out from a pile of dirt or sand and then driving and bounding over a dirt or sand covered surface;

D. Sand Buggy vehicle peeling out from a pile of dirt or sand and then driving over a dirt or sand covered surface, leaving a cloud of dust behind;

E. Harley-Davidson® Electra Glide motorcycle peeling out from a pile of dirt or sand, and driving on two wheels on a dirt or sand covered surface;

F. Hypersonic Fighter plane flying;

G. Dozer vehicle driving forward and pushing a pile of dirt or sand on a dirt or sand covered surface; and,

H. Dump Truck vehicle driving in reverse and then stopping, and its dump body raising, tilting back, and dumping a full load of miniature canisters

were not unaltered and the results shown did not accurately represent the performance of actual, unaltered Steel Tec motorized helicopter, Formula 1 race car, Off Road Super Sport vehicle, Sand Buggy vehicle, Harley-Davidson® Electra Glide motorcycle, Hypersonic Fighter plane, Dozer vehicle, and Dump Truck vehicle toys under the depicted conditions. Among other things, the Steel Tec:

1. Motorized helicopter was suspended in the air from monofilament wire and was moved by humans off camera to create the effects of hovering and ascending, and the propellers and rear rotors were spun manually by humans off camera to create the effect of motorized spinning;

2. Formula 1 race car was pulled and guided in a straight line by a monofilament wire held by humans off camera to create the effect of driving at a rapid pace on a grated surface;

3. Off Road Super Sport vehicle was pulled and guided by a monofilament wire held by humans off camera to create the effects of peeling out from a pile of dirt or sand, and driving and bounding over a dirt or sand covered surface;

4. Sand Buggy vehicle was pulled and guided by a monofilament wire operated by humans off camera to create the effects of peeling out from a pile of dirt or sand and driving over a dirt or sand covered surface;

5. Harley-Davidson® Electra Glide motorcycle was moved along the dirt or sand covered surface by humans off camera using a black tube connected to the side of the vehicle and recessed out of view from the camera to create the effects of peeling out and driving on a dirt or sand covered surface;

6. Hypersonic Fighter plane was moved along a horizontally suspended monofilament wire by humans off camera to create the effect of flying;

7. Dozer vehicle was pulled and guided by a monofilament wire held by humans off camera to create the effects of pushing a pile of dirt or sand and driving over a dirt or sand covered surface; and,

8. Dump Truck vehicle was pulled and guided by a monofilament wire held by humans off camera to create the effects of driving in reverse and stopping, and the dump body was pulled upward by a monofilament wire held by humans off camera to create the effect of dumping a load of miniature canisters.

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 on the packages referred to in paragraph four, including but not necessarily limited to the advertisements and packages attached as Exhibits A-G, respondents have represented, directly or by implication, that the Steel Tec:

A. Motorized helicopter can hover and ascend, and its propellers and rotors can spin in a sustained manner without human assistance;

B. Formula 1 race car can drive at a rapid pace in a sustained and directed manner without human assistance;

C. Off Road Super Sport vehicle can peel out from a pile of dirt or sand and drive and bound over a dirt or sand covered surface in a sustained and directed manner without human assistance;

D. Sand Buggy vehicle can peel out from a pile of dirt or sand and drive on a dirt or sand covered surface in a sustained and directed manner without human assistance;

E. Harley-Davidson® Electra Glide motorcycle can peel out from a pile of dirt or sand and drive on a dirt or sand covered surface in a sustained and directed manner without human assistance;

F. Hypersonic Fighter plane can fly in a sustained and directed manner without human assistance;

G. Dozer vehicle can push dirt or sand and drive on a dirt or sand covered surface in a sustained and directed manner without human assistance; and,

H. Dump Truck vehicle can drive in reverse, stop, raise the dump body, tilt it back, and then dump its load without human assistance.

PAR. 8. In truth and in fact, the Steel Tec:

A. Motorized helicopter cannot hover and ascend, and its propellers and rotors cannot spin in a sustained manner without human assistance;

B. Formula 1 race car cannot drive at a rapid pace in a sustained and directed manner without human assistance;

C. Off Road Super Sport vehicle cannot peel out from a pile of dirt or sand and drive and bound over a dirt or sand covered surface in a sustained and directed manner without human assistance;

D. Sand Buggy vehicle cannot peel out from a pile of dirt or sand and drive on a dirt or sand covered surface in a sustained and directed manner without human assistance;

E. Harley-Davidson® Electra Glide motorcycle cannot peel out from a pile of dirt or sand and drive on a dirt or sand covered surface in a sustained and directed manner without human assistance;

F. Hypersonic Fighter plane cannot fly in a sustained and directed manner without human assistance;

G. Dozer vehicle cannot push dirt or sand and drive on a dirt or sand covered surface in a sustained and directed manner without human assistance; and,

H. Dump Truck vehicle cannot drive in reverse, stop, raise the dump body, tilt it back, and then dump its load without human assistance.

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

PAR. 9. Through the use of the statements and depictions contained in the advertisements and on the packages referred to in paragraph four, including but not necessarily limited to the advertisements and packages attached as Exhibits A-G, respondents have represented, directly or by implication, that the Steel Tec Off Road Super Sport vehicle, Sand Buggy vehicle, Harley-Davidson®

Electra Glide motorcycle, Dozer vehicle, and Dump Truck vehicle can be used on dirt, sand, and similar surfaces.

PAR. 10. In truth and in fact, the Steel Tec Off Road Super Sport vehicle, Sand Buggy vehicle, Harley-Davidson® Electra Glide motorcycle, Dozer vehicle, and Dump Truck vehicle cannot be used on dirt, sand, and similar surfaces. The "Helpful Hints Manual" accompanying these products states, "OPERATE YOUR VEHICLE ON A SMOOTH, DRY SURFACE ONLY. NEVER OPERATE YOUR VEHICLE ON GRASS, DIRT, SAND, CARPET OR WATER AS THIS MAY RESULT IN DAMAGE TO YOUR VEHICLE." Therefore, the representation set forth in paragraph nine was, and is, false and misleading.

PAR. 11. Respondents have disseminated or have caused to be disseminated packages for Steel Tec toys, including but not necessarily limited to the attached Exhibits E-G. These packages contain the following statements and depictions:

A. Exhibit E depicts, *inter alia*, nine models, including the Steel Tec motorized helicopter, Formula 1 race car, Off Road Super Sport vehicle, and Sand Buggy vehicle. The nine models appear side-by-side in two rows in a large photograph, which makes up more than two-thirds of the front panel of the package. Copy on the package states:

1. "ROAD & AIR VEHICLES PLUS WALKING ROBOT" [appears on 5 of 6 panels];
2. "BUILD 9 OR MORE MODELS INDIVIDUALLY WITH THIS SET" [appears on 5 of 6 panels];
3. "348 PARTS" [appears in large red letters inside of a yellow hexagon with a red border on 5 of 6 panels]; and,
4. "ANY ONE OF THE STYLES SHOWN CAN BE BUILT ONE AT A TIME" [appears on back panel, above photographs of 9 individual packages of toys and 5 packages of sets of toys].

B. Exhibit F depicts, *inter alia*, three Harley-Davidson® motorcycles, including the Electra Glide. The three models appear side-by-side in a large photograph, which makes up more than two-thirds of the front panel of the package. Copy on the package states:

1. "BUILD 3 OR MORE MOTORCYCLES INDIVIDUALLY WITH THIS SET" [appears on 5 of 6 panels; photograph of 3 motorcycles side-by-side appears on 3 of 6 panels];
2. "545 PARTS" [appears in large red block letters inside of a yellow hexagon with a red border on 5 of 6 panels]; and,

3. "THE HARLEY-DAVIDSON® MOTORCYCLES IN THIS SET OPERATE ON 2-AA ALKALINE BATTERIES (NOT INCLUDED)" [appears on back panel].

C. Exhibit G depicts, *inter alia*, nine models, including the Steel Tec Dozer and Dump Truck vehicles. The nine models appear side-by-side in a large photograph, which makes up more than two-thirds of the front panel of the package. Copy on the package states:

1. "HEAVY MACHINERY PLUS WALKING DINOSAUR" [appears on 5 of 6 panels];
2. "BUILD 9 OR MORE MODELS INDIVIDUALLY WITH THIS SET" [appears on 5 of 6 panels];
3. "390 PARTS" [appears in large red block letters inside of a yellow hexagon with a red border on 5 of 6 panels]; and,
4. "THE STEEL TEC™ VEHICLES IN THIS SET OPERATE ON 2-AA ALKALINE BATTERIES (NOT INCLUDED)" [appears on back panel].

PAR. 12. Through the use of the statements and depictions contained on the packages of the Steel Tec toys referred to in paragraph eleven, including but not necessarily limited to the packages attached as Exhibits E-G, respondents have represented, directly or by implication, that each package contains the number of parts required to build the number of vehicles depicted on the package at the same time.

PAR. 13. In truth and in fact, the packages do not contain the number of parts required to build the number of vehicles depicted on the package at the same time. Each package contains enough parts to build a single vehicle at one time. 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 in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

EXHIBIT A

TV

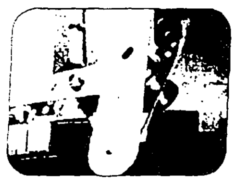
PRODUCT	STEEL TEC CONSTRUCTION TOYS	EXHIBIT A	
TITLE	"BORN OUT OF STEEL"		
PROGRAM	FULL HOUSE	11/24/94	30
STATION	WPIX	(NEW YORK)	6 25PM
	REVISION OF COMMERCIAL 94-11819		

(MUSIC) ANNCR: Born out of steel

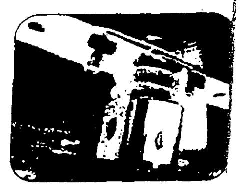
and forging the way

the, Steel Tec Construction System.

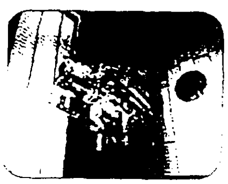
Get a grip on the Power Wrench,



feel the magnetic force.



(MUSIC)



Because no matter how high, (SFX: IN & OUT) no matter how fast,

(SFX: IN & OUT) no matter how powerful,

or no matter how

monstrous your imagination might be.

(MUSIC)

Steel Tec is the beginning of creation. (MUSIC OUT)

ALSO AVAILABLE IN COLOR VIDEO-TAPE CASSETTE

EXHIBIT B

TV

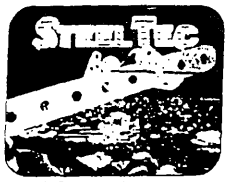
EXHIBIT B

PROGRAM FULL HOUSE

STATION WPIX NEW YORK

REVISION OF COMMERCIAL #4115833

(MUSIC) (SFX: IN & OUT)



ANNCR: Born out of steel

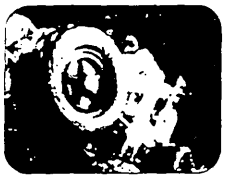
and forging the way, the Steel Tec Construction System.

Get a grip on the Power Wrench.

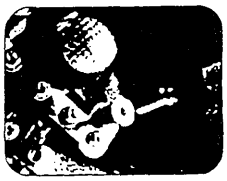
feel the magnetic force.

Let your imagination soar with the U.S.S. Enterprise.

from Star Trek The Next Generation.



Steel Tec powerful.



(MUSIC)

Steel Tec cool as chrome. (SFX IN) With Harley Davidson.

Steel Tec.

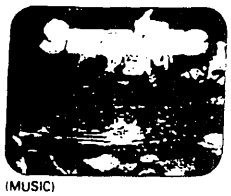
the beginning of creation. (MUSIC OUT) (SFX: IN & OUT)

ALSO AVAILABLE IN COLOR VIDEO-TAPE CASSETTE

EXHIBIT C

TV

PRODUCT [illegible]
TITLE VALUE PACKED POWER COMMAND WORKSHOP
PROGRAM FULL HOUSE 02/09/95 15
STATION [illegible] (NEW YORK) 6:27PM



(MUSIC)

ANNCR: Now for a limited time,

Steel Tec's Value Packed Power Command Workshop.

(MUSIC)

Complete with a Steel Tec power wrench, storage case

and all the tools and parts you need to get your dreams off the ground. (MUSIC OUT)

ALSO AVAILABLE IN COLOR VIDEO-TAPE CASSETTE

EXHIBIT D

[Television Advertisement]

[Announcer]: "Born out of steel and forging the way, the Steel Tec Construction System. Get a grip on the Power Wrench, feel the magnetic force. Because no matter how fast, no matter how powerful, no matter how massive, or no matter how high your imagination might be, Steel Tec is the beginning of creation."
This television advertisement contains depictions of the Steel Tec "Off Road Super Sport," "Dozer," "Dump Truck," and motorized helicopter operating on their own power without human assistance, including the following scenes:

1. One sequence depicts a rear wheel of an assembled Steel Tec Off Road Super Sport vehicle spinning and peeling out from a pile of dirt or sand. The ad then cuts to a scene of the Steel Tec Off Road Super Sport vehicle driving and bounding over a dirt or sand covered surface.
2. Another sequence depicts an assembled Steel Tec Dozer vehicle driving forward and pushing a pile of dirt or sand on a dirt or sand covered surface.
3. Another sequence depicts an assembled Steel Tec Dump Truck vehicle driving in reverse and then stopping, and its dump body raising, tilting back, and dumping a full load of miniature canisters.
4. Another sequence depicts an assembled Steel Tec motorized helicopter hovering, with propellers and rear rotors spinning, then ascending. The audio portion simulates the sound of a helicopter in flight, including the sound of propellers spinning.

EXHIBIT E


EXHIBIT E
TEC
CONSTRUCTION SYSTEM
5
PLUS
WALKING ROBOT
BATTERY POWERED
MOTOR INCLUDED
348 PARTS
BUILD 9 OR MORE VEHICLES INDIVIDUALLY WITH THIS SET
STEEL TEC
ROAD & AIR VEHICLES
Requires 2 AA Alkaline Batteries (Not Included).
Item # 7022
REMCO
AGES 8 & UP
TOOLS INCLUDED

EXHIBIT E

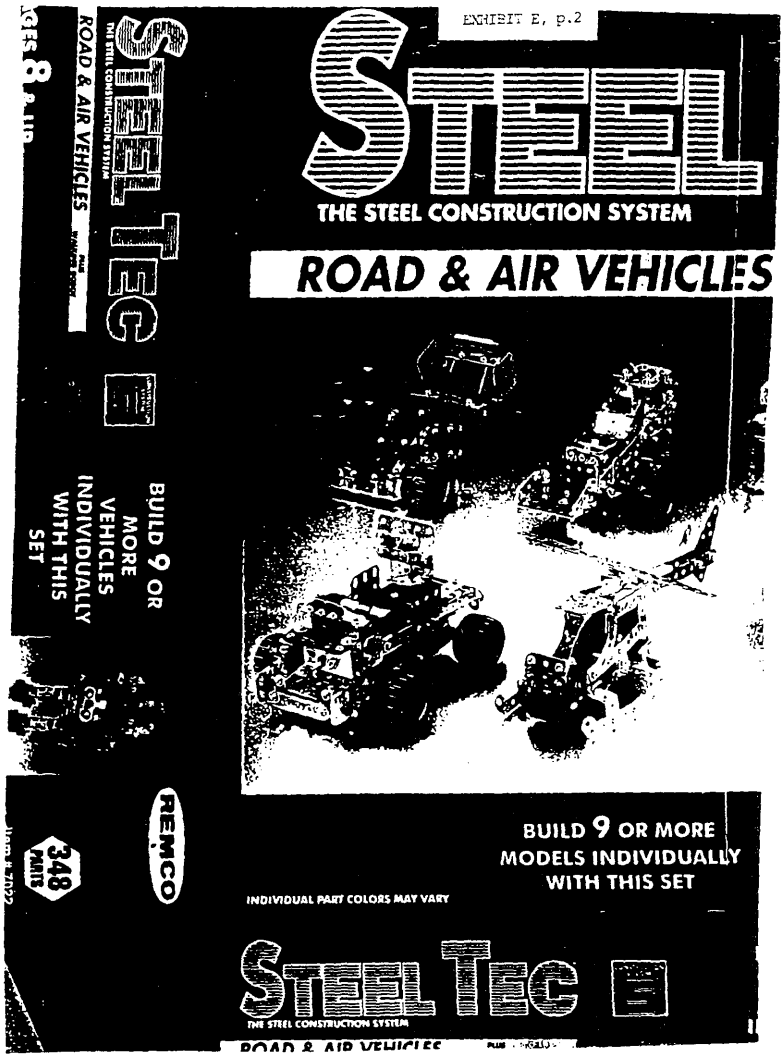


EXHIBIT E, p.2
STEEL
THE STEEL CONSTRUCTION SYSTEM
ROAD & AIR VEHICLES
BUILD 9 OR MORE MODELS INDIVIDUALLY WITH THIS SET
INDIVIDUAL PART COLORS MAY VARY
STEEL TEC
THE STEEL CONSTRUCTION SYSTEM
BUILD 9 OR MORE VEHICLES INDIVIDUALLY WITH THIS SET
REMCO
348 PARTS

EXHIBIT F


EXHIBIT F
EL TEC
CONSTRUCTION SYSTEM
301
N SYSTEM
CAFE RACER
BATTERY POWERED
MOTOR INCLUDED
BUILD 3 OR MORE MOTORCYCLES INDIVIDUALLY WITH THIS SET
REMCO
545 PARTS
Steel Tec
HARLEY-DAVIDSON
545 PARTS
Requires 2 AA Alkaline Batteries (Not Included).
REMCO
4 TOOLS INCLUDED
Item # 7091
AGES 9 & UP
REMCO
3 OR
545 PARTS

EXHIBIT F

EXHIBIT F, p.2

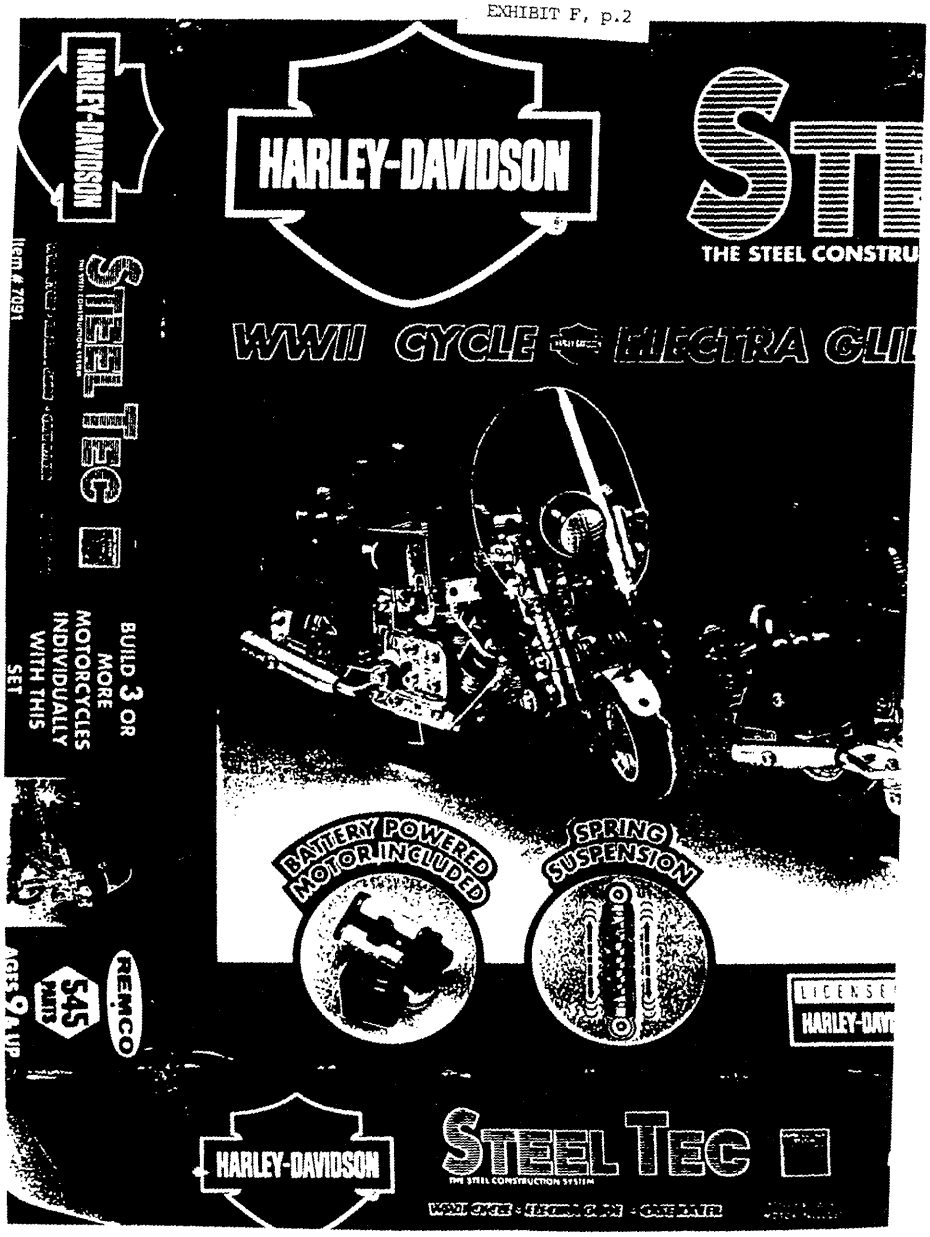


EXHIBIT G


EXHIBIT G
TEC
CONSTRUCTION SYSTEM
304
PLUS WALKING DINOSAUR
BATTERY POWERED MOTOR INCLUDED
REMCO
390 PARTS
BUILD 9 OR MORE MODELS INDIVIDUALLY WITH THIS SET
STEEL TEC
THE STEEL CONSTRUCTION SYSTEM
HEAVY MACHINERY
AGES 8 & UP
Requires 2 AA Alkaline Batteries (Not Included).
Item # 7023
REMCO
AGES 8 & UP
REMCO
390 PARTS

EXHIBIT G


EXHIBIT G, p.2
STEEL
THE STEEL CONSTRUCTION SYSTEM
HEAVY MACHINER
BUILD 9 OR MORE MODELS INDIVIDUALLY WITH THIS SET
INDIVIDUAL PART COLORS MAY VARY
REMCO
390 PARTS
STEEL TEC
THE STEEL CONSTRUCTION SYSTEM
HEAVY MACHINERY
PLUS WALKING DINOSAUR
AGES 8 & UP

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, 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 Azrak-Hamway International, 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 1107 Broadway, New York, New York.

Respondents Marvin Azrak and Ezra Hamway are owners and officers of said corporation. They formulate, direct, and control 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, Azrak-Hamway International, Inc., a corporation, its successors and assigns, and its officers, and Marvin Azrak and Ezra Hamway, 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, labeling, advertising, promotion, offering for sale, sale, or distribution of any toy in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. In connection with any advertisement or package depicting a demonstration, experiment or test, making any representation, directly or by implication, that the demonstration, picture, experiment or test depicted in the advertisement or package proves, demonstrates or confirms any material quality, feature or merit of any toy when such demonstration, picture, experiment or test does not prove, demonstrate or confirm the representation for any reason, including but not limited to:

1. The undisclosed use or substitution of a material mock-up or prop;
2. The undisclosed material alteration in a material characteristic of the advertised toy or any other material prop or device depicted in the advertisement; or
3. The undisclosed use of a visual perspective or camera, film, audio or video technique;

that, in the context of the advertisement as a whole, materially misrepresents a material characteristic of the advertised toy or any other material aspect of the demonstration or depiction.

Provided, however, that notwithstanding the foregoing, nothing in this order shall be deemed to otherwise preclude the use of fantasy segments or prototypes which use otherwise is not deceptive.

B. Misrepresenting, directly or by implication, any performance characteristic of any toy.

C. Misrepresenting the number of toys contained in, or that can be constructed with the parts contained in, the package.

II.

It is further ordered, That for three (3) years after the last date of dissemination of any representation covered by this order, respondent Azrak-Hamway International, Inc., 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 that were relied upon in disseminating such representation;

B. Any and all videotapes, in complete as well as unedited form, and any and all still photographs taken during the production of any advertisement depicting a demonstration, experiment, or test;

C. Any and all affidavits or certifications submitted by an employee, agent or representative of respondent to a television network or to any other individual or entity, which affidavit or certification affirms the accuracy or integrity of a demonstration or demonstration techniques contained in an advertisement; and

D. Any toy, as well as the packaging for any toy, involved in such representation.

III.

It is further ordered, That respondent Azrak-Hamway International, Inc., or its successors and assigns, shall offer refunds to purchasers of any Steel Tec toy(s) in accordance with the provisions of this Part.

A. Within fifteen (15) days from the date of service of this order, respondents shall compile a mailing list containing the name and last known address of each purchaser in respondents' possession or control. This list shall include all purchasers who have contacted respondents, either in writing or by telephone, regarding a Steel Tec toy. Within sixty (60) days from the date of service of this order, respondents shall provide Commission staff with a computer print-out copy of the mailing list, as well as provide the list in computer

readable form, in standard MS-DOS diskettes or IBM-mainframe compatible tape.

B. Within sixty (60) days from the date of service of this order, respondents shall send via first-class mail, postage prepaid, a Notice of Refund Offer in the form set forth in Appendix B to this order, to all purchasers listed on the mailing list required by subpart A of this Part.

C. Respondents shall also send via first-class mail, postage prepaid, a Notice of Refund Offer, in the form set forth in Appendix B to this order, to all purchasers who contact respondents or the Commission in any manner within one hundred twenty (120) days from the date of service of this order. Each mailing shall be made within fifteen (15) business days after respondents receive the purchaser's name and address.

D. No information other than that contained in Appendix B shall be included in or added to the Notice of Refund Offer, nor shall any other material be transmitted therewith. The envelope containing the Notice of Refund Offer shall be in the form set forth in Appendix C to this order. For each mailing returned by the U.S. Postal Service as undeliverable for which respondents thereafter obtain a corrected address, respondents shall, within fifteen (15) business days after receiving the corrected address, send a Notice of Refund Offer to the corrected address.

E. Respondents shall send a refund check to each purchaser who returns the completed application form appended to the Notice of Refund Offer to respondents or who otherwise requests a refund in writing, and who returns the toy(s), or a substantial portion of the toy(s), to respondents within one hundred eighty days (180) from the date of service of this order. The amount of the refund shall equal the sum of the price for the toy(s) as set forth in Appendix A to this order and the actual cost of postage for returning the toy(s). Respondents shall send refund checks by first-class mail, postage prepaid within fifteen (15) business days after respondents receive the returned toy(s) from the purchaser. The envelope containing the refund check shall be in the form set forth in Appendix D to this order.

F. Respondents shall notify any purchaser who applies for a refund but fails to return the Steel Tec toy or to otherwise apply properly of any error in the purchaser's refund application, and shall provide a reasonable opportunity for the purchaser to rectify any such error.

G. Within two hundred forty (240) days from the date of service of this order, respondents shall furnish to Commission staff the following:

1. In computer readable form (standard MS-Dos diskettes or IBM-mainframe compatible tape) and in computer print-out form, a list of the names and addresses of all consumers who were sent refund checks pursuant to Part III of this order, and for each name included on the list, the amount, check number and mailing date of every refund check sent;

2. In computer readable form (standard MS-Dos diskettes or IBM-mainframe compatible tape) and in computer print-out form, a list of the names and addresses of all consumers who contacted respondents or were referred to respondents by the Commission in accordance with sub part C of this Part,

3. Copies of all correspondence and other communications to, from, or concerning all consumers who requested a refund but were refused, and the reason(s) for denying the refund;

4. All Notices of Refund Offer returned to respondents as undeliverable; and

5. All other documents and records evidencing efforts made and actions taken by respondents to identify, locate, contact and provide refunds to consumers requesting a refund.

For purposes of this Part, "purchaser" shall mean any person who has purchased a Steel Tec toy and who has not previously received a full refund of the purchase price. "Steel Tec toy(s)" shall mean any of the toys identified in Appendix A to this order. "Substantial portion" of the toy shall mean a majority of the parts, including the battery pack, if such is part of the toy.

IV.

It is further ordered, That respondent Azrak-Hamway International, Inc., or its successors and assigns, shall within sixty (60) days after the date of service of this order send by certified mail, return receipt requested, to the station president or manager of each television station that aired any advertisement that was the subject of the complaint issued in this matter, as identified in Appendix F to this order, a copy of the letter set forth in Appendix E to this order.

V.

It is further ordered, That respondent Azrak-Hamway International, Inc., or its successors and assigns, shall within thirty (30) days after service of this order, provide a copy of this order to its current principals, officers, directors, and managers, and to all personnel, agents, and representatives having sales, advertising, or policy responsibility with respect to the subject matter of this order.

VI.

It is further ordered, That respondents Marvin Azrak and Ezra Hamway shall for a period of ten (10) years from the date of entry of this order, notify the Commission within thirty (30) days of the discontinuance of their present business or employment and of their affiliation with any new business or employment. Each such notice of affiliation with any new business or employment shall include the respondent's new business address and telephone number, current home address, and a statement describing the nature of the business or employment and his duties and responsibilities.

VII.

It is further ordered, That respondent Azrak-Hamway International, 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.

VIII.

This order will terminate on May 2, 2016, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

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

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

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

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

IX.

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

APPENDIX A

STEEL TEC TOYS SUBJECT TO THE REFUND OFFER

Toy or Toy Set	Refund Amount
Helicopter (not battery operated)	
Helicopter (packaged individually)(System 203/item #7009)	$8.99
Starter Set Copters (System 151/item #7085)	$14.99
Street and Flying Vehicles (System 203/item #7000)	$8.99
Helicopter (battery operated)	
Road & Air Vehicles Plus Walking Robot Set (System 305/item #7022)	$39.99
Construction & Road Vehicles Set (System 202/item #7010)	$19.99
Road & Air Vehicles Set (System 307/item #7020)	$29.99
Road, Rail and Air Vehicles Set (System 302/item #7024)	$34.99
Formula 1 Race Car	
Road & Air Vehicles Set (System 307/item #7020)	$29.99
Road & Air Vehicles Plus Walking Robot Set (System 305/item #7022)	$39.99
Off Road Super Sport	
Road & Air Vehicles Set (System 307/item #7020)	$29.99
Construction Vehicles Set (System 306/item #7021)	$29.99
Road & Air Vehicles Plus Walking Robot Set (System 305/item #7022)	$39.99
Sand Buggy	
Road & Air Vehicles Set (System 307/item #7020)	$29.99
Road & Air Vehicles Plus Walking Robot Set (System 305/item #7022)	$39.99
Road, Rail and Air Vehicles Set (System 302/item #7024)	$34.99
Excavating and Land Vehicles Set (System 303/item #7025)	$24.99
Dump Truck (not battery operated)	
Street and Flying Vehicles (System 203/item #7000)	$8.99
Construction and Road Vehicles (System 202/item #7010)	$19.99
Dump Truck (battery operated)	
Heavy Machinery/Construction Vehicles Plus Walking Dinosaur Set (System 304/item #7023)	$39.99

STEEL TEC TOYS SUBJECT TO THE REFUND OFFER (P.2)

Toy or Toy Set	Refund Amount
Dozer (bulldozer) Construction Vehicles Set (System 306/item #7021)	$29.99
Road & Air Vehicles Plus Walking Robot Set (System 305/item #7022)	$39.99
Heavy Machinery/Construction Vehicles Plus Walking Dinosaur Set (System 304/item #7023)	$39.99
Excavating and Land Vehicles Set (System 303/item # 7025)	$24.99
Harley-Davidson® Motorcycles Set (not battery operated) (System 201 /item #7090)	$34.99
Harley-Davidson® Motorcycles Set (battery operated) (System 301/item #7091)	$44.99
Hypersonic Jet Fighter Power Command Center/Value Pack: including Fighter Jet, Power Wrench and Storage Case (item #7031)	$19.99
Power Command Center/Value Pack: including Fighter Jet and Power Wrench but without Storage Case (item #7031A)	$12.49
Power Command Center/Value Pack: including Fighter Jet and Storage Case but without Power Wrench (item #7031B)	$12.49
Power Command Center/Value Pack: without Power Wrench and Storage Case [returning Fighter Jet only] (item #7031C)	$4.99
Starter Set Airplanes Assortment (System 151/item #7085)	$14.99

APPENDIX B

NOTICE OF REFUND OFFER

Dear Remco Toys Customer:

YOU MAY BE ENTITLED TO A CASH REFUND. We understand that you may have bought one or more Steel Tec Toys. We recently settled a dispute with the Federal Trade Commission about allegedly deceptive advertising for Steel Tec Toys. The FTC alleges that certain Steel Tec ads showed the toy vehicles flying, driving or moving in ways that they cannot actually do. Although we don't believe that our ads were deceptive, we have agreed to give a full refund to all eligible purchasers who return the toy and ask for their money back.

To get a refund, here's what you need to do:

1) Check the attached list to make sure that the toy you bought is included in this refund offer.
2) Return the toy(s), assembled or unassembled, including the battery pack, if it is part of the toy. The original packaging is not required.
3) Fill out the attached form. Then send the form and the toy back to us by first-class mail. To be eligible for a refund, you must send us the toy by [DATE CERTAIN 180 DAYS AFTER DATE OF SERVICE OF THE ORDER].
4) For every eligible toy you return, we'll send you a check for the price of the toy as stated on the attached list and the return postage. We'll send you a refund check within 15 business days of receiving the toy.

If you believe that you were not deceived by the alleged deceptive advertising and you are satisfied with your Steel Tec toy, you are not required to return the toy for a refund.

To get your refund, please make sure to write your correct address on the attached form. If you have any questions, please call 1-800-243-2961.

President
Remco Toys

____DETACH AND RETURN THIS FORM WITH THE TOY_____

NAME_____
STREET ADDRESS_____
CITY/STATE/ZIP_____
NAME OF STEEL TEC TOY OR TOY SET_____

Return this form and the toy by first-class mail to:

Steel Tec Toy Refund
Remco Toys
36 W. 25th Street
New York, New York 10016

DEADLINE: (DATE CERTAIN 180 DAYS AFTER DATE OF SERVICE OF THE ORDER)

FOR OFFICE USE ONLY

DATE RECEIVED _____
TOY RECEIVED _____
POSTAGE PAID _____
RECEIVER _____
REFUND $ _____
APPROVED BY _____
CHECK DATE _____
CHECK # _____
CHECK $ _____
MAILING DATE _____

STEEL TEC TOYS SUBJECT TO THE REFUND OFFER

Toy or Toy Set	Refund Amount
Helicopter (not battery operated)	
Helicopter (packaged individually)(System 203/item #7009)	$8.99
Starter Set Copters (System 151/item #7085)	$14.99
Street and Flying Vehicles (System 203/item #7000)	$8.99
Helicopter (battery operated)	
Road & Air Vehicles Plus Walking Robot Set (System 305/item #7022)	$39.99
Construction & Road Vehicles Set (System 202/item #7010)	$19.99
Road & Air Vehicles Set (System 307/item #7020)	$29.99
Road, Rail and Air Vehicles Set (System 302/item #7024)	$34.99
Formula 1 Race Car	
Road & Air Vehicles Set (System 307/item #7020)	$29.99
Road & Air Vehicles Plus Walking Robot Set (System 305/item #7022)	$39.99
Off Road Super Sport	
Road & Air Vehicles Set (System 307/item #7020)	$29.99
Construction Vehicles Set (System 306/item #7021)	$29.99
Road & Air Vehicles Plus Walking Robot Set (System 305/item #7022)	$39.99
Sand Buggy	
Road & Air Vehicles Set (System 307/item #7020)	$29.99
Road & Air Vehicles Plus Walking Robot Set (System 305/item #7022)	$39.99
Road, Rail and Air Vehicles Set (System 302/item #7024)	$34.99
Excavating and Land Vehicles Set (System 303/item # 7025)	$24.99

STEEL TEC TOYS SUBJECT TO THE REFUND OFFER (P.2)

Toy or Toy Set	Refund Amount
Dump Truck (not battery operated)	
Street and Flying Vehicles (System 203/item #7000)	$8.99
Construction and Road Vehicles (System 202/item #7010)	$19.99
Dump Truck (battery operated)	
Heavy Machinery/Construction Vehicles Plus Walking Dinosaur Set (System 304/item #7023)	$39.99
Dozer (bulldozer)	
Construction Vehicles Set (System 306/item #7021)	$29.99
Road & Air Vehicles Plus Walking Robot Set (System 305/item #7022)	$39.99
Heavy Machinery/Construction Vehicles Plus Walking Dinosaur Set (System 304/item #7023)	$39.99
Excavating and Land Vehicles Set (System 303/item # 7025)	$24.99
Harley-Davidson® Motorcycles Set (not battery operated) (System 201/item #7090)	$34.99
Harley-Davidson® Motorcycles Set (battery operated) (System 301/item #7091)	$44.99
Hypersonic Jet Fighter	
Power Command Center/Value Pack: including Fighter Jet, Power Wrench and Storage Case (item #7031)	$19.99
Power Command Center/Value Pack: including Fighter Jet and Power Wrench but without Storage Case (item #7031A)	$12.49
Power Command Center/Value Pack: including Fighter Jet and Storage Case but without Power Wrench (item #7031B)	$12.49
Power Command Center/Value Pack: without Power Wrench and Storage Case [returning Fighter Jet only] (item #7031C)	$4.99
Starter Set Airplanes Assortment (System 151/item #7085)	$14.99

APPENDIX C

REFUND NOTICE LETTER ENVELOPE

FORWARDING AND RETURN POSTAGE GUARANTEED

Remco Toys
36 W. 25th Street
New York, New York 10016

Window Envelope

[The following statement is to appear in a box, on the left hand side of the envelope in red, in extra large, bold type face]

ATTENTION: IMPORTANT
REFUND INFORMATION
INSIDE

APPENDIX D

REFUND CHECK ENVELOPE

FORWARDING AND RETURN POSTAGE GUARANTEED

Remco Toys
36 W. 25th Street
New York, New York 10016

Window Envelope

(indicates a check is enclosed)

APPENDIX E

(Azrak-Hamway stationery)

Dear Station President/Manager:

This letter notifies you that Azrak-Hamway International, Inc. ("Azrak-Hamway") has entered into a consent agreement with the Federal Trade Commission ("FTC") regarding certain advertising for its Remco Toys Steel Tec toy line. We have agreed as part of the settlement to send you this letter. It will advise you of how you may obtain information recognized by many organizations as useful in reviewing children's advertising to avoid misleading the public.

The FTC complaint in this matter alleges that advertisements for the Steel Tec toys included false demonstrations and representations of the performance of the depicted toys. More specifically, the FTC alleges that the ads depicted Steel Tec vehicles driving, flying, or otherwise moving in ways they cannot do in actual use. Azrak-Hamway does not admit to the alleged violations. The FTC action does not allege any liability on the part of the television stations that broadcast our ads.

Under Section 5 of the Federal Trade Commission Act (15 U.S.C. 45), advertisers are prohibited from disseminating false or deceptive advertising. As you may be aware, the advertising industry has undertaken various self-regulatory efforts to assist companies to comply with the law and to promote other industry goals. The Children's Advertising Review Unit ("CARU") was established in 1974 by the advertising industry to promote responsible children's advertising and to respond to public concerns. CARU reviews and evaluates child-directed advertising in all media. It is not affiliated with the Federal Trade Commission, but is part of the Council of Better Business Bureaus.

CARU has issued Guidelines on Children's Advertising that many industry members use to screen child-directed advertising. The Guidelines address many issues relating to advertising to children, some of which include deceptive advertising. For additional information regarding the CARU Guidelines, or a copy of the Guidelines, you may write to Elizabeth Lascoutx, Esq., Director of CARU, at 845 Third Avenue, New York, N.Y. 10022, or call her at (212) 705-0111.

If you need further information regarding deceptive advertising under the Federal Trade Commission Act, you may write to Dean C. Forbes, Esq., Division of Advertising Practices, Federal Trade Commission, 6th and Pennsylvania Ave., N.W., Washington, D.C. 20580, or call him at (202) 326-2831.

Sincerely,

_____

[Azrak-Hamway representative to be identified]

APPENDIX F

LIST OF TELEVISION STATIONS TO RECEIVE LETTER

Station	Channel	Location
KABB-TV	29	San Antonio, TX
KCAL-TV	09	Los Angeles, CA
KCPQ-TV	13	Seattle-Tacoma, WA
KDAF-TV	33	Dallas-Ft. Worth, TX
KDEB-TV	27	Springfield, MO
KDNL-TV	30	St. Louis, MO
KHTV-TV	39	Houston, TX
KITN-TV	29	Minneapolis-St. Paul, MN
KLGT-TV	23	Minneapolis-St. Paul, MN
KMSP-TV	09	Minneapolis-St. Paul, MN
KNXV-TV	15	Phoenix-Flagstaff, AZ
KOKH-TV	25	Oklahoma City, OK
KPDX-TV	49	Portland, OR
KPLR-TV	11	St. Louis, MO
KPHO-TV	05	Phoenix-Flagstaff, AZ
KPRC-TV	02	Houston, TX
KPRL-TV	11	St. Louis, MO
KSHB-TV	41	Kansas City, MO
KSMO-TV	62	Kansas City, MO
KSTU-TV	20	Salt Lake City, UT
KSTW-TV	11	Seattle-Tacoma, WA
KTLA-TV	05	Los Angeles, CA
KTTV-TV	11	Los Angeles, CA
KTVD-TV	20	Denver, CO
KTVT-TV	11	Dallas-Ft. Worth, TX
KTXH-TV	20	Houston, TX
KWGN-TV	02	Denver, CO
WBFS-TV	33	Miami-Ft. Lauderdale, FL
WCCB-TV	18	Charlotte, NC
WCNC-TV	36	Charlotte, NC
WFLD-TV	32	Chicago, IL
WFXI-TV	08	Greenville, New Bern-Washington, NC
WFXT-TV	25	Boston, MA
WGBS-TV	57	Philadelphia, PA
WGN-TV	09	Chicago, IL
WGNX-TV	46	Atlanta, GA
WGRZ-TV	02	Buffalo, NY
WHNS-TV	21	Greenville-Asheville-Spartanburg, NC

LIST OF TELEVISION STATIONS TO RECEIVE LETTER (P.2)

Station	Channel	Location
WIVB-TV	04	Buffalo, NY
WJZY-TV	03	Charlotte, NC
WKBD-TV	50	Detroit, MI
WKCF-TV	18	Orlando-Daytona, FL
WKFT-TV	40	Raleigh-Durham, NC
WKRN-TV	02	Nashville, TN
WLBZ-TV	02	Bangor, ME
WLFL-TV	22	Raleigh-Durham, NC
WLVI-TV	56	Boston, MA
WNUV-TV	54	Baltimore, MD
WOFL-TV	35	Orlando-Daytona, FL
WOIO-TV	19	Cleveland-Akron, OH
WPGH-TV	53	Pittsburgh, PA
WPHL-TV	17	Philadelphia, PA
WPIX-TV	11	New York, NY
WPTT-TV	22	Pittsburgh, PA
WPWR-TV	60	Chicago, IL
WSBK-TV	38	Boston, MA
WSTR-TV	64	Cincinnati, OH
WSYT-TV	68	Syracuse, NY
WTBS-TV	17	Atlanta, GA
WTEN-TV	10	Albany-Schenectedy, NY
WTIC-TV	61	Hartford-New Haven, CT
WTOG-TV	44	Tampa-St. Petersburg, FL
WTTG-TV	05	Washington, DC
WTTV-TV	04	Indianapolis, IN
WTVZ-TV	33	Norfolk-Portsmith, VA
WTXF-TV	29	Philadelphia, PA
WUAB-TV	43	Cleveland-Akron, OH
WXIX-TV	19	Cincinnati, OH
WXMI-TV	17	Grand Rapids-Kalamazoo, MI
WXON-TV	62	Detroit, MI
WYFF-TV	04	Greenville-Asheville-Spartanburg, NC
WZTV-TV	17	Nashville, TN

IN THE MATTER OF

STARWOOD ADVERTISING, INC., ET AL.

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

Docket C-3654. Complaint, May 2, 1996--Decision, May 2, 1996

This consent order prohibits, among other things, a Colorado-based advertising agency and its officer from using deceptive demonstrations and certain other misrepresentations in future advertising campaigns.

Appearances

For the Commission: *Toby M. Levin* and *Dean Forbes.*

For the respondents: *Aaron Locker, Locker, Greenberg & Brainin,* New York, N.Y.

COMPLAINT

The Federal Trade Commission, having reason to believe that Starwood Advertising, Inc., a corporation, and Les Towne, individually and as an officer of said corporation ("respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent Starwood Advertising, Inc., is a Colorado corporation, with its principal office or place of business at 600 North Starwood Drive, Aspen, Colorado.

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

PAR. 2. Respondent Starwood Advertising, Inc. is now, and has been at all times relevant to this complaint, an advertising agency of Azrak-Hamway International, Inc. Respondents have prepared and disseminated advertisements to promote the sale of the Steel Tec Steel Construction System line of toys ("Steel Tec toys").

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 prepared and disseminated or have caused to be disseminated advertisements for Steel Tec toys, including but not necessarily limited to the attached Exhibits A-D. These advertisements contain the following statements and depictions:

A. [Exhibit A, Television Advertisement]

[Audio] "Born out of steel and forging the way, the Steel Tec Construction System. Get a grip on the Power Wrench, feel the magnetic force. Because no matter how high, no matter how fast, no matter how powerful, or no matter how monstrous your imagination might be, Steel Tec is the beginning of creation."

This television advertisement contains depictions of the Steel Tec motorized helicopter, "Formula 1" race car, and "Off Road Super Sport" vehicle operating on their own power without human assistance, including the following scenes:

1. One sequence depicts an assembled Steel Tec motorized helicopter hovering, with propellers and rear rotors spinning, then ascending. The audio portion simulates the sound of a helicopter in flight, including the sound of propellers spinning.

2. Another sequence depicts an assembled Steel Tec Formula 1 race car driving at a rapid pace on a grated surface.

3. Another sequence depicts a rear wheel of an assembled Steel Tec Off Road Super Sport vehicle spinning and peeling out from a pile of dirt or sand. The ad then cuts to a scene of the Steel Tec Off Road Super Sport vehicle driving and bounding over a dirt or sand covered surface.

B. [Exhibit B, Television Advertisement]

[Audio] "Born out of steel and forging the way, the Steel Tec Construction System. Get a grip on the Power Wrench, feel the magnetic force. . . . Steel Tec powerful. Steel Tec cool as chrome. With Harley-Davidson. Steel Tec, the beginning of creation."

This television advertisement contains depictions of the Steel Tec "Sand Buggy" vehicle, and "Harley-Davidson® Electra Glide" motorcycle operating on their own power without human assistance, including the following scenes:

1. One sequence depicts a rear wheel of an assembled Steel Tec Sand Buggy vehicle spinning and peeling out from a pile of dirt or sand. The ad then cuts to a scene of the Steel Tec Sand Buggy vehicle driving over a dirt or sand covered surface and leaving a cloud of dust behind.

2. Another sequence depicts the rear wheel of an assembled Steel Tec Harley-Davidson® Electra Glide motorcycle spinning and peeling out from a pile of dirt or sand. The audio portion simulates the sound of a motorcycle revving up. The ad then cuts to a scene showing the Steel Tec Harley-Davidson® Electra Glide

motorcycle driving on two wheels on a dirt or sand covered surface. The audio portion of the ad simulates the sound of a motorcycle being driven.

C. [Exhibit C, Television Advertisement]

[Audio] "Now for a limited time, Steel Tec's Value Packed Power Command Workshop. Complete with a Steel Tec Power Wrench, storage case and all the tools and parts you need to get your dreams off the ground."

This television advertisement contains depictions of the Steel Tec "Hypersonic Fighter" plane operating on its own power without human assistance, including the following scene:

1. One sequence depicts an assembled Steel Tec Hypersonic Fighter plane flying across the television screen. The audio portion simulates the sound of a jet plane in flight.

2. A small print video-only disclosure states, "Product Does Not Fly Without Assistance."

D. [Exhibit D, Television Advertisement]

[Audio] "Born out of steel and forging the way, the Steel Tec Construction System. Get a grip on the Power Wrench, feel the magnetic force. Because no matter how fast, no matter how powerful, no matter how massive, or no matter how high your imagination might be, Steel Tec is the beginning of creation."

This television advertisement contains depictions of the Steel Tec "Off road Super Sport," "Dozer," "Dump Truck," and motorized helicopter operating on their own power without human assistance, including the following scenes:

1. One sequence depicts a rear wheel of an assembled Steel Tec Off Road Super Sport vehicle spinning and peeling out from a pile of dirt or sand. The ad then cuts to a scene of the Steel Tec Off Road Super Sport vehicle driving and bounding over a dirt or sand covered surface.

2. Another sequence depicts an assembled Steel Tec Dozer vehicle driving forward and pushing a pile of dirt or sand on a dirt or sand covered surface.

3. Another sequence depicts an assembled Steel Tec Dump Truck vehicle driving in reverse and then stopping, and its dump body raising, tilting back, and dumping a full load of miniature canisters.

4. Another sequence depicts an assembled Steel Tec motorized helicopter hovering, with propellers and rear rotors spinning, then ascending. The audio portion simulates the sound of a helicopter in flight, including the sound of propellers spinning.

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

A. Motorized helicopter hovering, with propellers and rear rotors spinning, then ascending;

B. Formula 1 race car driving at a rapid pace on a grated surface;

C. Off Road Super Sport vehicle peeling out from a pile of dirt or sand and then driving and bounding over a dirt or sand covered surface;

D. Sand Buggy vehicle peeling out from a pile of dirt or sand and then driving over a dirt or sand covered surface, leaving a cloud of dust behind;

E. Harley-Davidson® Electra Glide motorcycle peeling out from a pile of dirt or sand, and driving on two wheels on a dirt or sand covered surface;

F. Hypersonic Fighter plane flying;

G. Dozer vehicle driving forward and pushing a pile of dirt or sand on a dirt or sand covered surface; and,

H. Dump Truck vehicle driving in reverse and then stopping, and its dump body raising, tilting back, and dumping a full load of miniature canisters

were unaltered and the results shown accurately represent the performance of the actual, unaltered Steel Tec motorized helicopter, Formula 1 race car, Off Road Super Sport vehicle, Sand Buggy vehicle, Harley-Davidson® Electra Glide motorcycle, Hypersonic Fighter plane, Dozer vehicle, and Dump Truck vehicle toys under the depicted conditions.

PAR. 6. In truth and in fact, the demonstrations in the television advertisements of the Steel Tec:

A. Motorized helicopter hovering, with propellers and rear rotors spinning, then ascending;

B. Formula 1 race car driving at a rapid pace on a grated surface;

C. Off Road Super Sport vehicle peeling out from a pile or sand and then driving and bounding over a dirt or sand covered surface;

D. Sand Buggy vehicle peeling out form a pile of dirt or sand and then driving over a dirt or sand covered surface, leaving a cloud of dust behind;

E. Harley-Davidson® Electra Glide motorcycle peeling out from a pile of dirt or sand, and driving on two wheels on a dirt or sand covered surface;

F. Hypersonic Fighter plane flying;

G. Dozer vehicle driving forward and pushing a pile of dirt or sand on a dirt or sand covered surface; and,

H. Dump Truck vehicle driving in reverse and then stopping, and its dump body raising, tilting back, and dumping a full load of miniature canisters

were not unaltered and the results shown did not accurately represent the performance of actual, unaltered Steel Tec motorized helicopter, Formula 1 race car, Off Road Super Sport vehicle, Sand Buggy vehicle, Harley-Davidson® Electra Glide motorcycle, Hypersonic Fighter plane, Dozer vehicle, and Dump Truck vehicle toys under the depicted conditions. Among other things, the Steel Tec:

1. Motorized helicopter was suspended in the air from monofilament wire and was moved by humans off camera to create the effects of hovering and ascending, and the propellers and rear rotors were spun manually by humans off camera to create the effect of motorized spinning;

2. Formula 1 race car was pulled and guided in a straight line by a monofilament wire held by humans off camera to create the effect of driving at a rapid pace on a grated surface;

3. Off Road Super Sport vehicle was pulled and guided by a monofilament wire held by humans off camera to create the effects of peeling out from a pile of dirt or sand, and driving and bounding over a dirt or sand covered surface;

4. Sand Buggy vehicle was pulled and guided by a monofilament wire operated by humans off camera to create the effects of peeling out from a pile of dirt or sand and driving over a dirt or sand covered surface;

5. Harley-Davidson® Electra Glide motorcycle was moved along the dirt or sand covered surface by humans off camera using a black tube connected to the side of the vehicle and recessed out of view from the camera to create the effects of peeling out and driving on a dirt or sand covered surface;

6. Hypersonic Fighter plane was moved along a horizontally suspended monofilament wire by humans off camera to create the effect of flying;

7. Dozer vehicle was pulled and guided by a monofilament wire held by humans off camera to create the effects of pushing a pile of dirt or sand and driving over a dirt or sand covered surface; and,

8. Dump Truck vehicle was pulled and guided by a monofilament wire held by humans off camera to create the effects of driving in reverse and stopping, and the dump body was pulled upward by a monofilament wire held by humans off camera to create the effect of dumping a load of miniature canisters.

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

PAR. 7. Through the use of the statements and depictions contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits A-D, respondents have represented, directly or by implication, that the Steel Tec:

A. Motorized helicopter can hover and ascend, and its propellers and rotors can spin in a sustained manner without human assistance;

B. Formula 1 race car can drive at a rapid pace in a sustained and directed manner without human assistance;

C. Off Road Super Sport vehicle can peel out from a pile of dirt or sand and drive and bound over a dirt or sand covered surface in a sustained and directed manner without human assistance;

D. Sand Buggy vehicle can peel out from a pile of dirt or sand and drive on a dirt or sand covered surface in a sustained and directed manner without human assistance;

E. Harley-Davidson® Electra Glide motorcycle can peel out from a pile of dirt or sand and drive on a dirt or sand covered surface in a sustained and directed manner without human assistance;

F. Hypersonic Fighter plane can fly in a sustained and directed manner without human assistance;

G. Dozer vehicle can push dirt or sand and drive on a dirt or sand covered surface in a sustained and directed manner without human assistance; and,

H. Dump Truck vehicle can drive in reverse, stop, raise the dump body, tilt it back, and then dump its load without human assistance.

PAR. 8. In truth and in fact, the Steel Stec:

A. Motorized helicopter cannot hover and ascend, and its propellers and rotors cannot spin in a sustained manner without human assistance;

B. Formula 1 race car cannot drive at a rapid pace in a sustained and directed manner without human assistance;

C. Off Road Super Sport vehicle cannot peel out from a pile of dirt or sand and drive and bound over a dirt or sand covered surface in a sustained and directed manner without human assistance;

D. Sand Buggy vehicle cannot peel out from a pile of dirt or sand and drive on a dirt or sand covered surface in a sustained and directed manner without human assistance;

E. Harley-Davidson® Electra Glide motorcycle cannot peel out from a pile of dirt or sand and drive on a dirt or sand covered surface in a sustained and directed manner without human assistance;

F. Hypersonic fighter plane cannot fly in a sustained and directed manner without human assistance;

G. Dozer vehicle cannot push dirt or sand and drive on a dirt or sand covered surface in a sustained and directed manner without human assistance; and,

H. Dump Truck vehicle cannot drive in reverse, stop, raise the dump body, tilt it back, and then dump its load without human assistance.

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

PAR. 9. Through the use of the statements and depictions contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits A-D, respondents have represented, directly or by implication, that the Steel Tec Off Road Super Sport vehicle, Sand Buggy vehicle, Harley-Davidson® Electra Glide motorcycle, Dozer vehicle, and Dump Truck vehicle can be used on dirt, sand, and similar surfaces.

PAR. 10. In truth and in fact, the Steel Tec Off Road Super Sport vehicle, Sand Buggy vehicle, Harley-Davidson® Electra Glide motorcycle, Dozer vehicle, and Dump Truck vehicle cannot be used on dirt, sand, and similar surfaces. The "Helpful Hints Manual" accompanying these products states, "OPERATE YOUR VEHICLE ON A SMOOTH, DRY SURFACE ONLY. NEVER OPERATE YOUR VEHICLE ON GRASS, DIRT, SAND, CARPET OR WATER AS THIS MAY RESULT IN DAMAGE TO YOUR VEHICLE." Therefore, the representation set forth in paragraph nine was, and is, false and misleading.

PAR. 11. Respondents knew or should have known that the representations set forth in paragraphs five, seven, and nine were, and are, false and misleading.

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

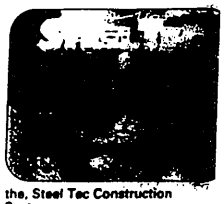
EXHIBIT A

TV

PRODUCT: STEEL TEC CONSTRUCTION TOYS EXHIBIT A
TITLE: "BORN OUT OF STEEL"
PROGRAM: FULL HOUSE 11/24/94 :30
STATION: WPIX (NEW YORK) 6:25PM
REVISION OF COMMERCIAL 94-11819

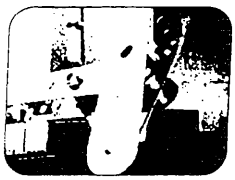
(MUSIC) ANNCR: Born out of steel

and forging the way

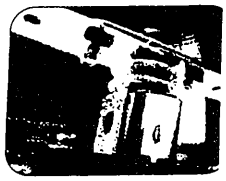


the, Steel Tec Construction System.

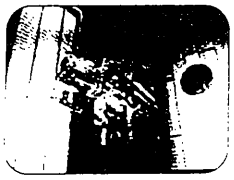
Get a grip on the Power Wrench.



feel the magnetic force.



(MUSIC)

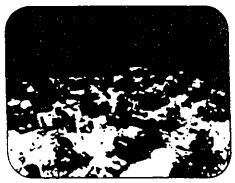


Because no matter how high, (SFX: IN & OUT) no matter how fast,

(SFX: IN & OUT) no matter how powerful,

or no matter how

monstrous your imagination might be.



(MUSIC)

Steel Tec is the beginning of creation. (MUSIC OUT)

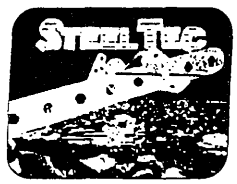
ALSO AVAILABLE IN COLOR VIDEO-TAPE CASSETTE

EXHIBIT B

TV

PRODUCT STEEL TEC CONSTRUC ION KITS EXHIBIT B
TITLE "BORN OUT OF STEEL"
PROGRAM FULL HOUSE 11/24/94 30
STATION WPIX (NEW YORK) 6:25PM
REVISION OF COMMERCIAL 94-15833

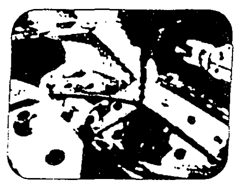
(MUSIC) (SFX: IN & OUT)



ANNCR: Born out of steel

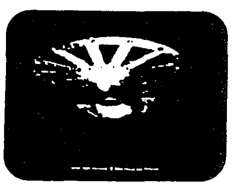
and forging the way, the Steel Tec Construction System.

Get a grip on the Power Wrench,

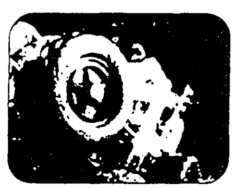


feel the magnetic force.

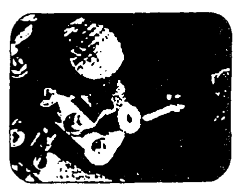
Let your imagination soar with the U.S.S. Enterprise,



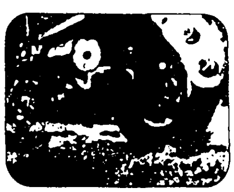
from Star Trek The Next Generation.



Steel Tec powerful.



(MUSIC)



Steel Tec cool as chrome. (SFX: IN) With Harley Davidson.

Steel Tec.

the beginning of creation. (MUSIC OUT) (SFX: IN & OUT)

EXHIBIT C

TV

TITLE "VALUE PACKED POWER COMMAND WORKSHOP"
PROGRAM FULL HOUSE 02/09/95 :5
STATION WPIX (NEW YORK) 6:27PM

(MUSIC)

ANNCR: Now for a limited time,

Steel Tec's Value Packed Power Command Workshop.

(MUSIC)

Complete with a Steel Tec power wrench, storage case

and all the tools and parts you need to get your dreams off the ground. (MUSIC OUT)

ALSO AVAILABLE IN COLOR VIDEO-TAPE CASSETTE

EXHIBIT D

[Television Advertisement]

[Announcer]: "Born out of steel and forging the way, the Steel Tec Construction System. Get a grip on the Power Wrench, feel the magnetic force. Because no matter how fast, no matter how powerful, no matter how massive, or no matter how high your imagination might be, Steel Tec is the beginning of creation."
This television advertisement contains depictions of the Steel Tec "Off Road Super Sport," "Dozer," "Dump Truck," and motorized helicopter operating on their own power without human assistance, including the following scenes:

1. One sequence depicts a rear wheel of an assembled Steel Tec Off Road Super Sport vehicle spinning and peeling out from a pile of dirt or sand. The ad then cuts to a scene of the Steel Tec Off Road Super Sport vehicle driving and bounding over a dirt or sand covered surface.
2. Another sequence depicts an assembled Steel Tec Dozer vehicle driving forward and pushing a pile of dirt or sand on a dirt or sand covered surface.
3. Another sequence depicts an assembled Steel Tec Dump Truck vehicle driving in reverse and then stopping, and its dump body raising, tilting back, and dumping a full load of miniature canisters.
4. Another sequence depicts an assembled Steel Tec motorized helicopter hovering, with propellers and rear rotors spinning, then ascending. The audio portion simulates the sound of a helicopter in flight, including the sound of propellers spinning.

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

1. Respondent Starwood Advertising, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Colorado, with its office and principal place of business at 600 North Starwood Drive, Aspen, Colorado.

Respondent Les Towne is an officer of said corporation. He formulates, directs, and controls the policies, acts and practices of said corporation and his address is the same as that of said corporation.

2. 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, Starwood Advertising, Inc., a corporation, its successors and assigns, and its officers, and Les Towne, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, promotion, offering for sale, sale, or distribution of any toy in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. In connection with any advertisement or package depicting a demonstration, experiment or test depicted in the advertisement or package proves, demonstrates or confirms any material quality, feature or merit of any toy when such demonstration, picture, experiment or test does not prove, demonstrate or confirm the representation for any reason, including but not limited to:

1. The undisclosed use or substitution of a material mock-up or prop;
2. The undisclosed material alteration in a material characteristic of the advertised toy or any other material prop or device depicted in the advertisement; or
3. The undisclosed use of a visual perspective or camera, film, audio or video technique;

that, in the context of the advertisement as a whole, materially misrepresents a material characteristic of the advertised toy or any other material aspect of the demonstration or depiction.

Provided, however, that notwithstanding the foregoing, nothing in this order shall be deemed to otherwise preclude the use of fantasy segments or prototypes which use otherwise is not deceptive.

Provided further, however, that it shall be a defense hereunder that respondents neither knew nor had reason to know that the demonstration, experiment or test did not prove, demonstrate or confirm the representation.

B. Misrepresenting, directly or by implication, any performance characteristic of any toy.

II.

It is further ordered, That for three (3) years after the last date of dissemination of any representation covered by this order, respondent Starwood Advertising, Inc., 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 that were relied upon in disseminating such representation;

B. Any and all videotapes, in complete as well as unedited form, and any and all still photographs taken during the production of any advertisement depicting a demonstration, experiment, or test;

C. Any and all affidavits or certifications submitted by an employee, agent or representative of respondent to a television network or to any other individual or entity, other than counsel for respondent, which affidavit or certification affirms the accuracy or integrity of a demonstration or demonstration techniques contained in an advertisement; and

D. Any toy involved in such representation.

III.

It is further ordered, That respondent Starwood Advertising, Inc. shall, within thirty (30) days after its service, distribute a copy of this order to each of its operating divisions and to each officer, agent and personnel responsible for the preparation, review or placement of advertising, or other materials covered by this order and shall secure from each such person a signed statement acknowledging receipt of this order.

IV.

It is further ordered, That respondent Les Towne shall, for a period of ten (10) years from the date of entry of this order, notify the Commission within thirty (30) days of the discontinuance of his present business or employment and of his affiliation with any new

business or employment. Each such notice of affiliation with any new business or employment shall include the respondent's new business address and telephone number, current home address, and a statement describing the nature of the business or employment and his duties and responsibilities.

V.

It is further ordered, That respondent Starwood Advertising, 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.

This order will terminate on May 2, 2016, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

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

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

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

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

for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

VII.

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

IN THE MATTER OF

AMOCO OIL COMPANY

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

Docket C-3655. Complaint, May 7, 1996--Decision, May 7, 1996

This consent order requires, among other things, the Chicago-based corporation to possess competent and reliable scientific evidence to substantiate claims regarding the environmental benefits, engine performance, power, acceleration, or engine cleaning ability of any gasoline.

Appearances

For the Commission: *Michael Dershowitz* and *Sidney N. Knight.*

For the respondent: *Elroy H. Wolff, Sidley & Austin,* Washington, D.C. and *James M. Amend, Kirkland & Ellis*, Chicago, IL.

COMPLAINT

The Federal Trade Commission, having reason to believe that Amoco Oil Company, a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent Amoco Oil Company is a Maryland corporation, with its offices and principal place of business located at 200 East Randolph Drive, Chicago, Illinois.

PAR. 2. Respondent Amoco Oil Company has advertised, offered for sale, sold, and distributed gasoline and other petroleum products including Amoco Silver 89 octane gasoline, and Amoco Ultimate 92 and 93 octane gasolines.

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 caused to be disseminated advertisements for Amoco Silver and Amoco Ultimate

gasolines, including but not necessarily limited to the advertisements attached hereto as Exhibits A through I. The aforesaid advertisements contain the following statements and depictions:

A. A television advertisement for Amoco Ultimate:
Announcer: What's clear? Crystal clear Amoco Ultimate.
[Video: Depiction of clear liquid being poured]
What isn't? All other premium gasolines.
[Video: Depiction of colored liquids in laboratory flasks]
What's clear? Amoco Ultimate is the only premium refined an extra step to remove harmful impurities. Harmful impurities you, as a premium user, don't want.
[Video: Depiction of laboratory flask containing a dark colored viscous liquid]
[Super #1: PNA Impurities Simulated]
[Super #2: Based On Reduction In Hydrocarbon Exhaust Emissions From Extra Refining Step.]
What's clear?
Why we do it?
For unsurpassed performance and a cleaner environment. Crystal clear. Crystal clear Amoco Ultimate.
[Exhibit A]
Superscript #1 appears on the screen for approximately 1.5 seconds.
Superscript #2 appears on the screen for approximately 2.5 seconds.

B. A television advertisement for Amoco Ultimate:
Announcer: What's clear? Crystal clear Amoco Ultimate.
[Video: Depiction of clear liquid being poured]
What isn't? All other premium gasolines.
[Video: Depiction of colored liquids in, laboratory flasks]
What's clear? Amoco Ultimate is the only premium refined an extra step to remove harmful impurities other premiums leave in. Impurities that can rob your engine of performance and pollute the air.
[Video: Depiction of laboratory flask containing a dark colored viscous liquid]
[Super: Based On Reduction In Hydrocarbon Exhaust Emissions From Extra Refining Step. PNA Impurities Simulated]
What's Clear? If you use premium, now you have a reason to switch. Crystal clear. Crystal Clear Amoco Ultimate.
[Exhibit B]
Superscript appears on the screen for approximately 2.5 seconds.

C. A television advertisement for Amoco Silver:
Announcer: Hop into Amoco and take the Silver one tank test.
[Video: Depiction of dirty rabbit on top of full gas gauge]
Fill up with one Tankful of Amoco Silver; it'll clean up the filthiest fuel injectors. Not five tankfuls. Not three tankfuls. New and improved Amoco Silver with even more cleaning power does it in just one tankful or your money back.
[Video: Depiction of dirty rabbit becoming clean as fuel gauge goes to empty]
So take the Silver One Tank Test and bring back the acceleration. Bring back the power.

[Super: For your purchase of one tankful of Amoco Silver. Eight Gallon Minimum. See your Amoco dealer for details.]
Video tagline: BRING BACK THE POWER
[Exhibit C]

D. A television advertisement for Amoco Ultimate:

Announcer: It's your car. Your baby. Your one and only. Everything about it has to be as good as gold. And when you're runnin' on Amoco Ultimate, you're running clean. Amoco Ultimate is refined an extra step for quality. And like all Amoco gasolines, Ultimate cleans clogged fuel injectors in one tankful. To keep your entire fuel intake system running clean.
[Exhibit D]

E. A radio advertisement for Amoco Silver:

Bert: Can I help you sir?
Guy: I'm here to take your test
Bert: Oh, our Amoco Silver One-Tank-Test.
* * * *
Bert: Sir, sir, you want an empty gas tank so you can fill-up with Amoco Silver.
Guy: I guess now's as good a time as any to take the test.
* * * *
Bert: Look, just one tankful of new and improved Amoco Silver...
Guy: Yes?
Bert: ... can help solve dirty-engine problems.
Guy: Solve engine problems? Oh no, science.
Bert: Now with even more cleaning power...
Guy: Ooh.
Bert: ... Amoco Silver cleans your fuel injectors as simple as A-B-C.
Guy: A-B-C! I always pick "D" -- all of the above.
Bert: Amoco Silver cleans fuel injectors in one tankful, not five or three like some gasolines.
Guy: Wow.
Bert: Or Amoco pays you back for your purchase.
* * * *
[Exhibit E]

F. A radio advertisement for Amoco Ultimate:

* * * *
Engine: ... I'm a dirty little engine. OK? There I admit it!
Woman: And you want to clean up your act.
Engine: Well that's where you come in.
Woman: Me? (TO A GUEST) Be right with you! Now, what is it?
Engine: Just give me Amoco Ultimate
Woman: Change gasolines?
Engine: Exactly. One fill-up of Amoco Ultimate will clean up my clogged fuel injectors just like that. And I won't run as sluggish as I do now.
Woman: Well, there is something to be said for clean living. Engine Then give me the good stuff!
Woman: Listen to your engine. Not only does Amoco Ultimate clean clogged fuel injectors in one tankful, it keeps your entire fuel intake system running clean.
* * * *
[Exhibit F]

G. A television advertisement for Amoco Silver:
Announcer: Ever since Ed got his new car, Streaker the dog next door, has been racing him down the road. Regular unleaded gasoline was all Ed needed to teach this dog a few tricks.
[Video: Depiction of dog chasing a new car with the car ahead of the dog]
But around 15,000 miles, a car can start to lose acceleration.
'Cause regular unleaded gasoline may not be enough.
[Video: Depiction of odometer approaching 15,000 miles as car begins to slow down and dog catches up and passes car]
Now's the time to turn to Silver. Higher octane Amoco Silver can bring back the acceleration. Bring back the power
[Exhibit G]

H. A radio advertisement for Amoco Silver:
Announcer: Remember what happened when you pressed on the accelerator when your car was new? Remember?
It ran like the wind! Charged like a champ! Even on regular unleaded gasoline. But as you put on the miles, your engine's appetite for octane can grow. Your car can begin to act sluggish. Unresponsive. And sooner than you think, as early as 15,000 miles, your car can begin to lose acceleration. Regular unleaded may not be enough. That's the time to turn to Silver! Amoco Silver is a step up from pure regular unleaded gasoline. Its higher octane can bring back the power that was there when your car was brand new. Amoco Silver may be all you'll ever need to keep your car's engine running the way it was designed to run. Amoco Silver. Bring back the power.
[Exhibit H]

I. A print advertisement for Amoco Silver:
AROUND 15,000 MILES,
YOU'RE BOUND TO LOSE SOMETHING.
FORTUNATELY, CARS DON'T HAVE HAIR.

As we rack up the miles, most of us start to feel sluggish. We slow down. Hair starts to thin. With the exception of this last point, the same may be true of your car. In fact, after 15,000 miles or so, some cars may actually sustain a loss of power if they run on regular gasoline. At this point, you're ready for Silver. Higher octane Amoco Silver gasoline can bring back the acceleration, bring back the power. And while we can't do a thing for thinning hair, we can provide the fuel to properly blow it back.
YOU EXPECT MORE FROM A LEADER.
SILVER. BRING BACK THE POWER.
[Exhibit I]

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

A. Amoco Ultimate gasoline is superior to all other brands of premium gasoline with respect to engine performance and environmental benefits because it is refined more than all other such brands.

B. The clear color of Amoco Ultimate gasoline demonstrates the superior engine performance and environmental benefits Amoco Ultimate provides compared to other premium brands of gasolines that are not clear in color.

C. A single tankful of Amoco Silver or Amoco Ultimate gasoline will make dirty or clogged fuel injectors clean.

D. Amoco Silver or Amoco Ultimate gasoline provides superior fuel injector cleaning compared to other brands of gasolines.

E. Automobiles driven more than 15,000 miles with regular gasoline generally suffer from lost engine power or acceleration which will be restored by the higher octane of Amoco Silver gasoline.

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 through I, respondent has represented, directly or by implication, that at the time it made the representations set forth in paragraph five, respondent possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 7. In truth and in fact, at the time it made the representations set forth in paragraph five, respondent did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation set forth in paragraph six was, and is, false and misleading.

PAR. 8. 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.

Commissioner Starek recused.

EXHIBIT A

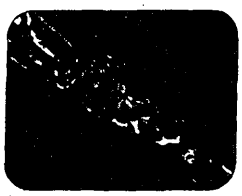
RADIO TV REPORTS
41 East 42nd Street, New York, NY 10017 (212) 309-1400

PRODUCT: AMOCO ULTIMATE GASOLINE
TITLE: "BOY FLYING KITE"
PROGRAM: WORLD NEWS
STATION: ABC

EXHIBIT A

9/04/92 :30
(NEW YORK) 6:59PM


(MUSIC) ANNCR: What's clear?


Crystal clear Amoco Ultimate.


What isn't?

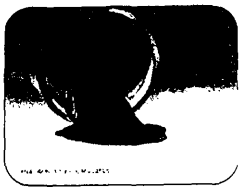

All other premium gasolines.


What's clear? Amoco Ultimate is the only premium


refined an extra step


to remove harmful impurities.


Harmful impurities


you, as a premium user, don't want.


What's clear? Why do we do it?


For unsurpassed performance and a cleaner environment. Crystal clear.

Crystal clear Amoco Ultimate. (MUSIC OUT)

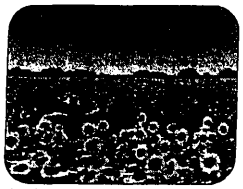
ALSO AVAILABLE IN COLOR VIDEO-TAPE CASSETTE

EXHIBIT B

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

PRODUCT: AMOCO ULTIMATE GASOLINE
TITLE: "WHAT'S CLEAR?"
PROGRAM: HARD COPY 9/04/92 :30
STATION: CBS (NEW YORK) 7:27PM

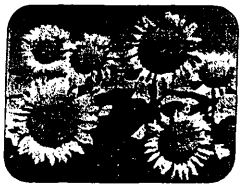
EXHIBIT B



(MUSIC) ANNCR: What's clear?

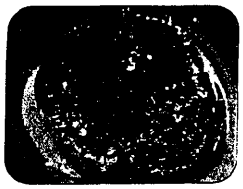
Crystal clear Amoco Ultimate. What isn't?

All other premium gasolines.



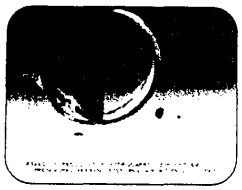
What's clear?

Amoco Ultimate is the only premium



refined an extra step to remove harmful impurities

other premiums leave in.



Impurities that can rob your engine

of performance and pollute the air.

What's clear? If you use premium,

now you have a reason to switch. Crystal clear.

Crystal clear Amoco Ultimate. (MUSIC OUT)

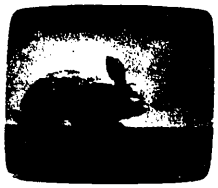
ALSO AVAILABLE IN COLOR VIDEO-TAPE CASSETTE

EXHIBIT C

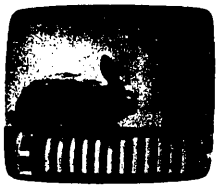
RADIO TV REPORTS
41 East 42nd Street New York, NY 10017 (212) 309-1400

EXHIBIT C

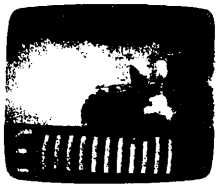
PRODUCT: AMOCO SILVER GASOLINE
TITLE: "TANK TEST"
PROGRAM: NEWS 05/22/91 :30
STATION: WXYZ (DETROIT) 6:36PM



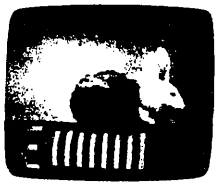
(MUSIC) ANNCR: Hop into Amoco and take the Silver One Tank Test.



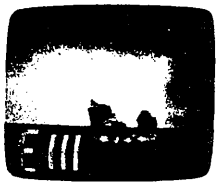
Fill up with one tankful of Amoco Silver;



it'll clean up the filthiest fuel injectors.



Not five tankfuls not three tankfuls.

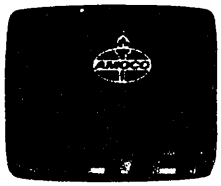


New and improved Amoco Silver with even more cleaning power

does it in just one tankful

or your money back.

So take the Silver One Tank Test and bring back the acceleration.



Bring back the power. (MUSIC OUT)

ALSO AVAILABLE IN COLOR VIDEO-TAPE CASSETTE

561 Complaint

EXHIBIT D

EXHIBIT D

AS PRODUCED 3/25/92

DMB&B

Amoco Oil Co.
Gasoline
"Runnin' Clean/East/NY"
:30 SNAA 3163
3/25/92 Rev. 3
JS:mo AO2P002
AORCENY

TELEVISION CONTINUITY

VIDEO	AUDIO
WS BEACH W/WOMAN AT SUNSET MS WOMAN SITTING BY PONTIAC WOMAN DRIVING PONTIAC MAN WIPING STEERING WHEEL WS MAN W/PICK UP TRUCK	CHORUS: YOU'RE JUST AS GOOD AS GOLD
WOMAN DRIVING CAR (& HOOD)	ANNCR: It's your car. Your baby. Your one and only. Everything about it has to be as good as gold. And when you're runnin' on Amoco Ultimate, you're running clean. Amoco Ultimate is refined an extra step for quality. And like all Amoco gasolines, Ultimate cleans clogged fuel injectors in one tankful. To keep your entire fuel intake system running clean.
MOM & BALLERINAS (WS)	
CU ULTIMATE SIGNAGE CAR ON ROAD (FOREST)	
CU ULTIMATE SIGNAGE & PUMP (PUMP DECAL: REFINED AN EXTRA STEP) WOMAN DEALER FILLING CAR CU WOMAN DEALER CU ULTIMATE SIGNAGE	
CU WOMAN'S FACE SMILING WS CAR DRIVING	
CU WOMAN DRIVING	
CU WOMAN SMILING	
POV OF ROAD ZOOM/CU ULTIMATE SIGNAGE WOMAN ON BEACH W/SUPER (SUPER: YOU EXPECT MORE FROM A LEADER)	CHORUS: YOU'RE JUST AS GOOD AS GOLD (FADE OUT)

EXHIBIT E

EXHIBIT E

Amoco Oil Co.

Gasoline

"Nervous One Tank Test"

:0 RA-185-80

11 8/80 Rev. 7

JS:bd AO1R374

AONOTT

DMB&B

AS PRODUCED

RADIO CONTINUITY

SFX:	GAS STATION DING DING
BERT:	Can I help you, sir?
GUY:	I'm here to take your test.
BERT:	Oh, our Amoco Silver One-Tank-Test.
GUY:	I've taken every test there is...the S.A.T., I.Q...
BERT:	Sir, it's not that kind of test.
GUY:	Got my number 2 pencils, 3-ring binder, and a good night's sleep
BERT:	Is your tank empty?
GUY:	No, mommy always said have a big breakfast before a test. I had hash-browns, pancakes...
BERT:	Sir, sir, you want an empty gas tank so you can fill-up with Amoco Silver.
GUY:	I guess now's as good a time as any to take the test.
BERT:	Well, that's true.
GUY:	True? It's true/false. Good. That means I got a 20/20 chance.
BERT:	Look, just one tankful of new and improved Amoco Silver...
GUY:	Yes?
BERT:	...can help solve dirty-engine problems.
GUY:	Solve engine problems? Oh no, science.
BERT:	Now with even more cleaning power...
GUY:	Don.
BERT:	...Amoco Silver cleans your fuel injectors as simple as A-B-C.

EXHIBIT E

DMB&B

AS PRODUCED

Amoco [illegible]
Gasoline
"Nervous/One Tank Test"
:60 RA-085-60
10/9/92 Rev. 7
JS:bd AO1R374
AONOTT

RADIO CONTINUITY

GUY:	A-B-C! I always pick "D" -- all of the above.
BERT:	Amoco Silver cleans fuel injectors in one tankful, not five or three like some gasolines.
GUY:	Wow.
BERT:	Or Amoco pays you back for your purchase.
GUY:	So, it's not True/False.
BERT:	No.
GUY:	Or multiple choice.
BERT:	No.
GUY:	Oh, no!
BERT:	What?
GUY:	Essay! Let me use your pen.
BERT:	That's my tire-gauge, sir.
GUY:	Well, let me use it anyway.
ANNCR:	Take the one-tank-test by filling up with 8 gallons or more of engine-cleaning Amoco Silver.

EXHIBIT F

EXHIBIT

DMB&B

AS PRODUCED 4/12/91

Amoco Oil Co.
Ultimate
"The Party"
:60 RA-053-60
5/9/91 Rev. 6
PB:bd AO1R378
AOTP

RADIO CONTINUITY

MUSIC:	UNDER
SFX:	SMALL GATHERING, VOICES IN BACKGROUND
ENGINE:	Pardon me. Coming through.
WOMAN:	You are one unbelievable engine! You climb out from under the hood and walk right into my party because you want to talk?
ENGINE:	That's right. But I'm not sure...oh what the heck? I'm a dirty little engine. OK? There I admit it!
WOMAN:	And you want to clean up your act.
ENGINE:	Well that's where you come in.
WOMAN:	Me? (TO A GUEST) Be right with you! Now, what is it?
ENGINE:	Just give me Amoco Ultimate.
WOMAN:	Change gasolines?
ENGINE:	Exactly. One fill-up of Amoco Ultimate will clean up my clogged fuel injectors just like that.
SFX:	SNAPS FINGERS
ENGINE:	And I won't run as sluggish as I do now.
WOMAN:	Well, there is something to be said for clean living.
ENGINE:	Then give me the good stuff!
WOMAN:	Listen to your engine. Not only does Amoco Ultimate clean clogged fuel injectors in one tankful, it keeps your entire fue intake system running clean.

EXHIBIT F

DMB&B

AS PRODUCED 4/12/91

Amoco Oil Co.
Ultimate
"The Party"
:60 RA-053-60
5/9/91 Rev. 6
PB:bd AO1R378
AOTP

RADIO CONTINUITY

ENGINE:	(To party guest) Hey, buddy. You hear the one about the fan belt and the radia...
WOMAN:	Hey! I thought you wanted to clean up your act!
ENGINE:	Oh, right. Sorry.
BOWMAN:	Amoco Ultimate. Your car knows.

EXHIBIT G

AS PRODUCED 7-2-

DMB&B

Amoco Oil Co. EXHIBIT G

Silver Gasoline

"Odometer/Streaker/Long Copy Rev."

:30 AO2T516

7/22/92 SNAA 3323

AOOSLCR

TELEVISION CONTINUITY

VIDEO	AUDIO
MAN DRIVING CAR – DOG CHASING CAR CAR WAY AHEAD OF DOG	ANNCR: Ever since Ed got his new car, Streaker the dog next door, has be racing him down the road. Regular
DOG CATCHES UP TO CAR AND PASSES CAR	unleaded gasoline was all Ed need to teach this dog a few tricks. But around 15,000 miles, a car can star to lose acceleration. 'Cause regula
ODOMETER TURNS TO SILVER LETTERS	unleaded gasoline may not be enough. Now's the time to turn to
CUT TO CU OF AMOCO SILVER PUMP	Silver. Higher Octane Amoco Silve
CAR ACCELERATES WITH DOG IN CAR	can bring back the acceleration. Bring back the power.
	SFX: DOG BARK
SUPER: YOU EXPECT MORE FROM A LEADER	

EXHIBIT H

EXHIBIT H

Silver

"Silver Symphony/Non-New"

:60

AO9R254 RA 956-60

3/14/91

DMB&B

AS RECORDED 3/14/91

REVISED 3/14/91

RADIO CONTINUITY

ANNCR:	Remember what happened when you pressed on the accelerator when your car was new? Remember?
MUSIC:	POWERFUL SYMPHONY (TCHAIKOVSKY)
	It ran like the wind! Charged like a champ!
	Even on regular unleaded gasoline.
MUSIC:	SEGUES...
	But as you put on the miles, your engine's appetite for octane can grow.
MUSIC:	TO A 2ND SYMPHONY, SLOWER IN PACE
	Your car can begin to act sluggish.
	Unresponsive.
MUSIC:	SEGUES...
	And sooner than you think.
MUSIC:	TO A 3RD SYMPHONY, GLOOM AND DOOM
	as early as 15,000 miles, your car can begin to lose acceleration. Regular unleaded may not be enough.
MUSIC:	SEGUES...
	That's the time...
MUSIC:	TO THE WILLIAM TELL OVERTURE
	to turn to Silver!

EXHIBIT I

DMB&B

AS RECORDED 3/12/90
CHANGED 3/12/90

Amoco Oil Co.
Silver
"Silver Symphony/Non New"
:60
3/14/91
AOR254
RA 956-60

RADIO CONTINUITY

ANNCR:	Amoco Silver is a step up from pure regular unleaded gasoline. Its higher octane can bring back the power that was there when your car was brand new. Amoco Silver may be all you'll ever need to keep your car's engine running the way it was designed to run.
MUSIC:	WILLIAM TELL REACHES CLIMAX
	Amoco Silver. Bring back the power.

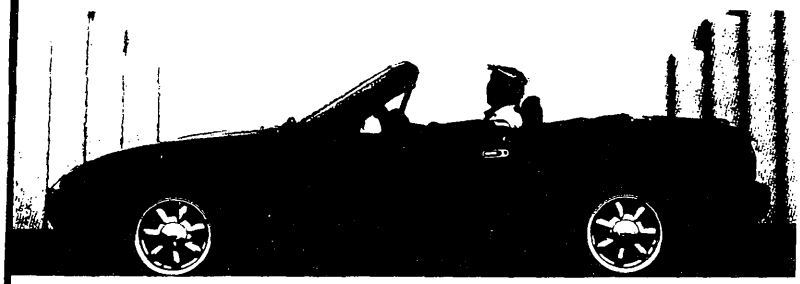
EXHIBIT I

EXHIBIT I

AROUND 15,000 MILES,
YOU'RE BOUND TO LOSE
SOME THING.

FORTUNATELY CARS
DON'T HAVE HAIR

As we rack up the miles, most of us start to feel sluggish. We slow down. Hair starts to thin. With the exception of this last point,



the same may be true of your car. In fact, after 15,000 miles or so, some cars may actually sustain a loss of power if they run on regular gasoline. At this point, you're ready for Silver. Higher octane Amoco Silver* gasoline can bring back the acceleration, bring back the power. And while we can't do a thing for thinning hair, we can provide the fuel to properly blow it back.

AMOCO

You Expect More From A Leader

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 the respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft complaint, a statement that the signing of the agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, 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 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 Amoco Oil Company, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Maryland with its offices and principal place of business located at 200 East Randolph Drive, Chicago, Illinois.

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

ORDER

I.

It is ordered, That respondent Amoco Oil Company, a corporation, its successors and assigns, and its officers, representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, labeling, offering for sale, sale or distribution of Amoco Silver 89 octane gasoline, Amoco Ultimate 92 or 93 octane gasoline, or any other gasoline 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, that:

(A) Amoco Ultimate gasoline is superior to all other brands of premium gasoline with respect to engine performance or environmental benefits because it is refined more than all other such brands;

(B) The clear color of Amoco Ultimate gasoline demonstrates the superior engine performance or environmental benefits Amoco Ultimate provides compared to other premium brands of gasolines that are not clear in color;

(C) A single tankful of Amoco Silver or Ultimate gasoline will make dirty or clogged fuel injectors clean;

(D) Amoco Silver or Ultimate gasoline provides superior fuel injector cleaning compared to other brands of gasoline;

(E) Automobiles driven more than 15,000 miles with regular gasoline generally suffer from lost engine power or acceleration which will be restored by the higher octane of Amoco Silver gasoline; or

(F) Concerns the relative or absolute attributes of any gasoline with respect to environmental benefits or with respect to engine performance, power, acceleration, or engine cleaning ability,

unless, at the time of making such representation, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation. For purposes of this order, "competent and reliable scientific evidence" shall mean tests, analyses, research, studies, or other evidence based upon 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.

For purposes of this Part, any representation, directly or by implication, that any gasoline will clean or clean up fuel injectors to a level that engine performance is not adversely affected will be deemed to be substantiated if respondent possesses and relies upon competent and reliable testing demonstrating that the flow rate of each fuel injector was returned to at least 95 percent of its original value.

Provided that, nothing in this order shall prohibit respondent from truthfully representing the numerical octane rating of any gasoline.

II.

It is further ordered, That respondent Amoco Oil Company, shall within thirty (30) days after service distribute a copy of this order to all operating divisions, subsidiaries, officers, managerial employees, and all of its employees or agents engaged in the preparation and placement of advertisements or promotional sales materials covered by this order and shall obtain from each such employee a signed statement acknowledging receipt of the order.

III.

It is further ordered, That for three (3) years after the last date of dissemination of any representation covered by this order, respondent Amoco Oil Company or its successors or 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 to substantiate any representation covered by this order; and

B. All tests, reports, studies or surveys, in respondent's possession or control that contradict any representation covered by this order.

IV.

It is further ordered, That respondent Amoco Oil Company 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 such as a 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.

V.

It is further ordered, That this order will terminate on May 7, 2016, 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 respondent Amoco Oil Company shall, within sixty (60) days after service of this order upon it, and at such other times as the Commission may require, file with the Commission

a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

Commissioner Starek recused.

IN THE MATTER OF

LITTON INDUSTRIES, 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-3656. Complaint, May 7, 1996 -- Decision, May 7, 1996

This consent order requires, among other things, the California-based corporation to divest, within ninety days, PRC, Inc.'s $40 million systems engineering and technical assistance contract for the Navy's Aegis destroyer program. If the divestiture is not completed as required, the Commission may appoint a trustee to finalize the divestiture.

Appearances

For the Commission: *Ann Malester, James Holden* and *William Baer.*

For the respondent: *Richard Parker* and *David Beddow, O'Melveny & Myers,* Washington, D.C.

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that respondent, Litton Industries, Inc. ("Litton"), a corporation subject to the jurisdiction of the Commission, has agreed to acquire all of the voting securities of PRC Inc. ("PRC"), a corporation subject to the jurisdiction of the Commission, in violation of Section 5 of the Federal Trade Commission Act ("FTC 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 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, stating its charges as follows:

I. RESPONDENT

1. Respondent Litton is a corporation organized and existing under and by virtue of the laws of the State of Delaware, with its

principal executive offices located at 21240 Burbank Boulevard, Woodland Hills, California.

II. ACQUIRED COMPANY

2. PRC is a corporation organized and existing under and by virtue of the laws of the State of Delaware, with its principal executive offices located at 1500 Planning Research Boulevard, McLean, Virginia.

III. JURISDICTION

3. Litton and PRC 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 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 ACQUISITION

4. On December 13, 1995, Litton and PRC entered into a Stock Purchase Agreement whereby Litton will acquire all of the issued and outstanding common shares of PRC for approximately $425 million.

V. THE RELEVANT MARKETS

5. The relevant lines of commerce in which to analyze the effects of the acquisition are: (a) the research, development, manufacture and sale of Aegis destroyers for the United States Department of the Navy ("Aegis destroyers"); and (b) the provision of systems engineering and technical assistance services to the United States Department of the Navy's Aegis destroyer program ("SETA Services").

6. The United States is the relevant geographic area in which to analyze the effects of the acquisition in both relevant lines of commerce.

VI. STRUCTURE OF THE MARKETS

7. The market for the research, development, manufacture and sale of Aegis destroyers is highly concentrated as measured by the Herfindahl-Hirschmann Index ("HHI") or the two-firm and four-firm concentration ratios ("concentration ratios"). Respondent is one of only two producers of Aegis destroyers in the United States.

8. The market for SETA Services is highly concentrated as measured by the HHI or concentration ratios. PRC has been the only provider of SETA Services since the inception of the Aegis destroyer program.

9. Respondent, through the acquisition, would be engaged in both the research, development, manufacture and sale of Aegis destroyers and the provision of SETA Services.

VII. BARRIERS TO ENTRY

10. New entry into the market for the research, development, manufacture and sale of Aegis destroyers is difficult and unlikely.

11. New entry into the market for the provision of SETA Services is difficult and unlikely.

VIII. EFFECTS OF THE ACQUISITION

12. The effects of the acquisition, if consummated, may be substantially to lessen competition or to tend to create a monopoly in the relevant markets set forth above 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. Respondent may gain access to competitively sensitive non-public information concerning the other Aegis destroyer manufacturer, so that actual competition between respondent and the other Aegis destroyer manufacturer will be reduced; and

b. Respondent may be in a position to disadvantage the other Aegis destroyer manufacturer, so that actual competition between respondent and the other Aegis destroyer manufacturers will be reduced.

IX. VIOLATIONS CHARGED

13. The acquisition described in paragraph four, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

14. The Stock Purchase Agreement described in paragraph four constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of the proposed acquisition by respondent of all of the assets and businesses of PRC Inc. ("PRC"), and the respondent having been furnished thereafter with a copy of a draft of complaint that the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and

Respondent, its attorneys, and counsel for the Commission having thereafter executed an Interim Agreement and 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, 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 Interim Agreement and placed such Agreements 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 Litton Industries, Inc. ("Litton") is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal executive offices located at 21240 Burbank Boulevard, Woodland Hills, 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, as used in this order, the following definitions shall apply:

A. *"Respondent"* or *"Litton"* means Litton Industries, Inc., its directors, officers, employees, agents and representatives, predecessors, successors and assigns; its subsidiaries, divisions, groups and affiliates controlled by Litton, and their respective directors, officers, employees, agents and representatives, successors, and assigns.

B. *"Ingalls"* means Ingalls Shipbuilding, Inc., a subsidiary of Litton, with its principal place of business at 100 W. River Road, Pascagoula, Mississippi, which is engaged in, among other things, the research, development, manufacture and sale of Aegis destroyers to the United States Department of the Navy, and its subsidiaries, divisions, groups and affiliates controlled by Ingalls, and their respective directors, officers, employees, agents and representatives, successors and assigns.

C. *"Bath Iron Works"* means Bath Iron Works Corporation, a subsidiary of General Dynamics Corporation, with its principal place of business at 700 Washington Street, Bath, Maine, which is engaged in, among other things, the research, development, manufacture and sale of Aegis destroyers to the United States Department of the Navy, and its subsidiaries, divisions, groups and affiliates controlled by Bath Iron Works, and their respective directors, officers, employees, agents and representatives successors and assigns.

D. *"PRC"* means PRC Inc., a Delaware corporation with its principal place of business at 1500 Planning Research Boulevard, McLean, Virginia, which is engaged in, among other things, the

provision of SETA Services to the United States Department of the Navy in support of the Aegis destroyer shipbuilding program, its directors, officers, employees, agents and representatives, predecessors, successors and assigns; its subsidiaries, divisions, groups and affiliates controlled by PRC, and their respective directors, officers, employees, agents and representatives, successors, and assigns.

E. *"Commission"* means the Federal Trade Commission.

F. *"Acquisition"* means Litton's acquisition of all of the voting securities of PRC pursuant to a Stock Purchase Agreement dated December 13, 1995.

G. *"SETA Services Operations"* means all assets, properties, business and goodwill, tangible and intangible, held by PRC and used in the provision of SETA Services to the United States Department of the Navy under contract N00024-94-C-6430, including, without limitation, the following:

1. All rights, obligations and interests in contract N00024-94-C-6430 between the Naval Sea Systems Command and PRC;

2. All customer lists, vendor lists, catalogs, sales promotion literature, advertising materials, research materials, financial information, technical information, management information and systems, software, software licenses, inventions, trade secrets, intellectual property, patents, technology, know-how, specifications, designs, drawings, processes and quality control data;

3. All rights, title and interests in and to owned or leased real property, together with appurtenances, licenses and permits;

4. All rights, title 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. All rights under warranties and guarantees, express or implied;

6. All books, records, and files;

7. All data developed, prepared, received, stored or maintained under contract N00024-94-C-6430 or any predecessor contract or subcontract to support the Aegis shipbuilding program, including the Aegis technical library; and

8. All items of prepaid expense.

H. *"SETA Services"* means systems engineering and technical assistance services provided by PRC to the United States Department of the Navy in support of the Aegis destroyer shipbuilding program.

I. *"Non-public Aegis Information"* means any information not in the public domain furnished by Ingalls or Bath Iron Works or any other company to PRC in its capacity as provider of SETA Services under contract N00024-94-C-6430 and any predecessor contract.

II.

It is further ordered, That:

A. Litton shall divest, absolutely and in good faith, within ninety (90) days of the date Litton signs this order, the SETA Services Operations, and shall also divest such additional ancillary PRC assets as are necessary to assure the continued ability of the acquirer to provide SETA Services.

B. Litton shall divest the SETA Services Operations only to an acquirer that receives the prior approval of the Commission and of the United States Department of the Navy, and only in a manner that receives the prior approval of the Commission. The purpose of the divestiture is to ensure the continued provision of SETA Services in the same manner as provided by PRC at the time of the proposed divestiture, at no increased cost to the United States Department of the Navy, and to remedy the lessening of competition alleged in the Commission's complaint.

C. Pending divestiture of the SETA Services Operations, Litton shall take such actions as are necessary to ensure the continued provision of SETA Services, and to maintain the viability and marketability of the assets used to provide SETA Services, and to prevent the destruction, removal, wasting, deterioration or impairment of the assets used to provide SETA Services, and to prevent the disclosure of Non-public Aegis Information.

D. Upon reasonable notice from the acquirer or from the United States Department of the Navy to respondent, respondent shall provide such technical assistance to the acquirer as is reasonably necessary to enable the acquirer to provide SETA Services in substantially the same manner and quality as provided by PRC prior to divestiture. Such assistance shall include reasonable consultation with knowledgeable employees and training at the acquirer's facility

for a period of time sufficient to satisfy the acquirer's management that its personnel are appropriately trained in the skills necessary to perform the SETA Services Operations. Respondent shall convey all know-how necessary to perform the SETA Services Operations in substantially the same manner and quality employed or achieved by PRC prior to divestiture. However, respondent shall not be required to continue providing such assistance for more than one (1) year from the date of the divestiture. Respondent shall charge the acquirer at a rate no more than its own costs for providing such technical assistance.

E. At the time of the execution of a purchase agreement between Litton and a proposed acquirer of the SETA Services Operations, Litton shall provide the acquirer with a complete list of all current full-time, non-clerical, salaried employees of PRC engaged in the provision of SETA Services on the date of the purchase agreement. 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 SETA Services Operations.

F. Litton shall provide the proposed acquirer with an opportunity to inspect the personnel files and other documentation relating to the individuals identified in paragraph II.E. of this order to the extent permissible under applicable laws. For a period of six (6) months following the divestiture, Litton shall further provide the acquirer with an opportunity to interview such individuals and negotiate employment contracts with them.

G. Litton shall provide all current employees identified in paragraph II.E. of this order with financial incentives to continue in their employment positions pending divestiture of the SETA Services Operations, and to accept employment with the acquirer at the time of the divestiture. Such incentives shall include continuation of all employee benefits offered by Litton until the date of the divestiture, and vesting of all pension benefits.

H. For a period of two (2) years commencing on the date of the individual's employment by the acquirer, Litton shall not re-hire any of the individuals identified in paragraph II.E. of this order who accept employment with the acquirer.

I. Prior to divestiture, Litton shall not transfer any of the individuals identified in paragraph II.E. of this order whose

employment responsibilities involve access to Non-public Aegis Information from SETA Services Operations to any other positions.

III.

It is further ordered, That:

A. Respondent shall not, absent the prior written consent of the proprietor of Non-public Aegis Information, provide, disclose, or otherwise make available to Ingalls or any other entity any Non-public Aegis Information.

B. PRC shall use any Non-public Aegis Information only in its capacity as provider of technical assistance to the acquirer, pursuant to paragraph II.D. of this order, unless PRC obtains the prior written consent of the proprietor of the Non-public Aegis Information.

IV.

It is further ordered, That:

A. If Litton has not divested, absolutely and in good faith, and with the prior approval of the Commission and the United States Department of the Navy, the SETA Services Operations within ninety (90) days of the date Litton signs this order, the Commission may appoint a trustee to divest the SETA Services Operations. In the event that 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, Litton 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 IV 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 Litton to comply with this order.

B. If a trustee is appointed by the Commission or a court pursuant to paragraph IV.A., Litton 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 Litton, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures. If Litton 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 Litton of the identity of any proposed trustee, Litton 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 SETA Services Operations.

3. Within ten (10) days after appointment of the trustee, Litton 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 IV.B.3. to accomplish the divestiture, which shall be subject to the prior approval of the Commission and of the United States Department of the Navy. 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 SETA Services Operations, or to any other relevant information, as the trustee may request. Litton shall develop such financial or other information as the trustee may request and shall cooperate with the trustee. Litton shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays in divestiture caused by Litton 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 and to the United States Department of the Navy, subject to Litton's absolute and unconditional obligation to

divest at no minimum price. The divestiture shall be made in the manner and to the acquirer as set out in paragraph II of this order, provided, however, if the trustee receives *bona fide* offers from more than one acquiring entity, and if the Commission and the United States Department of the Navy determine to approve more than one such acquiring entity, the trustee shall divest the SETA Services Operations to the acquiring entity or entities selected by Litton from among those approved by the Commission and the United States Department of the Navy.

7. The trustee shall serve at the cost and expense of Litton, without bond or other security unless paid for by Litton, 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 Litton, 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 Litton, 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 SETA Services Operations.

8. Litton 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 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 required by this order.

11. The trustee shall have no obligation or authority to operate or maintain the SETA Services Operations.

12. The trustee shall also divest such additional ancillary assets and businesses and effect such arrangements as are necessary to assure the marketability, viability and competitiveness of the SETA Services Operations.

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

V.

It is further ordered, That respondent shall comply with all terms of the Interim Agreement, attached to this order and made a part hereof as Appendix I. Said Interim Agreement shall continue in effect until the provisions in paragraphs II and III are complied with or until such other time as is stated in said Interim Agreement.

VI.

It is further ordered, That within thirty (30) days after the date this order becomes final and every thirty (30) days thereafter until Litton has fully complied with paragraphs II and IV of this order, Litton 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 IV of this order. Litton 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 including a description of all substantive contacts or negotiations for the divestiture required by this order, including the identity of all parties contacted. Litton shall include in its compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning the divestiture.

VII.

It is further ordered, That, for the purpose of determining or securing compliance with this order, Litton 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 Litton, relating to any matters contained in this order; and

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

VIII.

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

IX.

It is further ordered, That, notwithstanding any other provision of this order, this order shall terminate ten (10) years from the date this order becomes final.

APPENDIX I

INTERIM AGREEMENT

This Interim Agreement is by and between Litton Industries, Inc. ("Litton"), a corporation organized and existing under the laws of the State of Delaware, 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.*

PREMISES

Whereas, Litton has proposed to acquire one hundred percent of the voting securities of PRC Inc., a subsidiary of Black & Decker Corporation; and

Whereas, the Commission is now investigating the proposed acquisition to determine if it would violate any of the statutes the Commission enforces; and

Whereas, if the Commission accepts the Agreement Containing Consent Order ("Consent Agreement"), the Commission will place it on the public record for a period of at least sixty (60) days and subsequently may either withdraw such acceptance or issue and serve its complaint and decision in disposition of the proceeding 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 competition during the period prior to the final issuance of the Consent Agreement by the Commission (after the 60-day public notice period), there may be interim competitive harm and divestiture or other relief resulting from a proceeding challenging the legality of the proposed acquisition might not be possible, or might be less than an effective remedy; and

Whereas, Litton entering into this Interim Agreement shall in no way he construed as an admission by Litton that the proposed acquisition constitutes a violation of any statute; and

Whereas, Litton understands that no act or transaction contemplated by this Interim 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 Interim Agreement.

Now, therefore, Litton agrees, upon the understanding that the Commission has not yet determined whether the proposed acquisition will be challenged, and in consideration of the Commission's agreement that, at the time it accepts the Consent Agreement for public comment, it will grant early termination of the Hart-Scott-Rodino waiting period, as follows:

1. Litton agrees to execute and be bound by the terms of the order contained in the Consent Agreement, as if it were final, from the date Litton signs the Consent Agreement.

2. Litton agrees to deliver, within three (3) days of the date the Consent Agreement is accepted for public comment by the Commission, a copy of the Consent Agreement and a copy of this Interim Agreement to the United States Department of Defense and to General Dynamics Corporation.

3. Litton agrees to submit, within thirty (30) days of the date the Consent Agreement is signed by Litton, an initial report, pursuant to Section 2.33 of the Commission's Rules, signed by Litton setting forth in detail the manner in which Litton will comply with paragraphs II and III of the Consent Agreement.

4. Litton agrees that, from the date Litton signs the Consent Agreement until the first of the dates listed in subparagraphs 4.a and 4.b, it will comply with the provisions of this Interim Agreement:

a. Ten (10) business days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Section 2.34 of the Commission's Rules;

b. The date the Commission finally issues its complaint and its Decision and Order.

5. Litton waives all rights to contest the validity of this Interim Agreement.

6. For the purpose of determining or securing compliance with this Interim Agreement, subject to any legally recognized privilege and applicable United States Government national security requirements, and upon written request, and on reasonable notice, to Litton made to its principal office, Litton shall permit any duly authorized representative or representatives of the Commission:

a. Access during the office hours of Litton 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 Litton relating to compliance with this Interim Agreement; and

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

7. This Interim Agreement shall not be binding until accepted by the Commission.

CONCURRING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

I agree with my colleagues that the final decision and order that the Commission issues today properly addresses the anticompetitive implications of the proposed transaction. I concur in the Commission's action except to the extent that paragraph II.B. of the proposed order makes the Department of the Navy a participant with the Commission in giving antitrust approval to any divestiture proposed under paragraph II.A. of the order.

With due deference to the Department of Defense and in full recognition that the Department of the Navy has the power to decide with which firms it will contract for the provision of goods and services vital to the national security, no persuasive argument has been presented to suggest that the Navy has or should have a role in deciding the competitive implications of a particular divestiture. In addition, no showing has been made that this case is unique, that national security issues or concerns relating to the integrity of the AEGIS destroyer program, to the extent they may be affected by this order, could not have been addressed, as they apparently have been in other defense-related transactions,[1] without inclusion of the Department of the Navy as a necessary participant in a decision committed by statute to the Commission.

The need to obtain technical assistance in reviewing commercial transactions in sophisticated markets is not uncommon. Nor should the Commission forget that national security is the province of the country's defense agencies. The Commission might well find it necessary to consult with the Department of the Navy both to assess the viability of a proposed buyer of the PRC assets to be divested and to ensure that a proposed transaction is not inconsistent with national security. I would have preferred, however, to accommodate that need in this case by means other than making the Department of the Navy a partner with the Commission in interpreting and applying a final order of the Commission.

[1] *See* Lockheed Corporation, C-3576, decision and order (May 9, 1995); *See also ARKLA, Inc.*, 112 FTC 509 (1989).

IN THE MATTER OF

MRS. FIELDS COOKIES, INC.

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

Docket C-3657. Complaint, May 13, 1996--Decision, May 13, 1996

This consent order prohibits, among other things, the Utah-based corporation from misrepresenting the fat, saturated fat, cholesterol or caloric content of baked food products.

Appearances

For the Commission: *Phoebe Morse* and *Colleen Lynch.*
For the respondent: *Jere Webb, Stoel Rives*, Portland, OR.

COMPLAINT

The Federal Trade Commission, having reason to believe that Mrs. Fields Cookies, Inc., a corporation ("Mrs. Fields" 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. Respondent Mrs. Fields is a California corporation, with its principal office or place of business at 462 West Bearcat Drive, Salt Lake City, UT.

PAR. 2. Respondent has manufactured, advertised, labeled, offered for sale, sold and distributed Mrs. Fields Cookies, 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 and promotional materials for Mrs. Fields Cookies, including but not necessarily limited to the attached

Exhibits 1-5. These advertisements and promotional materials contain the following statements and depictions:

A. Semi-sweet classic LOW FAT Cookies
[depiction of cookie chips] (Exhibit 1)
B. Chocolite LOW FAT Cookies
[depiction of cookie chips] (Exhibit 2)
C. Introducing our new line of LOW FAT Cookies
(Exhibit 3)
D. Introducing our new line of LOW FAT Cookies
[depiction of cookie chips and Mrs. Fields' logo] (Exhibit 4)
E. Introducing our new line of LOW FAT Cookies
[depiction of cookie chips and Mrs. Fields' logo] (Exhibit 5)

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 1, 3, 4 and 5, respondent has represented, directly or by implication, that Mrs. Fields' "low fat" semi-sweet classic cookie is low fat.

PAR. 6. In truth and in fact, Mrs. Fields' "low fat" semi-sweet classic cookie is not low fat. This cookie contained 5.5 grams of fat per serving at the time of dissemination of the advertisements and promotional materials referred to in paragraph four. Therefore, the representation set forth in paragraph five was, and is, 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 2, 3, 4 and 5, respondent has represented, directly or by implication, that Mrs. Fields' "low fat" chocolite cookie is low fat.

PAR. 8. In truth and in fact, Mrs. Fields' "low fat" chocolite cookie is not low fat. This cookie contained 5.5 grams of fat per serving at the time of dissemination of the advertisements and promotional materials referred to in paragraph four. Therefore, the representation set forth in paragraph seven was, and is, false and misleading.

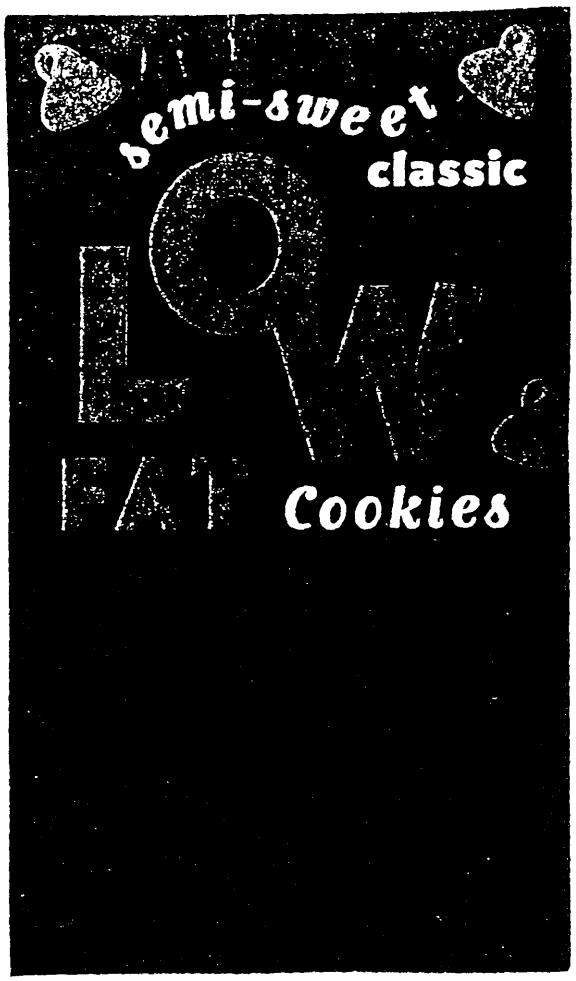
PAR. 9. Through the use of the statements and depictions contained in the advertisements and promotional materials referred to in paragraph four, including but not necessarily limited to the advertisements and promotional materials attached as Exhibits 3, 4

and 5, respondent has represented, directly or by implication, that Mrs. Fields' entire 1994 "low fat" line of cookies is low fat.

PAR. 10. In truth and in fact, Mrs. Fields' entire 1994 "low fat" line of cookies is not low fat. Only one of the three new cookies introduced as Mrs. Fields' 1994 "low fat" line of cookies was low fat at the time of dissemination of the advertisements and promotional materials referred to in paragraph four. Therefore, the representation set forth in paragraph nine was, and is, false and misleading.

PAR. 11. The acts and practices of the respondent as alleged in this complaint constitute unfair or deceptive acts or practices and the making of false advertisements and promotional materials in or affecting commerce in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

EXHIBIT 1



599 Complaint

EXHIBIT 2

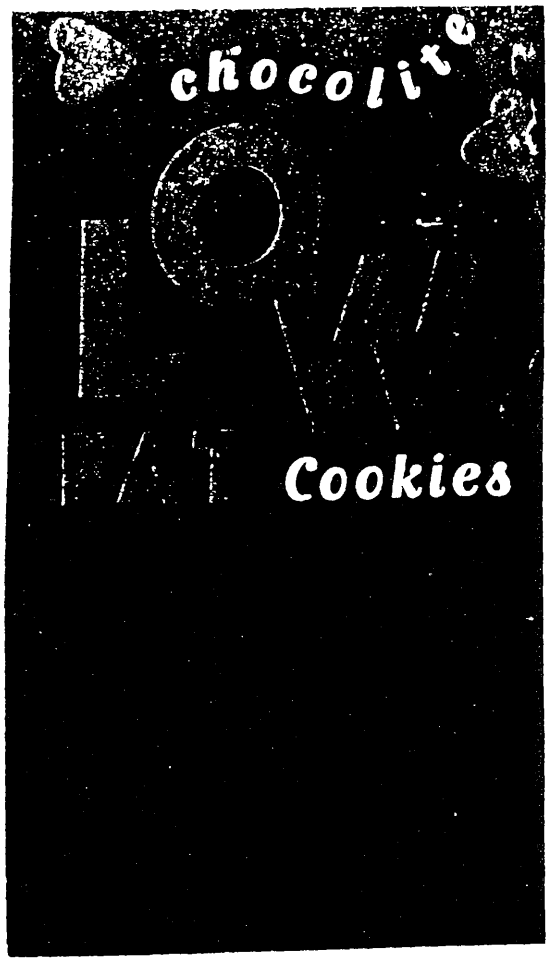


EXHIBIT 3

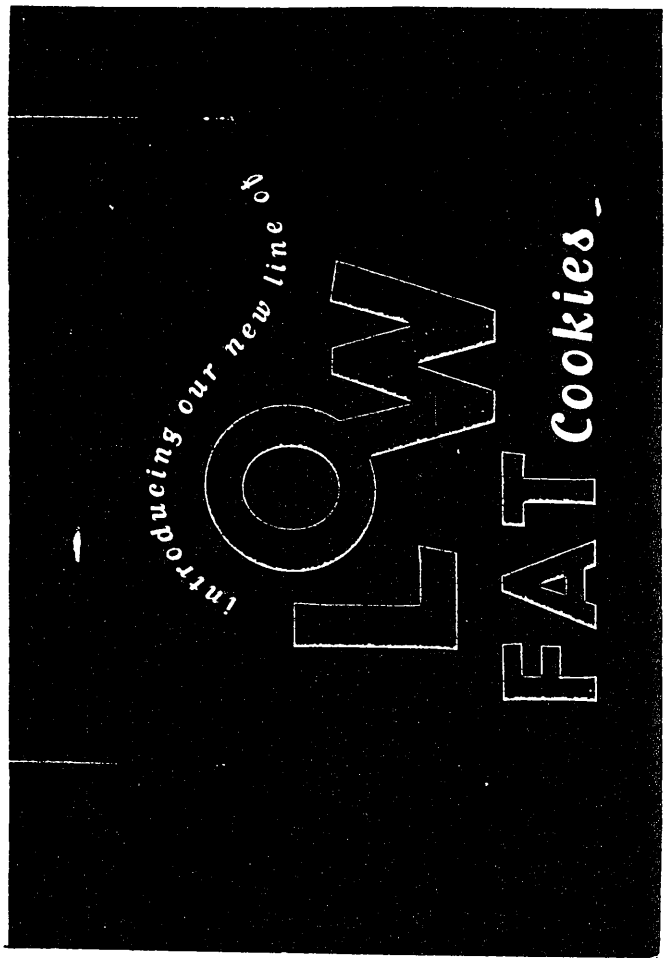


EXHIBIT 4

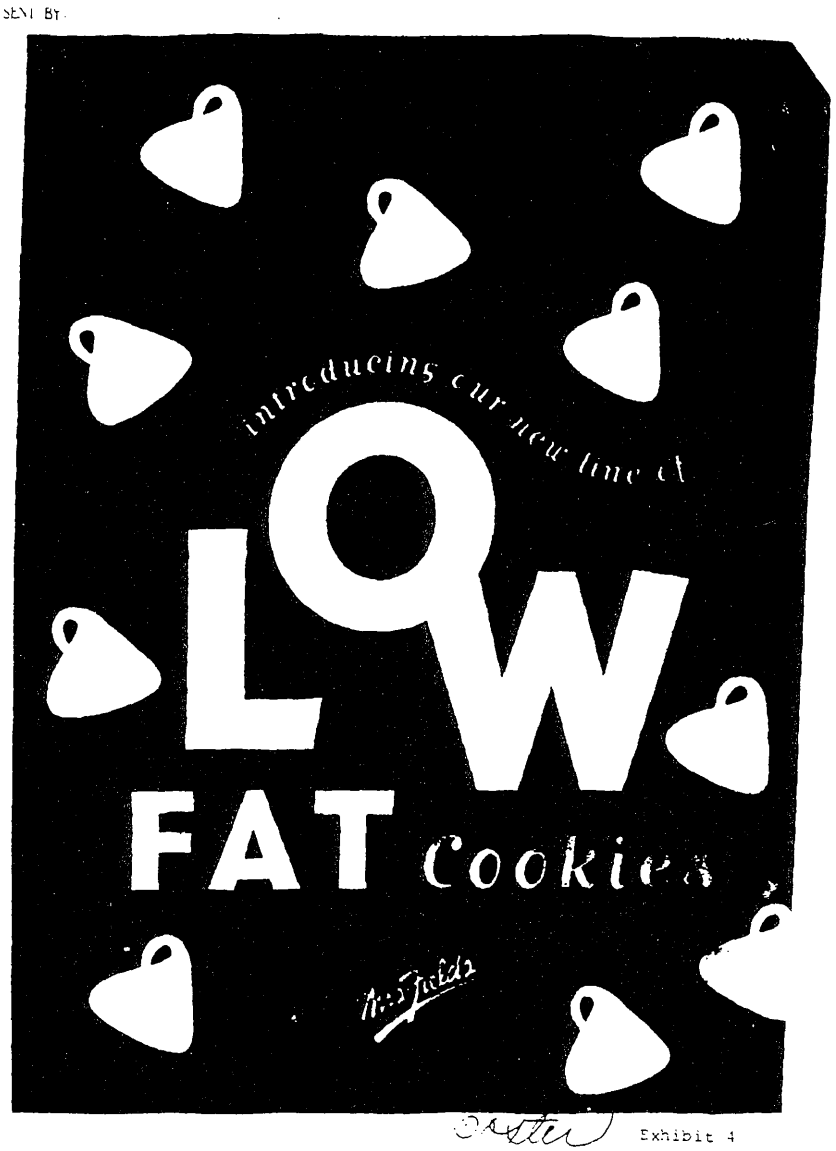
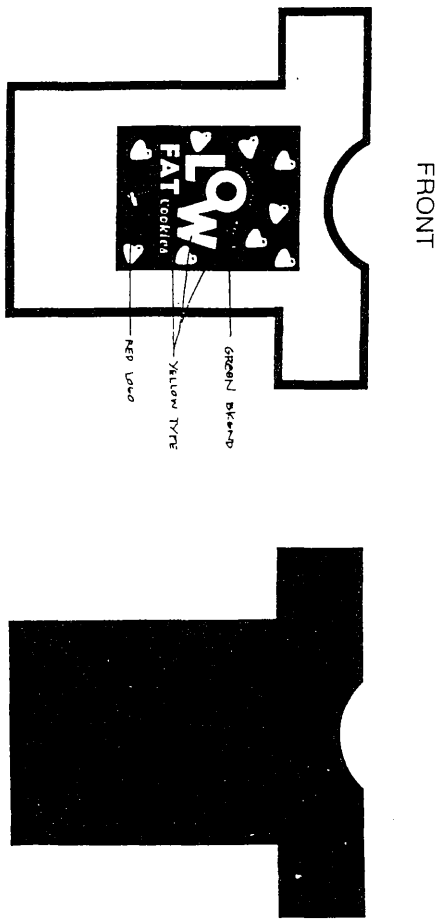

SENT BY
introducing our new line of
LOW
FAT Cookies
Mrs. Fields
Exhibit 4

EXHIBIT 5



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 Boston Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; 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 the 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 Mrs. Fields Cookies, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of California with its office and principal place of business located at 462 West Bearcat Drive, Salt Lake City, UT.

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 Mrs. Fields Cookies, 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 food in or affecting commerce, as "food" and "commerce" are defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting in any manner, directly or by implication, through numerical or descriptive terms or any other means, the existence or amount of fat, saturated fat, cholesterol or calories in any bakery food product, whether cooked or uncooked. If any representation covered by this Part either directly or by implication conveys any nutrient content claim defined (for purposes of labeling) by any regulation promulgated by the Food and Drug Administration, compliance with this Part shall be governed by the qualifying amount for such defined claim as set forth in that regulation.

II.

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

III.

If is further ordered, That for three (3) years after the last date of dissemination of any representation covered by this order, respondent, or its successors and assigns, shall maintain and upon request make available to the Federal Trade Commission for inspection and copying:

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

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

IV.

It is further ordered, That respondent shall 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.

V.

It is further ordered, That respondent shall, within thirty (30) days after service of this order, distribute a copy of this order to each of its operating divisions, to each manager of its company-owned and franchised stores, and to each of its officers, agents, representatives, and employees engaged in the preparation or placement of advertisements or promotional materials covered by this order.

VI.

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.

VII.

This order will terminate on May 13, 2016, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any paragraph of this order that terminates in less than twenty (20) 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 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

COLUMBIA/HCA HEALTHCARE CORPORATION

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-3619. Consent Order, Oct. 3, 1995--Modifying Order, May 15, 1996

This order reopens a 1995 consent order -- that permitted Columbia/HCA and Healthtrust, Inc., to merge, required the respondent to terminate its participation in a joint venture with the Orlando Regional Health System, and contained a prior-notice provision -- and this order modifies the termination provisions of the agreement to hold separate regarding the Utah Healthtrust Assets by releasing Columbia/HCA from the provision requiring it to operate the Utah assets separately from its other hospital operations in Utah once it completes the divestiture of Pioneer Valley Hospital and Davis Hospital to Paracelsus Healthcare Corporation.

ORDER REOPENING AND MODIFYING ORDER

On December 15, 1995, Columbia/HCA Healthcare Corporation ("Columbia") filed its Petition To Reopen And Modify Order Containing Agreement To Hold Separate ("Petition") in this matter. Respondent asks that the Commission reopen this 1995 consent order 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 Petition request that the Commission reopen the order and modify the termination provisions in paragraph 2(b) of the April 21, 1995, Agreement to Hold Separate regarding the Utah Healthtrust Assets ("Utah Hold Separate"), which is attached to the order and made a part thereof. The Petition was subject to a ten-day public comment period that expired on January 22, 1996, and no comments were received. For the reasons discussed below, the Commission has determined to grant Columbia's Petition.

Columbia's Petition seeks to change the termination of the Utah Hold Separate from the date that all Schedule B Assets, as identified in the order, are divested until the date that all of the hospitals identified in Part I of Schedule B are divested. The modification is necessary because of an asset identified as Schedule B, Part II, Item 6: "Lease of 7,134 sq. ft., 150 Wright Bros. Drive, Suite 540, Salt

Lake City, Utah 84116" ("Suite 540"). The space is used by Infusamed, a home health care company providing infusion and pharmacy services that was owned by Healthtrust, Inc. when it was acquired by Columbia. The order does not require Columbia to divest the Infusamed business, and the lease is not a part of the business of Pioneer Valley.

The requested modification merely changes the date for the termination of the Utah Hold Separate. Under the order in this matter, Columbia is obligated to hold separate all of Healthtrust Utah, which includes a number of hospitals and businesses it is not required to divest, pending divestiture of three hospitals and related assets in Utah. The hospitals to be divested are identified in Part I of Schedule B and the related assets are identified in Part II of Schedule B.[1] Columbia seeks to have the Hold Separate terminate upon completion of the divestitures of the three hospitals.

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" require such modification. 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").[2]

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.[3] In such a case, the respondent must demonstrate as a threshold matter

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[1] At present, the only distinction that the order makes between the Part I and Part II assets is that the acquirer of a divested Part I hospital need not give the Commission prior notification of the sale of a Part II asset to anyone who also owns a hospital in the Three County Area. *See* Order, paragraph IV.F.

[2] *See also United States v. Louisiana-Pacific Corp.*, 967 F.2d 1372, 1376-77 (9th Cir. 1992) ("A decision to reopen does not necessarily entail a decision to modify the order. Reopening may occur even where the petition itself does not plead facts requiring modification.")

[3] Hart Letter at 5; 16 CFR 2.51.

some affirmative need to reopen and modify the order.[4] 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."[5] 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.[6] The Commission also will consider whether the particular modification sought is appropriate to remedy the identified harm.[7]

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).

Columbia has met its burden of showing an affirmative need to reopen the order in that the continued operation of the order is causing competitive injury. Having to hold the remaining Healthtrust Utah assets separate pending a determination on the obligation to divest the lease is unnecessary to accomplish the purposes of the order and would impose significant and unforeseen costs on

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[4] Damon Corp., Docket No. C-2916, Letter to Joel E. Hoffman, Esq. (March 29, 1983), at 2 ("Damon Letter"), reprinted in [1979-1983 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 22,207.

[5] *Damon Corp.*, Docket No. C-2916, 101 FTC 689, 692 (1983).

[6] Damon Letter at 2.

[7] Damon Letter at 4.

Columbia. Where the potential harm to the respondent outweighs any further need for the order, the Commission may modify the order in the public interest to allow the respondent to retain the relevant assets. Since the lease of Suite 540 appears to have no competitive significance in connection with the operation of the to-be-divested Pioneer Valley Hospital in the acute care hospital market in Utah, there is no need for the Commission to require Columbia to continue to hold the Utah Healthtrust Assets separate upon completion of the divestitures of Jordan Valley, Davis and Pioneer Valley hospitals. Thus, the modification sought by Columbia is in the public interest.

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

It is further ordered, That the Agreement to Hold Separate Regarding The Utah Healthtrust Assets, attached to the order in Docket No. C-3619, be, and it hereby is, modified to read as follows:

2. Respondent agrees that from the date this Agreement is accepted until the earlier 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, Part I Assets or the Utah Healthtrust Assets, as required by the consent order, is completed.

Commissioner Azcuenaga dissenting on the ground that the petitioner has not made a showing sufficient to satisfy the Commission's standard for reopening and modifying an order, and Commissioner Starek concurring in the result only.

STATEMENT OF COMMISSIONER ROSCOE B. STAREK, III, CONCURRING IN THE RESULT

I have no difficulty concluding that the public interest warrants granting the relief requested by respondent -- a change in the termination date for the Utah Hold Separate -- in light of how transparently unreasonable it would be to withhold that relief in the

circumstances presented here. On that basis, I agree with the Commission majority that the Utah Hold Separate should be reopened and modified. Nevertheless, I concur only in that result, and not in the reasoning employed to reach it. Once again my colleagues have found it necessary to articulate -- and then find satisfied on very shaky grounds -- an "affirmative need threshold" as part of the standard for order modifications under a "public interest" standard.[1]

The Commission has articulated its affirmative need threshold -- with some puzzling lapses in consistency -- in more than a decade's worth of competition cases, and last year the Commission suddenly took the unfortunate step of importing the concept into the consumer protection field.[2] Not only does the threshold serve no discernible purpose, except perhaps to dissuade some parties from filing potentially meritorious petitions; it also imposes needless burdens on the Commission. For example, rather than simply weigh the overall costs and benefits of a requested order modification under the "public interest" rubric of Commission Rule 2.51,[3] the Commission and its staff must search high and low -- and occasionally engage in evidentiary prestidigitation -- to come up with the "competitive harm" that will carry a petitioner across the affirmative need threshold.[4] A case such as this one -- in which the affirmative need "evidence" is paltry, but the requested relief fairly cries out to be granted -- demonstrates why the Commission should summon the will to jettison the "affirmative need" concept and embrace explicitly a simple cost/benefit balancing approach to order modifications pursuant to the "public interest" standard of Rule 2.51.

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[1] The Commission makes the following conclusory statement: "Columbia has met its burden of showing an affirmative need to reopen the order in that the continued operation of the order is causing competitive injury. Having to hold the remaining Healthtrust Utah assets separate pending a determination on the obligation to divest the lease is unnecessary to accomplish the purposes of the order and would impose significant and unforeseen costs on Columbia." Order Reopening and Modifying Order at 3 (May 15, 1996). It would be difficult to conjure up a less substantial foundation on which to rest the determination that a respondent had crossed the mythical "affirmative need threshold."

[2] California and Hawaiian Sugar Co., Docket No. C-2858 (Order Reopening the Proceeding and Modifying Cease and Desist order, Jan. 17, 1995).

[3] 16 CFR 2.51.

[4] *See* Concurring Statement of Commissioner Roscoe B. Starek, III, in California and Hawaiian Sugar Co., Docket No. C-2858 (Jan. 19, 1995); Concurring Statement of Commissioner Roscoe B. Starek, III, in Service Corporation International, Docket No. 9071 (May 17, 1994).

IN THE MATTER OF

DELL COMPUTER CORPORATION

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

Docket C-3658. Complaint, May 20, 1996--Decision, May 20, 1996

This consent order prohibits, among other things, a Texas-based personal computer manufacturer from enforcing its patent rights against computer manufacturers using the VL-bus, a mechanism to transfer instructions between the computer's central processing unit and its peripherals.

Appearances

For the Commission: *Michael E. Antalics* and *William J. Baer.*

For the respondent: *Raymond Jacobsen* and *Kirin Corcoran, Howrey & Simon*, Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the respondent, Dell Computer Corporation, a corporation, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

PARAGRAPH 1. Respondent Dell Computer Corporation ("Dell") 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 2214 West Braker Lane, Texas.

PAR. 2. Respondent is a publicly traded for-profit corporation engaged in the innovation, development, manufacture, and sale of personal computer systems throughout the United States. By virtue of its purposes and activities, respondent is a corporation within the meaning of Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

PAR. 3. Dell'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. 4. In February 1992 Dell became a member of the Video Electronics Standards Association ("VESA"), a non-profit standards-setting association composed of virtually all major U.S. computer hardware and software manufacturers.

PAR. 5. At or about the same time, VESA began the process of setting a design standard for a computer bus design, later to be known as the VESA Local Bus or "VL-bus." Like all computer buses, the VL-bus carries information or instructions between the computer's central processing unit and the computer's peripheral devices such as a hard disk drive, a video display terminal, or a modem.

PAR. 6. By June 1992 VESA's Local Bus Committee, with Dell representatives sitting as members, approved the VL-bus design standard, which improved upon then-existing technology by more quickly and efficiently meeting the transmission needs of new, video-intensive software. One year earlier, in July 1991, Dell had received United States patent number 5,036,481 (the "'481 patent"), which, according to Dell, gives it "exclusive rights to the mechanical slot configuration used on the motherboard to receive the VL-bus card." Nonetheless, at no time prior to or after June 1992 did Dell disclose to VESA's Local Bus Committee the existence of the '481 patent.

PAR. 7. After committee approval of the VL-bus design standard, VESA sought the approval of the VL-bus design standard by all of its voting members. On July 20, 1992, Dell voted to approve the preliminary proposal for the VL-bus standard. As part of this approval, a Dell representative certified in writing that, to the best of his knowledge, "this proposal does not infringe on any trademarks, copyrights, or patents" that Dell possessed. On August 6, 1992, Dell gave final approval to the VL-bus design standard. As part of this final approval, the Dell representative again certified in writing that, to the best of his knowledge, "this proposal does not infringe on any trademarks, copyrights, or patents" that Dell possessed.

PAR. 8. After VESA's VL-bus design standard became very successful, having been included in over 1.4 million computers sold in the eight months immediately following its adoption, Dell informed certain VESA members who were manufacturing computers using the new design standard that their "implementation of the VL-bus is a violation of Dell's exclusive rights." Dell

demanded that these companies meet with its representatives to "determine . . . the manner in which Dell's exclusive rights will be recognized . . . ." Dell followed up its initial demands by meeting with several companies, and it has never renounced the claimed infringement.

PAR. 9. By engaging in the acts or practices described in paragraphs four through eight of this complaint, respondent Dell has unreasonably restrained competition in the following ways, among others:

(a) Industry acceptance of the VL-bus design standard was hindered because some computer manufacturers delayed their use of the design standard until the patent issue was clarified.

(b) Systems utilizing the VL-bus design standard were avoided due to concerns that patent issues would affect the VL-bus' success as an industry design standard.

(c) The uncertainty concerning the acceptance of the VL-bus design standard raised the costs of implementing the VL-bus design as well as the costs of developing competing bus designs.

(d) Willingness to participate in industry standard-setting efforts have been chilled.

PAR. 10. The acts or practices of respondent 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.

Commissioner Azcuenaga dissenting.

DECISION AND ORDER

The Federal Trade Commission ("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 the 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 the Federal Trade Commission Act; and

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing 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 the complaint, and waivers and other provisions as required by the Commission Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments received, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Dell Computer Corporation 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 2214 West Braker Lane, Austin, Texas.

2. The Federal Trade Commission has jurisdiction 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 *"Dell"* means Dell Computer Corporation, its predecessors, subsidiaries, divisions, groups, and affiliates controlled by Dell Computer Corporation, their successors and assigns, and their directors, officers, employees, agents and representatives.

B. *"Designated representative"* means the person appointed by Dell to the standard-setting organization who communicates

respondent's position regarding respondent's patent rights related to any standard under consideration by the standard-setting organization.

C. *"VESA"* means the Video Electronics Standards Association, located at 2150 North First Street, Suite 440, San Jose, California.

D. *"VL-bus"* means the computer local bus design standard VESA established in August 1992 for the transmission of computer information between a computer's central processing unit and certain computer peripheral devices.

E. *"'481 patent"* means United States patent number 5,036,481.

F. *"Commission"* means the Federal Trade Commission.

II.

It is further ordered, That, within thirty (30) days after the date this order becomes final, and until the expiration of the '481 patent, respondent shall cease and desist all efforts it has undertaken by any means, including without limitation the threat, prosecution or defense of any suits or other actions, whether legal, equitable, or administrative, as well as any arbitrations, mediations, or any other form of private dispute resolution, through or in which respondent has asserted that any person or entity, by using or applying VL-bus in its manufacture of computer equipment, has infringed the '481 patent.

III.

It is further ordered, That, until the expiration of the '481 patent, respondent shall not undertake any new efforts to enforce the '481 patent by threatening, prosecuting or defending any suit or other action, whether legal, equitable, or administrative, as well as any arbitration, mediation, or other form of private dispute resolution, through or in which respondent claims that any person or entity, by using or applying VL-bus in its manufacture, use or sale of computer equipment, has infringed the '481 patent.

IV.

It is further ordered, That, for a period of ten (10) years after the date this order becomes final, respondent shall cease and desist from enforcing or threatening to enforce any patent rights by asserting or alleging that any person's or entity's use or implementation of an industry design standard, or sale of any equipment using an industry design standard, infringes such patent rights, if, in response to a written inquiry from the standard-setting organization to respondent's designated representative, respondent intentionally failed to disclose such patent rights while such industry standard was under consideration.

V.

It is further ordered, That, for a period of ten (10) years after this order becomes final, respondent shall maintain the procedure for assuring compliance with paragraph IV of this order, as accepted by the Commission pursuant to paragraph four of the Agreement Containing Consent Order to Cease and Desist.

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, complaint and the announcement shown in Appendix A to this order to VESA, to those members of VESA that Dell contacted regarding possible infringement of the '481 patent, and to any other person or entity to whom respondent has sent notice regarding its claim that the implementation of the VL-bus standard conflicts with or infringes the '481 patent.

B. Within thirty (30) days after the date this order becomes final, distribute a copy of this order, complaint and the announcement shown in Appendix A to this order to every officer and director of respondent, and to every employee of respondent whose responsibilities include acting as respondent's designated representative to any standard-setting organization, group or similar body of which respondent is a member.

C. For a period of five (5) years after the date this order becomes final, furnish a copy of this order and complaint to each new officer and director of respondent and to every new employee of respondent whose responsibilities will or do include acting as respondent's designated representative to any standard-setting organization, group or similar body of which respondent is a member. Such copies must be furnished within thirty (30) days after any such persons assume their position as an officer, director or employee. For purposes of this paragraph VI.C., "new employee" shall include without limitation any of respondent's employees whose duties change during their employment to include acting as respondent's designated representative to any standards-setting organization, group or similar body of which respondent is a member.

D. For a period of ten (10) years after the date this order becomes final, respondent shall furnish each standard-setting organization of which it is a member and which it joins a copy of the order and respondent shall identify to each such organization the name of the person who will serve as respondent's designated representative to the standard-setting organization.

VII.

It is further ordered, That respondent shall:

A. 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.

B. For a period of ten (10) years after the date this order becomes final, 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 paragraphs V and VI of this order.

C. 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 that may affect compliance obligations arising out of this order.

Commissioner Azcuenaga dissenting.

APPENDIX A

Announcement

Dell Computer Corporation has entered into a consent agreement with the Federal Trade Commission. Pursuant to this consent agreement, the Commission issued an order on [Date] that prohibits Dell from enforcing its United States patent number 5,036,481 against any company for such company's use of the Video Electronics Standards Association's VL-bus standard.

For more specific information, please refer to the FTC order itself, a copy of which is attached for your information.

General Counsel
Dell Computer Corporation

STATEMENT OF THE FEDERAL TRADE COMMISSION

Today the Commission issues its complaint and (with two minor modifications) its final consent order in Dell Computer Corporation. The Commission reached this decision after a careful and thorough evaluation of the public comments received on the proposed order. Because the proposed order generated considerable public comment, we offer these views to improve understanding of this enforcement action.

The outcome of any Commission enforcement action depends on the facts of the particular case. The Dell case involved an effort by the Video Electronics Standards Association ("VESA") to identify potentially conflicting patents and to avoid creating standards that would infringe those patents. In order to achieve this goal, VESA -- like some other standard-setting entities -- has a policy that member companies must make a certification that discloses any potentially conflicting intellectual property rights. VESA believes that its policy imposes on its members a good-faith duty to seek to identify potentially conflicting patents. This policy is designed to further

VESA's strong preference for adopting standards that do not include proprietary technology.

This case involved the standard for VL-bus, a mechanism to transfer instructions between a computer's central processing unit and its peripherals. During the standard-setting process, VESA asked its members to certify whether they had any patents, trademarks, or copyrights that conflicted with the proposed VL-bus standard; Dell certified that it had no such intellectual property rights.[1] After VESA adopted the standard -- based, in part, on Dell's certification -- Dell sought to enforce its patent against firms planning to follow the standard.

We believe that in the limited circumstances presented by this case, enforcement action is appropriate. In this case--where there is evidence that the association would have implemented a different non-proprietary design had it been informed of the patent conflict during the certification process, and where Dell failed to act in good faith to identify and disclose patent conflicts -- enforcement action is appropriate to prevent harm to competition and consumers.[2]

The remedy in this case is carefully circumscribed. It simply prohibits Dell from enforcing its patent against those using the VL-bus standard.[3] This relief assures that the competitive process is not harmed by the conduct addressed in the Commission's complaint. Moreover, the remedy in this case is consistent with those cases, decided under the concept of equitable estoppel, in which courts precluded patent-holders from enforcing patents when they failed

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[1] The dissent seems to suggest that the actions of the Dell representative in submitting the certification did not bind the corporation. Dissenting statement at 25-26. Contrary to that suggestion, Dell's voting representative made his certification on behalf of the corporation. This is supported by VESA's construction of its procedures. Corporations act through their agents, and when an agent acts in his capacity as an agent, as was the case here, he acts for the corporation. *See* Fletcher Cyclopedia of the Law of Private Corporations 30, 279 (1990).

[2] The Commission has reason to believe that once VESA's VL-bus standard had become widely accepted, the standard effectively conferred market power upon Dell as the patent holder. This market power was not inevitable: had VESA known of the Dell patent, it could have chosen an equally effective, non-proprietary standard. If Dell were able to impose a royalty on each VL-bus installed in 486-generation computers, prices to consumers would likely have increased.

The dissent speculates that computer manufacturers could have readily shifted to a new standard. Dissenting Statement at 10. Although that alternative might be possible in some settings, it was not in this case where the market had overwhelmingly adopted the VL-bus standard.

[3] It also prohibits Dell from enforcing patent rights in the future when it intentionally fails to disclose those rights upon request of any standard-setting organization during the standard-setting process.

properly to disclose the existence of those patents.[4] In this case, Dell is precluded from enforcing the patent only against those implementing the relevant standard.[5]

Some of those who commented on the Agreement Containing Consent Order suggested that this matter expresses an endorsement of certain types of standards (*i.e.*, those including only non-proprietary technology versus those including proprietary technology) or of a certain form of standard-setting process. On the contrary, the Commission's enforcement action does not address, and is not intended to address, any of these broader issues.

Other commenters asked whether the Commission intended to signal that there is a general duty to search for patents when a firm engages in a standard-setting process. The relief in this matter is carefully limited to the facts of the case. Specifically, VESA's affirmative disclosure requirement creates an expectation by its members that each will act in good faith to identify and disclose conflicting intellectual property rights. Other standard-setting organizations may have different procedures that do not create such an expectation on the part of their members.[6] Consequently, the relief in this case should not be read to impose a general duty to search.

Others suggested that the theory supporting this enforcement action could impose liability for an unknowing (or "inadvertent") failure to disclose patent rights. Again, the Commission's enforcement action is limited to the facts of this case, in which there is reason to believe that Dell's failure to disclose the patent was not

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[4] *See, e.g., Potter Instrument Co., Inc. v. Storage Technology Corp.*, 641 F.2d 190 (4th Cir.), *cert. denied*, 454 U.S. 832 (1981); *Wang Laboratories Inc. v. Mitsubishi Electronics America Inc.*, 29 U.S.P.Q.2d 1481 (C.D. Cal. 1993); *Stambler v. Diebold, Inc.*, 11 U.S.P.Q.2d 1709, 1715 (E.D.N.Y. 1988), *aff'd*, 878 F.2d 1445 (Fed. Cir. 1989).

[5] The dissent seems to suggest that relief should be limited to those firms that relied on Dell's certification. Dissenting statement at 13. The equitable estoppel doctrine, which seeks to remedy harm to the aggrieved companies, would support such a limited remedy. But from the Commission's perspective, based on our responsibility to protect the competitive marketplace, broader relief is warranted.

Here the market adopted the VL-bus standard. Both those who relied on Dell's representation, and others who had to adopt the industry standard, were faced with potential harm. Absent out enforcement action, Dell could have required royalties from all firms that adopted the standard. Where the market has chosen a particular technology believed to be available to all without cost, limiting the order solely to those companies that relied on Dell's certification might not fully protect the competitive process or consumers.

[6] Contrary to the dissent's assertion (dissenting statement at 20), the VESA policy for dealing with proprietary standards is not "very like ANSI's patent policy." ANSI does not require that companies provide a certification as to conflicting intellectual property rights. Therefore, its policy, unlike VESA's, does not create an expectation that there is no conflicting intellectual property.

inadvertent. The order should not be read to create a general rule that inadvertence in the standard-setting process provides a basis for enforcement action. Nor does this enforcement action contain a general suggestion that standard-setting bodies should impose a duty to disclose.

Finally, some commenters suggested that private litigation is sufficient to address this type of controversy. Although there has been private litigation for failure to disclose patent rights under equitable estoppel theories, enforcement of Section 5 of the Federal Trade Commission Act also serves an important role in this type of case, where there is a likelihood of consumer harm. Moreover, unlike other antitrust statutes, Section 5 provides only for prospective relief. In fact, the judicious use of Section 5 -- culminating in carefully tailored relief -- is particularly appropriate in this type of case, in which the legal and economic theories are somewhat novel.[7]

One topic considered by the Commission's hearings last fall on Global and Innovation-Based Competition was the important role of standard-setting in the technological innovation that will drive much of this nation's competitive vigor in the 21st Century. The record of those hearings is replete with discussion of the procompetitive role of standard-setting organizations. The Commission recognizes that enforcement actions in this area should be undertaken with care, lest they chill participation in the standard-setting process. Nevertheless, a standard-setting organization may provide a vehicle for a firm to undermine the standard-setting process in a way that harms competition and consumers.[8] We believe that the commission's enforcement action in Dell strikes the right balance between these important objectives.[9]

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[7] *Cf. Charles Pfizer & Co. v. Federal Trade Commission*, 401 F.2d 574 (6th Cir. 1968), *cert. denied*, 394 U.S. 920 (1969); Report of the American Bar Association, Section of Antitrust Law, Special Committee To Study the Role of the Federal Trade Commission 18 (Apr. 7, 1989).

[8] *See, e.g., Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988).

[9] The dissent takes issue with the our reliance on facts not alleged in the complaint. Dissenting statement at 21-23. It is entirely within the Commission's discretion to interpret its complaint and consent order and provide any information it deems helpful in assisting interested persons to interpret the order. *Cf.* Commission Rule 2.34, 16 CFR 2.34 (1996). It would be odd, indeed, for the Commission to spell out in the complaint each and every fact on which it relies when it issues a consent order. In any case, we note our disagreement with the dissent's own assessment of the record.

DISSENTING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

Today the Commission issues its complaint and final consent order against Dell Computer Corporation ("Dell"), accompanied by an unusual explanatory statement on behalf of the majority. The case, which was touted in the Commission's press release soliciting public comment as "precedent-setting," has aroused a high degree of interest. Several thoughtful comments have been received.

The complaint against Dell does not articulate a violation of Section 5 of the FTC Act under any established theory of law. Under any novel theory, the competitive implications of the conduct alleged remain unclear. As confirmed by the comments we have received, a host of questions needs to be resolved before the Commission creates a new antitrust-based duty of care for participants in the voluntary standards-setting process.[1]

The statement of the majority appears intended to respond to the concerns raised in the comments. Unfortunately, it does not resolve those concerns. Instead, by failing to take a clear stand on what legal standard it intends to apply, the majority creates more confusion. In its explanatory statement, the majority tries to have it both ways: it manages at once to suggest that this case is based on a traditional theory, which requires a showing of intent, and at the same time to say that this case is based on a novel theory, apparently to explain the absence of any showing or allegation of intent. The complaint and order combined with the explanatory statement of the majority give rise to troubling implications about the duty of care in the standards-setting process.

I. FACTUAL BACKGROUND

This is a case about alleged abuse of the standards-setting process by a patent holder. The facts alleged in the complaint are not complex. The Video Electronics Standards Association ("VESA") is a private standards-setting organization, including as members both computer hardware and software manufacturers. In 1991 and 1992, VESA developed a standard for a computer bus design, called the VESA Local Bus ("VL-bus"). The bus carries information and instructions between the computer's central processing unit and

[1] My dissenting statement when the order was first published invited comment on these issues. *See* Dissenting Statement of Commissioner Mary L. Azcuenaga in this matter (October 30, 1995).

peripheral devices. In August 1992, VESA conducted a vote to approve its VL-bus standard. The VESA ballot required each member's authorized voting representative to sign a statement that "to the best of my knowledge," the proposal did not infringe the member company's intellectual property rights.[2]

According to the Commission's complaint, after adoption of the standard, the VL-bus design was incorporated in many computers. The complaint alleges that Dell subsequently asserted that the "implementation of the VL-bus [by other computer manufacturers] is a violation of Dell's exclusive [patent] rights." For purposes of antitrust analysis, it is important to note that the complaint does not allege that Dell's representative to VESA had any knowledge of the coverage of Dell's relevant patent (known as the "'481" patent) or of the potential infringement by the VL-bus at the time he cast the ballot.

Nothing in the limited information available to the Commission suggests that Dell had any greater role in the development and promulgation of the VESA VL-bus standard than that described in the minimal factual allegations in the complaint. For example, the complaint does not allege that Dell proposed or sponsored the standard, that Dell urged others to vote for the standard, that Dell employees participated in drafting the standard, that Dell employees were present, in person or online, during the committee drafting sessions, that Dell steered the VESA committee toward adopting a standard that incorporated Dell technology, or that Dell had any hand whatsoever in shaping the standard.

The sole act for which Dell is charged with a violation of law is that Dell's voting representative, in voting to adopt the standard, signed a certification that to the best of his knowledge, the proposed standard did not infringe on any relevant intellectual property.

II. INTENTIONAL FRAUD OR ABUSE OF THE STANDARDS PROCESS

This might have been a routine antitrust case. A traditional antitrust analysis of Dell's conduct would have centered on two

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[2] The ballot contained the following certification:

I certify that I am the VESA member listed at the top of this ballot, or am authorized by such member to submit this ballot. By casting this vote I also certify that, to the best of my knowledge, this proposal does not infringe on any trademarks, copyrights, or patents, with the exception of any listed on the comment page. I understand that my vote and any comments will become public.

questions: whether Dell intentionally misled VESA into adopting a VL-bus standard that was covered by Dell's '481 patent and whether, as a result of the adoption of such a standard, Dell obtained market power beyond that lawfully conferred by the patent. If Dell had obtained market power by knowingly or intentionally misleading a standards-setting organization, it would require no stretch of established monopolization theory to condemn that conduct. Indeed, Section IV of the order against Dell seems to address precisely such a traditional antitrust violation. It prohibits Dell's enforcement of intellectual property rights only if in response to a written inquiry "respondent intentionally failed to disclose such patent rights" during the standards-setting process. (Emphasis added). The public comments, the majority, and I all seem to agree that Section 5 of the Federal Trade Commission Act ("FTC Act") prohibits knowing deception of standards makers to acquire market power and other intentional abuses of the standards process. If the case had gone only this far, it likely would not have elicited comment or controversy.[3]

The novelty of the case against Dell, the reason it has been characterized as precedent-setting, is that the order prohibits Dell from enforcing the '481 patent without any allegation in the complaint that Dell intentionally and knowingly misled VESA and without any allegation that Dell obtained market power as a result of the misstatement at issue.[4] The complaint does not allege that Dell's voting representative was aware either of the patent or of the potential infringement at the time the vote was taken.

The way in which the Commission handles the factual questions of intent and knowledge is critical to the policy issue at the core of this case, which is the nature and extent of the duty under Section 5 of the FTC Act of a member of a standards-setting organization in the

[3] A party who has engaged in intentional and knowing misleading conduct in the standards process may be estopped from asserting a patent. *See Stambler v. Diebold Inc.*, 11 U.S.P.Q. 1709, 1714 (E.D.N.Y. 1988), *aff'd*, 878 F.2d 1445 (Fed. Cir. 1989) (individual inventor sat on an ANSI committee without disclosing his patent "after concluding that the proposed thrift and MINTS standards infringed on his patent"); *Wang Laboratories Inc. v. Mitsubishi Electronics America Inc.*, 29 U.S.P.Q. 1481, 1495 (C.D. Cal. 1993) (allegation that "Wang persuaded JEDC to adopt its memory '30-pin' module configuration as the industry standard, without disclosing the pending patent application on said module"). *See also Potter Instrument Co. v. Storage Technology Corp.*, 207 U.S.P.Q. 763 (E.D.Va. 1980), *aff'd*, 641 F.2d 190 (4th Cir. 1981), *cert. denied*, 454 U.S. 832 (1981).

[4] The majority in its statement asserts that "once VESA's VL-bus standard had become widely accepted, the standard effectively conferred market power upon Dell as the patent holder." Statement at 2, n.2. It is reasonable to assume that the majority crafted its statement with care, and this sole reference to market power does not suggest that Dell wrongfully obtained market power, but rather that the standard conferred it.

standards-setting process. It is one thing to prohibit a knowing misrepresentation or an intentional manipulation; under that standard, it is clear how to avoid liability. It is quite another matter to base liability on constructive knowledge or unsubstantiated inferences. It is possible to assert that Dell "must have" known of the patent, because obviously some people at Dell did know about the patent.[5] That sort of logic leads to a strict liability standard, under which a company would place its intellectual property at risk simply by participating in the standards-setting process. No matter how much money, time and talent a company might devote to avoiding mistakes in the certification process, a mistake still would be possible and potentially very costly.

By finding a violation of Section 5 in the absence of any allegation of a knowing or intentional misrepresentation, the Commission effectively imposes a duty of disclosure on Dell beyond what VESA required. The Commission may have the authority to do this but the question is whether it is advisable. VESA might have required, but did not, that each voting representative certify, on behalf of the entire company, that nothing in its entire patent portfolio overlapped with the standard and have made the certification binding regardless of any mistakes or subsequent, good faith discoveries.[6] Had that been the standard, the process of collecting votes likely would have been quite prolonged and, perhaps, even impossible. Nevertheless, VESA could have structured its process in this more exacting way. Perhaps there is a good reason why it did not.

The theory of antitrust liability for intentional abuse of the standards process is similar to the monopolization theory applied in cases of fraud on the Patent and Trademark Office ("PTO"). In addition, although the decisions of the Court of Appeals for the Federal Circuit in patent cases are not controlling in cases under

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[5] Knowing of the patent is not the same as knowing that the standard would infringe the patent. One might expect this to be particularly true in high technology industries. The majority does not address this issue, although it would appear to be relevant in adopting a duty of care not based on intent. Another relevant question is what to do about an informed opinion, later disputed, that a standard would not infringe a patent. It would not be difficult to think of numerous other questions relevant to defining the duty of care.

[6] One view is that because the VESA ballot required a certification that the person signing is authorized to vote, the statement "to the best of my knowledge" refers to Dell's collective corporate knowledge rather than the personal knowledge of the voting representative. But the complaint did not adopt that construction of the ballot. Instead, paragraph seven of the complaint alleges that the "Dell representative certified in writing that, to the best of his knowledge," the standard did not infringe Dell's intellectual property claims. (Emphasis added.) *See* discussion at 25-26, below.

Section 5 of the FTC Act, it may be useful to consider the principles in those cases.

Two standards have been applied by the courts, respectively, in determining fraud on or inequitable conduct before the PTO. First, to prove fraud on the PTO necessary to make an unlawful monopolization claim, based on the Supreme Court's decision in Walker Process, a party must make out a common law fraud claim, including proof of a material misrepresentation, intentionally made to deceive, and reasonably relied on by the PTO.[7] Second, although the showing of inequitable conduct as a defense to a patent infringement claim is less rigorous than that necessary to establish common law fraud, the Court of Appeals for the Federal Circuit nonetheless requires clear and convincing evidence that the patent applicant failed to disclose material information known to the applicant, or that the applicant submitted false information with the intent to act inequitably.[8] Patent law is not within the institutional expertise of the Commission, but it would seem useful to study the history and policy underlying these strict requirements for establishing liability before setting forth in a different direction and creating new theories under Section 5 of the FTC Act.

III. ANTICOMPETITIVE EFFECTS

A second notable omission from the Dell complaint is any allegation that the company acquired or extended market power.[9] Instead, paragraph nine of the complaint alleges that Dell unreasonably restrained competition in four ways: (1) industry

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[7] *See. e.g., Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172, 177 (1965); *Argus Chemical Corp. v. Fibre Glass-Evercoat, Inc.*, 812 F.2d 1381, 1384-85 (Fed. Cir. 1987). In *American Cyanamid Co. v. FTC*, 363 F.2d 757 (6th Cir. 1966), the court found, by analogy to Walker Process, that the Commission had authority to order compulsory licensing of a patent obtained by fraud and remanded for a hearing de novo. The compulsory license was upheld. *See American Cyanamid Co.*, 72 FTC 623, 684-85 (1967), *aff'd sub nom. Charles Pfizer & Co.*, 410 F.2d 574 (6th Cir. 1968), *cert. denied*, 394 U.S. 920 (1969). Section 6 of the Antitrust Guidelines for the Licensing of Intellectual Property (April 6, 1995) states that enforcement of patents "obtained by inequitable conduct that falls short of fraud under some circumstances may violate Section 5 of the Federal Trade Commission Act."

[8] *See. e.g., Heidelberger Drukmaschinen v. Hantscho Commercial Products, Inc.*, 21 F.3d 1068, 1073 (Fed. Cir. 1994); *Labounty Manufacturing, Inc. v. ITC*, 958 F.2d 1066, 1076 (Fed. Cir. 1992); *SmithKline Diagnostics, Inc. v. Helena Labs.*, 859 F.2d 878, 891 (Fed. Cir. 1988); *Specialty Composites v. Cabot Corp.*, 845 F.2d 981, 991 (Fed. Cir. 1988); *FMC Corp. v. Manitowoc Co.*, 835 F.2d 1411, 1415 (Fed. Cir. 1987).

[9] The complaint does not identify or allege any relevant product or geographic market. Usually, the antitrust analysis of particular practices begins with the identification of relevant product and geographic markets.

acceptance of the VL-bus "was hindered"; (2) systems using the VL-bus "were avoided"; (3) uncertainty concerning the acceptance of the VL-bus design standard "raised the costs of implementing the VL-bus design" and "of developing competing bus designs"; and (4) "willingness to participate in industry standards-setting efforts have [sic] been chilled." Assuming the allegations are true, none of them suggests that Dell acquired the power to control price and output in a relevant antitrust market.[10] Indeed, if, as appears from the allegations to be the case, computer producers readily could switch to bus designs that do not incorporate Dell's technology, no monopoly seems possible. The first three allegations regarding delay in acceptance of the standard, avoidance of systems using the VL-bus, and uncertainty about the bus standard, all relate to the speed and breadth of industry acceptance of the standard. Assuming that industry acceptance of the bus was slower or less extensive than it otherwise would have been, those effects do not necessarily translate into higher prices of computers for consumers, restricted output of computers in any relevant geographic market, or any other harm to consumers or competition.

Although the complaint does not allege that Dell acquired market power, the majority asserts in its explanatory statement that "once VESA's VL-bus standard had become widely accepted, the standard effectively conferred market power upon Dell as the patent holder." Statement at 2, n.2. It is worth noting that even here the majority does not allege that Dell did anything to acquire market power. In addition, the majority fails to identify the relevant market in which market power assertedly was "conferred." Dell is a producer of computers, and the press release announcing that the order had been accepted for public comment stated that Dell restricted competition "in the personal computer industry." Perhaps the majority actually does mean to find that Dell has market power in the personal computer industry; if so, some explanation is needed to make the finding more plausible, and an allegation to that effect in the complaint would seem to be in order.

The fourth allegation in the complaint, that Dell "chilled" willingness to participate in standards-setting, is particularly odd. Under the Dell order, a participant in a VESA-like standards process would be well advised not only to review its patent portfolio carefully

[10] Market power is the ability to raise prices above the competitive level. *NCAA v. Board of Regents*, 468 U.S. 85, 109 n.38 (1984).

before permitting its voting representative to sign a ballot, but if it has valuable intellectual property to protect, it might well consider not voting at all. The danger that voting on a standard might result in the loss of a company's intellectual property rights may dissuade some firms from participating in the standards-setting process in the first place.[11] That would be a curious result indeed for an order resting on a complaint that alleges, as an anticompetitive effect, that "[w]illingness to participate in industry standard-setting efforts ha[s] been chilled."

IV. REMEDY

The relief imposed by the majority seems unnecessarily harsh. The order prohibits Dell from enforcing its '481 patent against any firm using the patented technology to implement the VL-bus design for the life of the patent. In effect, the order requires Dell to provide a global royalty-free license to any firm that may have used the technology in the past, or may use it in the future, to implement the standard. The explanatory statement of the majority indicates that the relief is "carefully limited to the facts of the case," because VESA's disclosure requirement "creates an expectation by its members" that intellectual property rights will be disclosed. Statement at 3. This emphasis on an "expectation" sounds like a private patent estoppel case, not a competition case brought in the interest of the public. In any event, the complaint did not allege an "expectation" by VESA members as an element of the offense or of the competitive effects.

The private remedy of patent estoppel should suffice to remedy expectations based on Dell's conduct by barring inappropriate enforcement of a patent claim. The three elements of patent estoppel are: (1) a misleading communication by way of words, conduct or silence by a knowledgeable patentee; (2) reliance by another party on the communication; and (3) material prejudice to the other party if the patent holder is allowed to proceed. *E.g., A.C. Aukerman Co. v. R.L. Chaides Construction Co.*, 960 F.2d 1020, 1041-43 (Fed. Cir. 1992). If Dell's vote with its accompanying certification was misleading, and if another VESA member relied on the certification to its material prejudice, then the other firm may assert estoppel as a

[11] Several of the comments the Commission received assert that the Dell order will chill participation in the standards-setting process.

bar to any claims under the patent. The Commission order, however, bars Dell from enforcing its patent without regard to whether the infringer relied on the miscommunication or whether the infringer would be materially prejudiced. If, as the majority suggests in its explanatory statement, an "expectation" is a critical underpinning of the remedy, it seems curious to bar enforcement of the patent without some better proof of expectation.

The anticompetitive effects alleged in the complaint were all highly ephemeral; they involved a delay in industry acceptance of the VL-bus design standard, avoidance of systems using the standard, and increased costs due to uncertainty about acceptance of the VL-bus and development of competing bus designs. As a practical matter, a Commission order, entered in 1996, can do little to correct any uncertainty and delay that might have occurred in early 1993, when Dell asserted the claim. Presumably, companies have long since decided what bus design to select. In a "precedent-setting" matter such as this one, the Commission should attempt to identify the relevant competitive interests and strike a fair balance among them. An order limiting enforcement of an undisclosed patent for an ample period of time to permit modification of the standard to eliminate the patent conflict would be less draconian than the majority's permanent ban on enforcement and seems more proportional to the alleged harm.

V. PUBLIC COMMENTS

Eleven thoughtful comments reflecting diverse viewpoints in the business community have been received. The comments contain a wealth of information and analysis, and I commend them in their entirety to anyone with an interest in this area. The comments reflect an unusual degree of concern and apprehension about the implications of the order. Several of the nation's most significant standards-setting organizations have written to state their opposition to the broad implications of the order and its possible chilling effect on the participation of firms with broad patent portfolios in the standards-setting process. VESA and a few other groups, however, support this or an even stronger order.

Seven commenters strongly opposed the imposition on participants in the standards-setting process of any duty to identify and disclose patents. The American National Standards Institute

("ANSI"), an umbrella organization that accredits standards development organizations, supported liability for failure to disclose relevant patents only insofar as a firm "intentionally and deliberately fails to disclose . . . in an attempt to gain an unfair advantage." ANSI opposed the imposition of any affirmative duty to identify and disclose patents, because it would chill participation in standards development. ANSI also expressed concern that the Dell remedy, which could be characterized as forfeiture of patent rights or mandatory licensing, might harm the United States' position in international negotiations.[12] Five standards development organizations and an intellectual property law bar association filed comments that supported all or parts of ANSI's comment.

The American Intellectual Property Law Association ("AIPLA"), a national bar association of intellectual property attorneys, supported the reconciliation of the rights of standards users and owners of intellectual property as set forth in ANSI's patent policy.[13] AIPLA agreed with ANSI that unless limited to egregious facts, the Dell order will discourage industry cooperation in standards-setting.[14] Because patent disputes in the standards as in other contexts are highly fact specific, AIPLA said that private patent estoppel litigation is a better forum than a Section 5 proceeding to resolve such disputes. AIPLA noted that the Dell remedy constitutes a forfeiture of patent rights or compulsory licensing and said that the remedy is too drastic and inappropriate for many situations.

Several other commenters also endorsed a standard that requires a showing of intent, including the Electronic Industries Association ("EIA"), the Telecommunications Industry Association ("TIA"), the Standards Board of the Institute of Electrical and Electronic Engineers ("IEEE"), and the Alliance for Telecommunications Industry Solutions, Inc. (ATIS).[15]

ANSI addressed the dangers of imposing liability on the basis of an unintentional failure to disclose a patent or of imposing an affirmative obligation to search patent portfolios. For firms with

[12] The majority has not addressed this concern.

[13] *See* p. 17, below.

[14] If limited to egregious facts, the order could not apply to this case, which does not involve intent.

[15] ATIS's Committee T1 develops standards for the national telecommunications network. Committee T1 ballots, like VESA ballots, request disclosure of relevant patents "based on the best knowledge at the time of the T1 member casting the ballot." It is significant that ATIS rejected a stricter standard requiring disclosure because that would place an "enormous and unreasonable" burden on participants.

hundreds of employees involved in standards-setting and with tens of thousands of patents, an affirmative obligation to search for patents would present the choice of either avoiding standards-setting or placing their intellectual property at risk. Several other commenters expressed the same concern. The EIA and TIA warned of a "profound chilling effect" on standards-making if Dell is extended to situations of negligent failure to disclose. The Standards Board of the IEEE similarly commented that if "a 'disclose it or lose it' approach becomes the test, the very robust standards-setting activities in industry today will be quickly truncated to a minimal level." Others expressed similar concerns.

The ANSI patent policy reconciles the interests of patent owners with the users of standards. The policy provides that the patent holder must supply ANSI with either:

1. A general disclaimer to the effect that the patent holder does not hold and does not anticipate holding any invention the use of which would be required for, compliance with the proposed standard, or

2. A written assurance that either:

a) A license will be made available to applicants desiring to utilize the license for the purpose of implementing the standard without compensation to the patent holder, or

b) A license will be made available to applicants under reasonable terms and conditions that are demonstrably free of unfair discrimination.[16]

ANSI specifically anticipates and addresses the situation in which intellectual property that bears on a standard is discovered after the standard is adopted. "Under ANSI's patent policy, the patent holder is then required to provide the same assurances to ANSI that are required in situations where patents are known to exist prior to the standard's approval. If those assurances are not forthcoming or if potential users can show that the policy is not being followed, the standard may be withdrawn through the appeals process."[17] Several other commenters follow this ANSI policy. Indeed, the patent policy

[16] ANSI comment at 6-7.

[17] *Id.* at 7.

attached to the VESA comment appears for all practical purposes to be like the ANSI policy.

Two commenters took issue with the statement quoted in the press release announcing the consent order for public comment that "[o]pen, industry-wide standards also benefit consumers because they can be used by everyone without cost." The ITI and the Standards Board of the IEEE disagreed with the view that open standards are standards without cost, observing that the common meaning of an open standard includes standards that incorporate patented technology licensed by the patent owner. It appears from the explanations in the comments that the statement in the Commission's press release was simply a mistake based on a lack of knowledge, rather than an attempt to effect a major change in the way business is done, with the attendant costs and dangers of such a change. The primary significance of this issue is that it illustrates that the Commission does not have a great deal of experience in this area and should tread carefully.

Four comments, including one anonymous comment, supported the imposition of a duty to search for and disclose patents during the standards-setting process. The American Committee for Interoperable Systems ("ACIS") argued that it is appropriate to place the burden to search for patent/standard conflicts on the patent holder because the patent holder is in the better position to determine if its patent reads on the standard. ACIS downplayed the concern about chilling participation in the development of standards and noted that participation in standards-setting is motivated by commercial self-interest and "is not a form of charitable or community service."[18] Bay Networks, Inc., also appears to support a strict liability standard. It would require firms participating in standards-setting to identify and disclose intellectual property rights or waive any such rights needed to practice the standard. Bay Networks argued that a requirement to license on reasonable and nondiscriminatory terms may not be sufficient, because firms may disagree about the meaning of these terms.

[18] One of the four comments supporting a more rigorous duty to search for and disclose patents was filed anonymously. As the Court of Appeals for the District of Columbia Circuit has observed, anonymous appearances raise "profound questions of fundamental fairness and perhaps even due process." *United States v. Microsoft Corp.*, 1995-1 Trade Cas. ¶ 71,027 at 74,828 (D.C. Cir. 1995). Nevertheless, I note that the anonymous commenter proposed "an affirmative duty . . . to conduct a search using reasonably diligent efforts to uncover any relevant patents."

VESA favored imposition of a "general duty of members of standards associations to disclose the existence of intellectual property rights (or potential rights) that the member is aware of . . ." In VESA's view, the disclosure duty should not be limited to the engineers involved in the standards-setting process. Instead, VESA favors "implying a duty to disclose on the organization that is participating in the standard-setting activities, as opposed to simply limiting that duty to the engineers involved." VESA would put the burden of showing good faith on the party "belatedly" asserting a patent or other intellectual property rights. The VESA Board Policy for dealing with proprietary standards is very like ANSI's patent policy, which is quoted at pages 6-7 of the ANSI comment.[19] It is not clear why the VESA patent policy was not sufficient to deal with the facts of this case.

Several comments applauded Commission action to halt intentional misrepresentations or intentional abuse of the standards process. These comments appear to be based on the erroneous assumption that the Commission's complaint against Dell alleges knowing, intentional deception of VESA, and they do not address the specific question of conduct that is not based on an allegation of intent or knowing misrepresentation.

VI. THE STATEMENT OF THE MAJORITY

"Because the proposed order generated considerable public comment" and in an attempt "to improve understanding of this enforcement action," the majority has issued an explanatory statement of its decision. Statement at 1. Unfortunately, the statement does not clarify the decision; if anything, it sows greater confusion. The majority attempts to confine the decision to "the

[19] The majority attempts to distinguish VESA's patent policy from ANSI's patent policy on the ground that VESA's certification "create[s] an expectation that there is no conflicting intellectual property." Statement at 3, n.6. The majority seems to confuse VESA's ballot with VESA Board Policy No. 109, which like the ANSI patent policy, does not provide for "certification" regarding intellectual property. Like VESA, many ANSI-accredited standards-setting organizations request disclosure of intellectual property conflicts. For example, ATIS commented that its ballots "request the disclosure of patents relevant to the matter being balloted based on the best knowledge at the time of the T1 member casting the ballot." ATIS Comment at 3-4. In the EIA and TIA, "[c]ommittee and subcommittee chairs ask during the meetings whether any parties are aware of any patents that relate to the contributions under discussion." EIA/TIA Comment at 3. Under the majority's rationale, ANSI-accredited standards-setting organizations that inquired about patent conflicts would thereby create "expectations" that should result in forfeiture of subsequently discovered intellectual property rights. It appears that their concern over this very point is what prompted those organizations to comment on the order.

limited circumstances presented by this case," but those are precisely the circumstances that necessitate setting a new legal standard in order to find Dell's conduct unlawful. The only unique aspect of the case is the majority's use for the first time of a legal standard that omits the element of intent, a standard that, as the commenters recognized, will have widespread applicability.

The majority in its statement alleges facts that are not contained in the complaint that is part of the settlement to which Dell has agreed. To explain this unusual procedure, the majority cites Commission Rule 2.34, 16 CFR 2.34, which provides that when the Commission seeks public comment on a consent order, it "will make available an explanation of the . . . order . . . and any other information which it deems helpful in assisting interested persons to understand the terms of the order." Statement at 4, n.9. The Analysis To Aid Public Comment, to which Rule 2.34 refers, does not become part of the Commission's permanent record of the case, and usually contains the following disclaimer:[20]

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

FTC Operating Manual, Ch. 6, Illustration 7. The Commission's Operating Manual, although not binding, provides:

> The purpose of [the Analysis To Aid Public Comment] is to advise the public concerning the nature of the law violations alleged and the remedies or other basis for disposition and settlement. Any substantive statement must be based upon the agreement documents, although paraphrasing in a few words the substance of a long provision is often appropriate. The focus of this analysis is upon the public impact and anticipated effects, including competitive effects, of the proposed settlement.[21]

FTC Operating Manual, Ch. 6.10.6 (emphasis added). It is one thing for the majority to provide information explaining an order; it is quite another to attempt under cover of Rule 2.34 to suggest support for allegations necessary to establish liability, such as intent or market power, that are entirely missing from the complaint. A more

[20] Inexplicably, the disclaimer was omitted in this case.

[21] This is not to say that the majority can never say anything beyond what is appropriate for inclusion in the Analysis To Aid Public Comment, but the majority should keep in mind that the consent agreement, within its four corners, contains the final decision and order of the Commission. If the majority wants to amend its decision, the proper course is to amend the decisional document.

important reference in this regard would seem to be Commission Rule 3.11, 16 CFR 3.11, which provides that a Commission complaint "shall contain . . . a clear and concise factual statement sufficient to inform each respondent with reasonable definiteness of the type of acts or practices alleged to be a violation of law . . ."[22]

Setting aside for the moment the process questions raised by alleging new facts in a separate statement, the new factual allegations raise even more questions about the basis for liability in this case. For example, the majority says in its statement that VESA has a "strong preference for adopting standards that do not include proprietary technology." Statement at 1. This assertion, perhaps included to heighten some sense of transgression, adds a questionable spin in characterizing VESA's policy. In fact, VESA recognizes that a standard sometimes will include proprietary technology and that a proprietary interest in a proposed standard will not necessarily preclude adoption of such a standard. The comment filed on VESA's behalf by counsel makes this point, and the VESA Patent Policy (Board Policy No. 109) attached to VESA's comment expressly states in the first paragraph: There is no objection in principle to a VESA proposal or standard that includes the use of patented technology if it is justified for technical reasons." (Emphasis added.) VESA Board Policy No. 109 spells out clearly how it will deal with a standard that requires the use of patented technology, and its procedure appears similar in significant respects to the policies of other standards organizations. On examination, this new factual assertion contributes nothing to a theory of liability.

In its statement, the majority also asserts, for the first time, that if VESA had been informed of Dell's patent during the certification process, VESA "would have implemented a different non-proprietary design." Statement at 1. The majority's assertion is either a throw-away line, or it opens a pandora's box of difficult technical questions. The complaint does not allege that other equally useful and valuable technologies for implementing the standard were available, and it does not allege that VESA would have adopted a different approach had it known of the Dell patent. The majority also offers the slightly different statement that "had VESA known of the Dell patent, it could have chosen an equally effective, nonproprietary standard." Statement at 2, n.2. Well, maybe. It is possible, as the majority

[22] To return to my initial observation about the case, the complaint against Dell does not allege a violation under any established theory of law. *See* p. 1, above.

suggests, that Dell's invention was one of an array of equally useful and valuable technical alternatives; if so, VESA might have selected an alternative without compromising the standard. It is also possible, however, that Dell's product was technically superior or more efficient, and if so, that a standards-setter might prefer the patented design, even though it would involve the payment of royalties to the inventor. We do not know and can only speculate.

The majority's reliance on supposed technological alternatives is troubling. We have not reviewed the technical merits of Dell's patent vis-a-vis the alternatives, but, in any event, I seriously question whether Section 5 liability should be based on such an assessment. Antitrust enforcement agencies are ill suited to evaluating the technical merits and economic value of patents.

A third new factual allegation is the majority's assertion that "Dell certified [to VESA] that it had no [conflicting] intellectual property rights." Statement at 1. Paragraph seven of the complaint, however, attributes the certification to "a Dell representative." This difference between "Dell" and "a Dell representative" is more significant than at first may appear. The complaint allegations regarding the voting certification are carefully confined to Dell's voting representative.[23] The majority, however, with this statement attributes Dell's corporate wide knowledge, which presumably is all inclusive, to its voting representative. This in turn would mean that the voting representative had constructive knowledge of the '481 patent at the time he signed the certification. In other words, by substituting "Dell" for "a Dell representative" with respect to the certification, the majority suggests that Dell intentionally misled VESA.[24] On reflection, it is obvious why Dell did not agree to a complaint allegation like that contained in the majority's statement. This is the first hint in the statement that the majority now might like to suggest that this case does involve intentional conduct.

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[23] The majority also says that "Dell's voting representative made his certification on behalf of the corporation," because he was acting in his capacity as an agent. Statement at 1, n.1. This discussion assumes the majority's conclusion. No one contests the validity of the vote cast by Dell's voting representative. Instead, the question is whether, under Section 5 of the FTC Act, the knowledge of the corporation is imputed to the voting representative with respect to this particular certification. The majority's discussion of agency law assumes a strict liability standard inconsistent with its assertion elsewhere (Statement at 3) that we should not infer from this case a general duty to search. It is impossible to discern on which of the majority's inconsistent statements we should rely. If footnote 1 in the majority's statement accurately reflects the majority's position, surely we should alert the press, because this case is precedent-setting, indeed.

[24] *See* discussion at 7, n.6, above.

A fourth new factual allegation in the majority statement is that "Dell failed to act in good faith to identify and disclose patent conflicts." Statement at 2. This assertion seems plainly to be responsive to the concerns expressed by the commenters about abandoning the intent standard, and it brings us directly back to the issue on which this case turns. The statement that Dell did not act in good faith seems to suggest that Dell's conduct was intentional. Having mentioned an absence of good faith, the majority adds that the decision in this case "should not be read to impose a general duty to search." Statement at 3. It would appear that the majority, seeking to assuage the commenters, hopes to suggest that it has not changed the traditional standard based on intent. Unfortunately, there are three reasons why this cannot be true. First, this is a consent order and Dell did not agree to a complaint allegation that it intentionally misled anyone. For a majority of the Commission now to assert in a statement separate from the complaint and order that there was intent would raise serious questions of fundamental fairness.[25]

The second reason we know that the majority has not employed traditional analysis lies in the express observation that this is the "type of case, in which the legal and economic theories are somewhat novel." Statement at 4. The third reason we know that the majority has not employed a traditional analysis comes from the single sentence that articulates the majority's new standard: the majority asserts that "there is reason to believe that Dell's failure to disclose the patent was not inadvertent." Statement at 3 (emphasis added). Hmmmm. . . . The "not inadvertent" standard is not easy to place. If Dell has not consented to an allegation of intent and if this case is "somewhat novel," then "not inadvertent" surely does not mean intentional. Therefore, "not inadvertent" apparently means something that lies somewhere between avoiding intentional misconduct and the general duty to search that the majority specifically rejects.

The choice of the phrase "not inadvertent" seems carefully crafted not to say that Dell acted knowingly or intentionally. "Not inadvertent" is not a familiar legal standard of conduct. Negligence is the legal characterization of conduct that seems closest to the standard of the majority. Negligence, however, implies a violation of some duty of care, presumably in this case a duty to identify and disclose patents. But that brings us back again to the general duty to

[25] To state the obvious, if intent is required to establish liability, the Commission has only two choices, either to dismiss the case or to renegotiate the consent agreement with Dell.

search that the majority rejects. Unfortunately, the majority does not enlighten us further, except to conclude that its decision "strikes the right balance." I beg to differ.

I do not favor a departure from the usual requirement that intent must be shown to establish liability. But looking beyond the merits, the decision of the majority is still faulty. The majority fails to articulate its standard in any comprehensible way, much less to explain why it is appropriate in the name of competition to upset a standards-setting process that seems to be well established and working well. When the Commission issues an order based on an adjudicative record, it is held accountable for its decision through the process of judicial review. When the Commission issues a consent order, it must hold itself accountable in the public interest by addressing the issues in a serious and rigorous manner. In carrying out this fundamental responsibility, the Commission has failed even to begin.

I dissent.

IN THE MATTER OF

BENCKISER CONSUMER PRODUCTS, INC.

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

Docket C-3659. Complaint, May 22, 1996--Decision, May 22, 1996

This consent order prohibits, among other things, the Connecticut-based company from misrepresenting that a portion of the revenue from the sale of any household cleaning product is donated to any organization. If the respondent chooses to make such claims in the future, the consent order requires the respondent to clearly and prominently disclose the method of determining the amount of the donation.

Appearances

For the Commission: *Thomas B. Carter, James R. Golder* and *Gary D. Kennedy*.

For the respondent: *Herbert C. Ross, Oppenheimer, Wolff & Donnelly*, New York, N.Y.

COMPLAINT

The Federal Trade Commission, having reason to believe that Benckiser Consumer Products, 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 Benckiser Consumer Products, Inc. is a Delaware corporation with its principal office or place of business at Corporate Centre I, 55 Federal Road, Danbury, Connecticut.

PAR. 2. Respondent has advertised, labeled, offered for sale, sold, and distributed household cleaning products, under the tradename EarthRite, and other products to the public.

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

PAR. 4. Respondent has disseminated or has caused to be disseminated advertisements, including product hangtags, for its EarthRite products, which include the following statement:

One percent of EarthRite's proceeds are donated to non-profit organizations working to restore and preserve our natural environment.

PAR. 5. Through the use of the statement contained in the advertisements referred to in paragraph four, including but not necessarily limited to the product hangtag, respondent has represented, directly or by implication, that respondent donates some portion of its revenue from the sale of EarthRite products to non-profit environmental organizations.

PAR. 6. In truth and in fact, respondent has not donated any portion of its revenue from the sale of EarthRite products to non-profit environmental organizations. Therefore, the representation set forth in paragraph five was, and is, false and misleading.

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

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

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

DECISION AND ORDER

The Federal Trade Commission ("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 Dallas Regional Office 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; 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 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 Benckiser Consumer Products, 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 Corporate Centre I, 55 Federal Road, in the City of Danbury, State of Connecticut.

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 respondent Benckiser Consumer Products, Inc., a corporation, its successors and assigns, and its officers, representatives, agents, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, labeling, promotion, offering for sale, sale, or

distribution of any household 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 any portion of the revenues from the sale of such household cleaning product is donated to any organization; provided, however, respondent will not be in violation of this Part I if it truthfully represents that a portion of the revenues from the sale of such household cleaning product is donated to an organization and discloses, clearly, prominently, and in close proximity to such representation, the method of determining the amount of such donation. A disclosure shall be deemed to be "in close proximity" to a representation if there is a clear and conspicuous cross-reference to the disclosure. The use of an asterisk or other symbol shall not constitute a clear and conspicuous cross-reference. A cross-reference shall be deemed clear and conspicuous if it is of sufficient prominence to be readily noticeable and readable by the prospective purchaser when examining the advertisement or part of the package on which the representation appears.

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 representation; and

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

III.

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, or employees engaged in the preparation and

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.

VI.

It is further ordered, That this order will terminate on May 22, 2016, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any paragraph in this order that terminates in less than twenty (20) 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

THE VONS COMPANIES, INC., 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-3233. Consent Order, Aug. 29, 1988--Modifying Order, May 24, 1996

This order reopens a 1988 consent order that settled allegations that The Vons Companies' ("Vons") acquisition of three Safeway divisions with stores in southern California and Nevada violated federal antitrust laws. This order modifies the consent order by replacing the 1988 order's prior-approval provision for acquisitions of supermarkets in Las Vegas, Nevada, or in numerous specified cities and towns in California, with a prior-notice provision for such acquisitions.

ORDER REOPENING AND MODIFYING ORDER

On November 15, 1995, The Vons Companies, Inc. ("Vons" or "respondent"), one of the respondents named in the consent order issued by the Commission on August 29, 1988, in Docket No. C-3233 ("order"), filed its Petition To Reopen and Modify Consent Orders ("Petition") in this matter.[1] Vons asks that the Commission reopen and modify the prior approval requirements of the order 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 on June 21, 1995 ("Prior Approval Policy Statement" or "Statement").[2] The order requires Vons to seek the prior approval of the Commission to acquire any retail grocery store in a number of California cities and towns and in the city of Las Vegas, Nevada.[3] In addition, paragraph IV(B) of the order contains a proviso that requires Vons to give the Commission 30-days' prior

[1] In its Petition, Vons also requested that the order in Docket No. C-3391 be reopened and similarly modified. The Commission has determined to deny Vons' Petition as to that order and has notified Vons by letter as to the reasons for its denial.

[2] 60 Fed. Reg. 39745-47 (Aug. 3, 1995); 4 Trade Reg. Rep. (CCH) ¶ 13,241.

[3] Although SSI Associates, L.P. ("SSI") and Safeway Stores, Incorporated ("Safeway"), a subsidiary of SSI, are also respondents, the order's prior approval provisions only apply to Vons. Order at ¶ IV(A) and ¶ IV(B).

written notice of certain acquisitions. The Petition further requests that the Commission clarify that "prior written notice" under paragraph IV(B) means a letter to the Secretary of the Commission and does not mean Hart-Scott-Rodino type notice and wait procedures.[4] The thirty-day public comment period on Vons' Petition expired on January 8, 1996. 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, 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.*

The Commission stated that it will continue to fashion remedies as needed in the public interest, including ordering narrow prior approval or prior notification requirements in certain limited 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. 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.

[4] Petition at 1 and 3.

The Commission also announced, in its Prior Approval Policy Statement, 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 complaint in this matter ("complaint") alleged that Vons, SSI and Safeway had entered into an agreement, that, 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, by substantially lessening competition in the retail sale and distribution of food and grocery items in retail grocery stores in certain localized markets in California.[5]

The complaint alleged that a substantial lessening of competition would result from the elimination of direct competition between Vons and Safeway in the relevant markets; the increase in the likelihood that Vons would unilaterally exercise market power in the relevant markets; and the increase in concentration and in the likelihood of collusion in certain already highly concentrated markets.

The presumption is that setting aside the prior approval requirements in this order is in the public interest. However, there has been no showing that the competitive conditions that gave rise to the complaint and the order no longer exist. Moreover, the relevant markets are localized and the acquisition price of a retail grocery store could fall well below the HSR size-of-transaction threshold. Therefore, the record evidences a credible risk that Vons could engage in future anticompetitive acquisitions that would 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 paragraphs IV(A) and IV(B) of the order to substitute a prior notification requirement for the prior approval requirement.[6]

[5] The relevant sections of the United States are the following areas in California: Barstow; Yucca Valley; Camarillo; South San Diego County; Santa Clarita Valley; Coachella Valley; Santa Barbara; Montecito; and Goleta. Complaint ¶ 11.

[6] Vons has stated that it has no objection to the substitution of prior notification provisions for the prior approval provisions of the order.

In addition to a prior approval requirement, paragraph IV(B) contains a proviso which requires Vons to give 30-days' written notice to the Commission prior to completing certain acquisitions. Such notice is not required to be given in accordance with the "Prior Notification to the Commission" procedure (as defined below) that is a part of the order, as now modified. Rather, the Commission's Rules of Practice and Procedure prescribe, and continue to prescribe, the method by which Vons must file such notice with the Commission. *See* 16 CFR 4.2 & 4.4. Therefore, the order, as modified, does not require Vons to follow the "Prior Notification to the Commission" procedure when providing notice to the Commission in those circumstances covered by the order's paragraph IV(B) proviso prior notice requirement.

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

It is further ordered, That paragraph IV(A) of the order be, and it hereby is, modified, as of the effective date of this order, to read, as follows:

(A) For a period commencing on the date this order becomes final and continuing for ten (10) years thereafter, Vons shall cease and desist from acquiring, without Prior Notification to the Commission (as defined below), 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 (6) months of the date of the offer by Vons 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:

Las Vegas, Nevada
Bakersfield, California
Santa Clarita, California
Camarillo, California
Ventura, California
Thousand Oaks, California
Victorville, California
Barstow, California
Carlsbad, California
Vista, California
Escondido, California
Poway, California
Rancho Bernardo, California
South San Diego County, California (that portion of San Diego County, California that

Coachella Valley, California (an area including the cities and towns of Palm Springs, Palm Desert, Indian Wells, Indio, Cathedral City, Rancho Mirage, La Quinta, and Coachella)
Yucca Valley, California
Solana Beach, California
is south of the Miramar Naval Air Station)
Santa Barbara, Montecito and Goleta, California
Palmdale, California
Lancaster, California
Simi Valley, California
Moreno Valley, California

Provided, however, that this paragraph IV(A) shall not be deemed to require Prior Notification to the Commission for the construction of new facilities by Vons or the purchase or lease by Vons of a facility that has not been operated as a retail grocery store at any time during the six (6) month period immediately prior to the purchase or lease by Vons in those locations.

"Prior Notification to the Commission" required by paragraphs IV(A) and IV(B) 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 Form"), 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 Vons and not of any other party to the transaction. Vons shall provide the Notification Form 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, Vons 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, Vons shall not be required to provide Prior Notification to the Commission pursuant to 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.

It is further ordered, That paragraph IV(B) of the order be, and it hereby is, modified, as of the effective date of this order, to read, as follows:

(B) For a period commencing on the date this order becomes final and continuing for ten (10) years thereafter, Vons shall cease and desist from acquiring, without Prior Notification to the Commission (as defined in paragraph IV(A)), 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 (6) 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 any retail grocery store in: (1) the city of San Bernardino, California; or (2) the city of Riverside, California; or (3) the counties of Los Angeles and Orange, California; provided, however, that upon thirty (30) days prior written notice to the Commission, Vons may acquire, directly or indirectly, through subsidiaries or otherwise, any such retail grocery stores, so long as, in any twelve (12) month period, commencing on the date this order becomes final and continuing thereafter for ten (10) years, the number of such retail grocery stores acquired, directly or indirectly, does not exceed: (1) two in the city of San Bernardino, California; (2) two in the city of Riverside, California; and (3) ten in the counties of Los Angeles and Orange, California. Provided further, however, that these prohibitions shall not relate to the construction of new facilities by Vons or the purchase or lease by Vons of a facility that was not operated as a retail grocery store at any time during the six (6) month period immediately prior to the purchase or lease by Vons in those locations.

IN THE MATTER OF

N.W. AYER & SON, INC.

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

Docket C-3660. Complaint, May 31, 1996--Decision, May 31, 1996

This consent order prohibits, among other things, the New York-based advertising agency from misrepresenting the absolute or comparative amount of cholesterol, total fat, saturated fat, or any other fatty acid in eggs or in any meat, dairy, or poultry product, and from misrepresenting the existence or results of any test or study.

Appearances

For the Commission: *Theodore H. Hoppock.*

For the respondent: *Bertrand M. Lanchner*, in-house counsel, New York, N.Y.

COMPLAINT

The Federal Trade Commission, having reason to believe that N.W. Ayer & Son, Inc. d/b/a NW Ayer, Inc. ("respondent"), a corporation, has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent is a Delaware corporation with its offices and principal place of business at 825 Eighth Avenue, New York, New York.

PAR. 2. Respondent, at all times relevant to this complaint, was an advertising agency of Eggland's Best, Inc., and prepared and disseminated advertisements to promote the sale of Eggland's Best eggs and other egg products to consumers. These products are "foods" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

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

PAR. 4. Respondent has disseminated or has prepared for dissemination advertisements for Eggland's Best eggs, including but not necessarily limited to the attached Exhibits A-H. With the exception of Exhibit H, these advertisements were disseminated or prepared for dissemination by respondent following the Commission's issuance of the final consent order in Eggland's Best, Inc., Docket No. C-3520 (Aug. 15, 1994). These advertisements contain the following statements:

A. AUDIO: Imagine eating delicious, real, whole eggs without raising your serum cholesterol. People did. In clinical tests of Eggland's Best Eggs, they ate a dozen a week while keeping within the limits of the Surgeon General's low-fat diet. And though each egg contained 213 milligrams of cholesterol, 71% of the FDA's maximum daily value, their serum cholesterol didn't go up. Surprised? Try it yourself. Eggland's Best. You can eat real eggs again.
VIDEO SUPERSCRIPTS (running simultaneously with audio portion):
REAL WHOLE EGGS
WITHOUT RAISING CHOLESTEROL
CLINICAL TESTS
LOW-FAT DIET
213 MG. CHOLESTEROL
(71% MAXIMUM DAILY VALUE)
CHOLESTEROL DIDN'T GO UP
YOU CAN EAT REAL EGGS AGAIN.
Depictions of eggs being cooked in different ways, and of Eggland's Best carton.
[Exhibit A: "Supers" 30-Second Television]

B. AUDIO: Imagine eating delicious, real, whole eggs . . . and not raising your serum cholesterol. People did. In two clinical tests for Eggland's Best eggs. They ate a dozen a week while keeping within the limits of the Surgeon General's low-fat diet. Each egg contained the usual 213 milligrams of cholesterol, 71% of the FDA's maximum Daily Value, yet their serum cholesterol didn't go up. (Surprised?) Try it yourself. Eggland's Best. Limit your fat and enjoy real eggs again.
VIDEO SUPERSCRIPTS (similar to Exhibit A).
Depictions (similar to Exhibit A).
[Exhibit B: "Supers" Revised 30-Second Television]

C. If you love eggs but are concerned about cholesterol, you'll be interested in clinical tests done here at the Medical College of Pennsylvania. In these tests, people ate a dozen eggs a week for six weeks, and showed no increase in their serum cholesterol. The eggs tested here were Eggland's Best. Fresh, real, whole eggs, each with the usual 213 mg. of cholesterol, or 71% of the FDA's maximum daily value. Yet the people's cholesterol didn't go up. How? They ate these eggs as part of the Surgeon General's low-fat diet. Keeping within the limits of this diet,

they were able to enjoy what some of them hadn't in a long time. Fresh, delicious, real eggs. And since the eggs were Eggland's Best, they also enjoyed the benefit of over six times more Vitamin E. Eggland's Best come from hens fed a special all-vegetarian diet so unique it's patented. So limit your fat and enjoy your eggs. Eggland's Best. You can eat real eggs again.
[Exhibit C: "MCP/Tests" 60-Second Radio]

D. You'd love a thick, juicy steak . . . but you eat fish. You'd love two eggs over easy. . . and guess what? You can have them. Even if you're concerned about cholesterol. Just do what people did in clinical tests of Eggland's Best eggs. One . . . follow the low-fat diet recommended by the Surgeon General. And two . . . keeping within the fat limits of this diet, eat as many as 12 Eggland's Best eggs a week. The people tested did. And after six weeks of enjoying real, whole eggs with the usual 213 mg. of cholesterol each, or 71% of the FDA's maximum daily value, guess what? They showed no increase in their serum cholesterol! And since the eggs were Eggland's Best, they also enjoyed the benefit of over six times more Vitamin E. Eggland's Best eggs come from hens fed a special all-vegetarian diet so unique its patented. So limit your fat and enjoy your eggs. Eggland's Best. You can eat real eggs again.
[Exhibit D: "Juicy Steak" 60-Second Radio]

E. Tests show how you can eat real eggs again. (Even if you're concerned about cholesterol.) [Large, Bold Headline]
In clinical tests, people ate a dozen Eggland's Best eggs a week and showed no increase in their serum cholesterol.
How? Simply by enjoying these fresh, delicious eggs while staying within the fat limits recommended by the Surgeon General for all adults. Namely, a diet with less than 10% saturated fat, 30% total fat.
What makes the test results such astonishing news is that the eggs they ate were real, whole eggs. With the usual 213 mg. of cholesterol per egg, or 71% of the FDA's maximum Daily Value.
Imagine! A way to enjoy real, whole eggs again. And not increase your serum cholesterol!
To be sure you're getting the same fresh, delicious eggs used in the clinical tests, insist on Eggland's Best.
Then just limit you fat and enjoy your eggs. [Text]
Eggland's Best. You can eat real eggs again. [Large, Bold Tagline]
[Exhibit E: "Tests Show" Print FSI]

F. Tests now show how you can eat real eggs again. (Even if you're concerned about cholesterol.) [Large, Bold Headline]
In two clinical tests, people ate a dozen Eggland's Best a week and showed no increase in their serum cholesterol.
How? Simply by enjoying these fresh, delicious eggs while staying within the fat limits recommended by the Surgeon General for all adults. Namely, a diet with less than 10% saturated fat, 30% total fat.
And what may surprise you is that the eggs they ate were real, whole eggs. With the usual 213 mg. of cholesterol per egg, or 71% of the FDA's maximum Daily Value.
Imagine! A way to enjoy real, whole eggs again and not increase your serum cholesterol.

What are you waiting for? Use the coupon below and save 50¢. [Text]
EGGLAND'S BEST. Limit Your Fat And Enjoy Real Eggs Again. [Large, Bold Tagline]
[Exhibit F: "Tests Now Show" Revised Print FSI]

G. Tests show how you can eat real eggs again. (Even if you're concerned about cholesterol.) [Large, Bold Headline]
In clinical tests, people ate a dozen Eggland's Best eggs a week, and showed no increase in their serum cholesterol.
How? By including the eggs within the fat limits recommended by the Surgeon General for all adults. Namely, a diet with less than 10% saturated fat, 30% total fat.
And we're talking about fresh, delicious, real whole eggs! With the usual 213 mg. of cholesterol, or 71% of the FDA's maximum Daily Value.
Imagine a way to enjoy real whole eggs and not increase you serum cholesterol.
Eggland's Best. Limit your fat and enjoy real eggs again. [Large, Bold Tagline]
[Exhibit G: "Tests show how" half page Print FSI]

H. It's simple. When the hens eat better, you eat better, too. [Large, Bold Headline]
Introducing Eggland's Best. Premium eggs from hens fed a premium diet.
Unlike ordinary eggs, Eggland's Best are laid by hens that eat no animal fat. Just lots of healthy grains, extra Vitamin E and a little canola oil -- the oil lowest in saturated fat.[Text]
[Exhibit H: "It's Simple" Print FSI]

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-G, respondent has represented, directly or by implication, that:

A. Eating Eggland's Best eggs will not increase serum cholesterol.

B. Eating Eggland's Best eggs will not increase serum cholesterol as much as eating ordinary eggs.

PAR. 6. Through the use of the statements contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits A-G, respondent has represented, directly or by implication, that at the time it made the representations set forth in paragraph five, respondent possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 7. In truth and in fact, at the time it made the representations set forth in paragraph five, respondent did not possess and rely upon a reasonable basis that substantiated such

representations. Therefore, the representation set forth in paragraph six was, and is, false and misleading.

PAR. 8. Through the use of the statements contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits A-G, respondent has represented, directly or by implication, that clinical studies have proven that adding twelve Eggland's Best eggs per week to a low-fat diet does not increase serum cholesterol.

PAR. 9. In truth and in fact, clinical studies have not proven that adding twelve Eggland's Best eggs per week to a low-fat diet does not increase serum cholesterol. Therefore, the representation set forth in paragraph eight was, and is, false and misleading.

PAR. 10. Through the use of the statements contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisement attached as Exhibit H, respondent has represented, directly or by implication, that:

A. Eggland's Best eggs are low in saturated fat.
B. Eggland's Best eggs are lower in saturated fat than ordinary eggs.

PAR. 11. In truth and in fact:

A. Eggland's Best eggs are not low in saturated fat.
B. Eggland's Best eggs are not lower in saturated fat than ordinary eggs.

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

PAR. 12. Respondent knew or should have known that the representations set forth in paragraphs six, eight and ten were, and are, false and misleading.

PAR. 13. 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.

EXHIBIT A

Ayer

NW Ayer Incorporated
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019-7498
212-474-5000
Fax: 212-474-5400

EXHIBIT A

CLIENT	Egg•Land's Best		
PRODUCT	Egg•Land's Best Eggs	FACILITIES	TV
TITLE	"Supers - Foam Split"	DATE	October 11, 1994
NUMBER	ZAYA 4169 ** AS PRODUCED **	LENGTH	:30

VIDEO	AUDIO
	(Music up and under throughout.)
CU HAND CRACKING AN EGG.	Announcer: Imagine eating delicious,
CU RAW EGG FALLING INTO FRYING PAN. TITLE: REAL WHOLE EGGS	real, whole eggs
CU WHOLE EGGS IN BOILING WATER. TITLE: WITHOUT RAISING CHOLESTEROL	without raising your serum cholesterol.
CU HARD BOILED EGG BEING SLICED.	People did.
CU PAN ACROSS EGG•LAND'S BEST EGGS PACKAGE. TITLE: CLINICAL TESTS	In clinical tests of Egg•Land's Best eggs,
PAN UP BASKET OF EGGS; HAND LIFTS ONE UP.	they ate a dozen a week
CU WHISK STIRRING EGGS.	while keeping within the limits
CU SLIDING SCRAMBLED EGG ONTO MUFFIN. TITLE: LOW-FAT DIET	of the Surgeon General's low-fat diet.
CU PAN OF OPEN PACKAGE OF EGGS.	And though each egg contained
CU POACHED EGG BEING LIFTED OUT OF WATER. TITLE: 213 MG. CHOLESTEROL	213 milligrams of cholesterol,
CU TOPPINGS BEING ADDED TO OMELET. TITLE: 213 MG. CHOLESTEROL (71% MAXIMUM DAILY VALUE)	71% of the FDA's
CU BAKED EGGS AND CROUTONS. TITLE: *(SAME AS ABOVE)*	maximum daily value,
CU FRIED EGGS IN PAN. TITLE: CHOLESTEROL DIDN'T GO UP	their serum cholesterol didn't go up.
CU EGGS AND TOAST ON PLATE.	Surprised? Try it yourself.
MS EGG•LAND'S BEST PACKAGE. TITLE: YOU CAN EAT REAL EGGS AGAIN.	Egg•Land's Best. You can eat real eggs again.

EXHIBIT B

DEC-20-1994 11:21 EGGLAND'S BEST N.Y. EXHIBIT B

Revise 12/94
On Air 01/95

EGG.LAND'S BEST
CHOLESTEROL STRATEGY
:30 TV
"SUPERS"

VIDEO

EGG SHOTS. WITH SUPERS UNDERSCORING VO. COPY.

AUDIO

SFX: EGG CRACKING, PER VIDEO.
MUSIC: UNDER THROUGHOUT
VO: Imagine eating delicious, real, whole eggs...and not raising your serum cholesterol. People did. In two clinical tests for Egg.land's Best eggs. They ate a dozen a week while keeping within the limits of the Surgeon General's low-fat diet. Each egg contained the usual 213 milligrams of cholesterol, 71% of the FDA's maximum Daily Value, yet their serum cholesterol didn't go up. (Surprised?) Try it yourself. Eggland's Best. Limit your fat and enjoy real eggs again.

TOTAL P.03

EXHIBIT C

Ayer

N.W. Ayer Incorporated
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019-7498
212-474-5000
Fax: 212-474-5400

EXHIBIT C

CLIENT	Egg•Land's Best		
PRODUCT	Egg•Land's Best Eggs	FACILITIES	Radio
TITLE	"MCP/Tests"	DATE	October 11, 1994
NUMBER	ZAYA 4165 ** AS PRODUCED **	LENGTH	:60

SFX: *FOOTSTEPS ECHOING ON A HARD FLOOR.*

Announcer: If you love eggs but are concerned about cholesterol, you'll be interested in clinical tests done here at the Medical College of Pennsylvania. In these tests, people ate a dozen eggs a week for six weeks, and showed no increase in their serum cholesterol.

SFX: *DOOR OPENING. FOOTSTEPS ON WOOD FLOOR.*

Announcer: The eggs tested here were Egg•Land's Best. Fresh, real, whole eggs, each with the usual 213 mg. of cholesterol, or 71% of the FDA's maximum daily value.

SFX: *FILE DRAWER OPENING.*

Announcer: Yet the people's cholesterol didn't go up. How?

SFX: *PAPERS RUSTLING.*

Announcer: They ate these eggs as part of the Surgeon General's low-fat diet. Keeping within the limits of this diet, they were able to enjoy what some of them hadn't in a long time. Fresh, delicious, real eggs. And since the eggs were Egg•Land's Best, they also enjoyed the benefit of over six times more Vitamin E. Egg•Land's Best come from hens fed a special all-vegetarian diet so unique it's patented. So limit your fat and enjoy your eggs.

Egg•Land's Best. You can eat real eggs again.

EXHIBIT D

Ayer

NW Ayer Incorporated
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019-7498
212-474-5000
Fax: 212-474-5400

EXHIBIT D

CLIENT	Egg•Land's Best		
PRODUCT	Egg•Land's Best Eggs	FACILITIES	Radio
TITLE	"Juicy Steak"	DATE	October 11, 1994
NUMBER	ZAYA 4164 ** AS PRODUCED **	LENGTH	:60

Announcer: You'd love a thick, juicy steak...

SFX: *SIZZLE, SIZZLE*

Announcer: ... but you eat fish.

SFX: *UTENSILS AGAINST PLATE*

Announcer: You'd love two eggs over easy...

SFX: *EGGS CRACKING*

Announcer: ... and guess what?

SFX: *SIZZLE, SIZZLE*

Announcer: You can have them. Even if you're concerned about cholesterol. Just do what people did in clinical tests of Egg•Land's Best eggs. One... follow the low-fat diet recommended by the Surgeon General. And two... keeping within the fat limits of this diet, eat as many as 12 Egg•Land's Best eggs a week. The people tested did. And after six weeks of enjoying real, whole eggs with the usual 213 mg. of cholesterol each, or 71% of the FDA's maximum daily value, guess what? They showed no increase in their serum cholesterol! And since the eggs were Egg•Land's Best, they also enjoyed the benefit of over six times more Vitamin E. Egg•Land's Best eggs come from hens fed a special all-vegetarian diet so unique it's patented. So limit your fat and enjoy your eggs.

Egg•Land's Best. You can eat real eggs again.

EXHIBIT E

EXHIBIT E

Tests show how you can eat real eggs again.

(Even if you're concerned about cholesterol.)

In clinical tests, people ate a dozen Egg-land's Best® eggs a week and showed no increase in their serum cholesterol.

How? Simply by enjoying these fresh, delicious eggs while staying within the fat limits recommended by the Surgeon General for all adults. Namely, a diet with less than 10% saturated fat, 30% total fat.

What makes the test results such astonishing news is that the eggs they ate were real, whole eggs. With the usual 213 mg. of cholesterol per egg, or 71% of the FDA's maximum Daily Value.

Imagine! A way to enjoy real, whole eggs again. And not increase your serum cholesterol!

To [illegible] you're getting the same fresh, delicio[illegible]d in the clinical tests, insist on Egg[illegible]

[illegible]limit your fat and enjoy your eggs

Egg-land's Best. You can eat real eggs again.

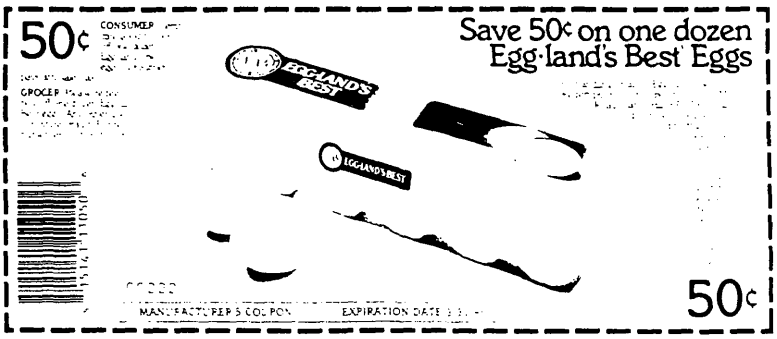
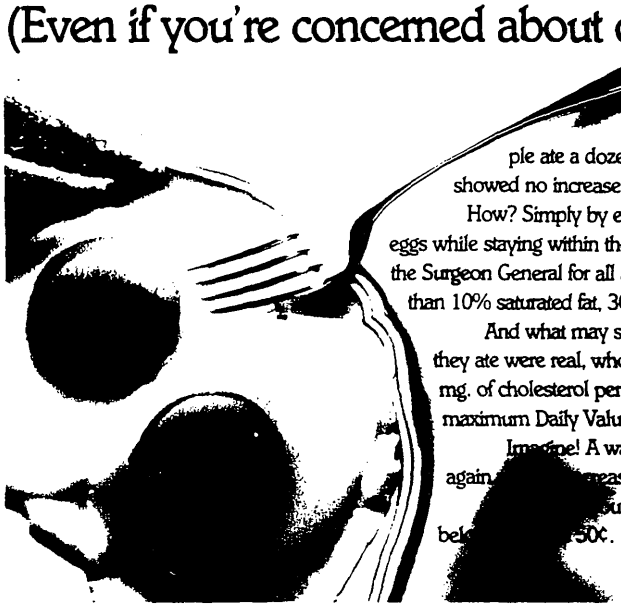


EXHIBIT F

Tests now show how you can eat real eggs again.

EXHIBIT

(Even if you're concerned about cholesterol.)



In two clinical tests, people ate a dozen Egg•land's Best® a week and showed no increase in their serum cholesterol.

How? Simply by enjoying these fresh, delicious eggs while staying within the fat limits recommended by the Surgeon General for all adults. Namely, a diet with less than 10% saturated fat, 30% total fat.

And what may surprise you is that the eggs they ate were real, whole eggs. With the usual 213 mg. of cholesterol per egg, or 71% of the FDA's maximum Daily Value.

Imagine! A way to enjoy real, whole eggs again ...ease your serum cholesterol. ...u waiting for? Use the coupon bel... 50¢.

EGG•LAND'S BEST.
Limit Your Fat
And Enjoy Real Eggs Again.

50¢ CONSUMER

GROCER

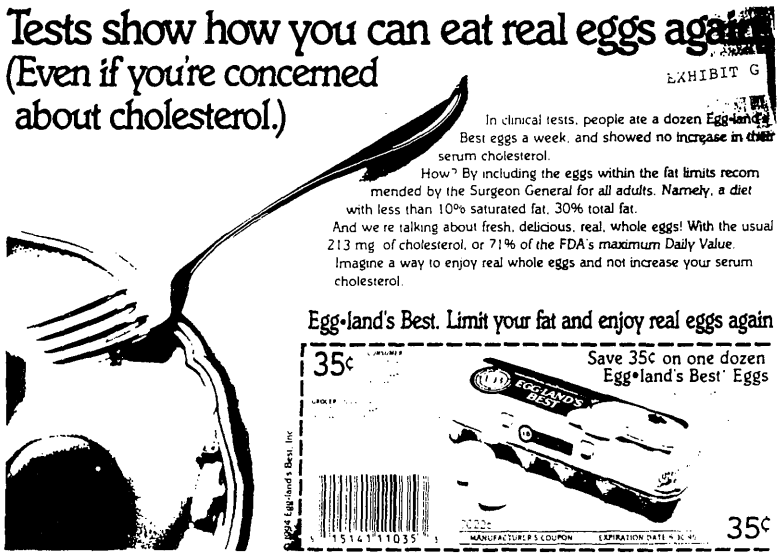
Save 50¢ on one dozen Egg•land's Best® Eggs

00221

MANUFACTURER'S COUPON | EXPIRATION DATE 6 30 95

50¢

EXHIBIT G



1,200,000 coupons for **Egg•land's Best® Eggs** will appear in ***VALASSIS INSERTS*** on Sunday, **February 26, 1995.**

Don't be caught short. . .
Order, stock and display extra cases of
Egg•land's Best® Eggs
during this promotion.

EXHIBIT H

It's simple. When the hens eat better, you eat better, too.

Introducing Egg-land's Best®. Premium eggs from hens fed a premium diet.

Unlike ordinary eggs, Egg-land's Best are laid by hens that eat no animal fat. Just lots of healthy grains, extra Vitamin E and a little canola oil–the oil lowest in saturated fat.

Ask for them at one of the fine restaurants listed in this book. And find out just how good an egg can be.

Introducing Egg-land's Best.

UTAH MENU GUIDE AD -- RAN JULY 1992

CR-NAT-P20005
8" x 5"
Utah Menu Directory—July 1992

Exhibit H

DECISION AND ORDER

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

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

The 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 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 N.W. Ayer & Son, Inc., d/b/a/ NW Ayer, 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 825 Eighth Avenue, 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

DEFINITION

For purposes of this order, the phrase "covered food product" shall mean only eggs and any meat, dairy, or poultry product. For purposes of this definition, "meat product" shall include any food product for human consumption that is made in whole or in substantial part of the meat of cattle, sheep, swine, or goats; "dairy product" shall include any food product for human consumption that is made in whole or in substantial part from milk; and "poultry product" shall include any food product for human consumption that is made in whole or in substantial part of the meat of any fowl.

I.

It is ordered, That respondent N.W. Ayer & Son, Inc. d/b/a NW Ayer, Inc., a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of any covered food product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting, in any manner, directly or by implication, through numerical or descriptive terms or any other means, the absolute or comparative amount of cholesterol, total fat, saturated fat or any other fatty acid in such covered food product. If any representation covered by this Part either directly or by implication conveys any nutrient content claim defined (for purposes of labeling) by any regulation promulgated by the Food and Drug Administration, or, if applicable, the United States Department of Agriculture, compliance with this Part shall be governed by the qualifying amount for such defined claim as set forth in such regulation.

II.

It is further ordered, That respondent N.W. Ayer & Son, Inc. d/b/a NW Ayer, Inc., its successors and assigns, and its officers, agents, representatives and employees, directly or through any

corporation, subsidiary, division or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of any covered food product 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, about the absolute or comparative effect of such covered food product on serum cholesterol, whether or not such covered food product is consumed as part of an unrestricted diet or as part of any specific dietary regimen, unless at the time of making the representation, respondent possesses and relies upon competent and reliable scientific evidence substantiating such representation. For purposes of this order, "competent and reliable scientific evidence" shall mean tests, analyses, research, studies or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

III.

It is further ordered, That respondent N.W. Ayer & Son, Inc. d/b/a NW Ayer, Inc., its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of any covered food product 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, about the absolute or comparative health benefits of such covered food product, including but not limited to its effect on heart disease, unless at the time of making the representation, respondent possesses and relies upon competent and reliable scientific evidence substantiating such representation.

IV.

It is further ordered, That respondent N.W. Ayer & Son, Inc. d/b/a NW Ayer, Inc., its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with

the labeling, advertising, promotion, offering for sale, sale, or distribution of any covered food product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting, in any manner, directly or by implication, the existence, contents, validity, results, conclusions or interpretations of any test or study.

V.

Nothing in this order shall prohibit respondent N.W. Ayer & Son, Inc. d/b/a NW Ayer, Inc., 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, or by nutrition labeling regulations promulgated by the Department of Agriculture pursuant to the Federal Meat Inspection Act or the Poultry Products Inspection Act.

VI.

It is further ordered, That for five (5) years after the last date of dissemination of any representation covered by this order, respondent N.W. Ayer & Son, Inc. d/b/a NW Ayer, Inc., or its successors and assigns, shall maintain and upon request make available to the Federal Trade Commission for inspection and copying:

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

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

VII.

It is further ordered, That respondent N.W. Ayer & Son, Inc. d/b/a NW Ayer, Inc., shall, within thirty (30) days after service upon it of this order, distribute a copy of the order to each of its operating divisions, each of its managerial employees, and each of its officers,

agents, representatives or employees engaged in the preparation or placement of advertising or other materials covered by this order and shall secure from each such person a signed statement acknowledging receipt of this order.

VIII.

It is further ordered, That respondent N.W. Ayer & Son, Inc. d/b/a NW Ayer, Inc., shall notify the Commission at least thirty (30) days prior to any proposed change in its corporate structure, including but not limited to dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or affiliates, or any other corporate change that may affect compliance obligations arising out of this order.

IX.

It is further ordered, That respondent N.W. Ayer & Son, Inc. d/b/a NW Ayer, Inc., shall, within sixty (60) days after service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

X.

This order will terminate on May 31, 2016, 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

JOHNSON & COLLINS RESEARCH, INC., ET AL.

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

Docket C-3661. Complaint, May 31, 1996--Decision, May 31, 1996

This consent order prohibits, among other things, a Minnesota-based company and its officer from misrepresenting the efficacy and results of their weight-loss products, and requires the respondents to disclose that such product consists primarily of a booklet or pamphlet containing information and advice on weight loss, and to possess competent and reliable scientific evidence to substantiate any future advertisements for weight-loss booklets or for other weight-loss products or programs.

Appearances

For the Commission: *Richard L. Cleland* and *C. Lee Peeler.*
For the respondents: *Peter Rosden*, Charlottesville, VA.

COMPLAINT

The Federal Trade Commission, having reason to believe that Johnson & Collins Research, Inc., a corporation, and Gregor A. von Ehrenfels, individually and as an officer of said corporation ("respondents"), have violated the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent Johnson & Collins Research, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Minnesota. Its principal place of business is located at 5115 Excelsior Blvd., Minneapolis, MN.

Respondent Gregor A. von Ehrenfels is an officer of the corporate respondent. Individually, or in concert with others, he participates in and/or formulates, directs, and controls the acts and practices of the corporate respondent, including the acts and practices alleged in this complaint. His address is the same as that of the corporate respondent.

PAR. 2. Respondents have advertised, offered for sale, sold, and distributed weight-loss and body-shaping products, consisting primarily of booklets containing advice on dieting and exercise, to the public. Respondents have marketed these products under various names, including "TOTAL BODY RESHAPING SYSTEM" and "SUPER TOTAL BODY RESHAPING SYSTEM" (collectively, "TBRS").

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 TBRS including but not necessarily limited to the attached Exhibits A through D. These advertisements contain the following statements:

A. NOW - IN ONLY 2 WEEKS you can start to have . . .
THINNER, FIRMER, LEGS & HIPS. . .
Slimmer Arms & Shoulders, a Smaller,
Tighter Waistline, and a Prettier Bust!

YES! IN AS LITTLE AS 14 DAYS, your entire body could suddenly start to take on a whole new shape! Plus you could be thinner and firmer than ever before. In fact, the all new TOTAL BODY RESHAPING SYSTEM (SUPER TBRS for short) is 100% Guaranteed to help give you a sleeker, sexier body . . . no matter what you look like right now! (And no matter what you've tried before!)

Too Fat - or Too Thin?

SUPER TBRS is NOT just another diet program. It's a total body improver designed to "reshape" you from head to toe. So if you're overweight, SUPER TBRS will help you melt and float away ugly fat leaving you with a firmer, more beautiful body.

* * * *

Stubborn Spots???

The SUPER TOTAL BODY RESHAPING SYSTEM shows you how to attack your own unique problem areas -- shaping and molding them -- tightening, firming, helping dissolve layer after layer of fat with each new day!

That means you can zero-in on your thighs, calves, hips, waist, arms, neck or another area that needs extra strong, extra fast treatment.

* * * *

Here's How it Works ...

The moment you put SUPER TBRS methods into action, you begin to burn-off excess calories and fatty deposits. So more of the food you eat is automatically converted into energy instead of fat. That's because SUPER TBRS helps you modify your caloric intake. At the same time, SUPER TBRS's 4 Special Shaping Actions™ let you stimulate muscle tone exactly where you need it ... WITH NO AEROBIC EXERCISE!

Plus, like many other girls, you'll know it's working because you'll feel it from the very first day and see results in the mirror as quickly as fourteen days!...

But the best part is, SUPER TBRS tells you how to keep those improvements so your beautiful new body can stay that way -- and even continue to improve!...

Yet with SUPER TBRS there are ...

- NO dangerous diet pills to take
- NO chalky-tasting chemical powders
- NO silly heat suits or belts
- NO unhealthy crash diets
- NO long exhausting exercise

TBRS contains absolutely NOTHING chemical, internal, topical, or artificial like other products.

* * * *

Plus - YOU GET ALL THIS! The TBRS Master Manual, TBRS Food Tables & Personal Meal Planner, TBRS One-Year Progress Tracker, TBRS Motivational Audio Cassette, TBRS Ultra Weight Loss Formula, TBRS Ideal proportion chart & Tape Measure . . . . The TOTAL BODY RESHAPING SYSTEM is arguably the most result-producing program of it's kind in the world today!.....

* * * *

When your package arrives, we want you to use it ... go ahead, let SUPER TBRS show you how to reshape, firm and beautify your body. Use it as much as you like to help solve your figure problems!

(Exhibit A; Sassy Magazine, August 1995)

B. "They Laughed When I Bought My Bikini,
But When I Walked On the Beach ... !"

I promised myself to finally do something about the way I looked. But I didn't want to go on some diet like my mom would use. Besides, I tried dieting before and nothing happened. I wanted something made for girls my age, something that really worked . . . fast!

* * * *

After being fat for so long, the Total Body Reshaping System finally gave me the body I always wanted!

How to Get the Body You Always Wanted ...

Now it's your turn! Because in as little as 14 days, your entire body could suddenly start to take on a whole new shape! Plus you could be thinner and firmer than ever before. In fact, the all new TOTAL BODY RESHAPING SYSTEM (TBRS™ for short) manual is 100% Guaranteed to give you a sleeker, sexier body that makes you stand out from other girls and gets you noticed -- no matter what you look like right now!

So if you're overweight, the TBR SYSTEM will help you melt and float away ugly fat . . . .

Stubborn Spots???

The TOTAL BODY RESHAPING SYSTEM shows you how to attack <u>your</u> own unique problem spots -- shaping and molding them -- tightening, firming, helping dissolve layer after layer of fat with each new day!

* * * *

The moment you put the TBR System into action, it helps you burn off excess calories and fatty deposits. That means more of the food you eat is automatically converted into energy -- instead of fat. (It's sort of like *tricking* your body into

losing weight.) Next, TBRS modifies your caloric intake. At the same time, our *Special Shaping Actions* let you stimulate muscle tone exactly where you need it.

* * * *

(Exhibit B; Seventeen Magazine, September 1995)
(Exhibit D; YM Young & Modern Magazine, August 1995)

C. NOW - IN ONLY 2 WEEKS You Can Start to Have . . .
THINNER, FIRMER, LEGS & HIPS . . .
A Smaller, Tighter Waistline, A Flatter,
Tighter Stomach and a Prettier Bust!

YES! In as little as 14 days, your entire body could suddenly start to take on a whole new shape! Plus you could be thinner and firmer than ever before. In fact, the all new SUPER TOTAL BODY RESHAPING SYSTEM (TBRS for short) is 100% Guaranteed to give you a sleeker, sexier body . . . no matter what you look like right now!

Too Fat - or Too Thin?

SUPER TBRS is NOT just another weight-loss product. It's a total body improver designed to "reshape" you from head to toe. So if you're overweight, the SUPER TBR SYSTEM will help you melt and float away ugly fat (even cellulite!) leaving you with a firmer more beautiful body.
(Exhibit C; Teen Magazine, September 1995)

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 through D, respondents have represented, directly or by implication, that users of TBRS are not required to consciously diet to lose weight.

PAR. 6. In truth and in fact, users of TBRS are required to consciously diet to lose weight. The product consists primarily of a booklet containing advice for reducing caloric intake and requires conscious dieting to lose weight. 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 advertisements attached as Exhibits A through D, respondents have represented, directly or by implication, that:

A. TBRS is effective in causing fast and significant weight loss;

B. TBRS is effective in significantly reducing body fat and cellulite;

C. TBRS is effective in causing weight loss, fat reduction, and increased muscle tone in specific, desired areas of the body; and

D. TBRS is effective in burning excess calories, modifying caloric intake, and converting food into energy instead of fat.

PAR. 8. 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 through D, 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 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. In their advertising and sale of TBRS, respondents have represented that users of this product will achieve significant weight and fat loss. Respondents have failed to disclose adequately that this product consists primarily of booklets or pamphlets containing advice concerning techniques for reducing caloric intake and/or exercise, and that reducing caloric intake and/or increasing exercise is required to lose weight or fat. These facts would be material to consumers in their purchase or use decisions regarding the product. The failure to disclose these facts, in light of the representations made, was, and is, a deceptive practice.

PAR. 11. 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

NOW - IN ONLY 2 WEEKS
THINNER, FIRME
Slimmer Arms & Shoulders, a Smaller

YES! IN AS LITTLE AS 14 DAYS, your entire body could suddenly start to take on a whole new shape! Plus you could be thinner and firmer than ever before. In fact, the *all new* **TOTAL BODY RESHAPING SYSTEM** (**SUPER TBRS** for short) is 100% Guaranteed to help give you a sleeker, sexier body that makes you stand out from other girls and gets you noticed - *no matter what you look like right now!* - And no matter what you've tried before!

Too Fat - or Too Thin?

SUPER TBRS is NOT just another diet program. It's a total body improver designed to "reshape" you from head to toe. So if you're overweight, **SUPER TBRS** will help you melt and float away ugly fat leaving you with a firmer, more beautiful body.

Or if you're on the skinny side - or just certain parts of you could use some eye catching curves - **SUPER TBRS** can help you add exciting new shape to your frame in all the right places! And that's still only the beginning.

Stubborn Spots???

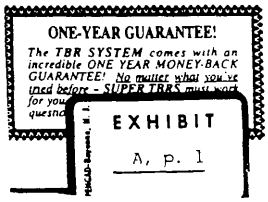
The **SUPER TOTAL BODY RESHAPING SYSTEM** shows you how to attack your own unique problem areas - shaping and molding them - tightening, firming, helping dissolve layer after layer of fat with each new day!

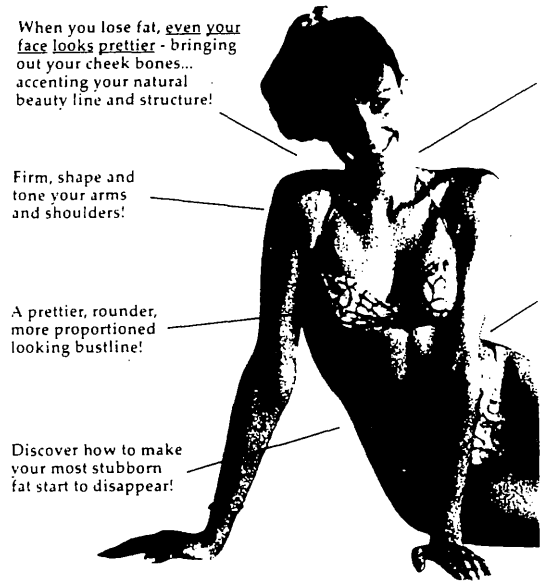
That means you can *zero-in* on your thighs, calves, hips, waist, arms, neck or another area that needs extra strong, extra fast treatment.

And since every girl's body is different, your results are unique for you! That means fluctuations in speed, shape, pounds and fat loss are Guaranteed to vary for each and every girl who uses **SUPER TBRS**. Yes! This is your opportunity to *finally* get your perfect body!

Here's How It Works...

The moment you put **SUPER TBRS** methods into action, you begin to burn-off excess calories and fatty deposits. So more of the food you eat is automatically converted into energy *instead* of fat. That's because **SUPER TBRS** helps you modify your caloric intake. At the same time, **SUPER TBRS**' "





Special Shaping Actions" let you stimulate muscle tone exactly where you need it... with NO aerobic exercise!

Plus, like many other girls, you'll *know* it's working because you'll feel it from the very first day and see results in the mirror as quickly as fourteen days! Plus, you can expect even better results the longer you use it! Even your face can look prettier - bringing out your cheek bones and accenting your natural beauty line and structure.

But the best part is, **SUPER TBRS** tells you how to keep those improvements so your beautiful new body can stay that way - *and even continue to improve!* That means now you can look your best all year long, wear the fashions you love, and look gorgeous! Yet with **SUPER TBRS** there are:

- NO dangerous diet pills to take
- NO chalky-tasting chemical powders
- NO silly heat suits or belts
- NO unhealthy crash diets
- NO long exhausting exercise

Once you use the **SUPER TOTAL BODY RESHAPING SYSTEM** there is nothing else to buy - ever! Simply follow it faithfully and then...day-by-day, inch-by-inch you'll see and feel amazing changes start to take place - simply, safely, naturally.

FACT: **SUPER TBRS** is safe for all ages. There are NO side effects. **TBRS** contains absolutely NOTHING chemical, internal, topical or artificial like other products.

EXHIBIT A

(S you can start to have...

ER, LEGS & HIPS...

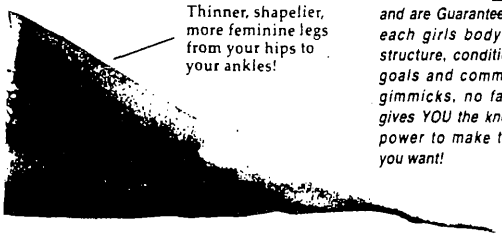
er, Tighter Waistline, and a Prettier Bust!

A more graceful, thinner looking neck and a more beautiful back!

NEW & IMPROVED!
SUPER TBRS is Better than ever!
Yes! Now it's possible to
SEE Results IN ONLY 2 WEEKS!

A smaller, tighter waistline and smoother, firmer, more shapely hips!

Thinner, shapelier, more feminine legs from your hips to your ankles!



Super TBRS is Safe and Healthy for girls of all ages! Your results are unique for you and are Guaranteed to vary for each girls body type, bone structure, condition, personal goals and commitment. No gimmicks, no fads. TBRS gives YOU the knowledge and power to make the changes you want!

world today! Now just imagine what it could do for you...

You'll Hardly Believe Your Eyes!!!

The *all new* **SUPER TBRS** costs less than a new pair of jeans, but can ultimately improve your appearance one hundred times more! You may hardly believe your eyes when you look in the mirror! But maybe the best sign that you're growing sleeker and sexier is the looks from guys who never noticed you before (...and the jealous looks from the competition).

Act Now and Get This ONE YEAR GUARANTEE!

Yes! **SUPER TBRS** must do everything exactly as we have promised or you don't pay a penny! And to prove it to you, we'll let you use it – *keep it* – for ONE FULL YEAR! That's how sure we are that **SUPER TBRS** will work for you.

When your package arrives, we *want* you to use it... go ahead, let **SUPER TBRS** show you how to reshape, firm and beautify your body. Use it as much as you like to help solve your figure problems!

Then – if you are not completely delighted with your new shape and appearance, if you don't look and feel absolutely sensational, simply return it for a complete and speedy refund. No hassles. No questions. No delays. Just your money back. You risk nothing.

So it's up to you. One month from today you could look no different than you do right now – *or* – you could look in the mirror and see a whole, new beautiful you blossoming before your eyes! You decide.

Fill in the Rush Coupon below and mail it now! Then see how great it feels to actually *have* a beautiful body instead of just wishing you did. We won't disappoint you!

lers

FACT: Only **SUPER TBRS** gives you *Special Shaping Actions* that let you *zero-in* on your own special problem areas for new shape and tone.

FACT: **SUPER TBRS**'s purpose is to *dramatically* change the way you look and show you how to stay that way for the rest of your life!

Plus – YOU GET ALL THIS! The **TBRS** Master Manual, **TBRS** Food Tables & Personal Meal Planner, **TBRS** One-Year Progress Tracker, **TBRS** Motivational Audio Cassette, **TBRS** Ultra Weight Loss Formula, **TBRS** Ideal proportion chart & Tape Measure, plus an incredible ONE YEAR GUARANTEE!! The TOTAL BODY RESHAPING SYSTEM is arguably the most result-producing program of it's kind in the

Mail this SPECIAL RUSH ORDER FORM TODAY for your ONE-YEAR MONEY-BACK GUARANTEE!

Yes! I want to have a beautiful body! RUSH me the *all New* **SUPER TBR SYSTEM** immediately! I must be thrilled with the results or I get my money back! I am enclosing ☐ $29.95 for the Complete System or ☐ $49.95 (You save $10.*) for Two systems ☐ Add $5.00 for Shipping, Insurance & Handling Canadian residents add $10.00 per system.

☐ Check here for Guaranteed Privacy. Yes! Send my **SUPER TBRS** in a plain, unmarked package **NO COINS PLEASE!**

PLEASE! -You must PRINT VERY CLEARLY so your package is delivered to the right address. ☐ Use a 3 X 5 note card if you need to.

TBR System PERSONAL BODY TYPE AND PROBLEM SPOT FORM

DIRECTIONS: Please put an X in the boxes that apply to your personal problem areas. Check off as many boxes as you like. Feel free to add any special notes or wishes on a separate piece of paper.

EXHIBIT A, p. 2

This is my general body type:

☐ TYPE A - I am overweight. I need to lose pounds and inches - reshape my problem spots for a sleeker, more graceful and toned body.

☐ TYPE B - I am too skinny. I need more shape and curves in all the right places for a more eye-catching figure.

These are the parts of my body that need the most improvement:

☐ FACE	☐ WRISTS	☐ OUTER THIGH	☐ UPPER BACK
☐ CHIN	☐ HANDS	☐ KNEE	☐ LOWER BACK
☐ NECK	☐ STOMACH	☐ CALVES	☐ BUTTOCKS
☐ SHOULDERS	☐ HIPS	☐ ANKLES	☐ BUST- Bigger
☐ UPPER ARMS	☐ INNER THIGH	☐ FEET	☐ BUST- Smaller

MAIL TO: Johnson & Collins Research, Dept. SS-695, USPOB NR. 16346, Mpls., MN 55416-0346

PRICED Seymour, N. J.

EXHIBIT B

ADVERTISEMENT

"They Laughed When I Bought My Bikini, But When I Walked On the Beach...!"

WHY DID they invite me anyway? For a good laugh! I mean, I hadn't worn a bathing suit since I was 10.

And now, here I am, *invited* to a beach party. No way could I fit in a swimsuit. I felt so fat - and depressed.

But then, something inside me said *you can do something about this!* Power to everyone - *you must!* - that I could look great too! Right then and there, I promised myself to finally *do* something about the way I looked. But I didn't want to go on some diet like my mom would use. Besides, I tried dieting before and nothing happened. I wanted something made for girls my age, something that really worked, and would make me look great - fast.

That's when I heard about the *Total Body Reshaping System*. I knew a lot of other girls used it - and they looked great. Plus I liked that it was totally safe and healthy for me too. So I sent away and sent for it.

They sent it to me fast, and I started to use it right away. After only 5 days I was so excited about it, I did something kind of crazy. I went and bought my very first bikini! Everyone laughed - my friends, my friends, *even my best friend*. But I didn't care. I was confident that the *Total Body Reshaping System* would give me the body I wanted. So I followed it everyday, exactly like it said. 'Wow' - it worked!

What happened next was the most exciting moment of my life!

When I walked on the beach in my new bikini, guys - *really cute guys* - who never talked to me before suddenly wanted to meet me. Everyone crowded around me. 'You look incredible.' 'How'd you do it?' 'What a body!' 'What's your secret?' 'She's beautiful!'

I couldn't believe it. It was like I was a *totally* new person. For the first time in my life I felt beautiful - *even popular*. After being fat for so long, the *Total Body Reshaping System* finally gave me the body I always wanted!

How to Get the Body You Always Wanted...

Now it's *your* turn! Because in as little as 14 days your entire body could suddenly start to take on a whole new shape! Plus you could be thinner and firmer than ever before. In fact, the *all new* TOTAL BODY RESHAPING SYSTEM - TBRS™ for short - **manual** is **100% Guaranteed** to give you a sleeker, sexier body that makes you stand out from other girls and gets you noticed - ***no matter what you look like right now!***

So if you're overweight, the TBR SYSTEM will help you *melt and float* away ugly fat - leaving you with a firmer, more beautiful body. But that's only the beginning.

Stubborn Spots???

The TOTAL BODY RESHAPING SYSTEM shows you how to attack *your* own unique **problem spots - shaping and molding them** - tightening, firming, helping dissolve layer after layer of fat with each new day.

That means you can zero in on your thighs, calves, hips, waist, arms, neck or another area that needs **extra strong, extra fast** treatment.

And since every girl's body is different, the TOTAL BODY RESHAPING SYSTEM lets you **change the parts you don't like about you**... so you end up with **the perfect body for you!**

Here's How It Works

The moment you put the *TBR System* into action, it helps you burn off excess calories and fatty deposits. That means most of the food you eat is **automatically** converted into energy - instead of fat. It's sort of like *turning your body into living weight!* Next, TBRS modifies your calorie intake. At the same time, our *Special Stepping Know-how* let you stimulate muscle tone exactly where you need it.

Plus, like many other girls you'll know is working because you'll feel it from the very first day, and could see **results on the mirror as quickly as fourteen days!** Even your face can look prettier - bringing out your cheek bones and accenting your natural beauty line and structure.

But the best part is, TBRS will you now keep those improvements so your beautiful new body will stay that way. That means now you can look your best all year long, wear the fashions you love and look gorgeous! Yet with the TBR System there are:

- NO dangerous diet pills to take
- NO chemical powders to mix
- NO rubber heat suits or belts
- NO unhealthy crash diets
- NO long exhausting exercise

Once you use the TOTAL BODY RESHAPING SYSTEM there is **nothing else to buy - ever**. Simple read and follow it faithfully and then, day-by-day, inch-by-inch you'll **see and feel amazing changes** start to take place. All your figure problems will suddenly start to disappear - **simply, safely, naturally.**

FACT: TBRS is completely safe for all ages. There are NO side effects. It contains absolutely NOTHING chemical, internal, topical or artificial like other products.

FACT: TBRS gives YOU the power to make the changes you want. Your **results are unique for you** and are Guaranteed to vary for each girls body type, bone structure, condition, personal goals and commitment.

FACT: No matter what you look like right now, TBRS can DRAMATICALLY change the way you look and show you how to stay that way for the rest of your life.

The TOTAL BODY RESHAPING SYSTEM costs less than a new bathing suit, but can improve your appearance one hundred times more. In fact, you'll hardly recognize your self when you look in the mirror.

But maybe the best sign that you are growing sleeker and sexier is the looks from guys who never noticed you before - and the jealous looks from the competition.

Try It For 14 Days!

The TOTAL BODY RESHAPING SYSTEM must do *everything* exactly as we have promised - or you don't pay a penny! And to prove it to you, we'll let you try TBRS in your home, with a **NO RISK 14 DAY TRIAL!**

So when your package arrives, we want you to use it - go ahead, let the TBR SYSTEM start to reshape, firm and beautify your body. Use it as much as you like to help solve your figure problems!

Then - if you are not completely delighted with your new shape and appearance in just 14 days and feel absolutely sensational, simply return it for a complete and speedy refund. No hassles. No questions. No delays. Just your money back.

So it's up to you. One month from today you could look no different than you do right now - or - you could look in the mirror and see a whole, new beautiful you blossoming before your eyes! You decide. Order TBRS today! Then see how great it feels to actually *have* a beautiful body instead of just wishing you did.

100% MONEY BACK GUARANTEE!

Try the TBR SYSTEM for 30 days to help you get the body you want. Then if you are not absolutely thrilled with the new you - simply return it for a full refund. No matter what you've tried before - TBRS must work for you or you get your money back.

MAIL THIS SPECIAL RUSH ORDER-FORM TODAY!

Yes! I want to have a beautiful body! Rush me the TBR System right now! I must be thrilled with the results or I get my money back. I am enclosing ☐ $12.00 for one system or ☐ $22.00 for two systems. ☐ Add $3.00 for postage & handling. NO COINS PLEASE

PLEASE! You must PRINT VERY CLEARLY so that your package is delivered to the right address.

☐ Check here for Guaranteed Privacy. Yes! Send me my TBR System in a plain, unmarked package.

Name_____

Street_____

City_____

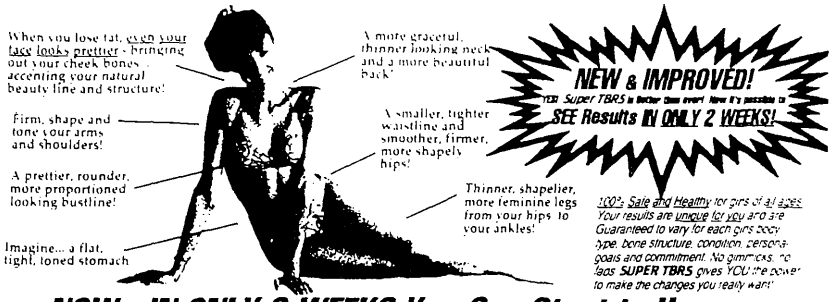
State_____

EXHIBIT B

PENCAD Research, N.J.

Johnson & Collins Research
Dept S-995 USPOB NR 16346
Mpls MN 55416-0346

EXHIBIT C



NOW - IN ONLY 2 WEEKS You Can Start to Have...

THINNER, FIRMER, LEGS & HIPS...

A Smaller, Tighter Waistline, A Flatter, Tighter Stomach and a Prettier Bust!

YES! In as little as 14 days your entire body could suddenly start to take on a whole new shape! Plus you could be thinner and firmer than ever before. In fact, the all new SUPER TOTAL BODY RESHAPING SYSTEM TBRS for short) is 100% Guaranteed to give you a sleeker, sexier body that makes you stand out from other girls and gets you noticed - no matter what you look like right now!

Too Fat - or Too Thin?

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Or if you're on the skinny side - or just certain parts of you could use some eye-catching curves - SUPER TBRS can help you add exciting new shape to your frame - in all the right places! And that's only the beginning.

Stubborn Spots???

The SUPER TOTAL BODY RESHAPING SYSTEM shows you how to attack your own unique problem spots - shaping and molding them - tightening, firming, helping dissolve layer after layer of fat with each new day!

That means you can zero-in on your thighs, calves, hips, waist, arms, neck or another area that needs extra strong, extra fast treatment.

And since every girl's body is different, SUPER TBRS lets you change the parts you don't like about you...so you end up with the perfect body for you!

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The moment you put SUPER TBRS methods into action, you begin to burn-off excess calories and fatty deposits. So more of the food you eat is automatically converted into energy instead of fat. That's because SUPER TBRS helps you modify your caloric intake. At the same time, SUPER TBRS's Special Shaping Actions let you stimulate muscle tone exactly where you need it... with NO aerobic exercise!

Plus, like many other girls, you'll know it's working because you'll feel it from that very first day and should see results in the mirror as quickly as fourteen days! Even your face can look prettier - bringing out your cheek bones and accenting your natural beauty line and structure.

But the best part is, SUPER TBRS tells you how to keep those improvements so your beautiful new body can stay that way - and even continue to improve. That means now you can look your most all year long - wear the fashions you love and look gorgeous. Yet with SUPER TBRS there are:

- NO dangerous diet pills to take
- NO chalky tasting chemical powders
- NO silly heat suits or belts
- NO unhealthy crash diets
- NO long exhausting exercise

Once you use SUPER TBRS there is nothing else to buy - ever! Simply read and follow it faithfully and then - day-by-day, inch-by-inch - you'll see and feel amazing changes starting to take place - simply, safely, naturally.

FACT. The SUPER TBRS is safe for all ages - there are NO side effects. TBRS contains absolutely NOTHING chemical, internal, topical or artificial like other products.

FACT. Only the SUPER TBRS gives you Special Shaping Actions that let you zero-in on your own unique problem spots, firming and toning you!

FACT. The SUPER TBRS's purpose is to permanently change the way you look and show you how to stay that way for the rest of your life!

You'll Hardly Believe Your Eyes!!!

The SUPER TBR SYSTEM costs less than a new haircut, but will improve your appearance one hundred times more! In fact, you'll hardly believe your eyes when you look in the mirror!

But maybe the best sign that you're going sleeker and sexier is the looks from guys who never noticed you before - and the jealous looks from the competition!

ONE YEAR GUARANTEE!

Yes! The SUPER TBR SYSTEM must do everything exactly as we have promised or you don't pay a penny! And to prove it to you, we'll let you try it for ONE FULL YEAR! That's how sure we are that TBRS will work for you.

When your package arrives, we want you to use it... go ahead, let SUPER TBRS start to reshape, firm and beautify your body. Use it as much as you like to help solve your figure problems!

Then - if you are not completely delighted with your new shape and appearance, if you don't look and feel absolutely sensational, simply return it for a complete and speedy refund. No hassles. No questions. No delays. Just your money back.

So it's up to you. One month from today you could look no different than you do right now - or - you could look in the mirror and see a whole, new beautiful you blossoming before your eyes! You decide.

Fill in the Rush Coupon below and mail it now! Then see how great it feels to actually have a beautiful body instead of just wishing you did. We won't disappoint you!

Free Gift For You!

If you order TBRS right now, we'll also send you a copy of CHANGES!, the ultimate in Total Self-Improvement absolutely FREE just for trying TBRS. Act Now!

...1995 JCR Inc.

100% SATISFACTION GUARANTEED OR YOUR MONEY BACK!

Yes! I want to have a beautiful body! RUSH me the all new SUPER TBR System immediately! I must be thrilled with the results or I get my money back! I am enclosing ☐ $12.00 for the complete system or ☐ $25.00 for TWO systems and Add $4.00 for postage & handling. NO COINS PLEASE. (Canadians must add $5.00)

☐ GUARANTEED PRIVACY. Yes! Send my SUPER TBRS in a plain, unmarked package.

TBR System PERSONAL BODY TYPE AND PROBLEM SPOT FORM

DIRECTIONS: Please put an X in the boxes that apply to your personal problem areas. Check off as many boxes as you like. Feel free to add any special notes or wishes on a separate piece of paper.

This is my general body type:

☐ TYPE A - I am overweight. I need to lose pounds and inches - reshape my problem spots for a sleeker, more graceful and toned body.

☐ TYPE B - I am too skinny. I need more shape and curves in all the right places for a more eye-catching figure.

These are the parts of my body that need the most improvement:

☐ FACE	☐ WRISTS	☐ OUTER THIGH	☐ UPPER BACK
☐ CHIN	☐ HANDS	☐ KNEE	☐ LOWER BACK
☐ NECK	☐ STOMACH	☐ CALVES	☐ BUTTOCKS
☐ SHOULDERS	☐ HIPS	☐ ANKLES	☐ BUST Bigger
☐ UPPER ARMS	☐ INNER THIGH	☐ FEET	☐ BUST Smaller

MAIL TO: Johnson & Collins Research, Dept. T-995A, USPOB NR. 16346, Mpls., MN 55416-0346

EXHIBIT C

PENCILED Reason, M.I.

FULL ONE-YEAR GUARANTEE!

The New Super TBRS comes with an incredible ONE YEAR MONEY-BACK GUARANTEE. No matter what you've tried before - TBRS must work for you or you get your money back. No questions asked. You risk nothing!

EXHIBIT D

"They Laughed When I Bought My Bikini, But When I Walked On the Beach...!"

WHY DID they invite me anyway... For a good laugh! I mean, I hadn't worn a bathing suit since I was 10.

And now, here I am, invited to a beach party. No way could I fit in a swimsuit. I felt so fat... and depressed.

But then something inside me said... Prove to everyone... *and myself*... that I could look great too! Right then and there I promised myself to finally do something about the way I looked. But I didn't want to go on some diet like my mom would use. Besides, I tried dieting before and nothing happened. I wanted something made for girls... something that really worked... and would make me look great... fast.

That's when I heard about the *Total Body Reshaping System*. I knew that one of other girls used it... and they looked great. Plus I saw that it was totally safe and healthy for me too. So I went ahead and ordered it.

They sent it to me fast and I started to use it right away. After only 3 days I was so excited about it. I did something kind of crazy. I went and bought my very first bikini! Everyone laughed... my family... my friends... *even my best friend*. But I didn't care. I was confident that the *Total Body Reshaping System* would give me the body I wanted. So I followed it every day exactly like it said. Wow... it worked.

What happened next was the most exciting moment of my life.

When I walked on the beach in my new bikini, guys... *really cute guys*... who never talked to me before suddenly wanted to meet me. Everyone crowded around me... "You look incredible"... "How'd you do it?"... "What a body"... "What's your secret?"... "She's beautiful"

I couldn't believe it. It was like I was a whole new person. For the first time in my life I felt beautiful – *even popular*. After being fat for so long, the *Total Body Reshaping System* finally gave me the body I always wanted!

How to Get the Body *You* Always Wanted...

Now it's *your* turn! Because in as little as 14 days, your entire body *could* suddenly start to take on a whole new shape! Plus you could be thinner and firmer than ever before. In fact, the ... new TOTAL BODY RESHAPING SYSTEM (TBRS for short) **manual** is **100% Guaranteed** to give you a sleeker, sexier body that makes you stand out from other girls and gets you noticed – ***no matter what you look like right now!***

So if you're overweight, the TBR SYSTEM will help you **melt and float away ugly fat**... leaving you with a firmer, more beautiful body. But that's only the beginning.

Stubborn Spots???

The TOTAL BODY RESHAPING SYSTEM shows you how to attack *your* own unique **problem spots – shaping and molding them**... tightening, firming, helping ... [illegible]

That means you can *zero in* on your thighs, calves, hips, waist, arms, neck or another area that needs ***extra strong***, extra fast treatment.

And since every girl's body is different, the **TOTAL BODY RESHAPING SYSTEM lets you change the parts you don't like about you, so you end up with the perfect body for you!**

Here's How It Works

The moment you put the TBR System *into* action, it helps you burn off excess calories and fatty deposits. That means more of the *food you* eat is **automatically** converted into energy... instead of fat... it's sort of like *tricking* your body into losing weight. Next, **TBRS** modifies your caloric intake. At the same time, our *Special Shaping* ... lets you stimulate muscle tone exactly where you need it.

Plus, like many other girls, you'll know it's working because you'll feel it from the very first day and should see results in the mirror as quickly as fourteen days! Even your face can look prettier ... bringing out your cheek bones and accenting your natural beauty line and structure.

But the best part is, **TBRS** tells you how keep those improvements so your beautiful, new body will stay that way. That means now you can look your best all year long... wear the fashions you love and look gorgeous! Yet with the **TBR System** there are:

- NO dangerous diet pills to take
- NO chemical powders to mix
- NO silly belt suits or belts
- NO unhealthy crash diets
- NO long exhausting exercise!

Once you use the TOTAL BODY RESHAPING SYSTEM *there is* ***nothing else*** *to buy – ever*. Simply read and follow it faithfully and then... day-by-day, inch-by-inch you'll **see and feel amazing changes** start to take place. All your figure problems will suddenly start to disappear – simply, safely, naturally.

FACT: TBRS is completely safe for all ages. There are NO side effects. It contains absolutely NOTHING chemical, internal, topical or artificial like other products.

FACT: TBRS gives YOU the power to make the changes you want. Your results are unique for you and are *Guaranteed* to vary for each girl's body type, bone structure, condition, personal goals and commitment!

FACT: No matter what you look like right now, TBRS can DRAMATICALLY change the way you look and show you how to stay that way for the rest of your life.

The TOTAL BODY RESHAPING SYSTEM costs less than a few haircuts but can improve your appearance one hundred times more! In fact, you'll hardly believe your eyes when you look in the mirror.

© 1995 JCR Inc.

But maybe the best sign that you are growing sleeker and sexier is the looks from guys who never noticed you before ... and the envious looks from the competition!

Try It For 14 Days!

The TOTAL BODY RESHAPING SYSTEM must do *everything* exactly as we have promised... or you don't pay a penny! And to prove it to you, we'll let you try TBRS in your home with our NO RISK 14 DAY TRIAL!

So when your package arrives, we want you to use it... go ahead, let the TBR SYSTEM start to *reshape, firm and beautify* your body. Use it as much as you like to help solve your figure problems!

Then – if you are not completely delighted with your new shape and appearance, if you don't look and feel absolutely sensational, simply return it for a complete and speedy refund. **No hassles. No questions. No delays. Just your money back.**

So it's up to you. One month from today you could look *no different* than you do right now – or – **you could look in the mirror and see a whole, new *beautiful* you blossoming before your eyes!** You decide. **Order TBRS today!** Then see how great it *feels to actually* ***have*** a beautiful body instead of just wishing you did.

100% MONEY BACK GUARANTEE!

Try the TBR SYSTEM for 30 days to help you get the body you want. Then if you are not absolutely thrilled with the new you – simply return it for a full refund. No matter what you've tried before – TBRS must work or you get your money back.

MAIL THIS SPECIAL RUSH ORDER-FORM TODAY!

Yes! I want to have a beautiful body! Rush me the ***TBR System*** right now! I must be thrilled with the results or I get my money back. I am enclosing ☐ $12.00 for the original ***TBR System*** or ☐ $29.95 for the *new* ***Super TBR System*** with a One Year Guarantee! Add $4.00 for postage & handling. NO COINS PLEASE

PLEASE! You must PRINT VERY CLEARLY so that your package is delivered to the right address.

☐ Check here for Guaranteed Privacy. Yes! Send me my TBR System in a plain, unmarked package

Name ____________

Street ____________

City ____________

State ________ Zip ____________

EXHIBIT

D

PENGAD, Bayonne, N.J.

Johnson & Collins Research
Dept. Y-895 USPO8 NR 16346
Mpls. MN 55416-0346

DECISION AND ORDER

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

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that 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 Johnson & Collins Research, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Minnesota, with its office and principal place of business located at 5115 Excelsior Blvd., in the City of Minneapolis, State of Minnesota.

Respondent Gregor A. von Ehrenfels is an officer of said corporation. Individually or in concert with others, he participates in and/or formulates, directs, and controls the acts and practices of said corporation and his principal office and place of business are located at the above stated address.

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

ORDER

For purposes of this order;

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

(a) 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.

(b) In a print advertisement, the disclosure shall be in a type size, and in a location, that are sufficiently noticeable so that an ordinary consumer will see and read it, in print that contrasts with the background against which it appears. In multi-page documents, the disclosure shall appear on the cover or first page.

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

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

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

I.

It is ordered, That respondents, Johnson & Collins Research, Inc., a corporation, its successors and assigns, and its officers; and Gregor A. von Ehrenfels, individually and as an officer of Johnson & Collins Research, Inc.; 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 Total Body Reshaping System, Super Total Body Reshaping System, 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 does not require dieting.

II.

It is further ordered, That respondents, Johnson & Collins Research, Inc., a corporation, its successors and assigns, and its officers; and Gregor A. von Ehrenfels, individually and as an officer of Johnson & Collins Research, Inc.; and respondents' agents, representatives and employees, directly or through any partnership, corporation, subsidiary, division or other device, in connection with the manufacturing, advertising, packaging, labeling, promotion, offering for sale, sale, or distribution of any weight-loss product, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, in any manner, directly or by implication, that:

A. Such product is effective in causing fast and significant weight loss;

B. Such product is effective in reducing body fat or cellulite;

C. Such product is effective in causing weight loss, fat reduction, or increased muscle tone in specific, desired areas of the body;

D. Such product is effective in burning excess calories, modifying caloric intake, or converting food into energy instead of fat; or

E. Such product has any effect on users' weight, body size or shape, body measurements, or appetite,

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

III.

Nothing in Parts I and II of this order shall prohibit respondents from making representations which promote the sale of books and other publications, provided that, the advertising only purports to express the opinion of the author or to quote the contents of the publication; the advertising discloses the source of the statements quoted or derived from the contents of the publication; and the advertising discloses the author to be the source of the opinions expressed about the publication. This Part shall not apply, however, if the publication or its advertising is used to promote the sale of some other product as part of a commercial scheme.

IV.

It is further ordered, That respondents, Johnson & Collins Research, Inc., a corporation, its successors and assigns, and its officers; and Gregor A. von Ehrenfels, individually and as an officer of Johnson & Collins Research, Inc.; 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 Total Body Reshaping System, Super Total Body Reshaping System, 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 making any representation, in any manner, directly or by implication, that any such product has any effect on weight or body size, unless respondents disclose, clearly and prominently, that such product consists primarily of a booklet or pamphlet containing information and advice on weight loss.

V.

It is further ordered, That respondents, Johnson & Collins Research, Inc., a corporation, its successors and assigns, and its

officers; and Gregor A. von Ehrenfels, individually and as an officer of Johnson & Collins Research, Inc.; and respondents' agents, representatives and employees, directly or through any partnership, corporation, subsidiary, division or other device, in connection with the manufacturing, advertising, packaging, labeling, promotion, offering for sale, sale, or distribution of any weight-loss product, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from making any representation, in any manner, directly or by implication, that any such weight-loss product has any effect on weight or body size, unless they disclose, clearly and prominently, that dieting and/or increasing exercise is required to lose weight; provided however, that this disclosure shall not be required if respondents possess and rely upon competent and reliable scientific evidence demonstrating that the weight-loss product is effective without either dieting or increasing exercise.

VI.

It is further ordered, That respondent, Johnson & Collins Research, Inc., shall:

A. Within thirty (30) days after service of this order, provide a copy of this order to each of respondent's current principals, officers, directors, and managers, and to all personnel, agents, and representatives having sales, advertising, or policy responsibility with respect to the subject matter of this order; 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 respondent's 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 respondent or any subsidiary, successor, or assign, within three (3) days after the person assumes his or her responsibilities.

VII.

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.

VIII.

It is further ordered, That respondent, Johnson & Collins Research, 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.

IX.

It is further ordered, That respondent, Gregor A. von Ehrenfels, shall, for a period of three (3) 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 involving the advertising, offering for sale, sale, or distribution of any weight-loss product. 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.

X.

This order will terminate on May 31, 2016, 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.

XI.

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

IN THE MATTER OF

CANCER TREATMENT CENTERS OF AMERICA, INC., ET AL.

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

Docket C-3662. Complaint, May 31, 1996--Decision, May 31, 1996

This consent order requires, among other things, the Illinois-based company and two affiliated hospitals to substantiate future claims regarding the success or efficacy of their cancer treatments and to ensure that testimonials they use do not misrepresent the typical experience of their patients.

Appearances

For the Commission: *Walter Gross, III.*

For the respondents: *Stephen Durchslag* and *Michael Silbarium, Winston & Strawn,* Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that Cancer Treatment Centers of America, Inc., a corporation, Midwestern Regional Medical Center, Inc., a corporation, and Memorial Medical Center and Cancer Institute, Inc., a corporation, ("respondents") have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would he in the public interest, alleges:

PARAGRAPH 1. Respondent Cancer Treatment Centers of America, Inc., is an Illinois corporation, with its principal office or place of business at 3455 Salt Creek Lane, Suite 200, Arlington, Illinois.

Respondent Midwestern Regional Medical Center, Inc., is an Illinois corporation, with its principal office or place of business at Shiloh Boulevard and Emmaus Avenue, Zion, Illinois.

Respondent Memorial Medical Center and Cancer Institute, Inc., is an Oklahoma corporation, with its principal office or place of business at 8181 South Lewis Avenue, Tulsa, Oklahoma.

PAR. 2. Individually or in concert with others, respondents have advertised, offered for sale and sold cancer treatments and related health care services under the trade name "Cancer Treatment Centers of America" ("CTCA").

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 advertising in the form of promotional brochures for CTCA, including but not necessarily limited to the attached Exhibit A. This brochure contained the following statement:

(a) "Statistically our five-year survivorship is among the highest documented."

PAR. 5. Through the use of the statement contained in the advertisement referred to in paragraph four, including but not necessarily limited to the statement in the advertisement attached as Exhibit A, respondents have represented, directly or by implication, that statistical evidence demonstrates that the five-year survivorship rate for cancer patients in respondents' hospitals is among the highest recorded rates of survivorship for cancer patients.

PAR. 6. Through the use of the statement contained in the promotional brochure referred to in paragraph four, including but not necessarily limited to the statement in the brochure 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 substantiating such 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 substantiating such representation. Therefore, the representation set forth in paragraph six was, and is, false and misleading.

PAR. 8. Respondents have disseminated or have caused to be disseminated advertisements and promotional materials for CTCA, including but not necessarily limited to the attached Exhibits A-C. These advertisements and promotional materials contain the following statements:

(a) "The outlook has previously been bleak for people with certain forms of cancer, which resisted conventional types of treatment. Today, as a result of several treatments we were instrumental in pioneering, those cancers are beginning to yield.

Whole body hyperthermia is one such treatment. An approved medical procedure that raises the body's temperature to kill cancer cells without harming the normal cells that surround them, it is the product of years of meticulous research.

. . .

We felt certain that raising the body's temperature to the threshold of a cancer cell's viability could help us save lives." (Exhibit A)

(b) 'Cancer is not invincible. I Know'

'I had what the doctors called a modified radical mastectomy at a local hospital near my home in Indiana, and it didn't work.

'The cancer metastasized to the bone. The prognosis took just three words. "Less than poor." They told me to go home. There was really no hope. No options left.

'Maybe so, but I wasn't ready to die yet, and found a place that wasn't ready to let me. Cancer Treatment Center of America.

. . .

'For me the treatment was fractionated-dose chemotherapy combined with whole-body hyperthermia -- killing the cancer cells with heat, intense heat, something they pioneered way back in the 70's. . . .

'That was more than a year ago. More than a year of living life to the hilt. And getting to watch my daughter grow up.

'*Guess it all depends on where you go.*'

Barbara Hladek, cancer patient, at home in Indiana with her daughter." (Exhibit B)

(c) "We Found A Way To Pin A Bullseye On Lung Cancer

[The American Cancer Society] . . . estimate[s] that 142,000 [of 155,000 new cases of lung cancer diagnosed each year] will end in death, many with severe complication of lung obstruction -- a problem we hope to change with our newest weapon brachytherapy.

. . .

Brachytherapy is a new addition to our comprehensive cancer treatment program. Helping even one of those 142,000 lives makes it so." [Exhibit C]

PAR. 9. Through the use of the statements contained in the advertisements and promotional materials referred to in paragraph eight, including but not necessarily limited to the statements in the advertisements and promotional materials attached as Exhibits A-C, respondents have represented, directly or by implication, that:

(a) Whole body hyperthermia is a treatment that is approved for treatment of cancer by an independent medical organization;

(b) Through whole body hyperthermia, respondents are able to treat successfully certain forms of cancer that were previously unresponsive to conventional types of cancer treatment; and

(c) Through brachytherapy, respondents may be able to improve the chances of survival for many lung cancer patients.

PAR. 10. In truth and in fact, whole body hyperthermia is not approved for treatment of cancer by an independent medical organization. Therefore, the representation set forth in paragraph nine (a) was, and is, false and misleading.

PAR. 11. Through the use of the statements contained in the advertisements referred to in paragraph eight, including but not necessarily limited to the statements in the advertisements attached as Exhibits A-C, respondents have represented, directly or by implication, that at the time they made the representations set forth in paragraph nine, respondents possessed and relied upon a reasonable basis substantiating such representations.

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

PAR. 13. Respondents have disseminated or have caused to be disseminated advertisements and promotional brochures for CTCA, including but not necessarily limited to the attached Exhibits D-F. These advertisements contain the following statements:

(a) "You Can Beat Cancer. I'm Living Proof

. . .

[Flossie Dishong] had to travel almost a thousand miles from her home in Indiana to discover she had an inoperable tumor. Flossie refused to accept that diagnosis, and continued her search.

That's when Flossie found Cancer Treatment Centers of America . . . . We found a way to treat her cancer as well as her pain.

You see, cases like hers are the kind we generally take -- whether the cancer was just discovered or the previous treatments have failed.

. . .

We've given these people another chance to live, time and time again.

. . .

We've helped many patients to know the joy of living life to the fullest again, of waking each morning to a cloudless sky with many silver linings." (Exhibit D).

(b) "IF SOMEONE TELLS YOU DYING OF CANCER IS INEVITABLE REMEMBER THIS FACE.

You're looking at Nancy Cockle. An elated Nancy Cockle.

Thirty-Eight. Mother of three. Registered nurse. Cancer in remission. Complete remission.

We can tell you that while she may feel like one in a million at this moment in her life, full of exuberance and plans for the future, which now include a farm in Nebraska, her case is by no means novel.

We make a habit out of conquering cancer.

. . .

One way we measure our success is by the number of trees we plant in the park next door. One tree for each of our cancer patients who is alive and well five years later.

We're saving a spot for Nancy's." (Exhibit E)

(c) "They Beat Cancer

Sam Alsbach, Lymphoma - 7 Year Survivor; Diane Casto, Breast Cancer - 10 Year Survivor; Chester Jermakowicz - Prostate and Bone Cancer - [illegible] Year Survivor; Norma Baith Breast cancer - 9 Year Survivor; Harlan Martin, Lymphoma - 6 Year Survivor; Katy Rouse, Breast Cancer, 6 Year Survivor; Ron Benzler, Colon Cancer - 9 Year Survivor; Ewald Ehresman, Lymphoma - 6 Year Survivor.

Six-year survivor. Seven-year survivor. Eight-year survivor. Nine. Ten. Eleven. And even more! They're just some of the battles with cancer we've fought, for brave people who came to us, often after treatment elsewhere. Often with the feeling that there was little reason to hope. They came away with new leases on life, like many other patients we've helped. It's a success story built on highly advanced, innovative, comprehensive treatment programs, a team approach, and a highly caring environment." (Exhibit F)

PAR. 14. Through the use of the statements contained in the advertisements referred to in paragraph thirteen, as well as the statements contained in the advertisement referred to in paragraph eight (b), including but not necessarily limited to the statements in the advertisements attached as Exhibits B and D-F, respondents have represented, directly or by implication, that testimonials from consumers appearing in advertisements for respondents' treatment centers reflect the typical and ordinary experience of members of the public who have undergone treatment at said treatment centers.

PAR. 15. Through the use of the statements contained in the advertisements referred to in paragraph thirteen, as well as the statements contained in the advertisement referred to in paragraph eight (b), including but not necessarily limited to the statements in the advertisements attached as Exhibits B and D-F, respondents have represented, directly or by implication, that at the time they made the representation set forth in paragraph fourteen, respondents possessed and relied upon a reasonable basis substantiating such representation.

PAR. 16. In truth and in fact, at the time they made the representation set forth in paragraph fourteen, respondents did not possess and rely upon a reasonable basis substantiating such

representation. Therefore, the representation set forth in paragraph fifteen was, and is, false and misleading.

PAR. 17. The acts and practices of respondents as alleged in this complaint constitute deceptive acts or practices in or affecting commerce in violation of Section 5 (a) and 12 of the Federal Trade Commission Act.

EXHIBIT A

This tree
represents every tree growing in our Cancer Survivors' Arboretum,
a source of inspiratio n to cancer victims everywhere.
One tree is planted ther e for every patient of ours who has
survived for at least fi ve years, the standard used by the
American Cancer So ciety to define the word "cure."
There is no more fitting symbol to co nmemorate all the battles won and all the lives
saved. The tree, the boy and his com panion speak of the optimism of youth, of new
beginnings, soaring spirits, years of lo ve and laughter and loyal friends, and the joy of
looking forw ard to life once again.

We have already plan ted more than a hundred trees.
Our goal is to plant a forest.

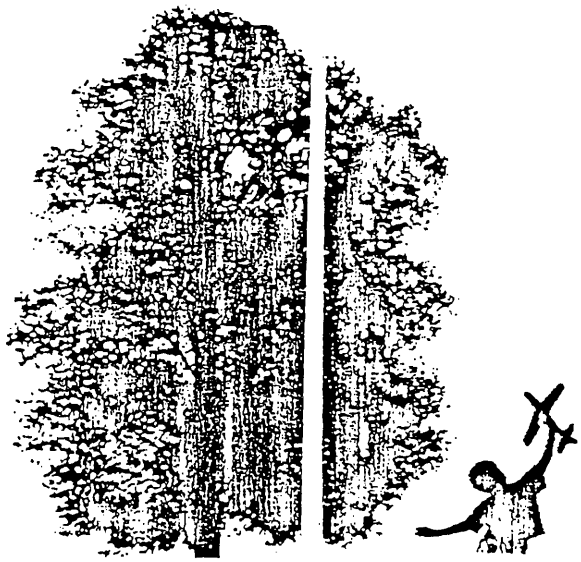


EXHIBIT A

EXHIBIT A

WHO WE ARE

To achieve our mission required creating an approach to treatment almost unheard of in the medical community and only dreamed of by the patient.

Assembling the finest professionals in oncology, tumor biology, immunology and other cancer specialties wasn't enough. Others have first-rate staffs, too. Our approach calls for the specialists on staff to work as a team, regularly sharing information and insights regarding each patient's case.

What's more, the patient is always present and participating—a partner in the planning. Until he or she fully understands each proposal, and agrees with it, no course of treatment begins. And because our oncology physicians are members of our staff exclusively, they are always close by, ready to provide immediate comfort and guidance.

Another difference in our approach—and benefit—is ease of access. Since our patients come to us from all parts of the country, we go to great lengths to make the journey extra easy on them. Our travel staff makes arrangements for the patients and family members to visit one of our facilities. They're met at the airport and driven to our front door, and back to the airport as well. If the flight is delayed, the driver will wait with them. If it is cancelled, he'll make other arrangements on the spot and, if necessary, check them into a nearby hotel for the night.

The results that our approach to cancer treatment produces are best evidenced by the names you'll see on the last page—patients still alive at least five years after coming to us for treatment. Statistically, our five-year survivorship is among the highest documented.

We believe it is attributable to the comprehensive treatment program we offer, the kind that makes the life of every patient we work with the most important life in the world.

ACCREDITATION

Cancer Treatment Centers of America facilities, laboratories or programs have either received or are in the process of applying for accreditation, approval or certification from the Joint Commission on the Accreditation of Health Care Organizations, the American College of Surgeons, the Association of Community Cancer Centers and the College of American Pathology.

EXHIBIT A

CARING

We have se· the cycle of discovery,

denial, shock, fear, (ger, despair, helplessness—and

hope—pl ed out many times.

This debilitating r(r coaster ride of emotions is a

condition it must be addressed.

We believe doing so lls for a recognition of special

ne(and support.

It requires ipassion and comfort,

especially emotional d spiritual comfort, as well as

a great deal of th ind of care we specialize in,

Ten r, loving care.

EXHIBIT A

OUR APPROACH

Cancer Treatment Centers of America uses what is called a multi-modality approach to treat cancer. That simply means we combine traditional therapies, primarily chemotherapy, radiation and surgery, with medicine's newest therapies—such innovative treatments as whole-body, local and regional hyperthermia, fractionated-dose chemotherapy and tumor vaccines.

Our objective is to provide our patients with options. Options that allow us to target the cancer as precisely as possible. Options that are tailored to its type and behavior. Options that result in the most effective available treatment or combination of treatments, old or new.

We also buttress the treatment plan selected with nutritional, psychological and pastoral support, all of which have been proved to be biologically as well as emotionally beneficial in fighting cancer.

Our approach is as comprehensive as possible, because it offers us more ways to succeed and our patients more ways to survive.

EXHIBIT A

WINNING

Our objective is res: ılts.
We believe there is no alternativ excepttowinthe
fight, to slow cancer's grow: h, to stop it,
to excise it, to give back the life it': taking for as long
as possible. By any mean s possible.

We also believe it is not enoug h to win once,
or twice, or merely now ı ınd then.
Again, the only option is to w in repeatedly,
time after time after time.
For only being able to repeat ana repeat and repeat
the outcome can we tr: ly claim
victory over can: er.

EXHIBIT A

TREATMENT

The outlook has previously been bleak for people with certain forms of cancer, which resisted conventional types of treatment. Today, as a result of several treatments we were instrumental in pioneering, those cancers are beginning to yield.

Whole-body hyperthermia is one such treatment. An approved medical procedure that raises the body's temperature to kill cancer cells without harming the normal cells that surround them; it is the product of years of meticulous research.

We knew, for instance, that the size of malignant tumors had been shown to *decrease* in patients running a fever. We also knew that the effectiveness of chemotherapy had been shown to *increase* during the presence of a fever. We felt certain that raising the body's temperature to the threshold of a cancer cell's viability could help us save lives. We acted on that belief as far back as 1978.

The treatment, which takes place in the sterile environment of a surgery suite, calls for the patient's torso and limbs to be carefully wrapped in cotton insulating pads. Then, after being anesthetized, he or she is placed between thick rubber blankets through which very hot water is pumped. The temperature is slowly, carefully elevated to the point at which cancer cells begin to die—106 degrees Fahrenheit. It is held there for approximately two hours, during which vital signs are monitored continuously. The procedure is non-invasive and very safe when administered by specialists on our staff.

Cancer Treatment Centers of America has led the world in the development of whole-body hyperthermia. We have administered it more than 1,000 times since 1978. We have also led the way in the performance of clinical studies that seek to learn how much hyperthermia can increase the effect of chemotherapy and radiation on cancer.

We also perform local and regional hyperthermia. This method of utilizing heat to treat cancer makes it possible to target specific tumors or areas of the body very accurately with low-power microwaves. We apply the precise amount of heat necessary—109 degrees or higher—to weaken and destroy the malignant cells and increase their vulnerability to radiation, chemotherapy and other methods of attack. Better yet, local and regional hyperthermia can be used with only a local anesthetic on either an inpatient or outpatient basis.

Unfortunately, not every cancer patient is a good candidate for hyperthermia. The type and severity of the cancer as well as the patient's medical history must be considered. Even his or her emotional and psychological well-being is taken into account. Results from extensive testing—diagnostic, laboratory and X-ray—also determine which patients may benefit most.

Patients who choose to have the treatment meet with our hyperthermia specialists to discuss possible risks as well as benefits. Mutual understanding and agreement are essential.

PLEASE CALL 1-800-FOR-HELP

EXHIBIT A

PATIENT RIGHTS

We believe
the last word in the formulation of a patient's
treatment plan belongs to the patient alone.
It is his or her inalienable right.
The right to know the options and the expectations
for each, and then to decide.
Exercising that right can help greatly to improve the
chances for success.

For those reasons our team of doctors,
nurses and supporting staff works closely with both
patient and family to make sure
that the likely effects of possible treatment modalities
are clearly understood.
Only then can patient join with
their medical team in confidently choosing the most
prudent course of action.

EXHIBIT A

LABORATORY

Our fully accredited laboratory is one of the finest in the country. It's an asset that makes Cancer Treatment Centers of America stand above all other such organizations.

It gives us, for instance, the ability to perform highly sophisticated advanced assays that gauge the function of the immune system, a measurement tool not readily available at most hospitals. Three such tests—natural killer cell, mitogen stimulation and T-suppressor assays—allow our oncology physician team to monitor the overall effect of the treatment as well as each patient's capacity to battle his or her cancer.

Most important of all, perhaps, is the ability our laboratory gives us to clone some patients' tumor cells, to "grow" them outside the patient's body. For some patients this means we can determine beforehand the type of treatment—the kind of chemotherapy or the optimum amount of radiation that will be most effective.

This procedure, in vitro determination of chemosensitivity, allows us to determine in a glass or test tube (*in vitro*) which chemical or other agent will work best on the cells taken from the patient's body. How they react is carefully monitored and the agent that proves most effective is then selected as a possible treatment.

Another great advantage our laboratory affords us is assessment of the immune function, by which we can detect very early on which of the body's cells may become cancerous. The test, called a tumor marker panel, analyzes normal-appearing cells to detect "markers" on or in them that indicate a predisposition to cancer, or that cancer is already present in a very early stage of development.

Once cancer is positively identified, the lab's cancer specialists work to develop both the most effective treatments for fighting it as well as methods of overcoming the body's own natural defenses. Although impaired by the growth of the cancer, the immune system can be strengthened to help with the fight.

In addition, the laboratory houses a research and development section where, as a matter of course, new ideas are joined with new technology to find more effective ways to combat cancer. We are currently developing tumor vaccines, tumor-derived killer cells and lymphokine-activated lymphocytes that may prove to be the breakthroughs we've been searching for.

The goal of this aggressive research program, the effort of every waking moment, is to find more new ways to arrest cancer and someday, a way to cure it and even prevent it.

PLEASE CALL 1-800-FOR-HELP

EXHIBIT A

FAMILY

We are family.

We think as one and we work as one.

Equally important, we take pains to treat our

patients and their loved ones as family.

It is at the heart of the caring atmosphere our

patients experience.

It also creates a powerful

force that can help in their treatment, a

"we're in this together"

mentality that welds us all together in

the battle against cancer.

EXHIBIT A

SUPPORT SERVICES

"Comprehensive" means using every available weapon in the fight against cancer. Not only treatments and lab work, but support services as well.

One important area of support is the creation and maintenance of a positive mental attitude. Studies that examine the relationship between mind and body suggest that being positive helps the body fight disease. We provide an environment that makes it easier.

A team of psychologists, social and pastoral care counselors meets with patients regularly, in one-on-one and group sessions. The staff also encourages unstructured, informal meetings among patients where they can speak frankly about their cancers, share ideas, and support one another emotionally.

Equally important is patient diet and nutrition, which bears directly on how well the immune system functions. Our first step, therefore, is to determine each patient's overall nutritional status. Vitamin, mineral and amino-acid levels are examined by the lab, as well as the levels of metals like copper, chromium, zinc and manganese. How individual cells absorb and process nutrients is also monitored.

The findings guide our team of nutritionists in developing an individualized diet program for each patient, one loaded with natural foods and vitamin and mineral supplements, to help his or her immune system regain its natural cancer-fighting ability.

The National Academy of Sciences issued its dietary recommendations for reducing the risk of contracting cancer in 1982. They paralleled our own patient nutrition program in use since 1976. In the fight against cancer, "you are what you eat" is not a hackneyed expression. It is a vital aspect of modern care.

PLEASE CALL 1-800-FOR-HELP

EXHIBIT A

THE DIFFERE! E

Cancer Treatment Cen. rs of America
is a leader in innovative c ncer treatment.

We were among the fi : to adopt a
comprehensive approach to :atment, to offer
programs for strengthening n ds as well as bodies,
to place a premium on fam involvement and
spiritual needs, and to encou: ie patients to play a
decision-making role in t tment selection.

As a result, we are now one t he most progressive
cancer treatment organizat s in America. All
our resources have been dedic d to achieving that
result and will continue to be i order that we may
provide our patients with be · treatment options
than they have eve id before.

EXHIBIT A

INSTITUTIONAL REVIEW BOARD FOR RESEARCH AND ETHICS

Our strong commitment to clinical research requires an equally strong, highly qualified Institutional Review Board for Research and Ethics (IRBRE) to guide our efforts in this area. To that end, we have assembled some of the brightest minds in medicine as the Scientific Advisory Board component of the IRBRE.

Several are currently professors of medicine at this country's leading universities. Many have published extensively in the area of clinical oncology and have devoted major portions of their careers to cancer research.

We have also reached out to the communities where Cancer Treatment Centers of America has established cancer units and hospitals enlisting the aid of community leaders and successful men and women from the ranks of business, the professions and clergy. Together with the board's scientifically oriented members, they form a blue-ribbon panel tasked with developing guidelines and making recommendations for ethical research procedures.

Their charter is clear-cut, and based in part on the following principles which we consider sacred:

1. In all clinical research work with patients, the voluntary consent of the patient is essential.

2. The objective of the clinical research effort is to yield results capable of advancing the fight against cancer.

3. The objective of the clinical research avoids all unnecessary suffering and injury.

4. The degree of risk involved must never outweigh the potential benefits to the patient.

5. Studies should be undertaken only by qualified medical professionals.

The foregoing represents the unwavering allegiance of Cancer Treatment Centers of America to the highest ethical and technical standards of cancer research.

PLEASE CALL 1-800-FOR-HELP

EXHIBIT A

QUALITY OF LIFE

We never forget
what it is like to have cancer, nor to put ourselves
in our patients' shoes.
Treatment modalities are therefore chosen
for more than their effectiveness in battling a
specific cancer.

They are also chosen to allow patients to live
life as normally as possible while being treated.
Life as free of nausea or hair loss or
tiredness or depression as we can make it.
Life as our patients have always lived it—working,
raising their kids, going dancing,
whatever—interrupted as infrequently as possible by
treatments at the center.

EXHIBIT A

FINANCIAL MATTERS

Because changes occur frequently in the health insurance industry, Cancer Treatment Centers of America updates financial policies and procedures continuously to assure compliance with insurance carrier requirements.

Under the Clinical Case Management Department, there are strong pre-admission, pre-certification and utilization review programs. Medical criteria such as severity of illness and intensity of service are constantly monitored throughout the hospital stay. Extended certifications are done as necessary, in conjunction with concurrent medical reviews.

To expedite the processing of insurance claims, Cancer Treatment Centers of America utilizes a state-of-the-art computerized billing system for both hospital and physician services. Claim accuracy and timeliness has been noticeably improved by an order-entry charge system and a central billing system for both hospital and physician services.

Financial counselors are individually assigned to patients in order to expedite both hospital and physician claims. This establishes a close, positive relationship which makes dealing with financial matters a great deal easier for the patient.

The important thing to remember is at Cancer Treatment Centers of America we never forget the financial burden our patients face. Like the treatment options offered, we also think it's essential to provide financial options as well.

PLEASE CALL 1-800-FOR-HELP

EXHIBIT A

OUR TRAVEL PROGRAM

Our patients come to us from throughout the United States and from abroad as well. Since that can entail traveling great distances, we have established a program to make the journey easier-financially as well as emotionally.

We recognize that travel under trying circumstances can be most difficult. And that the cost to and from Cancer Treatment Centers of America, or any other treatment facility for that matter, is usually not covered by insurance. For those reasons we have established a program designed to cut down on the strain and the expense of travel.

We will make all the arrangements every time you come for treatment. We will be at the airport when you arrive. We will take you back to the airport after each visit.

On your first visit, not only is your airfare paid for, but the airfare of a guest as well. Whomever you choose to accompany you. He or she will also receive our VIP Card, good for three meals in our dining room every day. On subsequent visits you will continue to be reimbursed for your travel expenses, but not for those of a guest.

Our program covers travel within the continental United States only. For more information call 1-800-FOR-HELP.

PLEASE CALL 1-800-FOR-HELP

EXHIBIT A

MEMBERS OF OUR MEDICAL STAFF

Nowhere is our commitment to excellence more important than in the selection of our medical staff. Its members must be at the top of their profession. They must be doctors with exemplary qualifications in one or more cancer specialties, doctors who believe in the kind of close collaboration implicit in our teamwork approach to treatment, doctors who truly "feel" for the patients they treat...and they show it.

R. Michael Williams, MD, PhD
Senior Medical Director,
Cancer Treatment Centers of America.

Dr. Williams is a medical oncologist with subspecialties in microbiology and immunological therapy.

He received his Bachelor of Arts degree in 1969 from Yale College, his Master of Science degree in microbiology from Yale University in 1970, and his MD in 1974 from Harvard Medical School. He also received a PhD in immunology from Harvard University, after which he served his internship and residency at Peter Bent Brigham Hospital in Boston.

In 1976 he was appointed Assistant Professor of Medicine, Harvard Medical School, and joined the professional staff of the Sidney Farber Cancer Institute, Boston.

In 1979 he became Professor of Medicine and Chief of the Section of Medical Oncology at Northwestern University Medical School and Northwestern Memorial Hospital. In 1987 Dr. Williams joined American International Hospital in Zion, Illinois, and subsequently Cancer Treatment Centers of America as Senior Medical Director and Chief Medical Officer.

Dr. Williams has also published extensively. Additionally, he is the founder and Chairman of the Cancer Consulting Group, a cancer information and referral service in Evanston, Illinois.

Ranulfo S. Sanchez, MD
Co-Medical Director,
Cancer Treatment Centers of America,
American International Hospital,
Zion, Illinois.

Dr. Sanchez is a general surgeon with a subspecialty in oncology.

He received his Bachelor of Arts degree in 1961 from the University of San Carlos at Cebu in the Philippines, and MD in 1966 from the Cebu Institute of Medicine. He interned and served two residency programs (in surgery and pathology) at St. John's Episcopal Hospital in Brooklyn, New York.

Upon completion of his training there, Dr. Sanchez practiced at St. John's Baptist Hospital and Flatbush General Hospital for the next twelve years. Then, in 1978, he joined the cancer program at American International Hospital in Zion, Illinois, where he later became Chief of Surgical Oncology.

Alfonso V. Mellijor, MD
Co-Medical Director,
Cancer Treatment Centers of America,
American International Hospital,
Zion, Illinois

Dr. Mellijor is board certified in general surgery and surgical oncology.

He received his Bachelor of Science degree in 1966 from the University of San Carlos at Cebu in the Philippines, and his MD in 1972 from Cebu Institute of Medicine. He served his internship and surgical residency at St. John's Episcopal Hospital in Brooklyn, New York, as well as a fellowship in surgical oncology at the State University of New York.

Dr. Mellijor then joined St. John's and New York's Downstate Medical Center, where he practiced his medical specialties until 1980. At that time he became a member of the cancer program at American International Hospital in Zion, Illinois, where he was subsequently named Chief of Surgery.

Over...

EXHIBIT A

Robert D. Levin, MD
Chief of Medical Oncology,
Cancer Treatment Centers of America,
American International Hospital,
Zion, Illinois.

Dr. Levin is board certified in internal medicine, hematology and medical oncology.

He received his Bachelor of Science degree in 1965 from the California Institute of Technology in Pasadena, and his MD in 1969 from the University of Chicago. He took his internship at the General Rose Memorial Hospital in Denver, Colorado, and his residency at Chicago's Northwestern Memorial Hospital. His specialties at Northwestern: internal medicine, hematology and oncology.

Subsequently, Dr. Levin became a member of the medical staff at Mt. Sinai Hospital in Chicago, as well as a consulting physician at several other area hospitals. In 1986, he joined the cancer program at American International Hospital in Zion, Illinois, as Chief of Medical Oncology.

Young D. Kim, MD
Medical Director,
Whole Body Hyperthermia Program,
Cancer Treatment Centers of America,
American International Hospital,
Zion, Illinois.

Dr. Kim did his undergraduate work at the Korean University in Seoul, South Korea, receiving his Bachelor of Science degree in 1961. His MD came from Korean University as well. In 1965 he served his internship at Mercy Hospital in Toledo, Ohio.

Graduate training in general surgery and anesthesia followed, the former at Medical College of Ohio in Toledo and the latter at New York's highly regarded Beth Israel Medical Center. Upon completion of his graduate work, Dr. Kim went back to Korean University where he joined the Department of Anesthesia as an instructor.

He then returned to the United States, entering private practice at Whitestone General Hospital in Whitestone, New York, before joining the cancer team at American International Hospital in Zion, Illinois in 1982.

Hans B. Nevinny, MD
Chairman of Medical Oncology,
Cancer Treatment Centers of Americ[illegible],
Memorial Medical Center & Cancer Institute, Tulsa, Oklahoma

Dr. Nevinny holds an MD degree from Leopold Franzens University in Innsbruck, Austria, and a master of science degree from the Harvard University School of Public Health. His credentials also include a research fellowship in medicine at Harvard Medical School and a postdoctoral fellowship sponsored by the National Cancer Institute. He served as a research associate at Harvard and at Boston's Children Cancer Research Foundation, where he trained under the renowned cancer specialist, Dr. Sidney Farber.

Additionally, Dr. Nevinny served as an assistant and research associate at Peter Bent Brigham Hospital in Boston and as Director of the Strang Oncology Center, L.A. Weis Memorial Hospital in Chicago. He also has held professorships in medicine and oncology at the University of Illinois, Chicago since 1970 and before his appointment as Chairman of Medical Oncology at Memorial Medical Center & Cancer Institute in Tulsa was Chairman of the Oncology Department at Charter Medical Center in Hawaiian Gardens, California.

PLEASE CALL 1-800-FOR-HE

EXHIBIT A

"You Can Beat Cancer. I'm Living Proof."

Flossie Dishong was in terrible pain, and nobody knew why. She finally had to travel almost a thousand miles from her home in Indiana to be told she had inoperable cancer.

Fortunately, Flossie refused to accept that diagnosis. She came to us for a second opinion. To Cancer Treatment Centers of America. We found a way to treat her cancer, not just her pain.

You see, we specialize in treating cases others call "hopeless." They made up more than 90% of our admissions in 1989, and nearly the same last year. People fighting for a chance to live. We can't guarantee success in every case, but we make difficult cases our specialty.

We've helped people live life to the fullest once more. And we've done it without the horrible side effects of single-dose chemotherapies that can make other cancer treatments unbearable.

One reason, we're certain, is our caring, love-filled environment. Another is the quality and the scope of our cancer treatment program.

It's as comprehensive as we can make it, utilizing the most advanced, innovative weapons known to medicine. It has to be, because the effectiveness of any cancer treatment program depends on a variety of factors and differs from patient to patient. While no one can offer a guarantee, we can offer our best effort and our extensive experience.

As for Flossie, that picture really is worth a thousand words, although she said it all in just fourteen:

"Never thought I'd be fishing with my husband again. I am one happy lady."

EXHIBIT B


"Cancer Is Not Invincible. I Know."
"I had what the doctors called a modified radical mastectomy at a local hospital near my home in Indiana, and it didn't work.
"The cancer metastasized to the bone. The prognosis took just three words. 'Less than poor.' They told me to go home. There was really no hope. No options left.
"Maybe so, but I wasn't ready to die yet, and found a place that wasn't ready to let me. Cancer Treatment Centers of America.
"They gave me options, let me choose, and then fought like the dickens to save my life.
"For me the treatment was fractionated-dose chemotherapy combined with whole-body hyperthermia—killing the cancer cells with heat, intense heat, something they pioneered way back in the 70's. It's part of what I believe is the most comprehensive cancer-fighting program there is, incorporating the most advanced thinking in the field.
"That was more than a year ago. More than a year of living life to the hilt. And getting to watch my daughter grow up.
"Guess it all depends on where you go."
Barbara Hladek, cancer patient, at home in Indiana with her daughter.
CANCER TREATMENT CENTERS
1-800-255-8509

EXHIBIT C

We Found A Way To Pin A Bullseye On Lung Cancer

According to the American Cancer Society, 155,000 new cases of lung cancer will be diagnosed this year.

They also estimate that 142,000 of them will end in death, many with severe complication of lung abstruction–a problem we hope to change with our newest weapon brachytherapy.

What sets it apart–makes it extra ordinary–is pinpoint accuracy. It can hit a tumor dead-center. Bombard it. Without harming the healthy tissue that surrounds it.

The "bomb" is a very high-dose radiation source, delivered to the target for a precise period in a precise amount and configuration, all of which is determined and monitored by computer. The pain is equally precise, guided to its location by a catheter with built in fiber-optics.

It's a quick, painless, out-patient procedure. In addition, brachytherapy can help those patients whose tumor has come back after surgery, radiation therapy or chemotherapy.

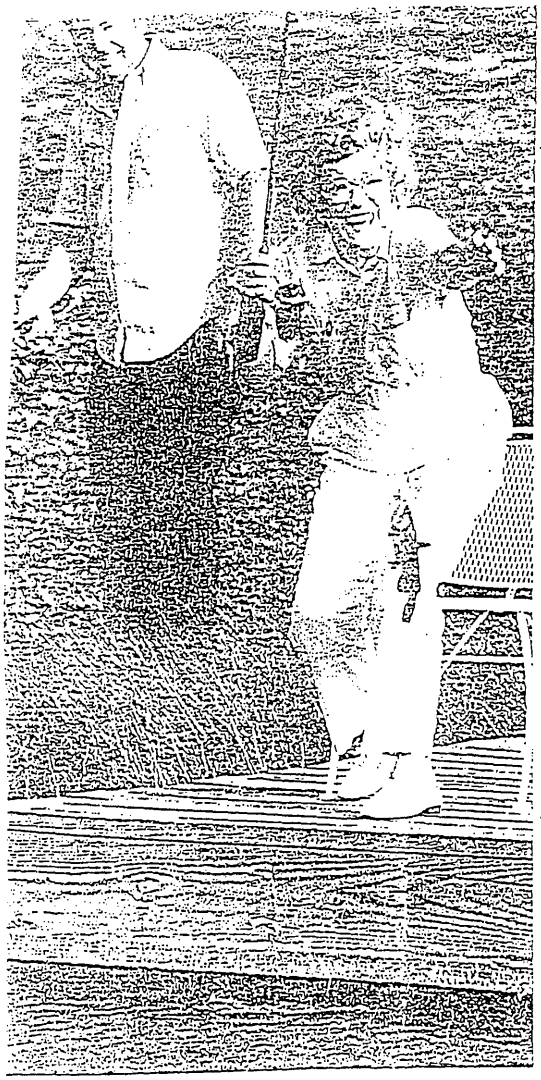
Brachytherapy is a new addition to our comprehensive cancer treatment program. Helping even one of those 142,000 lives makes it so.

CANCER TREATMENT CENTERS® OF AMERICA

CALL
1-800-553-0396

EXHIBIT C

EXHIBIT D



"You Can Beat Cancer. I'm Living Proof."

Flossie Dishong was in terrible pain, and nobody knew why.

She finally had to travel almost a thousand miles from her home in Indiana to discover she had inoperable cancer. Flossie refused to accept that diagnosis, and continued her search.

That's when Flossie found Cancer Treatment Centers of America at American International Hospital in Zion, Illinois. We found a way to treat her cancer as well as her pain.

You see, cases like hers are the kind we generally take—whether the cancer was just discovered or the previous treatments have failed. These cases made up more than 90% of our admissions in 1989, and nearly the same in 1990.

We've given these people another chance to live, time and again.

We've done it without the horrible side effects that sometimes make other cancer treatments unbearable. We've helped many patients to know the joy of living life to the fullest again, of waking each morning to a cloudless sky with many silver linings.

The reason, we're certain, is the quality and the scope of our cancer treatment program. It's the most comprehensive available, utilizing the most advanced, innovative weapons known to medicine. What's more, we never forget that the lives of our patients matter just as much as our own, and that a caring, love-filled environment is excellent medicine.

As for Flossie, that picture really is worth a thousand words, although she summed up her feelings just fine in fourteen.

"Never thought I'd be fishing with my husband again. I am one happy lady."

CANCER TREATMENT CENTERS OF AMERICA

Affiliate Hospitals

American International Hospital

EXHIBIT E

IF SOMEONE TELLS YOU DYING OF CANCER IS INEVITABLE, REMEMBER THIS FACE.

You are looking at Nancy Cockle. An elated Nancy Cockle.

Thirty-Eight. Mother of three. Registered nurse. Cancer in remission. Complete remission.

We can tell you that while she may feel like one in a million at this moment in her life, full of exuberance and plans for the future, which now include a farm in Nebraska, her case is by no means novel.

We make a habit of conquering cancer.

It is, after all, our specialty. A holistic approach that makes American International Hospital quite unique. An integrated program that combines stress management, nutrition and traditional therapies with promising new treatments like whole-body hyperthermia and fractionated-dose chemotherapy.

One way we measure our success is by the number of trees we plant in the park next door. One tree for each of our cancer patients who's still alive and well five years later.

Last year alone, we planted seventy-three.

We're saving a spot for Nancy's.

American International Hospital Cancer program
Call 1-800-FOR-HELP

EXHIBIT E

EXHIBIT F

They Beat Cancer.

Six-year survivor. Seven-year survivor. Eight-year survivor. Nine. Ten. Eleven. And even more!

They're just some of the battles with cancer we've fought for brave people who came to us, often after treatment elsewhere. Often with the feeling that there was little reason to hope.

They came away with new leases on life, like many other patients we've helped.

It's a success story built on highly advanced, innovative, comprehensive treatment programs, a team approach and a truly caring environment. This is a little of what it looks like.

CANCER TREATMENT CENTERS®

CALL 1-800-545-8259

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

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents 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 Cancer Treatment Centers of America, Inc., is an Illinois corporation, with its principal office or place of business at 3455 Salt Creek Lane, Suite 200, Arlington, Illinois.

2. Respondent Midwestern Regional Medical Center, Inc., is an Illinois corporation, with its principal office or place of business at Shiloh Boulevard and Emmaus Avenue, Zion, Illinois.

3. Respondent Memorial Medical Center and Cancer Institute, Inc. is an Oklahoma corporation, with its principal office or place of business at 8181 South Lewis Avenue, Tulsa, Oklahoma.

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

ORDER

DEFINITIONS

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

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

B. *"Cancer"* shall mean any of various malignant neoplasms characterized by the proliferation of anaplastic cells that tend to invade surrounding tissue and may metastasize to new body sites or the pathological condition characterized by such growths.

C. *"Independent organization or facility"* means any organization, association, or entity, whether or not for profit, which is not owned or controlled, directly or indirectly, by respondents, individually or collectively.

D. *"Endorsement"* means any advertising message (including verbal statements, demonstrations or depictions of the name, signature, likeness or other personal identifying characteristics of any individual or the name or seal of an organization) which message consumers are likely to believe reflects the opinions, beliefs, findings, or experience of a party other than the sponsoring advertiser.

I.

It is ordered, That respondents Cancer Treatment Centers of America, Inc., a corporation, Midwestern Regional Medical Center, Inc., a corporation, and Memorial Medical Center and Cancer Institute, Inc., a corporation, their successors or assigns, (hereinafter sometimes referred to as "respondents"), and respondents' officers, representatives, agents, and employees, directly or through any corporation, subsidiary, division, or other device, including franchisees or licensees, in connection with the advertising, promotion, offering for sale, or sale of products or services purporting to treat or cure disease, in or affecting commerce, as

"commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Making any representation, directly or by implication, about either:

(1) The existence or content of statistical data that purports to document survivorship rates or cure rates for cancer patients in respondents' treatment facilities; or

(2) Cure rates or survivorship rates either for any of respondents' treatment facilities or for any treatment modality or modalities offered by respondents,

unless, at the time of making any such representation, respondents possess and rely upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, substantiating the representation.

B. Representing, directly or by implication, that any modality for the treatment or mitigation of cancer or its attendant symptoms is approved, endorsed or accepted by any independent organization or facility unless, at the time of making any such representation, respondents possess and rely upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, substantiating the representation.

C. Making any representation, directly or by implication, about the efficacy of any modality that purports to treat or mitigate cancer or its attendant symptoms, unless, at the time of making any such representation, respondents possess and rely upon competent and reliable scientific evidence substantiating the representation.

D. Representing, directly or by implication, that any endorsement of any of respondents' treatment programs that purport to mitigate or cure cancer represents the typical or ordinary experience of members of the public who use the program, unless:

(1) At the time of making such representation, respondents possess and rely upon competent and reliable scientific evidence, that substantiates such representation, or

(2) Respondents disclose clearly, prominently and in close proximity to the endorsement or testimonial either:

(a) What the generally expected results would be for users of 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.

E. Making any representation, directly or by implication, about the performance, safety or benefits of any modality that purports to treat or mitigate cancer, its attendant symptoms or attendant diseases, unless, at the time of making any such representation, respondents possess and rely upon competent and reliable scientific evidence substantiating the representation.

II.

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

III.

It is further ordered, That 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.

IV.

It is further ordered, That within ten (10) days from the date of service of this order, respondents shall distribute a copy of this order

to each of their officers, agents, representatives, independent contractors and employees who are involved in the preparation and placement of advertisements or promotional materials or who have any responsibilities with respect to the subject matter of this order; and, shall secure from each such person a signed statement acknowledging receipt of this order.

V.

This order will terminate on May 31, 2016, 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 sixty (60) days after the date of service of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

THE DIET WORKSHOP INC., ET AL.

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

Docket C-3663. Complaint, June 3, 1996--Decision, June 3, 1996

This consent order prohibits, among other things, the Massachusetts-based corporations from misrepresenting the results of any weight-loss program they offer, requires them to possess scientific data to substantiate any claims concerning weight-loss and maintenance, and mandates that they make certain disclosures regarding maintenance and other claims.

Appearances

For the Commission: *Gary Cooper* and *Andrew Caverly.*

For the respondents: *John Tifford, Brownstein & Zeidman*, Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that The Diet Workshop, Inc. and The Diet Workshop of Boston, Inc., corporations (collectively 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 The Diet Workshop, Inc. ("Diet Workshop") and respondent The Diet Workshop of Boston, Inc. ("Diet Workshop of Boston") are Massachusetts corporations, with their principal offices or places of business located at 1 University Office Park, 29 Sawyer Road, Waltham, Massachusetts.

PAR. 2. Respondents advertise, offer for sale, sell, and otherwise promote throughout much of the United States weight loss and weight maintenance services and products, and make them available to consumers at numerous Diet Workshop centers. These products include "food" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act. Through centers owned by Diet

Workshop and Diet Workshop of Boston, franchised by Diet Workshop, and licensed by Diet Workshop to use the Diet Workshop trademark and the Diet Workshop weight loss and weight maintenance services and products, respondents are engaged, and have been engaged, in the sale and offering for sale of low calorie diet ("LCD") weight loss programs and weight maintenance programs to consumers.

PAR. 3. In the course and conduct of their businesses, respondents have disseminated or caused to be disseminated advertisements for weight loss and weight maintenance services and products. Respondents have placed, or have authorized the placement of, these advertisements with numerous newspapers, radio stations, and television stations for the purpose of inducing consumers to purchase their products and services. Respondents further advertise the Diet Workshop weight loss programs through the use of promotional materials, including pamphlets and brochures, that are mailed to customers and prospective customers or are given to them at individual Diet Workshop centers.

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

PAR. 5. Respondents' advertisements and promotional materials include, but are not necessarily limited to, the advertisements and promotional materials attached hereto as Exhibits A-R.

PAR. 6. The advertisements and promotional materials referred to in paragraph five, including but not necessarily limited to the attached Exhibits A-M and R, contain the following statements:

(a) For Weight Loss ... and Forever.
And if you've always wanted to be thin, THE DIET WORKSHOP has the weight-loss program that will help you reach your goal range and maintain it.
[Exhibit A]

(b) At the Diet Workshop, we care about your weight. Whether you have 5 pounds to lose, or 50, or more, we're ready to work with you and help you become the thin person you've always wanted to be.

. . .

The Diet Workshop's FLEXI-GROUPS can help you design a diet program that suits your lifestyle needs and helps you reach your Goal Range at a pace that's comfortable for you.
[Exhibit B]

(c) 1965 MINI-SKIRTS WERE IN. LBJ WAS PRESIDENT. I LOST 42 LBS. 1990 I'M STILL THIN!

Since 1965 THE DIET WORKSHOP has fit millions into the fashions of the day. In our 25th Anniversary Year, we still teach Healthy Eating Habits For Weight Loss and Forever!

. . .

LOSE WEIGHT!

. . .

Lois Lindauer, President and Maintainer For 25 Years! 24 Million Pounds Lost. Since 1965. Add Your Weight Loss to Our Losing Record!

[Exhibit C]

(d) 1969 TIE-DYE WAS COOL. MEN WALKED ON THE MOON. I LOST 54 LBS. 1990 I'M STILL THIN!

. . .

Karen Barnett, Maintainer For 21 Years!

[Exhibit D]

(e) 1974 DISCO WAS KING. MOOD RINGS WERE IN. I LOST 60 LBS. 1990 I'M STILL THIN!

. . .

Lauren Beckman, Maintainer For 16 Years!

[Exhibit E]

(f) In 1982, I lost 32 pounds. I'm still thin today. You can be thin, too!

. . .

Karen Martin, Maintainer for 8 years!

[Exhibit F]

(g) "Losing 216 pounds gave me back my self-respect and built up my confidence" - Terry Heinrich

. . .

Give DIET WORKSHOP a try ... you could be our next success story....

[Exhibit G]

(h) "After losing 31 lbs. in Diet Workshop's Quick Loss Program, my husband says I look better now than I did 10 years ago. Just like me, you can look better than ever and feel really good about yourself ...."

Kathie Mogensen

[Exhibits H and I]

(i) Join the millions who have learned how to become thin for life using Diet Workshop's nutritionally balanced weight-loss programs.

. . .

We want you to lose all the weight you want to once and for all. Whether you have 5, 50, 100 lbs. or more to lose, Diet Workshop is here to help you become the thin person you always wanted to be. Since 1965, we've helped millions of men and women like you become Diet Workshop weight-loss success stories ....

. . .

At Diet Workshop you'll not only lose weight, you'll gain control of your eating habits and acquire a new sense of achievement that will last you a lifetime.

[Exhibit J]

(j) Diet Workshop's Flexi-Groups offer you total flexibility to help you custom design a diet program that fits your lifestyle needs, so you can reach your goal range at a pace that's comfortable for you.

[Exhibit K]

(k) If you have ever lost weight only to regain it, you owe it to yourself to try the ultimate. The Diet Workshop's new Ultimate Flexi-Diet. It's the last diet you'll ever need. In a recent study, 3 out of 4 Diet Workshop graduates surveyed said they're still thin, some after more than 20 years ....
[Exhibit L]

(l) A Big Difference That's Permanent: Behavior Change.

. . .

By experiencing this behavior modification step, you are assured that your QUICK LOSS is permanent loss.
[Exhibit M]

(m) As member Kristen Campione says, "My mother lost 40 pounds and I've lost 56 pounds. In fact, our family has lost a total of 140 pounds at Diet Workshop." [Exhibit R]

PAR. 7. Through the use of the statements set forth in paragraph six, and others in advertisements and promotional materials not specifically set forth herein, respondents represent and have represented, directly or by implication, that most Diet Workshop customers:

(a) Reach their weight loss goals; and
(b) Maintain their weight loss either long-term or permanently.

PAR. 8. Through the use of the statements set forth in paragraph six, and others not specifically set forth herein, respondents represent and 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 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. Through the use of the statements set forth in paragraph six (c)-(h) and (m), and others in advertisements and promotional materials not specifically set forth herein, respondents represent and have represented, directly or by implication, that testimonials from consumers appearing in the advertisements and promotional materials for Diet Workshop weight loss programs reflect the typical or ordinary experience of members of the public who have used the programs.

PAR. 11. Through the use of the statements set forth in paragraph six (c)-(h) and (m), and others not specifically set forth herein, respondents represent and have represented, directly or by implication, that at the time they made the representation set forth in paragraph ten, respondents possessed and relied upon a reasonable basis that substantiated such representation.

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

PAR. 13. The advertisements and promotional materials referred to in paragraph five, including but not necessarily limited to the attached Exhibits H, I and N-Q, contain the following statements:

(a) Lose up to 20 lbs. for the summer!

. . .

Gain control and lose up to 20 lbs. in just 6 weeks.
[Exhibit H]

(b) Gain control and lose up to 20 pounds in just six weeks with Quick Loss.
[Exhibit I]

(c) LOSE UP TO 20 LBS. IN 6 WEEKS!

The Biggest Difference Of All! QUICK LOSS CLINICS have a distinct beginning and end. Six weekly visits and that's it! It is common for participants to lose as much as twenty pounds during a session!
[Exhibit N]

(d) LOSE UP TO 20 lbs. BY EASTER!
With the Energizer Diet
Quick Loss Sessions
6 Weekly Visits - That's It!
[Exhibit O]

(e) Do you think you could be 20 pounds thinner by Halloween? Well your answer could be, yes I can. If you call the Diet Workshop now and choose to lose the yes I can weight, with the Diet Workshop's Quick Loss clinics. Now here's how it works, the next Quick Loss clinic starts next week and continues on for six weekly visits. In those next six visits, before Halloween in fact, you could be 20 pounds thinner, with the kind of discipline and structured diet, only Quick Loss clinics can give .... Twenty pounds thinner, six weekly visits. Say, yes I can, to the next Quick Loss clinic and it will happen.
[Exhibit P]

(f) Structured for maximum results in just six weeks

. . .

Diet Workshop's Quick Loss program encourages Members to make a firm, intensive six week commitment to weight loss. Quick Loss Members motivate each

other by providing valuable insight and support. You'll remain enthusiastic and be rewarded for your efforts by a loss of up to 20 lbs. in 6 weeks.
[Exhibit Q]

PAR. 14. Through the use of the statements set forth in paragraph thirteen, and others in advertisements and promotional materials not specifically set forth herein, respondents represent and have represented, directly or by implication, that an appreciable number of customers on the Diet Workshop's Quick Loss program lose 20 pounds over a six week period.

PAR. 15. Through the use of the statements set forth in paragraph thirteen, and others not specifically set forth herein, respondents represent and have represented, directly or by implication, that at the time they made the representation set forth in paragraph fourteen, respondents possessed and relied upon a reasonable basis that substantiated such representation.

PAR. 16. In truth and in fact, at the time they made the representation set forth in paragraph fourteen, respondents did not possess and rely upon a reasonable basis that substantiated such representation. Therefore, the representation set forth in paragraph fifteen was, and is, false and misleading.

PAR. 17. In the course and conduct of their businesses, respondents provide their customers with diet instructions that require said customers, *inter alia*, to come in to one of respondents' weight loss program locations once a week for monitoring of their progress, including weighing in. In the course of regularly ascertaining their customers' weight loss progress, respondents, in some instances, are presented with weight loss results indicating that customers are losing weight significantly in excess of their projected goals, which is an indication that they may not be consuming all of the food prescribed by their diet instructions. Such conduct could, if not corrected promptly, result in health complications.

PAR. 18. When presented with the weight loss results described in paragraph seventeen, respondents on many occasions have not disclosed to the customers that failing to follow the diet instructions and consume all of the food prescribed could result in health complications. This fact would be material to consumers in their purchase and use decisions regarding respondents' weight loss programs. In light of respondents' practice of monitoring people on

the programs, said failure to disclose was, and is, a deceptive practice.

PAR. 19. In providing advertisements and promotional materials referred to in paragraph five to its individual franchisees or licensees, respondent Diet Workshop has furnished the means and instrumentalities to said franchisees or licensees to engage in the acts and practices alleged in paragraphs five through eighteen.

PAR. 20. The acts and practices of respondents as alleged in this complaint constitute deceptive acts or practices and the making of false advertisements in or affecting commerce in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

THE WORKPLACE PROGRAM

The Diet Workshop world where you work. In our Workplace Program, we bring our targeted Workplace Wellness Diet to you.

The Workplace group meetings are scheduled during lunchtimes and before and after business hours. This specially designed program is geared to the needs and lifestyle of the working person. Topics covered in this series include brown-bagging, choosing wisely in the cafeteria, handling business lunches, stress and your diet, and much more.

Workplace Programs also address the importance of adding activity to your life and maintaining a healthy weight through nutritious eating habits in today's high-stress world.

The wide range of organizations which have implemented The Diet Workshop Workplace Program include:

Allied Chemical
Baltimore, Maryland
Arco Oil and Gas Co.
Richardson, Texas
Bloomingdale's
Chestnut Hill, Massachusetts
Bow Chaus and Bass Saloid
United of Wisconsin
Milwaukee, Wisconsin
Department of Health and Human Services
Rockville, Maryland
Department of Labor
Washington, D.C.
Dow Chemical Company
Midland, Michigan
General Electric Company
Syracuse, New York
General Motors
Baltimore, Maryland
IBM
Mt. Michigan
Internal Revenue Service
Washington, D.C.
Levi Strauss and Company
San Francisco, California

Marshall Fields
Chicago, Illinois
Milwaukee Public Schools
Milwaukee, Wisconsin
New England Telephone
Boston, Massachusetts
Pacific Gas and Electric Company
San Francisco, California
Reed McNally
Chicago, Illinois
San Francisco Police Department
San Francisco, California
Sheraton Corporation Headquarters
Boston, Massachusetts
University of Pittsburgh
Pittsburgh, Pennsylvania
Wang Laboratories
Burlington, Massachusetts
Westinghouse Electric Corporation
Baltimore, Maryland
Xerox Corporation
Lexington, Massachusetts

The Diet Workshop Inc. Form 610R 5/89 Printed in USA

Our Credentials...

The Diet Workshop takes credit for helping people lose weight since 1965. Founded by Lois L. Lindauer as the result of her personal experience losing weight and desire to motivate others, The Diet Workshop has been a trendsetter in the weight control field.

The Diet Workshop was the first to:

- retain a medical consultant, Morton B. Glenn, M.D., past president of the American College of Nutrition and former nutrition consultant to the United Nations;
- consistently implement an intensive Staff Training Program, designed and supervised by Director of Training Donald Kieffer, Ph.D., a Clinical Psychologist;
- emphasize the importance of exercise;
- use behavior-modification techniques as a formal part of its weight-control program;
- develop a wide variety of programs, products, diets, and nutritional supplements to support the dieter.

The Diet Workshop takes pride in our corporate philosophy: Once you have lost weight, there is nothing in life you cannot accomplish, within reason.

for Weight Loss...and Forever."

And if you've always wanted to be thin, THE DIET WORKSHOP has the weight-loss program that will help you reach your goal range *and* maintain it.

The Diet Workshop®
There's A Location Near You!
Call Today:

California, Los Angeles (805) 584-3505
Connecticut, Hartford (203) 872-4386
Florida, Ft. Lauderdale (305) 726-3438
Jacksonville/Orl/Tam/St.Pete (407) 869-8600
Miami (305) 947-3438
Illinois, Chicago (312) 679-DIET
Peoria/Rockford (815) 229-3900
Springfield (217) 787-7188
Indiana, Southeastern (513) 351-SLIM
Kentucky, Northern (513) 351 SLIM
Maine, Portland (207) 775-3186
Maryland, Baltimore (301) 833 DIET
Washington D.C. (301) 468 3438
Mass. Boston/West (617) 625-8770
Northeast (617) 438 9180
Southeast (617) 848 7772
Michigan, Flint (313) 234 3438
N.H., Manchester (603) 622-4600
N.J. Princeton/Trenton (609) 588-0086
New York, Albany (518) 458-9616
Binghamton (607) 729-1599
Elmira/Buffalo (716) 634-7550
Rochester (716) 381-2323
Syracuse (315) 446-2254
Watertown (315) 782-4845
Ohio, Cincinnati (513) 351-SLIM
Columbus (614) 759-6717
Dayton (513) 277-4073
Findlay (419) 423-6463
Pennsylvania, Harrisburg (717) 561-0701
Pittsburgh (412) 222 2238
Scranton (717) 586-0839
Williamsport (717) 322-0765
R.I. N. Providence (401) 781 1770
Texas, Dallas (214) 644-THIN
San Antonio (512) 653-3828
Virginia, N. Wash. D.C. (301) 468-3438
West Virginia, Clarksburg (304) 624-7727
Wisconsin, Milwaukee (414) 258-1231

EXHIBIT B

Exhibit B

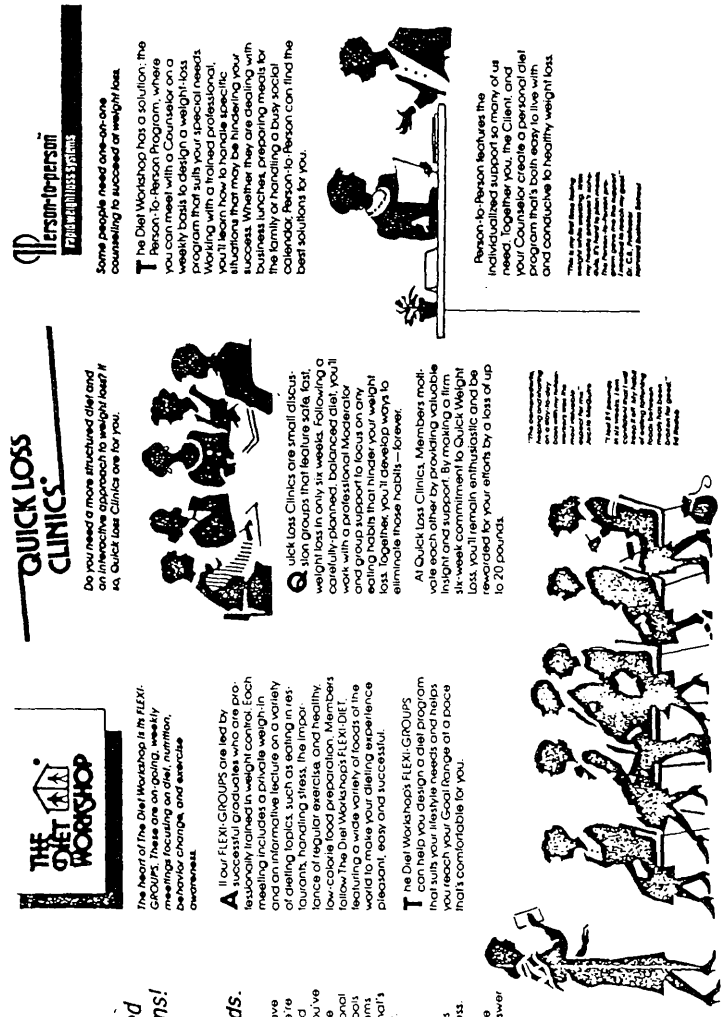


EXHIBIT C

Exhibit C

We work where you work.
Call us for more information on Workplace™ programs.

Ad size: 4 1/4" x 9" # 627-C

Replacement type for "C" ads in April:

April 22-28 Only!
With TDW Fitness Walking Program!

EXHIBIT D

Exhibit D

EXHIBIT E

Exhibit E

We work where you work.
Call us for more information on Workplace™ programs.

Ad size: 4 1/4" x 9" # 626-C

EXHIBIT F

Exhibit F

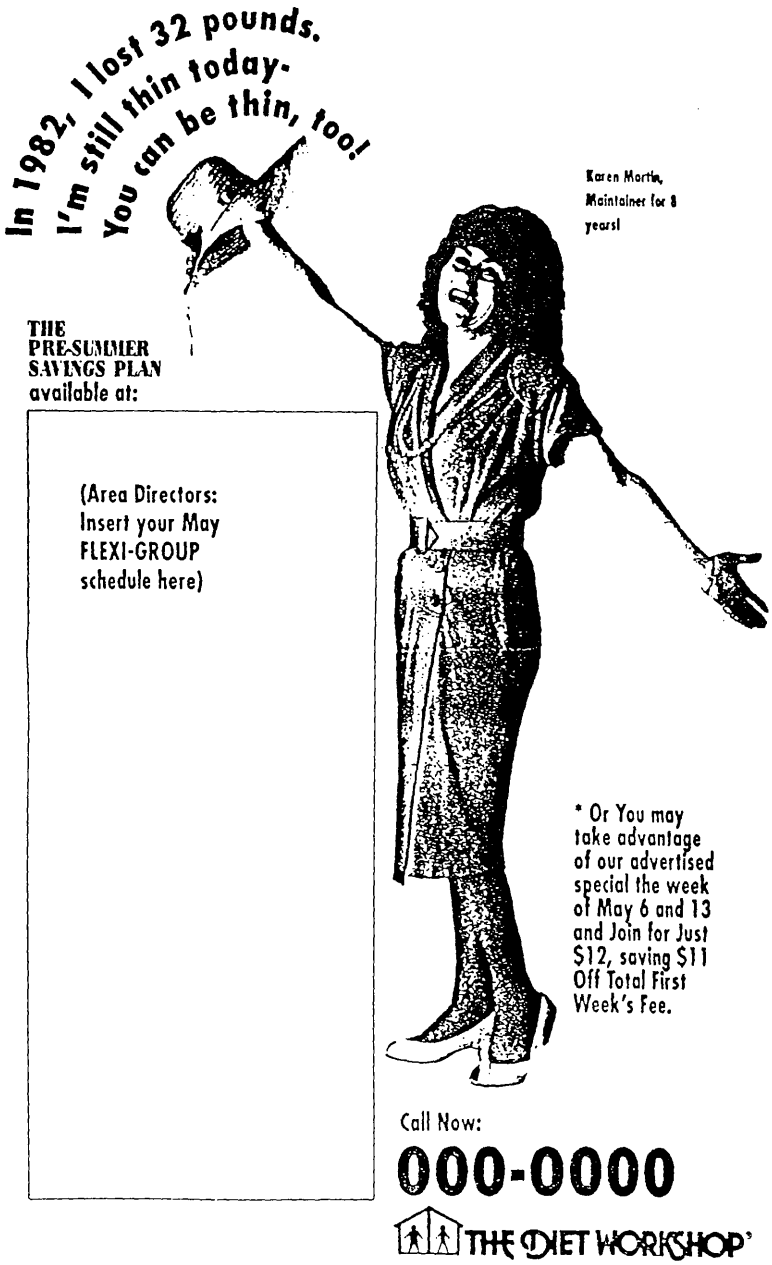


EXHIBIT G

Exhibit G

"Losing 216 pounds gave me back my self-respect and built up my confidence."

– Terry Heinrich

Diet Workshop teaches you how to deal with real food, so you can live the rest of your life at your ideal body weight. We put the emphasis on changing your eating habits, not selling you food. We've got the program you can afford to live with. Give DIET WORKSHOP a try...you could be our next success story, just like Terry Heinrich.

DIET WORKSHOP®

JOIN NOW! PAY AS LITTLE AS $6.00 A WEEK

SPECIAL SPRING BONUS GET ONE WEEK FREE

FOR DETAILS CALL

1-800-488-DIET

(OFFER EXPIRES MAY 15TH)

Patriot Ledger 4/28/93
page 3

EXHIBIT H

Exhibit H

Boston Globe Magazine
Sunday, June 6, 1993

32

EXHIBIT I

Exhibit I

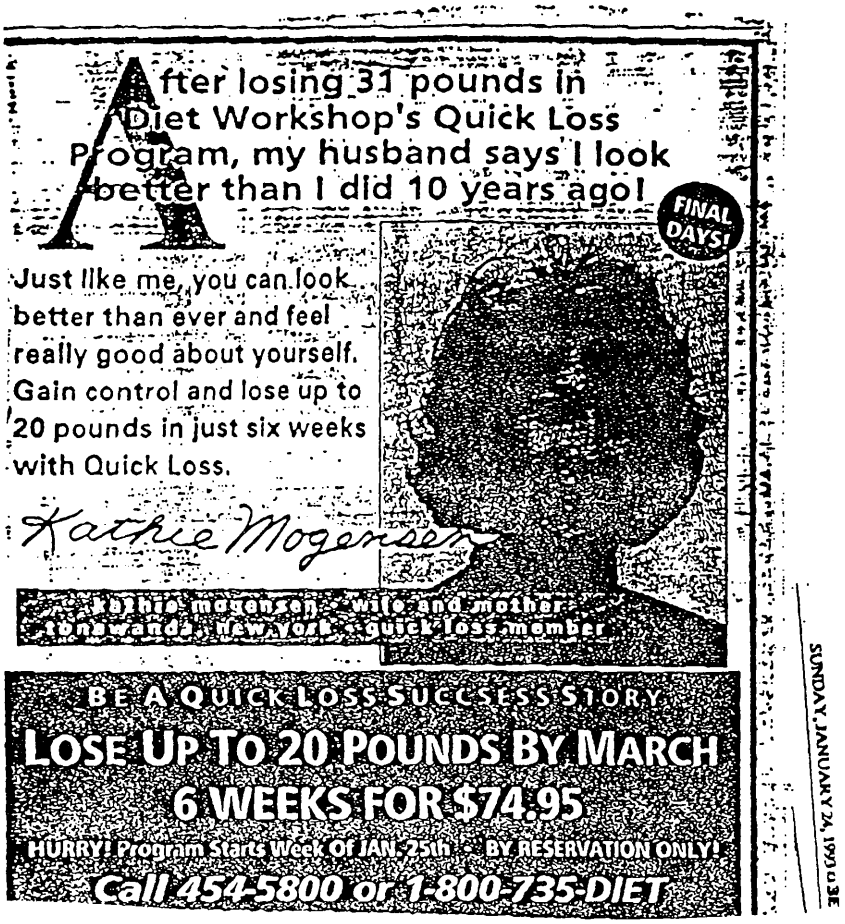
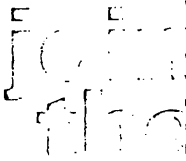


EXHIBIT J

Exhibit J

Join the millions who have learned how to become thin for life using Diet Workshop's nutritionally balanced weight-loss programs. Choose the plan that's right for you and start losing weight the Diet Workshop way. The Healthy Way To Success.



We want you to lose all the weight you want to once and for all. Whether you have 5, 50, 100 lbs. or more to lose, Diet Workshop is here to help you become the thin person you always wanted to be.

Since 1965, we've helped millions of men and women like you become Diet Workshop weight-loss success stories. Our medically proven methods for success use time-tested weight-loss tools and techniques for a sensible program of healthy nutrition, behavior modification and exercise that you can really live with — today and forever.

Achieving results is even faster and easier than you think. Each progressive weight-loss plan offers weekly support that includes monitored weigh-ins, nutritional counseling, a focus on behavior change and fitness plus convenient, optional D.W. Food choices. Best of all, Diet Workshop programs are led by professionally trained people who have personally achieved weight-loss with Diet Workshop. So you'll always receive the support you need from counselors who understand you best.

Unlike other diet services, Diet Workshop offers more than one weight-loss program. In fact, we offer four: Flexi•Group, Quick Loss, Workplace and Person to Person. Each specialized program offers unique features to best suit your individual tastes, needs and lifestyle and to ensure maximum results for you.

At Diet Workshop you'll not only lose weight, you'll gain control of your eating habits and acquire a new sense of achievement that will last you a lifetime.

Come on, take the first step. Join one of our easy-to-follow programs today and let us help you become our next Diet Workshop Success Story.

DIET WORKSHOP®

"Once you've lost weight with Diet Workshop there's nothing you can't accomplish within reason."

Lois Lindauer
Founder

EXHIBIT K

Exhibit K

If you like variety in your diet, our popular Flexi•Group Program is perfect for you. Flexi•Groups are led by successful graduates who are professionally trained in weight control management.

Each friendly, motivational meeting includes a private weigh-in and an informative lecture on an array of dieting topics, such as how to order from a menu, handling daily stress, the joy of regular exercise, and healthy meal preparation tips.

Members follow Diet Workshop's Ultimate Flexi•Diet, the only diet available which color-codes foods, counts fat grams for you and gives extra incentives for exercise.

Diet Workshop's Flexi•Groups offer you total flexibility to help you custom design a diet program that fits your lifestyle needs, so you can reach your goal range at a pace that's comfortable for you.

Flexi•Group
PROGRAM™

EXHIBIT L

Exhibit L

RADIO TV REPORTS

TITLE "FLEA DIET"
PROGRAM NEWS
STATION WCVB

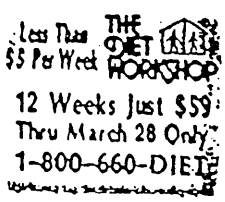
(MUSIC) LOIS LINDAUER: If you've ever lost weight

only to regain it.

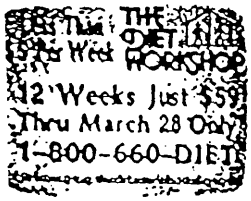
you owe it to yourself to try the ultimate.

The Diet workshop's new Ultimate Flexi-Diet.

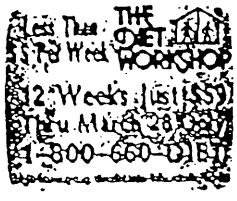
It's the last diet you'll ever need.



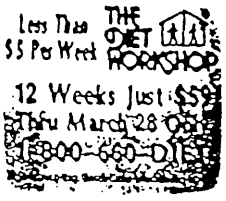
WOMAN ANNCR: In a recent study.



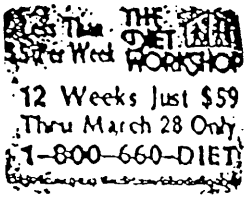
1 out of 4 Diet Workshop graduates surveyed said they're still thin.



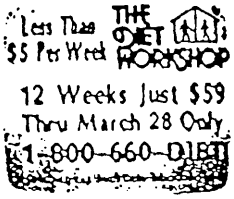
some after more than 20 years.



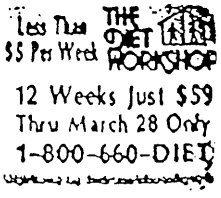
If that sounds good, then call 1-800-660-DIET now.



Get 12 weeks for just $59. That's 1-800-660-DIET.



1-800-660 DIET to pay less than $5 per week.



The Diet Workshop. Call now. (MUSIC OUT)

ALSO AVAILABLE IN COLOR VIDEO-TAPE CASSETTE

Exhibit M

One Big Difference Is The Small Group. Welcome to QUICK LOSS CLINICS, one of THE DIET WORKSHOP'S most innovative and successful weight loss programs. Unlike THE DIET WORKSHOP'S FLEXI GROUPS, which are ongoing weekly meetings with an unlimited Membership, QUICK LOSS CLINICS offer a small, intimate group setting with a limit of 15 participants in each Clinic.

Another Big Difference: Your Moderator. Most weight loss programs feature an Instructor who informs you on a variety of nutritional topics. With QUICK LOSS CLINICS, you get that and *more: A Moderator.* Who not only offers the most up to date nutritional advice, but who also guides you through a dieting experience that's personally tailored to you and your lifestyle.

A Big Difference That's Permanent: Behavior Change. QUICK LOSS CLINICS wor well for two types of dieters: those who want a large initial weight loss, and those who have a small amount of weight to lo Both types of people are guaranteed to know one thing by the time they complet the session that they didn't know when they began. And that is the reason they gained those extra pounds.

That Leads To Quick Loss!!"

Something special happens in this close knit atmosphere. Something that's called *"small group power."* You and the other participants have one special desire in common: to lose weight quickly and safely. Together, and individually, you will. Thanks to the bond that you'll share during six weekly visits, and the powerful strength and support that bond will bring.

"I look and feel great and am having no trouble maintaining my lower weight."
Charlotte Rivetz
Brookline

Over the course of your six weekly QUICK LOSS CLINIC visits you and your Mod erator will get to know each other well. Especially since she has successfully com pleted the same weight loss journey you'll be experiencing. By the end of the session, you'll not only have gained superior nutri tional knowledge, you'll have made a good friend as well.

"I lost 21 pounds in 6 weeks. I am confi dent that I will keep it off. My habit of eating fattening foods between meals has been broken for good."
Ed Radeb
Sharon

Your Moderator is professionally trained employ behavior modification technique that *change the way you feel about foo* Personal awareness is encouraged durin each visit through discussion as well as specially designed Journals that you kee throughout the whole session. By experi encing this behavior modification step, you are assured that your QUICK LOSS is permanent loss.

"The concentration on special behavior techniques was exactly what I needed t solve my weight problem."
Maryann Mackie
Stoughton

Even The Different Diets Are Different! Each QUICK LOSS CLINIC features a totally unique and different Diet. The reason: variety is the spice of life, and sweetener of weight loss! Each Diet, however, is created for health, for interest and for quick weight loss. They all employ the theory of behavior change, and meet all lifestyle needs. Here are just some of the Diets you may experience.

The Diets

The Energizer Diet™

TAKE-IT-OFF-QUICK DIET™

BEACON HILL DIET™

Wild Weekend Diet™

Blitz-It-Off Diet™

Boston Lo-Carbo Diet™

Form #9540 6-88
© The Diet Workshop, Inc. 1988

LOSE UP TO 20 LBS. IN 6 WEEKS!

The Biggest Difference Of All! QUICK LOSS CLINICS have a distinct beginning and an end. *Six weekly visits and that's it! It is common for participants to lose as much as twenty pounds during a session!*

Each CLINIC is limited to 15 participants only and fills on a first call, first serve, reservation only basis. Payment is required to reserve your space. Credit cards and personal checks are accepted, of course.

For More Information, Call:

A Word About THE DIET WORKSHOP. Since 1965, we've been teaching healthy eating habits for weight loss and forever. Our research tells us that different people respond to different ways of losing weight. To meet these needs, THE DIET WORKSHOP has created three major Divisions in addition to QUICK LOSS CLINICS:

FLEXI GROUPS
Ongoing
Weekly Group Meetings

WORKPLACE PROGRAM
On site Company Location
Weekly Meetings

PERSON TO PERSON
One on one
Private Counseling

QUICK LOSS CLINICS™ a Division of THE DIET WORKSHOP

The Diets

EXHIBIT O

Exhibit O

EXHIBIT P

Exhibit P

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

RADIO COMMERCIAL TRANSCRIPT			92R49638
PROGRAM:	NEWS	9-10-92	:60
STATION:	WBMX	(BOSTON)	1:00PM

THE DIET WORKSHOP

(MUSIC IN B.G.)

MALE ANNCR.: Do you think you could be 20 pounds thinner by Halloween? Well your answer could be, yes I can. If you call the Diet Workshop now and choose to lose the yes I can weight, with the Diet Workshop's Quick Loss clinics. Now here's how it works, the next Quick Loss clinic starts next week and continues on for six weekly visits. In those six visits, before halloween in fact, you could be 20 pounds thinner, with the kind of discipline and structured diet, only Quick Loss clinics can give. Personalized attention in a small group setting and real delicious foods that you can buy at the supermarket just like everyone else. Twenty pounds thinner, six weekly visits. Say, yes I can, to the next Quick Loss Clinic and it will happen. Starts next week for just $75. By reservation only, so hurry. Call 1-800-488-DIET. 1-800-488-DIET. For the next Quick Loss Clinic at the Diet Workshop. That's 1-800-488-DIET to reserve space right now. In New Hampshire call 1-800-582-7188 for Quick Loss Clinics at the Diet Workshop.

(MUSIC OUT)

# # #

EXHIBIT Q

Exhibit Q

structured for maximum results in just six weeks

When you need to lose weight fast, Diet Workshop has the answer. Our Quick Loss Program offers maximum results in minimum time with smaller, more intimate discussion groups that focus on behavior change and promote healthy, fast, weight loss in only six weeks. Following a variety of nutritious, well-balanced diets that help maintain your interest, you and your group will work with a professional Moderator to focus on changing habits that hinder your weight loss. Together, you'll develop new strategies for healthy eating and exercise that will last you a lifetime.

Quick Loss®
PROGRAM

Diet Workshop's Quick Loss program encourages Members to make a firm, intensive six-week commitment to weight loss. Quick Loss Members motivate each other by providing valuable insight and support. You'll remain enthusiastic and be rewarded for your efforts by a loss of up to 20 lbs. in 6 weeks.

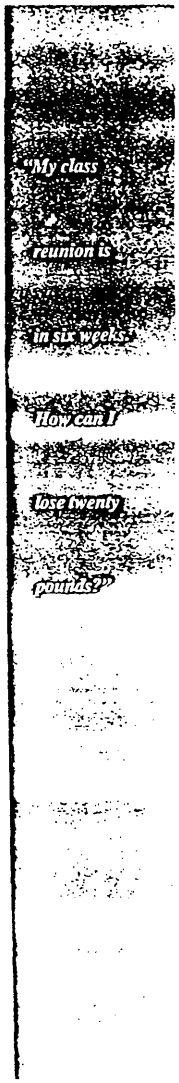


EXHIBIT R

Exhibit R

Thanks To Diet Workshop My Mother And I Are Seeing Less Of Each Other.

Sometimes two can lose weight better than one. And it's especially true with Diet Workshop's Food and Fitness Plan.

As member Kristen Campione says, "My mother lost 40 pounds and I've lost 56 pounds. In fact, our family has lost a total of 140 pounds at Diet Workshop."

Our Food and Fitness Plan helps you to achieve realistic, healthy weight loss without making unrealistic demands. You eat low-fat, real foods you like and follow a fitness program you can stick with. You can even dine in a restaurant to celebrate this and every Mother's Day.

And to give you a little extra incentive to get started, we're making a special offer to you and your family. So call us today.

Mother's Day Family Special

SAVE $5 each

when you join together

Offer ends May 14

1-800-488-DIET

Cannot be combined with other offers

DIET WORKSHOP®

The Right Weight, The Right Way.

Boston Herald, May 3, 1994 page 18

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft complaint which the Boston 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,

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 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. Respondents The Diet Workshop, Inc. and The Diet Workshop of Boston, Inc. are corporations organized, existing and doing business under and by virtue of the laws of the Commonwealth of Massachusetts, with their offices and principal places of business located at 1 University Office Park, 29 Sawyer Road, Waltham, 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

DEFINITIONS

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

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

B. *"Weight loss program"* shall mean any program designed to aid consumers in weight loss or weight maintenance;

C. A *"broadcast medium"* shall mean any radio or television broadcast, cablecast, home video or theatrical release;

D. For any order-required disclosure in a print medium to be made *"clearly and prominently"* or in a *"clear and prominent"* manner, it must be given both in the same type style and in: (1) twelve (12) point type where the representation that triggers the disclosure is given in twelve (12) point or larger type; or (2) the same type size as the representation that triggers the disclosure where that representation is given in a type size that is smaller than twelve (12) point type. For any order-required disclosure given orally in a broadcast medium to be made "clearly and prominently" or in a "clear and prominent" manner, the disclosure must be given at the same volume and in the same cadence as the representation that triggers the disclosure;

E. A *"short broadcast advertisement"* shall mean any advertisement of thirty seconds or less duration made in a broadcast medium.

I.

It is ordered, That respondents, The Diet Workshop, Inc. and The Diet Workshop of Boston, Inc., corporations, their successors and assigns, and their officers, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, including franchisees or licensees, in

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

A. Making any representation, directly or by implication, about the success of participants on any weight loss program in achieving or maintaining weight loss or weight control unless, at the time of making any such representation, respondents possess and rely upon competent and reliable scientific evidence substantiating the representation, provided, further, that for any representation that:

(1) Any weight loss achieved or maintained through the weight loss program is typical or representative of all or any subset of participants using the program, said evidence shall, at a minimum, be based on a representative sample of:

(a) All participants who have entered the program, where the representation relates to such persons; provided, however, that the required sample may exclude those participants who dropped out of the program within two weeks of their entrance, or who were unable to complete the program due to illness, pregnancy, or change of residence; or

(b) All participants who have completed a particular phase of the program or the entire program, where the representation only relates to such persons;

(2) Any weight loss is maintained long-term, said evidence shall, at a minimum, be based upon the experience of participants who were followed for a period of at least two years from their completion of the active maintenance phase of respondents' program or earlier termination, as applicable; and

(3) Any weight loss is maintained permanently, said evidence shall, at a minimum, be based upon the experience of participants who were followed for a period of time after completing the program that is either:

(a) Generally recognized by experts in the field of treating obesity as being of sufficient length for predicting that weight loss will be permanent, or

(b) Demonstrated by competent and reliable survey evidence as being of sufficient duration to permit such a prediction.

B. Representing, directly or by implication, except through endorsements or testimonials referred to in paragraph I.E. herein, that participants of any weight loss program have successfully maintained weight loss, unless respondents disclose, clearly and prominently, and in close proximity to such representation, the statement: "For many dieters, weight loss is temporary."; provided, further, that respondents shall not represent, directly or by implication, that the above-quoted statement does not apply to dieters in respondents' weight loss program; provided, however, that a mere statement about the existence, design, or content of a maintenance program shall not, without more, be considered a representation that participants of any weight loss program have successfully maintained weight loss.

C. Representing, directly or by implication, except through short broadcast advertisements referred to in paragraph I.D. herein, and except through endorsements or testimonials referred to in paragraph I.E. herein, that participants of any weight loss program have successfully maintained weight loss, unless respondents disclose, clearly and prominently, and in close proximity to such representation, the following information:

(1) The average percentage of weight loss maintained by those participants;

(2) The duration over which the weight loss was maintained, measured from the date that participants ended the active weight loss phase of the program, provided, further, that if any portion of the time period covered includes participation in a maintenance program(s) that follows active weight loss, such fact must also be disclosed; and

(3) If the participant population referred to is not representative of the general participant population for respondents' programs:

(a) The proportion of the total participant population in respondents' programs that those participants represent, expressed in terms of a percentage or actual numbers of participants, or

(b) The statement: "Diet Workshop makes no claim that this [these] result[s] is [are] representative of all participants in the Diet Workshop program.";

Provided, further, that compliance with the obligations of this paragraph I.C. in no way relieves respondents of the requirement under paragraph I.A. of this order to substantiate any representation about the success of participants on any weight loss program in maintaining weight loss.

D. Representing, directly or by implication, in short broadcast advertisements, that participants of any weight loss program have successfully maintained weight loss, unless respondents:

(1) Include, clearly and prominently, and in immediate conjunction with such representation, the statement: "Check at our clinics for details about our maintenance record.";

(2) For a period of time beginning with the date of the first broadcast of any such advertisement and ending no sooner than thirty days after the last broadcast of such advertisement, comply with the following procedures upon the first presentation of any form asking for information from a potential client, but in any event before such person has entered into any agreement with respondents:

(a) Give to each potential client a separate document entitled "Maintenance Information," which shall include all the information required by paragraph I.B. and subparagraphs I.C.(1)-(3) of this order and shall be formatted in the exact type size and style as the example form below, and shall include the heading (Helvetica 14 pt. bold), lead-in (Times Roman 12 pt.), disclosures (Helvetica 14 pt. bold), acknowledgment language (Times Roman 12 pt.) and signature block therein; provided, further, that no information in addition to that required to be included in the document required by this subparagraph I.D.(2) shall be included therein:

MAINTENANCE INFORMATION

You may have seen our recent ad about maintenance success. Here's some additional information about our maintenance record.

[Disclosure of maintenance statistics goes
hereXXXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXXXX]
For many dieters, weight loss is temporary.

I have read this notice._____
(Client Signature) (Date)

(b) Require each potential client to sign such document; and
(c) Give each client a copy of such document; and

Provided, however, that if any potential participant who does not then participate in the program refuses to sign or accept a copy of such document, respondents shall so indicate on such document and shall not, for that reason alone, be found in breach of this subparagraph I.D.(2); and

(3) Retain in each client file a copy of the signed maintenance notice required by this paragraph;

Provided, further, that:

(i) Compliance with the obligations of this paragraph I.D. in no way relieves respondents of the requirement under paragraph I.A. of this order to substantiate any representation about the success of participants on any weight loss program in maintaining weight loss; and

(ii) Respondents must comply with both paragraph I.D. and paragraph I.C. of this order if respondents include in any such short broadcast advertisement a representation about maintenance success that states a number or percentage, or uses descriptive terms that convey a quantitative measure such as "most of our customers maintain their weight loss long-term"; and

Provided, however, that the provisions of paragraph I.D. shall not apply to endorsements or testimonials referred to in paragraph I.E. herein.

E. Using any advertisement containing an endorsement or testimonial about weight loss success or weight loss maintenance success by a participant or participants of respondents' weight loss programs if the weight loss success or weight loss maintenance success depicted in the advertisement is not representative of what participants in respondents' weight loss programs generally achieve, unless respondents disclose, clearly and prominently, and in close proximity to the endorser's statement of his or her weight loss success or weight loss maintenance success:

(1) What the generally expected success would be for Diet Workshop customers in losing weight or maintaining achieved

weight loss; provided, however, that in determining the generally expected success for Diet Workshop customers respondents may exclude those customers who dropped out of the program within two weeks of their entrance or who were unable to complete the program due to illness, pregnancy, or change of residence; or

(2) One of the following statements:

(a) "You should not expect to experience these results."
(b) "This result is not typical. You may not do as well."
(c) "This result is not typical. You may be less successful."
(d) "_____'s success is not typical. You may not do as well."
(e) "_____'s experience is not typical. You may achieve less."
(f) "Results not typical."
(g) "Results not typical of program participants.";

Provided, further, that if the endorsements or testimonials covered by this paragraph are made in a broadcast medium, any disclosure required by this paragraph must be communicated in a clear and prominent manner and in immediate conjunction with the representation that triggers the disclosure; and

Provided, however, that:

(i) For endorsements or testimonials about weight loss success, respondents can satisfy the requirements of subparagraph I.E.(1) by accurately disclosing the generally expected success in the following phrase: "Diet Workshop clients lose an average of ___ pounds over an average _____- week treatment period"; and

(ii) If the weight loss success or weight loss maintenance success depicted in the advertisement is representative of what participants of a group or subset clearly defined in the advertisement generally achieve, then, in lieu of the disclosures required in either subparagraph I.E. (1) or (2) herein, respondents may substitute a clear and prominent disclosure of the percentage of all of respondents' customers that the group or subset defined in the advertisement represents.

F. Representing, directly or by implication, the rate or speed at which participants or prospective participants in any weight loss program have lost or will lose weight, unless at the time of making

such representation, respondents possess and rely upon competent and reliable scientific evidence substantiating the representation.

G. Representing, directly or by implication, that participants or prospective participants in respondents' weight loss programs have reached or will reach a specified weight within a specified time period, unless at the time of making such representation, respondents possess and rely upon competent and reliable scientific evidence substantiating the representation.

H. Failing to disclose, clearly and prominently, either (1) to each participant who, after the first two weeks on the program, is experiencing average weekly weight loss that exceeds two percent (2%) of said participant's initial body weight, or three pounds, whichever is less, for at least two consecutive weeks, or (2) in writing to all participants, when they enter the program, that failure to follow the diet instructions and consume the total caloric intake recommended may involve the risk of developing serious health complications.

I. Misrepresenting, directly or by implication, the existence, contents, validity, results, conclusions, or interpretations of any test or study.

J. Misrepresenting, directly or by implication, the performance, efficacy, or benefits of any weight loss program or weight loss product.

II.

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

III.

It is further ordered, That 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.

IV.

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 is involved in the preparation and placement of advertisements or promotional materials or in communication with customers or prospective customers or who have any responsibilities with respect to the subject matter of this order; and, for a period of five (5) years from the date of entry of this order, distribute same to all future such officers, agents, representatives, independent contractors and employees.

V.

It is further ordered, That:

A. Respondents shall distribute a copy of this order to each of their franchisees and licensees and shall contractually bind them to comply with the prohibitions and affirmative requirements of this order; respondents may satisfy this contractual requirement by incorporating such order requirements into their current Operations Manuals or, if they do not have a current Operations Manual, by notifying their franchisees and licensees that failure to comply with the provisions of this order is at variance with respondents' methods, standards, and specifications for proper conduct of the franchisee's business under the franchise agreement; and

B. Respondents shall further make reasonable efforts to monitor their franchisees' and licensees' compliance with the order provisions; respondents may satisfy this requirement by: (1) taking reasonable steps to notify promptly any franchisee or licensee that respondents

determine is failing materially or repeatedly to comply with any order provision; (2) providing the Federal Trade Commission with the name and address of the franchisee or licensee and the nature of the noncompliance if the franchise or licensee fails to comply promptly with the relevant order provision after being so notified; and (3) in cases where that franchisee's or licensee's conduct constitutes a material or repeated violation of the order, diligently pursuing reasonable and appropriate remedies available under their franchise or license agreements and applicable state law to bring about a cessation of that conduct by the franchisee or licensee;

Provided, however, that respondents' compliance with this Part shall constitute an affirmative defense to any civil penalty action arising from an act or practice of one of respondents' franchisees or licensees that violates this order where respondents: a) have not authorized, approved or ratified that conduct; b) have reported that conduct promptly to the Federal Trade Commission under this Part; and c) in cases where that franchisee's or licensee's conduct constitutes a material or repeated violation of the order, have diligently pursued reasonable and appropriate remedies available under the franchise or license agreement and applicable state law to bring about a cessation of that conduct by the franchisee or licensee.

VI.

This order will terminate on the third day of June, 2016, 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 respondents 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 respondents shall, within sixty (60) days after the date of service of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

RXCARE OF TENNESSEE, INC., ET AL.

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

Docket C-3664. Complaint, June 10, 1996--Decision, June 10, 1996

This consent order prohibits, among other things, a Tennessee-based pharmacy service administrative organization and an unincorporated trade association from: entering into, maintaining or enforcing a "most favored nations" clause in any participation agreement with any pharmacy firm; auditing any pharmacy firm for the purpose of enforcing a "most favored nations" clause; or inducing, suggesting, urging, encouraging, or assisting any person or entity to take any action in violation of this order.

Appearances

For the Commission: *Randall D. Marks* and *Michael McNeely.*

For the respondents: *W. Ovid* and *Blakeley D. Matthews, Cornelius & Collins,* Nashville, TN.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that respondents RxCare of Tennessee, Inc., and the Tennessee Pharmacists Association 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 as follows:

PARAGRAPH 1. Respondent RxCare of Tennessee, Inc. (RxCare), 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 at 1226 17th Avenue South, Nashville, Tennessee. RxCare is a pharmacy service administrative organization ("PSAO"), a group of pharmacies that offer themselves as a pharmacy network to pharmacy benefits managers ("PBMs") and third-party payers, such as managed care

organizations ("MCOs"), insurers, and employers who pay for prescription drugs provided as part of health benefit plans. A pharmacy network is the group of pharmacies that provides a given PBM or third-party payer with prescription drug services by filling the prescriptions of those served by the PBM or third-party payer. RxCare's pharmacy network includes at least 95 percent of all chain and independent pharmacies in Tennessee. In conjunction with Pro-Mark Holdings, Ltd. ("Pro-Mark"), a Rhode Island corporation, RxCare also offers pharmacy benefit management services, such as designing prescription drug benefit plans, providing drug utilization review services and data, and managing drug formularies.

PAR. 2. Respondent Tennessee Pharmacists Association ("TPA") is an unincorporated trade association 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 at 226 Capitol Blvd., Suite 810, Nashville, Tennessee. TPA is the largest professional association of pharmacists in the state of Tennessee and has approximately 2500 members. TPA created RxCare and is its sole shareholder. Among TPA's goals is to "define and promote appropriate compensation to pharmacists for patient care."

PAR. 3. RxCare and TPA are corporations subject to the jurisdiction of the Commission under Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

PAR. 4. The acts and practices of RxCare and TPA, including the acts and practices alleged herein, are in or affect commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. Third-party payers pay for about half of all prescriptions in Tennessee. RxCare provides the pharmacy network in Tennessee for major health care providers, including at least 90 percent of the state of Tennessee's TennCare program for Medicaid recipients and other uninsured citizens and all of the TennCare and non-TennCare business of BlueCross BlueShield of Tennessee, the state's largest managed care organization.

PAR. 6. RxCare is the leading pharmacy network in Tennessee, providing PBM and/or network services to MCOs and PBMs accounting for approximately 2.4 million residents of Tennessee, who represent more than half of Tennessee citizens with third-party pharmacy benefits. Because the RxCare network is the largest source of third-party business for almost all Tennessee pharmacies, it is important for pharmacies to be part of the RxCare pharmacy network.

PAR. 7. RxCare's agreements with the pharmacies in its provider networks include a "Most Favored Nations" or "MFN" clause. This clause requires that if a pharmacy in the network accepts a reimbursement rate from anyone else that is lower than its RxCare rate, the pharmacy shall accept such lower reimbursement rate for all RxCare contracts in which it participates. RxCare requires that each pharmacy in its network agree to this clause as a condition of remaining within its network, and enforces this clause against pharmacies that have accepted lower reimbursement rates from other persons.

PAR. 8. By promulgating and enforcing the MFN clause, RxCare and TPA have been acting as a combination of competing pharmacies and have acted in concert with TPA members and RxCare network pharmacies to maintain reimbursement levels for pharmacy services. Their use of the MFN clause and other activities have restrained rivalry in the provision of pharmacy benefit prescription services among Tennessee pharmacies and thereby harmed consumers by limiting price competition and entry into pharmacy network services. These activities of RxCare and TPA constitute an agreement in restraint of trade.

PAR. 9. In furtherance of such combination or agreement, RxCare and TPA have:

A. Required providers to agree to the MFN clause as a condition of remaining in, or joining, the RxCare network;

B. Enforced, and threatened to enforce, the MFN clause against network pharmacies that accept a reimbursement rate below the RxCare reimbursement rate;

C. Communicated third-party payers' offers of reimbursement that fall below the RxCare reimbursement rate and warned that acceptance of such rates might trigger the MFN clause; and

D. Urged pharmacies to refrain from participating in networks that offer reimbursement rates lower than the RxCare network rates.

PAR. 10. Because RxCare represents such a large portion of their business, most pharmacies in Tennessee would incur an unacceptable revenue loss if the MFN clause forced them to accept rates below the RxCare reimbursement rate on all of their RxCare business. As a result, the MFN clause has prevented some RxCare network pharmacies from accepting rates below the RxCare reimbursement

rate from other third-party payers. Further, since third-party payers in states other than Tennessee frequently offer reimbursement rates below the RxCare reimbursement rate, the MFN clause has forced third-party payers to pay higher rates in Tennessee than in other states. Moreover, the difficulty in establishing pharmacy networks that accept reimbursement at levels as low as the levels in other states has impeded entry by firms wishing to establish pharmacy networks or market prescription drug benefit in Tennessee.

PAR. 11. The combination or agreement and the acts and practices of RxCare and TPA have restrained competition unreasonably and injured consumers by:

A. Stabilizing reimbursement levels for third-party prescription services above competitive levels;

B. Inhibiting the establishment or expansion of pharmacy networks that could compete with the RxCare network;

C. Depriving consumers of the benefits of price competition among pharmacists with regard to participation in prescription drug benefit plans;

D. Depriving consumers of the benefits of competition among third-party payers in the establishment of prescription drug benefit plans.

PAR. 12. 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. 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 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 the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent RxCare 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 at 1226 17th Avenue South, Nashville, Tennessee.

2. Respondent TPA is an unincorporated trade association 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 at 226 Capitol Blvd., Suite 810, Nashville, Tennessee.

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

ORDER

I.

It is ordered, That the following definitions shall apply herein:

A. *"RxCare"* means RxCare of Tennessee, Inc.; its predecessors, divisions, subsidiaries, affiliates, joint ventures, successors, and assigns; and all directors, officers, employees, agents, and representatives of the foregoing;

B. *"TPA"* means the Tennessee Pharmacists Association; its predecessors, divisions, subsidiaries, affiliates, joint ventures, successors, and assigns; and all directors, officers, employees, agents, and representatives of the foregoing;

C. *"Third-party payer"* means any person or entity that provides a program or plan pursuant to which such person or entity agrees to pay for prescriptions dispensed by pharmacies to individuals described in the plan or program as eligible for coverage ("covered persons") and includes, but is not limited to, health insurance companies; prepaid hospital, medical, or other health service plans, such as Blue Cross and Blue Shield plans; health maintenance organizations; preferred provider organizations; and health benefits programs for government employees, retirees and dependents;

D. *"Participation agreement"* means any existing or proposed agreement, oral or written, in which a third-party payer, prescription benefit manager ("PBM"), pharmacy service administrative organization ("PSAO"), or other firm agrees to reimburse a pharmacy firm for the dispensing of prescription drugs to covered persons, and the pharmacy firm agrees to accept such payment from the third-party payer, PBM, PSAO, or other firm for such prescriptions dispense during the term of the agreement;

E. *"Pharmacy firm"* means any partnership, sole proprietorship, corporation, or other entity that owns, controls or operates one or more pharmacies; and

F. *"Most Favored Nations Clause"* or *"MFN"* means any agreement, understanding, or course of dealing between RxCare or TPA and any pharmacy firm under which, in the event the pharmacy firm accepts or agrees to accept from another third party payer, PBM, PSAO or other firm a lower reimbursement rate than the lowest RxCare reimbursement rate, the pharmacy firm must thereafter accept a reduction in its reimbursement rate for any or all RxCare contracts in which it participates. The term "Most Favored Nations Clause" includes, but is not limited to, any price protection clause, buyer protection clause, prudent buyer clause, consumer protection clause, meet or release clause, best price clause, or meeting competition clause.

II.

It is further ordered, That RxCare and TPA shall forthwith cease and desist, directly or indirectly, from:

A. Entering into, maintaining, or enforcing a Most Favored Nations Clause in any participation agreement with any pharmacy firm or by any other means or methods;

B. Auditing any pharmacy firm for the purpose of enforcing a Most Favored Nations Clause; or

C. Inducing, suggesting, urging, encouraging, or assisting any person or entity to take any action that if taken by RxCare or TPA would violate this order.

III.

It is further ordered, That RxCare shall, within thirty (30) days after the date this order becomes final:

A. Remove all Most Favored Nations Clauses from its agreements with pharmacy firms;

B. Distribute a copy of this order, the attached Appendix, and the complaint to each pharmacy firm with which RxCare has a participation agreement; and

C. Publish the Appendix to this order in the RxCare Update and on the "RxCare Network News" page of the Tennessee Pharmacist, or any successor publication(s).

IV.

It is further ordered, That, for the purpose of determining or securing compliance with this order, RxCare and TPA each shall:

A. Within sixty (60) days after the date this order becomes final, submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with this order;

B. One year (1) from the date this order becomes final, annually for the next four (4) years on the anniversary of the date this order becomes final, and at other times as the Commission may require, file

a verified written report with the Commission setting forth in detail the manner and form in which they have complied and are complying with this order. Respondents shall include in their compliance reports all written communications, internal memoranda, and reports and recommendations concerning compliance with this order;

C. For a period of ten (10) years after the date this order becomes final, 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 respondents relating to any matters contained in this order; and

2. Upon five days' notice to respondents and without restraint or interference from it, to interview officers, directors, or employees of respondents; and

D. For a period of ten (10) years after the date this order becomes final, notify the Commission at least thirty (30) days prior to any proposed change in TPA or RxCare 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.

V.

It is further ordered, That this order shall terminate on June 10, 2016.

APPENDIX

[Date]

ANNOUNCEMENT

The Tennessee Pharmacists Association ("TPA") and RxCare of Tennessee, Inc. ("RxCare"), have entered into a consent agreement with the Federal Trade Commission. Pursuant to this consent agreement, the Commission issued a consent order on June 10, 1996,

providing that RxCare and TPA may no longer enforce a Most Favored Nations ("MFN") clause in the RxCare network provider agreements. The MFN clause requires that if a participating pharmacy accepts a lower reimbursement rate than the lowest RxCare rate, the pharmacy shall accept its lower reimbursement rate for all RxCare contracts in which it participates. As a result of the consent order, RxCare will not require that pharmacies in its network that enter into any agreement at a lower reimbursement rate than the RxCare reimbursement rate shall accept such lower reimbursement rate for RxCare contracts.

For more specific information, TPA or RxCare pharmacy network members should refer to the FTC consent order itself. TPA and RxCare will provide a copy of the consent order to each pharmacy firm with which RxCare has a participation agreement.

Baeteena Black, Pharm. D.	Gary Cripps, Pharm. D.
Executive Director	Chairman & President
Tennessee Pharmacists Association	RxCare of Tennessee, Inc.

CONCURRING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

I join in the Commission's decision to issue a consent order prohibiting the Tennessee Pharmacists Association, a trade association of pharmacists, and its affiliated provider of pharmacy network services, RxCare of Tennessee, Inc., from employing most favored nation clauses in provider network contracts. I write separately to emphasize that this order does not call into question the general lawfulness of most favored nation clauses. Although most favored nation clauses usually raise no competetive concerns, in this case, the clause was used in furtherance of a horizontal agreement to stabilize the reimbursement rates for retail pharmacy services, as alleged in paragraph eight of the complaint.

STATEMENT OF COMMISSIONER CHRISTINE A. VARNEY

RxCare, a pharmacy network established and owned by the Tennessee Pharmacists Association, contracts with health plans to provide prescription drugs to the plans' subscribers. I have voted to issue the complaint and accept the consent order in this matter

because I agree that the most favored nations clause, in this case, may have lessened competition. But, in doing so, I want to emphasize that joint ventures by retail pharmacists can be procompetitive by injecting new competition into the market for pharmacy benefit management services.[1] I believe many of RxCare's programs can be procompetitive. The matter before the FTC concerns only one aspect of RxCare's pharmacy benefit management programs--its imposition of a most favored nations clause. By working on an expedited basis, staff has been able to identify this concern quickly and, by working closely with RxCare, has resolved it in a mutually agreeable fashion.

[1] *See* Prepared Remarks of Christine A. Varney, "Responses to the Managed Care Revolution: A Competition Policy Perspective," Conference of the National Ass'n of Retail Druggists, March 27, 1995.

IN THE MATTER OF

TIMOTHY R. BEAN

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

Docket C-3665. Complaint, June 10, 1996--Decision, June 10, 1996

This consent order prohibits, among other things, a California individual doing business as DMC Publishing Group from misrepresenting, in its advertisements for a work-at-home business, the profits, earnings, income, or sales from such business opportunity and prohibits any future earnings claims unless, at the time of making the representation, the respondent possesses and relies upon competent and reliable evidence that substantiates the claim.

Appearances

For the Commission: *Nicholas J. Franczyk, C. Steven Baker* and *Charulata Pager.*

For the respondent: *Pro se.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Timothy R. Bean, individually and doing business as DMC Publishing Group ("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 Timothy R. Bean is an individual doing business as DMC Publishing Group. His principal office or place of business is located at 26052 Merit Circle, Suite 107, Laguna Hills, California.

PAR. 2. Respondent is engaged in the advertising, promotion, offering for sale, sale, and distribution of a program to operate a publishing and printing business at home to the public.

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

PAR. 4. Respondent has disseminated or has caused to be disseminated advertisements, including advertisements through the Internet, for his program to operate a publishing and printing business at home. These advertisements include, but are not necessarily limited to, the attached Exhibits 1 and 2, which state, in part:

A. "Profit From Publishing and Print Brokerage At Home! Earn up to $4,000 or More Each Month!" (Exhibit 1.)
B. "Earn $500 -$5000 or More Each Month" (Exhibit 1.)
C. "[The] 'Quick Phone Directory' ... publication alone can earn you $4,000 or more in the first 30 days." (Exhibit 2.)
D. "Our HOME WORKERS FIRST YEAR INCOME averages $38,000 with 40-50% annual growth. Most are EARNING WELL OVER $75,000 by their third year." (Exhibit 2.)

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 and 2, respondent has represented, directly or by implication, that the amount of the money represented by these statements is representative, or typical, of what individuals who purchase respondent's program will generally achieve.

PAR. 6. In truth and in fact, the amount of money represented by these statements is not representative, or typical, of what individuals who purchase respondent's program will generally achieve. 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 advertisements attached as Exhibits 1 and 2, respondent has represented, directly or by implication, that at the time he made the representation set forth in paragraph five, respondent possessed and relied upon a reasonable basis that substantiated such representation.

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

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

EXHIBIT 1

Profit From Publishing and Print Brokerage At Hom

Earn up to $4,000 or More Each Month!

No Experience Necessary To Start!

An exclusive guide to making an excellent income at home.

Hands on, tried and true methods for success.

Valuable information not found anywhere else.

Big companies are continuing to downsize and the trend toward more home based business is even greater

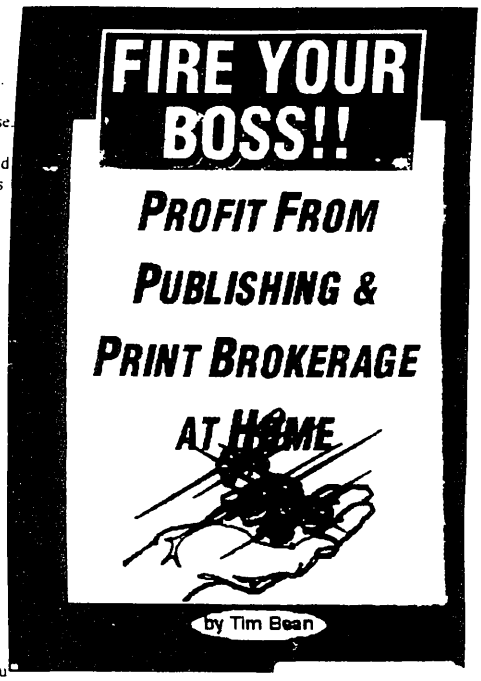
This is the best time to start your own business

Don't rely on others to provide for your future well being

Fire your boss before he fires you

This book will show you how to:

- Make Money Quickly With NO Investment
- Earn $500 - $5000 or More Each Month
- Expand For Unlimited Growth
- Obtain FREE Business Startup Material
- Discover the Freedom of Being Your Own Boss



No Investment or Experience is Required. You can build a publishing empire from your own home.

EXHIBIT 1

Written by Tim Bean, a successful publisher in his own right. This book gives you the ins and outs [illegible]

EXHIBIT 1

- Acquire Your Customers
- Keep Them Coming Back
- Getting Paid Easily
- The Best Customer Service
- Advertise For Success
- Reach Specialized Markets
- Follow Up Tips
- Easy Record Keeping

Tim shares with you the best way to quickly set up your business and start earning excellent income immediately. You don't want to miss out on this chance to have your own publishing business, all from the comfort of your home. think. You won't have to run down that same old "rut" every day. You can really, FIRE YOUR BOSS!

Only $9.95

plus $.50 shipping and handling

How To Order

Take advantage of this tremendous offer!

ORDER NOW. Send your check or money order to:

DMC Group
24002 Via Fabricante
Mission Viejo, CA 92691

-OR-
for your convenience

Phone Orders 1-714-454-1282 - Please have credit card available
Fax Orders 1-714-454-0869 - Include shipping address and credit card number

California Residents Add 5% Sales Tax

Return to Home Page

EXHIBIT 2

Thank you [illegible]

[illegible]

[illegible]
[illegible] Overhead
[illegible] Start Up Cost [illegible]
[illegible] Profit Margins
[illegible] Annual Growth
[illegible] Repeat Business
A Service that is Needed [illegible]
Absolutely Unlimited Growth [illegible]
Ability to Start Earning [illegible]
No Special Skills Required

[illegible] Publishing [illegible] that will [illegible] printed and published material [illegible] market and sell your own [illegible]

All businesses need [illegible] letterhead, booklets [illegible] marketing material [illegible]

You don't need to sell them anything THEY ALREADY HAVE A NEED FOR YOUR SERVICE! [illegible] market and customer base is WIDE OPEN. You will build a client base of REPEAT BUSINESS that GROWS and GROWS, YEAR after YEAR. Forget about getting a raise from your [illegible] growth raise ANNUALLY.

You will obtain wholesale discount [illegible] rates on the printed/published material that will allow you to mark [illegible] up [illegible]% for retail profits

You will be able to offer the same services for less than you local printer can offer because YOU DON'T HAVE ANY OVERHEAD. You can pass the savings on to your clients.

A FREE PUBLICATION TO JUMP START YOUR BUSINESS.

We'll GIVE YOU Your FIRST PUBLICATION, "Quick Phone Directory", ORDER FORM and instructions on how to market and sell this publication in your local area. This publication alone can earn you $4,000 or more in the first 30 days

EXHIBIT 2

It is ABSOLUTELY THE BEST SELLING and MOST PROFITABLE Publication we have produced. It is a VERY HIGH DEMAND marketing piece that you can sell also, and make alot of money. This is an EXCELLENT WAY TO BOOST YOUR INCOME and supplement your print brokerage business while building your customer base.

Our HOME WORKERS FIRST YEAR INCOME averages [illegible]
40-50% Annual growth. Most are EARNING WELL over [illegible]
by their third year.

PLEASE ORDER OUR COMPLETE TRAINING GUIDE TODAY

"Profit From Publishing & Print Bro[illegible]

"Plus you will receive our Annual 25 MINUTE MAILER of
"Quick Phone Directory" marketing publication [illegible]

THE COST:
$19.95 - $5 Shipping & Processing

HOW TO ORDER:

- 1. "REPLY" to this message [illegible]
MAIL or FAX an ORDER FORM [illegible] DMC DATED

- 2. CALL DMC Publishing [illegible]
RUSH credit card orders.

- 3. MAIL $24.95 to DMC Publishing
24002 FABRICANTE, STE 201
MISSION VIEJO CA 92691

- 4. FAX your order to DMC Publishing [illegible]

Allow 7-10 for delivery.

YOUR NAME: _____

ADDRESS: _____

_____

PHONE: _____ FAX _____

__ I AM SENDING A CHECK OR MONEY ORDER TODAY FOR $24.95
__ I PREFER TO PAY BY CREDIT CARD

CARD NUMBER: _ _ _ _ - _ _ _ _ - _ _ - _ _ _ _

EXP. DATE: _____

EXHIBIT 2

SIGNATURE REQUIRED: _____

COMPLETE 30-DAY MONEY BACK GUARANTEE!

*** A WRITTEN GUARANTEE ***
$$$ THAT WILL INCREASE YOUR INCOME $$$
and IMPROVE the QUALITY of your LIFE!!

You can feel confident that you have ANSWERED the
BEST OPPORTUNITY ad by requesting [illegible]
Based Publishing's and Cyber Marketing Business

I can say this with complete CONFIDENCE, HONESTY and
INTEGRITY because I have answered many of the same
ads as you and what I have what you [illegible]

NONE of the other offers compare to the VALUABLE PRODUCT
and WEALTH OF INFORMATION that I am [illegible]
you.

All of our publications and original [illegible]
PROVIDED INSTANTLY and ON DEMAND [illegible]

See how EASY AND FUN it is [illegible]
FAST time from home with [illegible]

This is your WRITTEN GUARANTEE [illegible]
satisfied with this [illegible]
reason, you can return it [illegible]
questions asked.

If you have any questions please feel free to CALL ME
DIRECTLY anytime between 8 am [illegible] pacific time
714 454-1282

Sincerely,

Timothy R. Bean, President
DMC Publishing Group
24002 Via Fabricante, Suite 203
Mission Viejo, CA 92691

(714) 454-1282 phone
(714) 454-0869 fax

P.S. You have my NAME, you have my ADDRESS, you have my
PHONE NUMBER, you have my PROMISE and my GUARANTEE. So
what are you waiting for? Please order today!

"REPLY" to this message by e-mail NOW and we will
FAX an order form to you immediately.

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, 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 complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and no comments having been filed thereafter by interested parties pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Timothy R. Bean is an individual doing business as DMC Publishing Group with his principal office or place of business at 26052 Merit Circle, Suite 107, Laguna Hills, California.

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

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

ORDER

I.

It is ordered, That respondent Timothy R. Bean, his agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, promotion, offering for sale, sale, or distribution of the business opportunity "Profit from Publishing and Print Brokerage at Home," or any other business opportunity, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting, in any manner, the past, present, or future profits, earnings, income, or sales from such business opportunity.

II.

It is further ordered, That respondent Timothy R. Bean, his agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, promotion, offering for sale, sale, or distribution of the business opportunity "Profit from Publishing and Print Brokerage at Home," or any other business opportunity, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, in any manner, the past, present, or future profits, earnings, income, or sales from such business opportunity, unless at the time of making such representation respondent possesses and relies upon competent and reliable evidence that substantiates 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, respondent, or his 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 his 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:

A. Within thirty (30) days from the effective date of this order deliver a copy of this order to each of his officers, agents, representatives, and employees who are engaged in the preparation or placement of advertisements, promotional materials or other such sales materials covered by this order.

B. For a period of ten (10) years from the effective date of this order deliver a copy of this order to each of his future officers, agents, representatives, and employees who are engaged in the preparation or placement of advertisements, promotional materials or other such sales materials covered by this order, within three (3) days after the person assumes such position.

V.

It is further ordered, That from the date this order becomes final, respondent shall notify the Commission within thirty (30) days of the discontinuance of his present business or employment and of each affiliation with a new business or employment. Each notice of affiliation with any new business or employment shall include his new business address and telephone number, current home address, and a statement describing the nature of the business or employment and the duties and responsibilities.

VI.

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

VII.

This order will terminate on June 10, 2016, 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

BRIAN CORYAT

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

Docket C-3666. Complaint, June 10, 1996--Decision, June 10, 1996

This consent order prohibits, among other things, a California individual doing business as Enterprising Solutions from misrepresenting any credit repair product, credit reporting remedy or the ability to remove adverse information in any credit report. In addition, the consent order prohibits the respondent from misrepresenting profits, earnings, income, or sales from such business opportunity.

Appearances

For the Commission: *Nicholas Franczyk, C. Steven Baker* and *Charulata Pager.*

For the respondent: *Pro se.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Brian Coryat, individually and doing business as Enterprising Solutions ("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 Brian Coryat is an individual doing business as Enterprising Solutions. His principal office or place of business is located at 6 Harbor Way, Suite 194, Santa Barbara, California.

PAR. 2. Respondent is engaged in the advertising, promotion, offering for sale, sale, and distribution of various products, including, but not limited to, The Credit Repair Kit, and business opportunities, including, but not limited to, the Credit Repair Agency business opportunity, to the public.

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

THE CREDIT REPAIR KIT

PAR. 4. Respondent has disseminated or has caused to be disseminated advertisements, including advertisements through the Internet, for "The Credit Repair Kit." These advertisements include, but are not necessarily limited to, the attached Exhibit 1, which states, in part:

Get the credit you deserve NOW!

* * *

The Credit Repair Kit contains over 90 pages of hard to find credit repair information. Information that, when yours, will allow you to change any credit report to reflect an excellent credit history.

* * *

Use proven techniques to permanently erase negative information contained on your credit report.

* * *

Explanations and step-by-step instructions of 7 proven techniques of deleting negative information from your credit report.

* * *

Using our proven techniques, you will now be able to erase;

Late payments	Repossessions
Non-payments	Judgements
Charge-offs	and even Bankruptcy!
Liens	

* * *

Once you have these secrets, you will have the credit you deserve regardless of your past credit experience. Bankruptcies, liens, repossessions, and late payment histories .... Gone!

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 1, respondent has represented, directly or by implication, that consumers can remove bankruptcies, judgments, liens, repossessions, late payments, and other adverse items of information from their credit reports even where such information is accurate and not obsolete.

PAR. 6. In truth and in fact, most consumers cannot remove bankruptcies, judgments, liens, repossessions, late payments, and other adverse items of information from their credit reports where such information is accurate and not obsolete. Therefore, the representation set forth in paragraph five was, and is, false and misleading.

THE CREDIT REPAIR AGENCY BUSINESS OPPORTUNITY

PAR. 7. Respondent has disseminated or has caused to be disseminated advertisements, including advertisements through the Internet, for the Credit Repair Agency business opportunity. These advertisements include, but are not necessarily limited to, the attached Exhibit 2, which states, in part:

Start Your Own Credit Counseling, Credit Repair Agency!

* * *

Step-by-easy-step instructions teach you exactly how to remove errors, and even true negative items from any credit report. The going rate for this service is anywhere from $350 to $1000! Something you can do in 5 to 6 hours! You can earn over $1000 a day for this service alone!

PAR. 8. Through the use of the statements contained in the advertisements referred to in paragraph seven, including but not necessarily limited to the advertisement attached as Exhibit 2, respondent has represented, directly or by implication, that the amount of money represented by these statements is representative, or typical, of what individuals who purchase the Credit Repair Agency business opportunity will generally achieve.

PAR. 9. In truth and in fact, the amount of money represented by these statements is not representative, or typical, of what individuals who purchase the Credit Repair Agency business opportunity will generally achieve. Therefore, the representation set forth in paragraph eight was, and is, false and misleading.

PAR. 10. Through the use of the statements contained in the advertisements referred to in paragraph seven, including but not necessarily limited to the advertisement attached as Exhibit 2, respondent has represented, directly or by implication, that at the time he made the representation set forth in paragraph eight, respondent possessed and relied upon a reasonable basis that substantiated such representation.

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

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

EXHIBIT 1

The Credit Repair Kit

Get the credit you deserve NOW!

Everyone knows that in society today, credit is sometimes even better than cash, in fact, just a simple Visa or MasterCard can mean:

- Always having "money" in your pocket.
- A pre-approved cash loan any time you want it.
- Quick pre-approval for travel reservations, car rentals, and check cashing.

That's just a credit card. Now an A-1 credit rating can be an even more powerful tool, and when used properly even help to fulfill your dreams! After all, most real estate millionaires and business tycoons would still be working 9-5 if they didn't have good credit when they needed it. Once you have these credit repair secrets, you will have the credit you deserve regardless of your past credit experience.

Best of all, you'll never need to discuss anything in person or over the telephone. All communication is strictly by mail. And only one letter per week will repair most bad credit reports in less than 60 days, sometimes in less than 2 weeks! For even faster results, you may prefer to write all of the letters in just one evening. The choice is yours.

How can a simple letter erase bad marks from your credit report? Basically, each letter that you mail references a specific section, subsection, and paragraph of the Federal Law, a law that all credit bureaus MUST comply with! These Federal Laws are the "loopholes" that credit repair agencies have used to clear bad credit for thousands of consumers just like yourself. But you won't have to pay upwards of $2000.00 to have your credit cleared. Because you'll do it yourself. Absolutely everything you need comes included in The Credit Repair Kit!

The Credit Repair Kit includes over a dozen sample letters. A letter for each conceivable credit problem. Each letter quotes a specific Federal Law. Just copy the letter that applies, and send it in the mail. That simple! (The credit bureaus won't have a legal leg to stand on when you use the Federal Law in your favor!)

Change "CREDIT DENIED" to "CREDIT APPROVED" in 30 days or less. GUARANTEE

That's right! Whether you've never had credit, or if your credit has been damaged in the past, just by following our simple step-by-step credit repair instructions, in just one month you will qualify for credit at any major bank or financial institution. They will not only approve your loan or major credit card request, but they will likely let you your own credit limit. (In fact, they will often contact you first, offering you pre-approved credit cards and pre-approved loan amounts!)

The Credit Repair Kit contains over 90 pages of hard to find credit repair information. Information that, when used, will allow you to change any credit report to reflect an excellent credit history. (If your credit report is anything less than outstanding, you need this manual.)

Easy Step-by-Step Instructions EXHIBIT 1

The Credit Repair Kit will take you by the hand and guide you through the step-by-step process proven to change

EXHIBIT 1

you and your family. Always there, if and when you need it.

It may never again be this easy to clean up your credit, and you never know when you might need it.

This is your opportunity for total financial acceptance Order today, as orders are shipped on a first come, first serv basis.

Sincerely yours,
Brian Coryat
President
Home Business Solutions

P. S. The Credit Repair Kit includes ALL known techniques of credit repair, updated at least once a year with the most current information.

EXHIBIT 1

If I gave you step-by step instructions how to erase all of your credit problems quckly and easily,... Would you be willing to spend. just a few minutes of your time to accomplish it?

Everyone knows that in America today, credit is sometimes better than cash. in fact, just a simple Visa or Master can mean;

Always having "money" in your pocket.

A pre-approved cash loan anytime you want it

Quick pre-approval for hotels. car rentals. and check cashing

That's just a credit card. Now an A-1 credit report can be an extremely powerful tool. and when used properly even help you to fulfill your dreams

After all. the real estate millionaires. would still be working 9-5 if they didn't have the good credit necessary real-estate when the time was right

And how about the people driving the newer cars and living in the nicer homes. they also used credit for the tool that it can be.. The same powerful tool will be yours if you are willing to spend just a few minutes a week That's right! Just by mailing one letter a week. good credit is yours!

The Credit Repair Kit contains ninety 8 1 2" 11" wire bound pages of extremely hard to find. valuable credit information. Information that will allow you to take full advantage of little known credit repair secrets. Secrets previously used by thousands to erase bad credit

Once you have these secrets. you will have the credit you deserve regardless of your past credit experiences Bankruptcies. liens. repossessions. and late payment histories . . Gone!

Best of all. you never have to discuss anything in person or over the telephone. All communication is accomplished through the mail. And only one letter a week will repair most bad credit reports in less than 60 days. sometimes in less than 2 weeks! For even faster results. you may prefer to mail all of the letters in just one evening The choice is yours!

How can a simple letter erase bad marks from your credit report?

Basically, each letter that you mail references a specific section, subsection, and paragraph of the Federal Law. a Law that the credit bureaus MUST conform with. These Federal Laws are the 'loopholes' that credit repair agencies have used to clear bad credit for thousands of consumers like yourself. But you won't have to pay upwards of $2000.00 to have your credit cleared. Because you'll do it yourself. Absolutely everything you need comes included in The Credit Repair Kit.

The Credit Repair Kit includes 13 sample letters. A letter for each conceivable credit problem. Each letter quotes a specific Federal Law (For example, "In accordance with Public Law 90-321, Title 4, Section 611, Subsection (a), I hereby petition.....)

Just copy the letter that applies, and send it in the mail. That simple! Also, the Credit Repair Kit is wire-o Bound to allow easy reading, and easy copying of the sample letters.

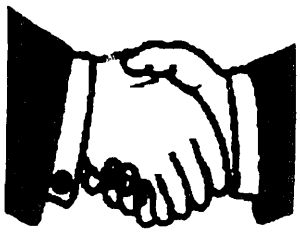
The credit bureaus won't have a legal leg to stand on when you use the Federal Law in your favor!

As President of this company, I assure you that you will be totally satisfied with The Credit Repair Kit. Of course I'm backing that up with an UNCONDITIONAL 100% MONEY BACK GUARANTEE.

When you receive The Credit Repair Kit you will immediately see how easy it is to clean your credit. and if you're like most people, you will practically run to the mailbox with your first outgoing letter. Soon after .... you may find yourself buying something that you've wanted for a long time. Will it be a new car, a boat, or perhaps the home of your dreams?

EXHIBIT 1

ACT NOW! This is your opportunity for total financial acceptance!



For more information, click HERE.

Stock # CRK 21-1 The Credit Repair Kit $24.95

For ordering information, click HERE.

EXHIBIT 1

Step 1 Use proven techniques to permanently erase negative information contained on your credit report
Step 2 Utilize the credit rebuilding system to add positive marks to your credit report thereby indicating you be in excellent credit standing.

Take a look at the features of The Credit Repair Kit

Explanations and step-by-step instructions of 7 proven techniques of deleting negative information from your credit report.
Step-by-step instructions on how to rebuild a positive credit profile, qualifying you for credit at any bank or financial institution.
Major credit card sources, that allow you to obtain major credit cards regardless of your past credit. YOU set your own credit limit.
Instructions how to obtain FREE copies of your credit report from the three largest credit bureaus in the United States, TRW, TransUnion, and Equifax.
A complete copy of The Fair Credit Reporting Act, allowing you to use this important Federal Law in your favor to delete negative information from your credit report.
Easy qualify major credit card sources.

Using our proven techniques, you will now be able to erase:

Late payments
Non-payments
Charge-offs
Liens
Repossessions
Judgements
and even Bankruptcy!

All the tools and techniques included in The Credit Repair Kit are 100% LEGAL and 100% PROVEN!

When you receive The Credit Repair Kit you will immediately see how easy it is to clean your credit, and if you're like most people, you will practically run to the mailbox with your first outgoing letter. Soon after you may find yourself buying something you've been wanting for a long time. Will it be a new car, a boat, or perhaps the home of your dreams? Even if you don't want to buy anything, just think of the extra security and peace of mind for you and your family!

IMPORTANT NOTICE

More than thirteen states have recently settled a law suit against TRW, the largest credit bureau, in Federal Court. The charges were brought about due to the enormous amount of errors found on the credit reports that they provide. In the settlement, TRW has begun a consumer awareness campaign, and has also indicated to the Attorney General that antiquated and ineffective reporting procedures will be revised to better insure accurate credit reporting. IT HAS NEVER BEEN EASIER TO ERASE NEGATIVE MARKS FROM YOUR CREDIT REPORT! Because the credit bureaus are currently under the constant pressure to reduce the amount of complaints by consumers, RIGHT NOW is probably the easiest time ever to clear negative marks from your credit report. However, TIME IS RUNNING OUT! When the credit bureaus rid themselves of their present ineffective procedures, they are very likely to also rid themselves of loopholes. Loopholes that have allowed thousands of consumers like yourself to erase bad credit. It may never again be this easy to clean up your credit!

Start Your Own Credit Counseling, Credit Repair Agency!

According to a recent government study, one out of every 4 people have negative marks on their credit report that could cause denial of credit. Another ten thousand or more people are turned down for a major credit card daily!

You can help these people! And you can make a great living doing it. By offering some basic financial services, you will be helping people in your community deal with their credit related problems. In this comprehensive course, contained in a beautiful three ring binder, you'll learn all the in's and out's of credit repair. Step-by-easy-step instructions teach you exactly how to remove errors, and even true negative items from any credit report. The going rate for this service is anywhere from $350 to $1000! Something you can do in 5 to 6 hours! You can earn over $1000 a day for this service alone!

Besides credit repair, you'll also offer your clients many other needed services such as debt consolidation, secured credit cards, budget analysis, and legal protection from their bill collectors. This huge manual will teach you absolutely everything you need to know In it you'll learn:

Over 7 proven techniques of removing negative items from a credit report.
Sources for major credit cards that have 98%+ approval rates.
A "magic" letter that can stop bill collectors cold!
A huge debt consolidating service that will pay you big bucks for referring customers.
How to set up your own credit services office.
All the legalities you need to know to start a home business.
And so much more!

When you receive this huge three ring binder, exploding with the credit repair secrets that have made many a credit repair agent rich, you can start your journey towards financial freedom! Making a kings ransom, by helping people! What better way could their be to earn a living and get rich.

Thousands of people are making quite a nice living in this business, now it's your turn. Remember, you have nothing to lose, only to gain!

Stock # CRA17-2..... Credit Repair Agency $49.95

For ordering information, click HERE.

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, 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 complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and no comments having been filed thereafter by interested parties pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Brian Coryat is an individual doing business as Enterprising Solutions with his principal office or place of business at 6 Harbor Way, Suite 194, Santa Barbara, California.

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

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

ORDER

DEFINITIONS

1. *"Credit report"* means any written, oral, or other communication of information by a consumer reporting agency bearing on a person's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics or mode of living that is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for credit.

2. *"Credit repair product"* means any product or service to improve a person's credit report by removing adverse information appearing therein, changing the rating of such information from negative to positive, or otherwise enhancing the person's credit report.

I.

It is ordered, That respondent Brian Coryat, his agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, promotion, offering for sale, sale, or distribution of any credit repair product, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting, either directly or indirectly, in writing, via a computer communications network, or by any other means, any right or remedy available under the Fair Credit Reporting Act, 15 U.S.C. 1681 *et seq.*, including, but not limited to, the ability to remove adverse information in any credit report.

II.

It is further ordered, That respondent Brian Coryat, his agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, promotion, offering for sale, sale, or distribution of the Credit Repair Agency business opportunity, or any other business opportunity, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist

from misrepresenting, in any manner, the past, present, or future profits, earnings, income, or sales from such business opportunity.

III.

It is further ordered, That respondent Brian Coryat, his agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, promotion, offering for sale, sale, or distribution of the Credit Repair Agency business opportunity, or any other business opportunity, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, in any manner, the past, present, or future profits, earnings, income, or sales from such business opportunity, unless at the time of making such representation respondent possesses and relies upon competent and reliable 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, respondent, or his 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 his 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 respondent shall:

A. Within thirty (30) days from the effective date of this order deliver a copy of this order to each of his officers, agents, representatives, and employees who are engaged in the preparation

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

B. For a period of ten (10) years from the effective date of this order deliver a copy of this order to each of his future officers, agents, representatives, and employees who are engaged in the preparation or placement of advertisements, promotional materials or other such sales materials covered by this order, within three (3) days after the person assumes such position.

VI.

It is further ordered, That from the date this order becomes final, respondent shall notify the Commission within thirty (30) days of the discontinuance of his present business or employment and of each affiliation with a new business or employment. Each notice of affiliation with any new business or employment shall include his new business address and telephone number, current home address, and a statement describing the nature of the business or employment and the duties and responsibilities.

VII.

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

VIII.

This order will terminate on June 10, 2016, 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

MARTHA CLARK

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

Docket C-3667. Complaint, June 10, 1996--Decision, June 10, 1996

This consent order prohibits, among other things, a New York-based individual doing business as Simplex Services from misrepresenting, in advertisements -- via a computer communications network, or by any other means -- for a credit repair product, any right or remedy available under the Fair Credit Reporting Act, including the ability to remove adverse information in any credit report, and the legality of any credit repair product.

Appearances

For the Commission: *Nicholas Franczyk, C. Steven Baker* and *Charulata Pager.*

For the respondent: *Michael Flaum,* Albany, N.Y.

COMPLAINT

The Federal Trade Commission, having reason to believe that Martha Clark, individually and doing business as Simplex Services ("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 Martha Clark is an individual doing business as Simplex Services. Her principal office or place of business is located at 135 Kipp U., P.O. Box 36, Niverville, New York.

PAR. 2. Respondent is engaged in the advertising, promotion, offering for sale, sale, and distribution of the Guaranteed Credit Doctor credit repair product to the public.

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

PAR. 4. Respondent has disseminated or has caused to be disseminated advertisements, including advertisements through the Internet, for the Guaranteed Credit Doctor credit repair product. These advertisements include, but are not necessarily limited to, the attached Exhibit 1, which states, in part:

Guaranteed Credit Repair

* * *

The "GUARANTEED CREDIT DOCTOR" is a very unique program designed to enable ANYONE to remove unwanted items from their credit report.

* * *

Not only will you learn how to remove unwanted items from your credit file -- you will also learn step-by-step how to establish a truly rock solid AA credit rating!

* * *

You will learn exactly, step-by-step:
How to remove derogatory information from your credit file at all major credit bureaus ...
How to remove judgments, including BANKRUPTCY from your credit file!

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 1, respondent has represented, directly or by implication, that consumers can remove bankruptcies, judgments, foreclosures, liens, repossessions, late payments, and other adverse items of information from their credit reports even where such information is accurate and not obsolete.

PAR. 6. In truth and in fact, most consumers cannot remove bankruptcies, judgments, foreclosures, liens, repossessions, late payments, and other adverse items of information from their credit reports where such information is accurate and not obsolete. Therefore, the representation set forth in paragraph five was, and is, false and misleading.

PAR. 7. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

EXHIBIT 1

Guaranteed Credit Repair

^^

PUT AN END TO YOUR CREDIT PROBLEMS ONCE AND FOR ALL!

^^

"Learn how to establish a rock-solid (AAA) credit rating in 90 days or less. . . REGARDLESS of your current situation!"

Dear Friend:

Don't be held back anymore by a less-then-perfect credit rating. Have you been turned down in the past for a car loan, a major credit card, a home mortgage, a job - or have felt the consequences of having less than perfect credit in other areas of your life?

The truth is that in this country a good credit rating is no longer a privilege, but one of life's primary necessities! Unfortunately each year millions of people experience some tragic event such as divorce, lay-offs, unemployment or serious injury or illness that can cause a good credit standing to crumble virtually overnight. . .

Personal bankruptcies are at an all time high and there is no end in sight!

Thousands of credit repair agencies have sprung up all over the country in the past years, cashing in on the exploding demand for 'credit repair' offering high priced and many times ineffective services to a desperate public. Most people with serious credit problems cannot afford the services of these agencies in the first place . . .

RESTORE YOUR CREDIT RATING ONCE AND FOR ALL

Now, finally and for the first time you can take charge of your credit rating and 'effectively' remove negative information from your credit report YOURSELF, without having to pay big bucks to one of the few qualified agencies or even more expensive attorneys specializing in credit repair and cleanup!

LITTLE KNOWN "TRICKS OF THE TRADE". . .

The laws governing credit reporting bureaus are very complex. Although there are a number of different strategies available that can be employed to remove unwanted information from your credit file, they are far to complex for the average consumer to use themselves effectively - UNTIL NOW!

The "GUARANTEED CREDIT DOCTOR" is a very unique program specifically designed to enable ANYONE to remove unwanted items from their credit report themselves AND MORE--without having to dish out hundreds or even thousands of dollars to a third party.

This unequalled DO-IT-YOURSELF credit program is designed around a powerful software program similar to those used by credit repair agencies and attorneys charging hundreds or even thousands of dollars for their services. . .

WE GUARANTEE RESULTS, and if you follow the simple step-by-step instructions you ABSOLUTELY WILL be able to repair your credit rating and much more!

You finally will be able to get that new car, a new house or a major credit card, regardless of your current credit rating!

BUT WE DON'T STOP THERE!

Not only will you learn how to remove unwanted items from your credit file -- you will also learn step-by-step how to establish a truly rock solid AAA credit rating!

AFTER ALL, YOU DON'T WANT TO BE STUCK WITH 'NO CREDIT' AFTER GETTING RID OF YOUR BAD CREDIT!

You would probably expect to pay a lot of money for this type of information, let alone the software. It is our mission to help you on your road to financial recovery, NOT TO RIP YOU OFF -- therefore we are making the "GUARANTEED CREDIT DOCTOR" available at an unbelievable price! The cost of this program is only $35.00 (plus $4 s&h), covered by a 90 day MONEY BACK GUARANTEE. You really have nothing to lose!

You will learn exactly, step-by-step:

How to remove derogatory information from your credit file at all ~~m~~major credit bureaus. (Yes, there are several and they share information. You MUST have corrections made to files at all major bureaus.)

How to remove judgements, including BANKRUPTCY from your credit file!

How to re-establish your credit rating, building a rock solid rating in 90 days or less!

How and where to get a major credit card, GUARANTEED and without having to pay an 'application fee' or some other silly nonsense!

You also receive professional credit repair software that not only guides you through the entire process, but also...

...composes and prints all necessary forms, letters, demands, etc. for you. All you do is enter your personal information and push a button.....!

THE INFORMATION AND SOFTWARE PACKAGE ARE SO POWERFUL THAT YOU QUITE LITERALLY COULD SET UP SHOP AND BECOME A CREDIT REPAIR SPECIALIST YOURSELF!

Do you know anyone that has credit problems? Most of us do!

This is your chance to reclaim the privileges available to those with impeccable credit! To order your copy of the "GUARANTEED CREDIT DOCTOR," choose from the buttons below....

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, 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 complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and no comments having been filed thereafter by interested parties pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Martha Clark is an individual doing business as Simplex Services with her principal office or place of business at 135 Kipp U., P.O. Box 36, Niverville, New York.

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

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

ORDER

DEFINITIONS

1. *"Credit report"* means any written, oral, or other communication of information by a consumer reporting agency bearing on a person's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living that is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for credit.

2. *"Credit repair product"* means any product or service to improve a person's credit report by removing adverse information appearing therein, changing the rating of such information from negative to positive, or otherwise enhancing the person's credit report.

I.

It is ordered, That respondent Martha Clark, her agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, promotion, offering for sale, sale, or distribution of any credit repair product, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting, either directly or indirectly, in writing, via a computer communications network, or by any other means, any right or remedy available under the Fair Credit Reporting Act, 15 U.S.C. 1681 *et seq.*, including, but not limited to, the ability to remove adverse information in any credit report.

II.

It is further ordered, That respondent shall:

A. Within thirty (30) days from the effective date of this order deliver a copy of this order to each of her officers, agents, representatives, and employees who are engaged in the preparation or placement of advertisements, promotional materials or other such sales materials covered by this order.

B. For a period of five (5) years from the effective date of this order deliver a copy of this order to each of her future officers, agents, representatives, and employees who are engaged in the preparation or placement of advertisements, promotional materials or other such sales materials covered by this order, within three (3) days after the person assumes such position.

III.

It is further ordered, That for a period of five (5) years from the date this order becomes final, respondent shall notify the Commission within thirty (30) days of the discontinuance of her present business or employment and of each affiliation with a new business or employment. Each notice of affiliation with any new business or employment shall include her new business address and telephone number, current home address, and a statement describing the nature of the business or employment and the duties and responsibilities.

IV.

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

V.

This order will terminate on June 10, 2016, 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

SHERMAN G. SMITH

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

Docket C-3668. Complaint, June 12, 1996--Decision, June 12, 1996

This consent order prohibits, among other things, a Utah-based individual doing business as Starr Communications from misrepresenting, in advertisements for a work-at-home business, the income, earnings, or sales from any business opportunity and prohibits any claims concerning past, present, or future earnings unless, at the time of making the representation, it possesses competent and reliable evidence to substantiate the claim.

Appearances

For the Commission: *Nicholas Franczyk, C. Steven Baker* and *Charulata Pager.*

For the respondent: *Robert Archuleta,* Salt Lake City, UT.

COMPLAINT

The Federal Trade Commission, having reason to believe that Sherman G. Smith, individually and doing business as Starr Communications ("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 Sherman G. Smith is an individual doing business as Starr Communications. His principal office or place of business is located at 78 West Broadway, No. 2007 North, Salt Lake City, Utah.

PAR. 2. Respondent is engaged in the advertising, promotion, offering for sale, sale, and distribution of the "U.S. Government Tracer Business Program" to the public.

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

PAR. 4. Respondent has disseminated or has caused to be disseminated advertisements, including advertisements through the Internet, for the "U.S. Government Tracer Business Program." The advertisements include, but are not necessarily limited to, the attached Exhibit 1, which states, in part:

Would You Like To Make $800 - $4,800 Per Week Or More,
Working At Home? Well you can!

* * *

You can help people get refunds due them after they've paid off their mortgages. It's extremely easy! You can do it from home as an Independent U.S. Government Tracer.

* * *

There's no shortage of refund recipients. I've been a "Govt. Tracer" since 1989, making an average of $5,423.72 per month. And I do this mostly part time!!! ... about 4 hours a day, 3 to 4 days a week.

* * *

I'll show you how to make from $200 to as much as $1,200 every time you help someone get their money back.

* * *

The average refund is $800.00 to $1,500.00, which makes your 20% - 30% fee equal to $240.00 to $400.00. ... The highest refunds are around $4,000.00 your fee would be around $1,200.00.

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 1, respondent has represented, directly or by implication, that the amount of money represented by these statements is representative, or typical, of what individuals who purchase the "U.S. Government Tracer Business Program" will generally achieve.

PAR. 6. In truth and in fact, the amount of money represented by these statements is not representative, or typical, of what individuals who purchase the "U.S. Government Tracer Business Program" will generally achieve. 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 1, respondent has represented, directly or by implication, that at the time he made the representation set forth in paragraph five, respondent possessed and relied upon a reasonable basis that substantiated such representation.

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

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

EXHIBIT 1

Subj.: $800 - $4800 /wk From Home
Date: 95-06-29 16:11:56 EDT
From: JStarrComm

Would You Like To Make $800 - $4,800 Per Week Or More,
Working At Home? Well You can!!

Its extremely easy and you can do it in the comfort of your own home.
Full or Part Time, No exp. needed.
For a FREE report by E-mail, E-mail your name and address to:

HUD_Info@mailback.com (for an immediate response)
or to: JStarrComm (here on America OnLine)
(Just hit<Ctrl> M right now!)

or browse our web page at: http://www.intele.net/-aimies

Subj: Home Business Opportunity
Date:
From:
To:
BCC:

Dear Friend,

Thanks for your interest!!

I've tried to keep it simple and explain as much as I can in this free e-mail report.

You can help people get refunds due them after they've paid off their mortgages. It's extremely easy! You can do it from home as an Independent U.S. Government Tracer.

Most of these people have no idea that the Government even owes them money. You get paid to find them (it's easy and I'll show you how), tell them, and fill out one form.

*** Set Your Own Hours ***

Your hours are up to you. _You_Get_Paid_ to help people get their own money back.

*** Get paid for giving people their own money ***
What could be easier?

There's no shortage of refund recipients. I've been a "Govt. Tracer" since 1989, making an average of $5,423.72 per month. And I do this mostly part time!!! I

don't work another job, and I only work at this about 4 hours a day, 3 to 4 days a week.

I hope you get as excited about this as I am, there's a lot of money to be made if you just have the desire to make it!

I'll show you how to make from $200 to as much as $1,200 every time you help someone get their money back.

*** You can do this from any state, for any state ***

First, please read everything carefully so you completely understand. After you have, if you have any questions, please feel free to call me, Jaimie, on my "direct personal line" at (800) 672-0287, after 2:00pm MT (for best results).

Second, everything I present here is legal, moral, practical, and can be verified by the Federal Government. In fact... They want you to do this. That's why they set this program up in the first place. If you'd like to check it out you can call them at (703) 487-4070 or (703) 235-8117.

*** Here's How It Works ***

Everyone who purchases a FHA/HUD home has to pay a MMI or MIP insurance policy on the loan. This does two things. It enables them to borrow with less down and at the same time, guarantees the lender that if the borrower defaults on the loan, the Federal Government (HUD/FHA) will step in and pay the loan. This helps millions of people buy homes who otherwise never could.

Each borrower is told if they pay back the loan in good faith, they're entitled to a refund on the MMI or MIP insurance policy. When they pay off their loan, they forget to call and ask for their refund.

HUD and FHA tries to contact them by mail, but if they don't respond to the letter, the money goes in a fund for these refund recipients. For years the money has been piling up and today there are MILLIONS and MILLIONS of UNCLAIMED DOLLARS in the fund!

*** Here's A Little More Information ***

Finally, in 1986, the government stepped in and told HUD/FHA that they had to figure out a way to get the money back to the people.

Well, HUD/FHA didn't want to eat the tremendous administrative costs to do that, so HUD/FHA came up with Great Way to solve the problem.

They decided to let anyone who wanted a chance to earn some extra money or go into business for themselves be a third party processor. You're allowed to find them, let them know they have an unclaimed refund owed to them, and receive a reasonable commission for doing so.

The Catch is. . .
They Won't Teach you How To Do It.
But I will !!!

I'll show you, step-by-step, how to become a processor.
I'll show you how to contact the people who have money due them.
I'll tell you exactly what to say and . . . this is _Extremely_Important_

*** How to Do the Paperwork ***
(there's very little but it must be done right)
And . . .
How to Make Lots of Money Doing So

This isn't some "hokey" -- "Get Rich Quick Scheme." This is a STEADY, HONEST, AND LUCRATIVE MONTHLY INCOME from providing a real (but easy and necessary) service.

It's Actually Kind of Fun!

Plus. . . You Get the Freedom of Setting Your Own Hours!!!
Just like I do. :)

Everything you need to get started is included in my easy to use software package.

Here's the most common questions people ask me when they find out I'm in this exciting sort of "Good Guy -- Bounty Hunter" line of work.

Question:	Is it legal?
Answer:	Yes, In every way.
Question:	What's stopping me from ordering the list from HUD/FHA myself and becoming a processor?
Answer:	Nothing! But . . . there is absolutely no way you'll know -- How to contact these people -- What to say -- How to do the paperwork or . . . How to Get Paid RIGHT AWAY! I've already worked all of that out for you. Which will save you a lot of time and aggravation.
Question:	What is the average refund?
Answer:	The _average_ refund is $800.00 to $1,500.00, which makes your 20% - 30% fee equal to $240.00 to $400.00. If you wanted to, you could work only on the cases where the individual has over $1,200.00 coming back. The highest refunds are around $4,000.00 your fee would be around $1,200.00.
Question:	How long will it take from the day I begin till I start making money?
Answer:	You can start making money the same day, but it will _usually_ take a week or so to actually get a check in your hands. I'll show you how to get paid the same day you disclose the information to the individual.

Question: Do I have to do a lot of mailing?
Answer: No. I'll teach you how to do most of the work (75%) over the phone.
Question: How many people have money owed to them?
Answer: When you order your state list you'll see that there are thousands of people with money due them.
It depends which state you're going to work in. If you order, say, the California list, you'll see it could take forever to get through them all.
Literally Millions of dollars are owed to thousands of people as a result of this program.
Question: Do I get paid by HUD/FHA or by the people who have money owed them?
Answer: By the people. I'll explain how to do that, step-by-step. It's very simple
In no case will HUD/FHA make out a separate check payable to you. Some other programs claim that the government will send checks directly to you.
While this isn't a lie, it's a very difficult (and totally unnecessary) process to go through. I'll show a much easier and quicker way to get your money.
Question: Does HUD/FHA require you to be licensed?
Answer: No. HUD/FHA requires no license because you're not dealing directly with these funds.
Question: This sounds too good to be true, Is it?
Answer: I want you to know everything is exactly as I say. If you like. You can verify everything through the Federal Government by calling them at (703) 487-4070, and call me if you have any other questions at (800) 672-0287.
This truly is a great way to make a lot of money and help people at the same time.

The "Freedom of Information Act" enables HUD to release the names of people who haven't claimed their refunds. And made this program possible.

These people aren't hiding! They just aren't aware that they are owed this money!

And. . . There are Tens of Thousands of them. People who have money due them. And you. . . can make money just helping them get the money they rightly deserve.

I'm sure you can see the potential here, can't you?

This is legitimate business opportunity. There is a lot of money to be made and it's not difficult work at all! You just need to apply yourself and do it. Nothing could be simpler.

PLUS. . . I'm always available to assist you, if you have any questions.
and best of all . . .

* * * ITS GUARANTEED * * *

It's completely, 100% money back Guaranteed !!! If after trying the program, it doesn't work exactly the way I've stated, or you can't make a reasonable income using the program, you will be entitled to a full refund of your program price.

And Here's Even More Good News. . .

If you order your U.S. Government Tracer Business Program within the next 15 days, you'll receive a 25% discount off the regular price of $56.00! You'll Save $14.00!!

To get your complete Tracer Business Software Package on How To Run this Business, which includes everything you need to get started, for just $42.00, you have several easy options:

Phone Check:
1) Have your check book handy.
2) Call Jaimie @ 1-800-672-0287, 3 p.m. to 11 p.m. MST, Mon-Sat.

E-Mail Check:
1) E-Mail your name and address EXACTLY as they appear on checks, your phone number for verbal authorization, banks name and address as it appears on checks.
2) The amount of the check.
3) The entire number across the bottom of the check, (use dash for blank spaces). And the fractional number up near the check number. Please indicate like this: 31-73/1240
4) Send E-Mail to any of the following:
JaimieS@intele.net
JStarrComm@aol.com
74737.1005@compuserve.com

FAX Check
1) Make out a check to: Starr Comm. Be sure to include delivery instructions, either a home address or an e-mail address.
2) Then, simply fax your check and delivery info to: (801) 264-8647

Credit Card:
1) Use your VISA, or MasterCard.
2) Phone, E-mail, or U.S. Mail your order.
3) Include your name EXACTLY as it appears on the card, your address, your phone number for verbal authorization, and the billing address for that card.
4) The amount of the charge.
5) The credit card number and expiration date.
6) Don't forget to sign it!!

U.S. Mail
1) Use the handy order form at the end of this file and send a check or money order for just $42.00 + $3.00 shipping and handling to:
STARR COMM.
4516 S. Triton Dr., Suite D
Murray, Utah 84107

Thanks again for your interest,

Jaimie Starr

P.S. I hope you decide to take me up on this offer and get your complete software package to get started making money today. Because, You really have everything to gain and nothing to lose. It's an easy way to make good money right from your home. (I've been doing it for years.) and
. . . it's 100% guaranteed. But if you're still not sure it's right for you, Please feel free to call me on my "direct personal line" at (800) 672-0287.

P.P.S. You Can Save Even More -- You can save the shipping charges, and get the program instantly -- via E-mail. It saves me having to stuff and mail an envelope, plus you can get going right away. Just let me know with your order.
But remember to let me know about your system too (i.e. IBM Comp., Mac, Windows, Etc.).

Thanks! :)

----------ORDERFORM----------

Name_____
ScreenName_____
Address _____
_____
City: _____ State: _____
Zip:_____

Name on Credit Card: _____
Card Number: _____
Exp. Date: _____ Amount $ _____
Signature:_____
Phone (_____) _____
System: _____
_____

If you are seriously interested in being your own boss, working at home, and making good money then this opportunity is for you! Remember, this special discount offer expires in 15 days.
So . . .

DON'T DELAY . . . . ORDER TODAY!

P.S. I also can show you how you can accept checks by E-mail/Fax/Phone.
E-Mail for more information.

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, his counsel, 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 complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and no comments having been filed thereafter by interested parties pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Sherman G. Smith is an individual doing business as Starr Communications with his principal office or place of business at 78 West Broadway, No. 2007 North, Salt Lake City, Utah.

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

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

ORDER

I.

It is ordered, That respondent Sherman G. Smith, his agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, promotion, offering for sale, sale, or distribution of the "U.S. Government Tracer Business Program," or any other business opportunity, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting, in any manner, the past, present, or future profits, earnings, income, or sales from such business opportunity.

II.

It is further ordered, That respondent Sherman G. Smith, his agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, promotion, offering for sale, sale, or distribution of the "U.S. Government Tracer Business Program," or any other business opportunity, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, in any manner, the past, present, or future profits, earnings, income, or sales from such business opportunity, unless at the time of making such representation respondent possesses and relies upon competent and reliable evidence that substantiates 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, respondent, or his 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 his 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:

A. Within thirty (30) days from the effective date of this order deliver a copy of this order to each of his officers, agents, representatives, and employees who are engaged in the preparation or placement of advertisements, promotional materials or other such sales materials covered by this order.

B. For a period of ten (10) years from the effective date of this order deliver a copy of this order to each of his future officers, agents, representatives, and employees who are engaged in the preparation or placement of advertisements, promotional materials or other such sales materials covered by this order, within three (3) days after the person assumes such position.

V.

It is further ordered, That from the date this order becomes final, respondent shall notify the Commission within thirty (30) days of the discontinuance of his present business or employment and of each affiliation with a new business or employment. Each notice of affiliation with any new business or employment shall include his new business address and telephone number, current home address, and a statement describing the nature of the business or employment and the duties and responsibilities.

VI.

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

VII.

This order will terminate on June 12, 2016, 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

ROBERT SERVISS

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

Docket C-3669. Complaint, June 12, 1996--Decision, June 12, 1996

This consent order prohibits, among other things, a Connecticut-based individual doing business as Excel Communications from misrepresenting, in advertisements for a work-at-home business, the income, earnings, or sales from any business opportunity and prohibits any claims concerning past, present, or future earnings unless, at the time of making the representation, it possesses competent and reliable evidence to substantiate the claim.

Appearances

For the Commission: *Nicholas Franczyk, C. Steven Baker* and *Charulata Pager.*

For the respondent: *Walter Diercks,* Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that Robert Serviss, individually and doing business as Excel Communications ("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 Robert Serviss is an individual doing business as Excel Communications. His principal office or place of business is located at 2169 Summer Street, Suite 115, Stamford, Connecticut.

PAR. 2. Respondent is engaged in the advertising, promotion, offering for sale, sale, and distribution of the "ON-LINE Profits Made Easy" business opportunity to the public.

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

PAR. 4. Respondent has disseminated or has caused to be disseminated advertisements, including advertisements through the Internet, for the "ON-LINE Profits Made Easy" business opportunity. The advertisements include, but are not necessarily limited to, the attached Exhibit 1, which states, in part:

YOU CAN MAKE $1000 A DAY WORKING FROM HOME!
This opportunity is so fantastic, you can make $1000 a day working from home in an easy, pleasant business.
Consider this: If you make just one $25 sale per day (7 days a week) on 145 computer Bulletin Board Systems (out of 70,000) -- you are earning over $100,000 a month! Can you make just one $25 sale a day on 145 B.B.S.s? If so, you can earn $100,000 a month! Yes it can be done!

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 1, respondent has represented, directly or by implication, that the amount of money represented by these statements is representative, or typical, of what individuals who purchase the "ON-LINE Profits Made Easy" business opportunity will generally achieve.

PAR. 6. In truth and in fact, the amount of money represented by these statements is not representative, or typical, of what individuals who purchase the "ON-LINE Profits Made Easy" business opportunity will generally achieve. 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 1, respondent has represented, directly or by implication, that at the time he made the representation set forth in paragraph five, respondent possessed and relied upon a reasonable basis that substantiated such representation.

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

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

EXHIBIT 1

Subject: Re: Making money
Date:
From:
Reply-to:
To:

YOU CAN MAKE $1000 A DAY WORKING FROM HOME!
A COMPLETELY DIFFERENT APPROACH
TO ELECTRONIC MARKETING.

READ MY MESSAGE AND DISCOVER WHY A SANE
PERSON WOULD REVEAL THIS KIND OF SECRET!

(Please do yourself a big favor and print out this report. It contains a lot of information and there is a time limit given below to receiving $1,663 worth of FREE gifts!)

Dear Friend:

As a computer user and recipient of this report I know you are wondering: Can I really make BIG PROFITS ON-LINE? Can I make serious money without any special computer skills?

The answer is YES! This opportunity is so fantastic, you can make $1,000 a day working from home in an easy, pleasant business. The reason I can predict such success is simple. What I am about to tell you is revolutionary! In fact, it may be . . .

THE HOTTEST MARKETING BREAKTHROUGH OF ALL TIME.

My name is Robert Serviss, Jr.. I live in Connecticut. I am writing this letter on a couch with my laptop at home. This is where I have "worked" for the past two years. I know what you are about to read will be hard to believe. And it will probably be even more difficult for you to believe that you too can make money using my system. But, I hope you'll hear me out. I may be the guy who improves your financial future in a BIG way.

I WOULD HAVE NEVER GUESSED
I WOULD HAVE THIS OPPORTUNITY.

This is not some pie in the sky theory. My electronic marketing system is full of practical, proven information. I offer you the opportunity to work with me. You may get to know me, and even get my private phone number.

I am an opportunity junkie. Over the years I have bought more tapes, books, programs and opportunities than I care to mention. Why? I hated working for someone else. I had a "nice" job but it kept me away from home for long periods of time. I felt stuck. I wanted more time with my family, and more time to pursue my favorite recreational activities. I didn't want to wait until 65 to have fun.

Much of what I sent away for was useless. It was either too complicated, just plain insulting, or involved risking a lot of money. I can remember promising to myself then that if I ever found a money making system that actually worked I would share it with anyone willing to learn.

About two years ago, I discovered the on-line computer services, the Internet, and the B.B.S.s. They offered the opportunity I had been waiting for. Why? Because electronic marketing combines the best of all worlds. It is low cost, minimal work, has practically no risk, and HUGE profit potential. Furthermore, no advanced computer, business, or marketing skills are necessary to succeed. Let's take a closer look.

LEARN TO MARKET PRODUCTS OR SERVICES ON-LINE!

There has always been a lot of money to be made through direct selling. You could place ads in newspapers and magazines and respond to inquiries through the mail. But, times have changed. If you posses a computer and a modem you can easily make big on-line profits without big expenses.

THE PAST: For many years, people have made big money selling information in traditional direct mail campaigns. It works something like this.

Assume you wanted to sell an information package on how to improve credit. This is a 'hot' topic and it is easy to compile the information once you know how. First, you would run lead generating ads in national publications. Your ad would include an offer for a free report and a 1-800 number for people to call and respond.

Second, you would send a sizzling sales letter to those people who answered your ad. This letter would attempt to sell your information package about improving credit.

Third, you would mail out your package to those who ordered.

Take a look at the associated expenses. you might run 1/6 of a page lead generating ads in the National Enquirer, STAR, and Popular Science. The total circulation would be about 7,800,000. You would spend an estimated $13,000 to reach them. That's thirteen thousand dollars.

And there are more expenses, add the cost of your 1-800 line (about $1 per call), mailing information ($.50 per piece) and fulfilling your orders. Your costs are HUGE. Any profits?

Let's use some industry 'standards,' to calculate. About 1/2 of 1% of the circulation would call for information (that's a great %) and about 5% of those would order your $49.95 information package. If it costs you $5 to print and mail your book, your total costs become approximately $81,250. Your total income would be about $97,400, making you a little over $16,000. This is a large profit but do you have the $81,000 to risk on the ad campaign? And do you want to take the risk? Now you don't have to. That was all in the past.

WHAT MAKES ON-LINE MARKETING SO EXCITING?

THE PRESENT AND FUTURE:

Imagine for a moment that all of the magazines let you run your ads - FREE!

What would happen? You'd save a huge $13,000. Add this to your profits from the past and you're now making $29,000 instead of $16,000. Are you getting excited yet? There's more!

Now, let's say the 1-800 service doesn't charge you the $1 per call. They take your calls at no cost to you! In the past you were paying $1 per call for about 39,000 calls. Now, you just saved $39,000. Your profits have jumped to $68,000!

But Wait, There Are Still More Savings!

Throw away the cost of mailing your sales letter! That's right, with electronic marketing it is possible to eliminate this expense as well!

You'd save another $19,500. Making your total profits $ 87,500.

Does this get you excited? Are you beginning to see what I am so excited about? Wouldn't you love to make this kind of money yourself? Then please read on!

The only expense left is printing and mailing your book. No way around this expense, right? WRONG! My system, ON-LINE Profits Made Easy, affords you the opportunity to eliminate this expense as well.

With electronic marketing, you can place Free ads in front of the Internet's estimated 30 million users, Free ads on America Online (about 2 million users), Free ads on a large number of the 70,000 B.B.S.s or pay a whole $3 to place an ad in front of CompuServe's 3 million! It is hard to lose at these prices!

When people reply to your ads (and using what I teach you, they definitely will), you simply e-mail your free report - your sales letter in disguise. When people order, you can e-mail them the information. That is the present and future of marketing.

Now, just take a minute to imagine what it would be like to make 1,950 sales at $49.95 each. Your expenses are close to zero and you earn profits of about $97,000 - pure profit. Wouldn't this be fantastic! How could it change your life?

I DON'T EXPECT YOU TO BELIEVE A WORD OF WHAT I'M SAYING.

Heck! I sometimes have to kick myself to make sure I'm not dreaming. Is it for real? "Impossible," you say? It's something that exist only in one of your dreams, right?

At one time, I could have felt the same way myself. But what I learned is amazingly simple. There is money to be made. Anyone can do it in just a few hours a week from the comfort of their own home!

No more need to miss Little League games or school plays or any family events. Let someone else fight the traffic during rush hour. You can stay home and have time to golf, shop, fish or whatever it is you like to do.

Listen, I have studied hundreds of electronic marketing campaigns. I have spent the past months running ads on-line, learning what works and why.

Now that you understand just how easy it is, why do you need me? Because you still need to learn the secrets and tips to ensure that you have products or services that sell and that you know how to market them. There are methods that work and methods that won't.

Plus, I offer you the opportunity to work directly with one of the most successful on-line marketers - me. I have turned my business into a step-by-step system that anyone can use.

** I WILL GUARANTEE EVERYTHING. I KNOW IT IS HARD TO BELIEVE, BUT WHAT IF I'M RIGHT? **

I have put together a totally new and totally exciting package entitled, ON-LINE Profits Made Easy. It is available for IBM (3.5) or MAC. It contains

everything you need to know and everything you need to do to get started making serious money immediately. All that I know will be yours:

* What sells ON-LINE.
* 40 of the hottest information packages that you can sell (Deluxe System only)
* The one secret that will double the number of orders you get.
* Exactly how to sell ON-LINE step by easy step.
* How to write winning ads that will keep your pockets full of cash.
* 6 essential steps for Huge ON-LINE Profits! You cannot fail!
* Where to advertise on the Internet.
* How to locate the Bulletin Board Systems.
* How to sell ON-LINE when you are not allowed to sell.
* 13 closely guarded secrets to make your ON-LINE marketing 100% more effective without costing you a penny. You won't read about these anywhere else.
* How to start RIGHT NOW - without leaving your job, with just a few hours a week.
* How to Live the Dream - a worry free, hassle free, home based business.
* How to put your business on 'Auto-Pilot' and still earn Huge Profits.
* How my complete business works with examples of my sales letters, my classified ads and my postings.

WHY AM I NOT KEEPING THIS TO MYSELF?

First, something as exciting as electronic marketing won't remain a secret for long. In fact, seminars about on-line marketing costing thousands of dollars to attend already exist.

Second, it takes nothing away from me to share with you everything I've discovered. You see, each person can apply my system to different products and services.

Finally, I remember how frustrating it is to feel trapped in a depressing job. To see others doing better and wondering, Why not me? And to send away for opportunities only to receive useless trash. So I decided to create a straight forward, guaranteed offer to help people. I get excited just knowing that anyone can use my system and generate $1,000 per day, or more, in a home based business.

WHAT YOU WILL RECEIVE

The main manual titled: "ON-LINE Profits Made Easy."

This is not a cheap "book on disk," that will cause your eyes to strain as you stare at your computer screen trying to read it. This is a complete, hard bound manual.

Plus if you order within 4 weeks of receiving this letter (we track it by, what else, our computer) you will receive the following free gifts:

FREE GIFT #1

LISTEN CLOSELY! THIS IS AN EXTREMELY VALUABLE OPPORTUNITY SO PLEASE READ THE FOLLOWING CAREFULLY.

I am often asked by on-line entrepreneurs to do phone consultations an/or review their sales material. But I will only do so, for non-members, at $100 a pop.

Included in your package will be three very valuable coupons.

ONE coupon allows you up to ONE HOUR of phone consultation (must be prearranged).

Two coupons allow you to send me (snail mail or e-mail) any ad, sales letter, promotional piece, etc., for my review. (Please allow 2 weeks for a response. Phone inquiries are not available for this.)

You get $300 worth of expertise and time, FREE. All that I know will be handed to you on a silver platter!

FREE GIFT #2

A HALF YEAR SUBSCRIPTION TO MY NEWSLETTER TITLED: "THE LETTER: ON-LINE PROFITS MADE EASY."

I have found that things on-line change quickly. What worked one month may not the next. The newsletter allows me to keep you current on on-line marketing issues.

In 15-20 minutes every issue will give you crucial tips, techniques, and the latest strategies for marketing on-line!

The cost for an annual subscription is $97. The first half year is FREE!

FREE GIFT #3

A SIX WEEK COURSE ON NAVIGATING THE INTERNET

You want to make money on-line right? Then you must learn to use the Internet. This course will, in simple terms, explain how to use newsgroups, mailing lists, the World Wide Web, and more! This course cannot be sold, so I can't put an exact value on it. I estimate its value to be at least $200, if not more.

WANT MORE VALUE?

If you prefer, I have put together, a Deluxe system. In it you will get everything in the Basic System plus . . .

+ 40 of the hottest information reports you can sell. These reports range in size from two to thirty pages each. Many of them are on business topics such as writing ads, sales letters, business plans, etc. All of them sell like crazy on-line. You will receive full reprint rights to these reports.

And if you order before your 4 weeks are up you also get:

FREE GIFT #4 (Deluxe System Only)

A DEALERSHIP OPPORTUNITY

At your option, you can work directly with me. That's right! First I will teach you how to make money on-line, then I will help you actually do it!

When selling through your dealership, I'll handle filling your orders and collecting payments. I have a 1-800 number you can use, which is all set up. And I accept credit cards and checks. This flexibility will bring in more orders for you. And think about how much money you will SAVE in setting up your business.

I'll bet you are wondering how you get paid when using your dealership. Good question! Here is the answer.

For use with your dealership, you will receive a four digit number. Use it as an extension number. For example, in your sales letter you will write, "To order please call 1-800-555-5555 Ext. 5555." The operator will ask for an extension number when taking an order. That is how I will know to pay you. Complete instructions in your package will explain why this is the fastest and easiest way to profit on line.

FREE GIFT #5 (Deluxe System Only)

"E-MARKETING" BY SETH GODIN, CO-AUTHOR OF GUERRILLA MARKETING, THE BEST SELLING MARKETING SERIES.

This 200 page gem of a book tracks the past and the future of marketing. I refer to this book often. It is a great resource. It retails in book stores for $14.95. You will get an electronic version absolutely FREE.

Okay now for the prices. How much would it be worth to you if I showed you how to make $1,000 (or more) per day? $500, $1000, $1,500? Your investment for everything in the Basic system is only $97 (plus $5.95 for shipping and handling). Or just $147 (plus $6.75 for shipping and handling) for everything, in the Deluxe system. Take a moment now and review everything you will receive. Look at the real value here:

Package	Separate Purchases	Basic System	Deluxe System
ON-LINE Profits Manual	$97	$97	$97
Consultation Coupons	$300	FREE	FREE
Newsletter Subscription	$48	FREE	FREE
Internet Course	N/A (worth $200)	FREE	FREE
40 Outstanding Reports	$187	N/A	(Only) $50
Dealership Includes Use Of:			
Order Taking Service	$200	N/A	FREE
Credit Card Acceptance	$700	N/A	FREE
Fulfillment of Orders	$200	N/A	FREE
"E-Marketing"	$15	N/A	FREE
TOTAL VALUE	$1,947	$645	$1,947
Your Price	N/A	$97	$147
Total Savings	N/A	$548	N/A
Complete Package Savings	N/A	N/A	$1,800

Either way, with the Basic or the Deluxe System you have a 90 day 'GUARANTEE!'

The system will be everything I describe and more. You will agree the system is worth far more than what you pay for it. If for any reason you not happy with it, you can return everything for a full refund.

You see, you have absolutely no risk. I only want to work with successful and happy students.

WOULD YOU LIKE MORE GOOD NEWS?

If you use either Visa, Mastercard, or Discover, you can pay half now, and the balance 45 days from NOW!

Is this amount a lot or a little? I don't know you, yet, so I can't say. Maybe this is a stretch for you, maybe it isn't. But I do know there is no other way for you to easily get a complete turnkey on-line business and make thousands of dollars. Oh, I suppose you could go at it alone. But this WILL COST you a lot more money and take a long, long time.

It looks like you have a decision to make. You can turn your back on me and walk away. But, before you do, consider this: By requesting this report, you have shown an interest in creating a very high income in an easy, home based business. If you are sincere, walking may very well be a difficult thing to do. I'm no different than you. I have tried many plans and opportunities only to be frustrated time and time again. So I can say, from experience, my system will be one of the few, maybe only, 'true' opportunities you will receive.

You can also put it off. Go ahead, tell yourself that "someday" you' will take action to achieve your dream of independence and freedom. Someday when the timing is better. Let's be adults. You and I both know where that path leads. It leads to the "someday isle" of Fantasy Island (Do you remember the t.v. show?). You know someday I'll do this or someday I'll do that. But the someday never comes. So have the courage to either go forward or to toss this opportunity aside. There is no "in-between" choice. So make a decision and put your mind at ease!

The only other option you have is to ACT! Please follow the directions on the order form below. I hope you will join us today. On-line marketing is in its infancy and the profit potential is enormous. Those who get in early will reap the biggest profits. And I will be guiding you step by step.

If you still have questions or if you are still skeptical call me at 1-800-348-3454. I'd be happy to discuss your personal situation and see if this system is what you are looking for. After all the call is free and what is the worst that can happen: you waste a few minutes of your time. Go ahead and call, you never know, you might like what you find out!

And if you are experiencing a money crunch, don't forget the installment plan! The basic system can be split into two easy installments of only $48.50! First Payment with the order, the second payment 45 DAYS FROM NOW!

The Deluxe system can be split into two easy payments of only $73.50! 1st payment with the order, the 2nd payment not until 45 DAYS LATER!

I guarantee your satisfaction!
Sincerely,

Robert Serviss
President, Excel Communications

P.S. Consider this: If you make just one $25 sale per day (7 days a week) on 145 computer Bulletin Board Systems (out of 70,000) - you are earning over $100,000 a month! Can you make just one $25 sale a day on 145 B.B.S.s? If so you can earn $100,000 a month! Yes it can be done!

ORDER FORM

In Order to receive your FREE GIFTS with the order of either system you must order within 4 weeks from the date this message was sent to you. (Remember, we track this with our computer so don't delay.)

NO RISK MONEY BACK GUARANTEE!

If you are not completely satisfied with your course, simply return it within 90 days for a no questions asked full refund (less the shipping and handling).

To Enroll:
Using Visa, Mastercard, or Discover

a) Call 1-800-459-6658, Ext. 10, 24 hours a day. Do it NOW!
(For international orders call 706-854-4405, Ext. 10 Canadian orders add an additional $5 and all other International orders add an additional $10 for shipping and handling.)
(Note: please don't call the above 1-800 number with questions. That number does not ring in my office. The person there will only be able to take your order. I will not even get a message. I would enjoy talking with you and answering your questions but, for that please call 1-800-348-3454.)
OR

b) Mail your credit card number, expiration date and signature (please include your postal and e-mail addresses) to Excel Communications, 2169 Summer Street, Suite #115, Stamford, CT 06905. If paying by check please make it payable to Excel Communications. And please tell me if you have a MAC or IBM (3.5).
OPTIONS:
1. _____ Yes, Rob I want to make a serious money in an easy pleasant home based business. Please send me the "Basic System." Which includes the "ON-LINE Profits Made Easy," manual. And since I am ordering within four weeks of receiving this letter, please send the following free gifts.

FREE GIFT #1: FREE Consulting Coupons	$300 VALUE
FREE GIFT #2: FREE 1/2 Year Subscription "The Letter, ON-LINE Profits Made Easy"	$48 VALUE
FREE GIFT #3 : FREE Internet Course	$200 VALUE
TOTAL VALUE OF FREE GIFTS	$548!!

$97 (plus $5.95 shipping and handling)
OR try our installment plan, 2 easy payments of $48.50 (plus $5.95 shipping and handling). Installment plan available on credit card orders only.
2. _____ Yes, Rob I want to make serious money in an easy, pleasant home based business AND I CAN CERTAINLY SEE THE VALUE IN HAVING THE 40 REPORTS TO SELL IMMEDIATELY. I also want the ability to accept credit card payments with a 1-800 number through my dealership. I realize this will increase my profits quickly. So, please send me the "Deluxe System" which includes everything in the "Basic System" plus: 40 reports to sell immediately. And since I am ordering within four weeks of receiving this letter, please send me the 3 free gifts above (that's $548 worth of FREE gifts) plus:
FREE GIFT #4: FREE DEALERSHIP OPPORTUNITY
- INCLUDES 800 NUMBER ORDER TAKING SERVICE $200 VALUE
- INCLUDES ABILITY TO ACCEPT CREDIT CARDS $700 VALUE
- INCLUDES FULFILLMENT OF ORDERS $200 VALUE

FREE GIFT #5: E-MARKETING $15 VALUE
TOTAL VALUE OF FREE GIFTS: $1,663!!
$147 (plus $6.75 shipping and handling)
OR try our installment plan, 2 easy payments of $73.50 (plus $6.75 shipping and handling). Installment plan available on credit card orders only.
And remember my standing offer. If you have any questions or concerns, call me at 1-800-348-3454.

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, his counsel, 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 complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and no comments having been filed thereafter by interested parties pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Robert Serviss is an individual doing business as Excel Communications with his principal office or place of business at 2169 Summer Street, Suite 115, Stamford, Connecticut.

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

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

ORDER

I.

It is ordered, That respondent Robert Serviss, his agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, promotion, offering for sale, sale, or distribution of the "ON-LINE Profits Made Easy" business opportunity, or any other business opportunity, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting, in any manner, the past, present, or future profits, earnings, income, or sales from such business opportunity.

II.

It is further ordered, That respondent Robert Serviss, his agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, promotion, offering for sale, sale, or distribution of the "ON-LINE Profits Made Easy" business opportunity, or any other business opportunity, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, in any manner, the past, present, or future profits, earnings, income, or sales from such business opportunity, unless at the time of making such representation respondent possesses and relies upon competent and reliable evidence that substantiates 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, respondent, or his 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 his 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:

A. Within thirty (30) days from the effective date of this order deliver a copy of this order to each of his officers, agents, representatives, and employees who are engaged in the preparation or placement of advertisements, promotional materials or other such sales materials covered by this order.

B. For a period of ten (10) years from the effective date of this order deliver a copy of this order to each of his future officers, agents, representatives, and employees who are engaged in the preparation or placement of advertisements, promotional materials or other such sales materials covered by this order, within three (3) days after the person assumes such position.

V.

It is further ordered, That from the date this order becomes final, respondent shall notify the Commission within thirty (30) days of the discontinuance of his present business or employment and of each affiliation with a new business or employment. Each notice of affiliation with any new business or employment shall include his new business address and telephone number, current home address, and a statement describing the nature of the business or employment and the duties and responsibilities.

VI.

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

VII.

This order will terminate on June 12, 2016, 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

RANDOLF D. ALBERTSON

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

Docket C-3670. Complaint, June 12, 1996--Decision, June 12, 1996

This consent order prohibits, among other things, a Michigan-based individual doing business as Wolverine Capital from misrepresenting, in advertisements for cash grant assistance programs, the number of people who are approved for grants and the services or assistance provided in obtaining grants, loans, or any other financial product or service. The consent order requires the respondent to possess competent and reliable evidence to substantiate such claims.

Appearances

For the Commission: *Nicholas Franczyk, C. Steven Baker* and *Charulata Pager.*

For the respondent: *Pro se.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Randolf D. Albertson, individually and doing business as Wolverine Capital ("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 Randolf D. Albertson is an individual doing business as Wolverine Capital. His principal office or place of business is located at 1039 Gun River Drive, Plainwell, Michigan.

PAR. 2. Respondent is engaged in the advertising, promotion, offering for sale, sale, and distribution of a cash grant assistance program to the public.

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

PAR. 4. Respondent has disseminated or has caused to be disseminated advertisements, including advertisements through the Internet, for his cash grant assistance program. These advertisements include, but are not necessarily limited to, the attached Exhibit 1, which states, in part:

FREE CASH GRANTS BY MAIL...

Wolverine Capital is a financial finder and matching service. We have 17 years of experience, with over 250 private foundations in our program. Most of our clients are approved for cash grants.

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 1, respondent has represented, directly or by implication, that he is able to obtain cash grants for most of his clients.

PAR. 6. In truth and in fact, respondent is not able to obtain cash grants for most of his clients. 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 1, respondent has represented, directly or by implication, that at the time he made the representation set forth in paragraph five, respondent possessed and relied upon a reasonable basis that substantiated such representation.

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

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

EXHIBIT 1

FREE CASH GRANTS BY MAIL ARE AVAILABLE, if you know the secret of how and where to apply! Private Foundations (these are NOT government grants) give away billions of dollars to individuals every year. Most foundations are non-profit, dedicated to the betterment of society. These organizations MUST GIVE AWAY MONEY to fulfill their legal tax-free status. YOU can get a cash grant by mail. These funds may be used for any purpose (start a business, travel abroad, further your education, get out of debt, etc.) and never have to be paid back!!! To be eligible, all you have to do is apply!! And we can show you HOW and WHERE To get more information, send email to: FreeMoney@mailback.com

FREE CASH GRANTS BY MAIL ARE AVAILABLE, if you know the secret of how and where to apply! Private Foundations (these are NOT government grants) give away billions of dollars to individuals every year. Most foundations are non-profit, dedicated to the betterment of society. These organizations MUST GIVE AWAY MONEY to fulfill their legal tax-free status. YOU can get a cash grant by mail. These funds may be used for any purpose (start a business, travel abroad, further your education, get out of debt, etc.) and never have to be paid back!!! To be eligible, all you have to do is apply!! And we can show you HOW and WHERE.

Wolverine Capital is a financial finder and matching service. We have 17 years financing experience, with over 250 private foundations in our program. Most of our clients are approved for a cash grant. A higher percentage than would be approved by a bank for a loan. Obtaining a cash grant by mail is easier than you think. There are literally hundreds of foundations eager to donate money to you. We will show you exactly how to apply for a cash grant by mail; how to write a letter of appeal, what to include in your proposal, etc. Plus, we send you the names, addresses and, where possible, the telephone numbers of the foundations most likely to fund your needs. With daily updates, only the most active sources are suggested. You are protected by the fact these foundations are regulated by the laws of the United States.

We send you everything you need to get a cash grant by mail. There is a small one-time application fee of $19.95. There are no other fees to pay, now or later. We GUARANTEE you will get a cash grant by mail or we will refund your entire application fee, immediately. Complete the application below and return it to our office today. Upon receipt, we will review your application and match you the BEST foundations. If you are not 100% satisfied, keep everything we send you. Just mail us a letter explaining you wish a refund and we'll process your request that day. It's that simple- NO GRANT NO FEE -no questions. We are that confident in these foundations.

If you have any questions, please email:

Wcapitol@aol.com

All applications ordered within ten days will receive six extra financial reports absolutely FREE!!! You can only WIN!!! But only if you ACT NOW!!! Don't let FREE MONEY pass you by!!

APPLY TODAY. Send $19.95, check or money order, along with your completed application to:

WOLVERINE CAPITAL
1039 GUN RIVER DR
PLAINWELL MI 49080

All applications processed within 24 hours.
All applications GUARANTEED

CASH GRANTS BY MAIL APPLICATION

NAME_____
ADDRESS_____
CITY ST ZIP _____
PHONE (_____) _____
EMAIL ADDRESS_____
GRANT TYPE (Business or Personal) _____
GRANT AMOUNT ($500-$50,000) _____
Thank you.

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, 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 complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and no comments having been filed thereafter by interested parties pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Randolf D. Albertson is an individual doing business as Wolverine Capital with his principal office or place of business at 1039 Gun River Drive, Plainwell, Michigan.

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

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

ORDER

I.

It is ordered, That respondent Randolf D. Albertson, his agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, promotion, offering for sale, sale, or distribution of the cash grant assistance program, or any substantially similar 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:

A. The number of persons who are approved for grants; and

B. The services or assistance provided in obtaining grants, loans, or any other financial product or service.

II.

It is further ordered, That respondent Randolf D. Albertson, his agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, promotion, offering for sale, sale, or distribution of the cash grant assist program, or any substantially similar 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, the number of persons who are approved for grants, or the services or assistance provided in obtaining grants, loans, or any other financial product or service, unless at the time of making such representation respondent possesses and relies upon competent and reliable evidence that substantiates 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, respondent, or his 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 his 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:

A. Within thirty (30) days from the effective date of this order deliver a copy of this order to each of his officers, agents, representatives, and employees who are engaged in the preparation or placement of advertisements, promotional materials or other such sales materials covered by this order.

B. For a period of ten (10) years from the effective date of this order deliver a copy of this order to each of his future officers, agents, representatives, and employees who are engaged in the preparation or placement of advertisements, promotional materials or other such sales materials covered by this order, within three (3) days after the person assumes such position.

V.

It is further ordered, That from the date this order becomes final, respondent shall notify the Commission within thirty (30) days of the discontinuance of his present business or employment and of each affiliation with a new business or employment. Each notice of affiliation with any new business or employment shall include his new business address and telephone number, current home address, and a statement describing the nature of the business or employment and the duties and responsibilities.

VI.

It is further ordered, That within sixty (60) days after service of this order, and at such other times as the Commission may require, respondent shall file with the Commission a report, in writing, setting

forth in detail the manner and form in which he has complied with this order.

VII.

This order will terminate on June 12, 2016, 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

RICK A. RAHIM

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

Docket C-3671. Complaint, June 12, 1996--Decision, June 12, 1996

This consent order prohibits, among other things, a Virginia-based individual doing business as NBDC Credit Resource Publishing from misrepresenting, in advertisements -- via a computer communications network, or by any other means -- for a credit repair product, the legality of any credit repair product, and requires the respondent to disclose that the program may violate federal criminal laws.

Appearances

For the Commission: *Nicholas Franczyk, C. Steven Baker* and *Charulata Pager.*

For the respondents: *Pro se.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Rick A. Rahim, individually and doing business as NBDC Credit Resource Publishing ("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 Rick A. Rahim is an individual doing business as NBDC Credit Resource Publishing. His principal office or place of business is located at 7010 Brookfield Plaza, Suite 322, Springfield, Virginia.

PAR. 2. Respondent is engaged in the advertising, promotion, offering for sale, sale, and distribution of a credit repair product to the public.

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

PAR. 4. Respondent has disseminated or has caused to be disseminated advertisements, including advertisements through the Internet, for his credit repair product. These advertisements include, but are not necessarily limited to, the attached Exhibit 1, which states, in part:

You are about to learn the truth about credit repair and "New Credit Files." New Credit Files DO WORK!
We don't just sell you bogus information. We have created new credit files 100% legally for ourselves to make sure it works. Yes, we have successfully tested the system with all major credit bureaus and the IRS.
Yes, it is true that you can obtain a new taxpayer identification number from the IRS. You can then use that number in place of your social security number to establish a brand-new credit file from each of the major credit bureaus.

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 1, respondent has represented, directly or by implication, that respondent's product whereby consumers create new credit files is legal.

PAR. 6. In truth and in fact, respondent's product whereby consumers create new credit files is not legal. Therefore, the representation set forth in paragraph five was, and is, false and misleading.

PAR. 7. In the advertising, promotion, offering for sale, sale, and distribution of his credit repair product, including but not necessarily limited to the advertisement attached as Exhibit 1, respondent has represented that his product whereby consumers create new credit files is legal. Respondent has failed to disclose that consumers who follow respondent's product to create new credit files will violate federal criminal laws, including the federal law against making false statements on certain loan and credit applications, the federal law against falsely representing one's social security number, and the federal law against making false statements to a department or agency of the United States. This fact would be material to consumers in their decision to purchase respondent's product. The failure to disclose this fact, in light of the representation made, was, and is, a deceptive practice.

PAR. 8. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices in or

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

EXHIBIT 1

Subj: * NEW CREDIT FILE TRUTH *
Date:
From:

You are about to learn the truth about credit repair and "New Credit Files."
For a FREE REPORT (no obligation), please respond by E-Mail.
No scams here. No quick ways to cheat the system.
New Credit Files DO WORK!
We don't just sell you bogus information. We have created new credit files 100% legally for ourselves to make sure it works. Yes, we have successfully tested the system with all major credit bureaus and the IRS. You cannot afford to miss our FREE REPORT!

Subj: Re: New credit Files
Date:
From:
To:

ATTENTION!
You can listen to a FREE 3 minute recording about our program.
Call 1-800-500-7766
When prompted, enter code 8839 and the # sign.

YOU HAVE ALREADY TAKEN THE FIRST STEP TO ESTABLISHING YOUR NEW CREDIT FILE!
Thank you for your inquiry. As you know, just about everyone is trying to sell you their "system." But how many of them have actually followed their own plans and created a new credit file?
Yes, it is true that you can obtain a new taxpayer identification number from the IRS. You can then use that number in place of your social security number to establish a brand-new credit file from each of the major credit bureaus.
Use your new credit file prudently and you will be able to obtain any type of unsecured credit you desire within a very short time! But be careful. Because the IRS only allows you one new taxpayer identification number in your lifetime. You need to know which IRS form to use. And you need to know which IRS office to send the form to for the proper type of number.
If you don't understand the pitfalls of using the new number, you risk having your old credit file merged with your new one. Establishing your new credit file is a very simple process which anyone can complete. But you must take each step precisely so that you don't ruin your only chance.

Our guide gives you step-by-step instructions on how to have a brand new credit file in your name within 30 days. It cannot be done any faster than that; so don't be taken in by anyone else's claims.
You have to do this legally and you must pay particular attention to each of the three easy steps.
We have bought and analyzed all of the other guides, reports, and manuals.
We wanted to make sure that we give you the clearest, most concise instructions possible.
While you can buy similar information from other people selling their "systems"; BE CAREFUL!
Only our comprehensive report gives you the following:

* The actual IRS form ready for you to complete and mail.
* Addresses of which regional IRS centers to send this form to.
* How to create a new credit file once you have your new taxpayer identification number.
* How to establish perfect credit once you have a new credit file.
* What companies will actually give you unsecured credit on your new credit file.
* A mail-order company which will ship merchandise to you immediately on credit with no money down. AND, they will then help you establish positive credit by reporting your unsecured account to the major bureaus. (They will even give you credit on your "tarnished" social security number if you want!)
* A bonus report on credit repair scams and why credit repair just doesn't work.
* A MONEY BACK GUARANTY if you are unable to establish a brand new credit file with POSITIVE credit.

You might get lucky with other systems. If you use another program to establish your new credit file; just remember that you only get one chance.
Don't risk making a mistake in dealing with the IRS or the credit bureaus.
We show you how to avoid mistakes!
The only cost for everything you need is $19.00
You will be able to begin establishing your new credit file the same day you receive our reports!
Cash and money orders are shipped within 48 hours. Personal checks delay your order slightly. SEND $19.00 TO THE FOLLOWING ADDRESS:

NBDC CREDIT RESOURCE PUBLISHING
c/o AOL Offer
7010 Brookfield Plaza, Suite 322
Springfield, VA 22150

Our money-back guarantee means there is absolutely no risk to you
---
Just GOOD CREDIT IN YOUR FUTURE!
Good Luck. Remember, you only get once [sic] chance. BE CAREFUL !!!

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, 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 complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and no comments having been filed thereafter by interested parties pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Rick A. Rahim is an individual doing business as NBDC Credit Resource Publishing with his principal office or place of business at 7010 Brookfield Plaza, Suite 322, Springfield, Virginia.

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

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

ORDER

DEFINITIONS

1. *"Credit report"* means any written, oral, or other communication of information by a consumer reporting agency bearing on a person's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living that is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for credit.

2. *"Credit repair product"* means any product or service to improve a person's credit report by removing adverse information appearing therein, changing the rating of such information from negative to positive, or otherwise enhancing the person's credit report.

I.

It is ordered, That respondent Rick A. Rahim, his agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, promotion, offering for sale, sale, or distribution of any credit repair product, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting, either directly or indirectly, in writing, via a computer communications network, or by any other means, the legality of any such credit repair product.

II.

It is further ordered, That respondent Rick A. Rahim, his agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, promotion, offering for sale, sale, or distribution of any credit repair product involving the creation of a new credit file or tax identification number, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from failing to disclose in any advertisement or promotional

material, including any advertisement or promotion via a computer communications network, that:

A. Making misrepresentations to the Internal Revenue Service may be a federal crime;

B. Misrepresenting one's social security number for any purpose may be a federal crime;

C. Making misrepresentations for a loan application may be a federal crime; and

D. Making misrepresentations to a financial institution may be a federal crime.

III.

It is further ordered, That for five (5) years after the last date of dissemination of any representation covered by this order, respondent, or his 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 his 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:

A. Within thirty (30) days from the effective date of this order deliver a copy of this order to each of his officers, agents, representatives, and employees who are engaged in the preparation or placement of advertisements, promotional materials or other such sales materials covered by this order.

B. For a period of ten (10) years from the effective date of this order deliver a copy of this order to each of his future officers, agents, representatives, and employees who are engaged in the preparation or placement of advertisements, promotional materials or

other such sales materials covered by this order, within three (3) days after the person assumes such position.

V.

It is further ordered, That from the date this order becomes final, respondent shall notify the Commission within thirty (30) days of the discontinuance of his present business or employment and of each affiliation with a new business or employment. Each notice of affiliation with any new business or employment shall include his new business address and telephone number, current home address, and a statement describing the nature of the business or employment and the duties and responsibilities.

VI.

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

VII.

This order will terminate on June 12, 2016, 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

LYLE R. LARSON

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

Docket C-3672. Complaint, June 12, 1996--Decision, June 12, 1996

This consent order prohibits, among other things, a Washington-based individual doing business as Momentum from misrepresenting, in advertisements -- via a computer communications network, or by any other means -- for a credit repair product, any right or remedy available under the Fair Credit Reporting Act, including the ability to remove adverse information in any credit report, and the legality of any credit repair product. In addition, the consent order requires the respondent to disclose that the program may violate federal criminal laws.

Appearances

For the Commission: *Nicholas Franczyk, C. Steven Baker* and *Charulata Pager.*

For the respondent: *Pro se.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Lyle R. Larson, individually and doing business as Momentum ("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 Lyle R. Larson is an individual doing business as Momentum. His principal office or place of business is located at 3033 127th Place SE, Suite I-21, Bellevue, Washington.

PAR. 2. Respondent is engaged in the advertising, promotion, offering for sale, sale, and distribution of the CreditPlus credit repair product to the public.

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

PAR. 4. Respondent has disseminated or has caused to be disseminated advertisements, including advertisements through the Internet, for the CreditPlus credit repair product. These advertisements include, but are not necessarily limited to, the attached Exhibit 1, which states, in part:

Don't Wait 7-10 Years!
Legally Remove "Bad Marks" From Your Credit Report

* * *

Even if your credit report doesn't contain an error, you can remove damaging entries. Let CreditPlus show you how!

* * *

Bankruptcies Removed!
...Even if you've declared bankruptcy, this package will show you how to get it removed! Also removable are Judgements, Foreclosures, Tax Liens, Repossessions, Late Payments, etc!

* * *

Create a "NEW" Credit File!
If you can't clean up your credit, CreditPlus will show you the secrets of obtaining a NEW credit file.... This is a little-known 100-percent effective method of erasing bad credit that is completely LEGAL under federal law.

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 1, respondent has represented, directly or by implication, that:

A. Consumers can remove bankruptcies, judgments, foreclosures, liens, repossessions, late payments, and other adverse items of information from their credit reports even where such information is accurate and not obsolete; and

B. Respondent's product whereby consumers create new credit files is legal.

PAR. 6. In truth and in fact:

A. Most consumers cannot remove bankruptcies, judgments, foreclosures, liens, repossessions, late payments, and other adverse items of information from their credit reports where such information is accurate and not obsolete; and

B. Respondent's product whereby consumers create new credit files is not legal.

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

PAR. 7. In the advertising, promotion, offering for sale, sale, and distribution of the CreditPlus credit repair product, including but not necessarily limited to the advertisement attached as Exhibit 1, respondent has represented that his product whereby consumers create new credit files is legal. Respondent has failed to disclose that consumers who follow respondent's product to create new credit files will violate federal criminal laws, including the federal law against making false statements on certain loan and credit applications, the federal law against falsely representing one's social security number, and the federal law against making false statements to a department or agency of the United States. This fact would be material to consumers in their decision to purchase the CreditPlus credit repair product. The failure to disclose this fact, in light of the representation made, was, and is, a deceptive practice.

PAR. 8. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

EXHIBIT 1

Credit Plus

Don't wait 7-10 years!
Legally Remove "Bad Marks" From Your Credit Report
TRW, CBI, Equifax and Trans Union maintain records on 160 million Americans. These credit bureaus are not governmental agencies, they are private companies that collect personal information on you and sell it for a profit! A national study revealed that nearly half of these reports contain errors! Even if your credit report doesn't contain an error, you can remove damaging entries. Let CreditPlus show you how!
The CreditPlus Package provides sample reports from these credit bureaus, with an explanation in plain English what their complicated codes really mean. You will learn how creditors "need" these reports, what is considered "negative" and how to remove it. You can even add positive entries using law provided in the Fair Credit Reporting Act.
Bankruptcies Removed!
The CreditPlus Package contains information on how to wipe out debts completely without having going bankrupt. Even it you've declared bankruptcy, this package will show you how to get it removed! Also removable are Judgments, Foreclosures, Tax Liens, Repossessions, Late Payments, etc! This is the same technique that Americans best credit lawyers use (and charge up to $3,000 or more).
Create a "NEW" Credit File!
If you can't clean up your credit, CreditPlus will show you the secrets of obtaining a NEW credit file, enabling you to start from SCRATCH! It is then possible to add up to ten years of excellent credit to this new file. This is a little-known 100-percent effective method of erasing bad credit that is completely LEGAL under federal law.
This program is a detailed guide full of selected information on the latest and most effective credit repair techniques, legal angles, and no-nonsense how-to's. With all these features packaged in a menu driven program, with on-line help, and a self-running tutorial, CreditPlus is expertly designed custom software to create a level of functionality not found in books or guides you can interactively conduct your credit repair campaign with ease and accuracy by following the preprogrammed steps contained in the software. The system keeps track of everything you do, so you do not leave things out or miss responses or follow-ups. When you need information it is always there, available to you by pressing a key or selecting a from a menu. CreditPlus is the solution you've been looking for. The package also includes a hardcopy of instructions and all forms in case you do not have access to a computer.
No More Rejection
So stop being turned-down when you apply for credit, the answer will finally be "Yes, your application has been approved." Need a credit card? Learn how to get any credit card you want. Want a large loan? Don't wait 7-10 years to get that home, auto or boat - Order CreditPlus and start reestablishing your AAA-1 Credit Rating Today!

Guaranteed.
We're so sure that CreditPlus will help you, we're offering this amazing guarantee: Use CreditPlus for up to A FULL YEAR, following the step-by step instructions. If you do not succeed at removing negative items, or can't obtain a new file, we will refund the ENTIRE purchase price, no questions asked.
Dial 206.865.9000
Call Mon - Fri 9am - 5pm (Pacific Time)
And charge on your credit card.
OR
Send check or money order to:
Momentum
15600 NE 8th
Suite B1 - Dept. 131
Bellevue, WA 98008

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, 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 complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and no comments having been filed thereafter by interested parties pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Lyle R. Larson is an individual doing business as Momentum with his principal office or place of business at 3033 127th Place SE, Suite I-21, Bellevue, Washington.

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

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

ORDER

DEFINITIONS

1. *"Credit report"* means any written, oral, or other communication of information by a consumer reporting agency bearing on a person's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living that is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for credit.

2. *"Credit repair product"* means any product or service to improve a person's credit report by removing adverse information appearing therein, changing the rating of such information from negative to positive, or otherwise enhancing the person's credit report.

I.

It is ordered, That respondent Lyle R. Larson, his agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, promotion, offering for sale, sale, or distribution of any credit repair product, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting, either directly or indirectly, in writing, via a computer communications network, or by any other means:

A. Any right or remedy available under the Fair Credit Reporting Act, 15 U.S.C. 1681 *et seq.*, including, but not limited to, the ability to remove adverse information in any credit report; and

B. The legality of any credit repair product.

II.

It is further ordered, That respondent Lyle R. Larson, his agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, promotion, offering for sale, sale, or distribution of any credit repair product involving the creation of a new credit file or tax

identification number, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from failing to disclose in any advertisement or promotional material, including any advertisement or promotion via a computer communications network, that:

A. Making misrepresentations to the Internal Revenue Service may be a federal crime;

B. Misrepresenting one's social security number for any purpose may be a federal crime;

C. Making misrepresentations for a loan application may be a federal crime; and

D. Making misrepresentations to a financial institution may be a federal crime.

III.

It is further ordered, That for five (5) years after the last date of dissemination of any representation covered by this order, respondent, or his 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 his 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:

A. Within thirty (30) days from the effective date of this order deliver a copy of this order to each of his officers, agents, representatives, and employees who are engaged in the preparation or placement of advertisements, promotional materials or other such sales materials covered by this order.

B. For a period of ten (10) years from the effective date of this order deliver a copy of this order to each of his future officers, agents, representatives, and employees who are engaged in the preparation or placement of advertisements, promotional materials or other such sales materials covered by this order, within three (3) days after the person assumes such position.

V.

It is further ordered, That for a period of five (5) years from the date this order becomes final, respondent shall notify the Commission within thirty (30) days of the discontinuance of his present business or employment and of each affiliation with a new business or employment involving the advertising, offering for sale, sale, or distribution of any credit repair product. Each notice of affiliation with any new business or employment shall include his new business address and telephone number, current home address, and a statement describing the nature of the business or employment and the duties and responsibilities.

VI.

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

VII.

This order will terminate on June 12, 2016, 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

SAINT-GOBAIN/NORTON INDUSTRIAL CERAMICS 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-3673. Complaint, June 12, 1996--Decision, June 12, 1996

This consent order requires, among other things, a Massachusetts-based corporation to divest businesses and associated assets in the United States markets for fused cast refractories, hot surface igniters, and silicon carbide refractory bricks. If the divestiture is not completed as required, the Commission may appoint one or more trustees to divest the remaining properties and assets.

Appearances

For the Commission: *Howard Morse, Robert Tovsky* and *William Baer.*

For the respondent: *Mark Leddy, Cleary, Gottlieb, Steen & Hamilton*, Washington, D.C.

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, having reason to believe that Compagnie de Saint-Gobain, through its wholly-owned subsidiary Societe Europeenne des Produits Refractaires ("SEPR"), has entered into a Stock Purchase Agreement with subsidiaries of the British Petroleum Company p.l.c. ("BP") whereby Compagnie de Saint-Gobain will acquire certain of the subsidiaries of BP that together comprise The Carborundum Company ("Carborundum"), and that as part of this agreement, Saint-Gobain/Norton Industrial Ceramics Corporation ("Saint-Gobain") will acquire the United States assets of Carborundum other than assets relating to ceramic fibers, 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, and having reason to believe that Compagnie de Saint-Gobain has entered into

such agreements in restraint of trade in violation of 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 Saint-Gobain/Norton Industrial Ceramics Corporation is a corporation organized and existing under the laws of Delaware, with its principal place of business at One New Bond Street, Worcester, Massachusetts. Saint-Gobain is a wholly-owned indirect subsidiary controlled by Compagnie de Saint-Gobain, a French company with its principal place of business located at 18, avenue d'Alsace, 92400 Courbevoie, France.

2. At all times relevant herein, the respondent, Saint-Gobain, has been, and is now, engaged in commerce as "commerce" is defined in Section 4 of the FTC Act (15 U.S.C. 44) and Section 1 of the Clayton Act (15 U.S.C. 12), and is a corporation whose business is in or affecting commerce as defined in Section 4 of the Federal Trade Commission Act (15 U.S.C. 44).

II. THE PROPOSED ACQUISITION

3. On or about May 26, 1995, Compagnie de Saint-Gobain, through SEPR, and BP executed a Stock Purchase Agreement wherein Saint-Gobain agreed to acquire certain assets of Carborundum from BP.

4. Saint-Gobain and Carborundum are substantial direct competitors in several markets, including United States markets for fused cast refractories, hot surface igniters, and silicon carbide refractory bricks.

III. FUSED CAST REFRACTORIES

A. Relevant Line of Commerce

5. One relevant line of commerce within which to analyze the effects of the acquisition is the United States market for fused cast refractories. Fused cast refractories are highly dense brick or block materials typically comprised either of alumina, zirconia and silica

together or alumina alone. Glass manufacturers, including producers of float glass (flat glass for homes, offices and automobiles), container glass (for bottles and jars) and other types of glass products (*e.g.,* for video screens, light bulbs, lenses, and beakers), require fused cast refractories to line the interior of the furnaces in which they melt raw materials -- silica, soda ash, limestone, salt cake and dolomite -- into a homogenous mass of molten glass.

6. Fused cast refractories are used by glass manufacturers for their excellent wear-resistant properties. Glass manufacturers would not substitute to other materials for fused cast refractories even in response to a significant price increase. The use of other materials in the applications where fused cast refractories are currently used would generally lead to an unacceptable deterioration in glass quality, and would dramatically reduce the length of furnace campaigns, requiring more frequent costly and time-consuming furnace repairs.

7. Imports of fused cast refractories into the United States are small, and come primarily from Saint-Gobain. The potential for significant imports is constrained by overseas production costs, shipping and handling costs, and duties. Product availability and product quality issues also limit the competitiveness of most of the fused cast refractories produced overseas. In any event, customers in the United States would require extensive testing over several years before using fused cast refractories produced overseas.

8. Total sales of fused cast refractories in the United States are over $45 million.

B. Market Concentration

9. Saint-Gobain and Carborundum are the only two producers in the United States of fused cast refractories. Therefore, the United States fused cast refractory market is extremely concentrated as measured by the Herfindahl-Hirschmann Index (HHI), and the acquisition would result in a monopoly. In 1994, Carborundum accounted for the majority of sales of fused cast refractories in the United States, and Saint-Gobain accounted for the remainder. Even on a worldwide basis, Saint-Gobain is by far the largest producer of fused cast refractories, and Carborundum the second-largest, with a combined share of sales of approximately 70%.

10. Saint-Gobain has a dangerous probability of obtaining unilateral market power in the United States market for fused cast refractories.

C. Conditions of Entry

11. Entry into the fused cast refractories market would not be timely, likely or sufficient to deter or offset reductions in competition resulting from the acquisition.

12. Product development and plant construction alone would take several years. Obtaining product qualification at glass producers, who require extensive life cycle testing before they will use fused cast refractories in their plants because these products are so critical to the manufacturing process, would require many more years. The total time from initial entry to significant market impact likely would be many years.

13. Entry would also be extremely unlikely as it would require a large sunk capital investment. Efficient production would require entry at a scale that would be relatively large compared to the total sales available in the fused cast refractories market, making entry more risky and unlikely.

D. Effects of the Acquisition

14. The acquisition of Carborundum by Saint-Gobain may substantially lessen competition and tend to create a monopoly in the United States market for fused cast refractories because, among other things:

a. It will increase concentration substantially in a highly concentrated market;

b. It will eliminate substantial head-to-head competition between Saint-Gobain and arborundum;

c. It will leave Saint-Gobain as the sole producer of fused cast refractories in the United States, allowing Saint-Gobain unilaterally to exercise market power;

d. It will likely result in increased prices for fused cast refractories; and

e. It will likely result in diminished product innovation in fused cast refractories.

IV. HOT SURFACE IGNITERS

A. Relevant Line of Commerce

15. A second line of commerce within which to analyze the effects of the acquisition is the United States market for hot surface igniters ("HSIs"). HSIs are ceramic devices which are used as the ignition source in the ignition control system of gas appliances such as range ovens, dryers and furnaces. Depending on the application, HSIs differ in design and price, and are not interchangeable among applications. HSIs are an extremely reliable and cost-effective ignition source for gas appliances.

16. For most of the applications in which HSIs are used, appliance manufacturers would not substitute for HSIs in response to even a significant price increase. Other products, including pilot ignition and spark ignition, are less efficient, less reliable and less cost-effective than HSIs for nearly all gas appliance applications. In addition, appliance manufacturers would need to do extensive product re-design and product testing before substituting another type of ignition source for HSIs.

17. Imports of HSIs into the United States are negligible. Because of differences in line voltages, appliance design and energy efficiency regulations, there is little demand for HSIs overseas, and little production. The only producer of HSIs outside the United States is a Japanese company, Kyocera, which has been trying for several years to develop a commercially viable HSI, and has obtained only minimal sales in the United States. The Kyocera HSI requires a more expensive ignition system.

18. Total sales of HSIs in the United States are over $45 million.

B. Market Concentration

19. Saint-Gobain and Carborundum together account for nearly all HSI sales in the United States. The only other producer of HSIs in the United States is Igniter Systems, Inc. Igniter Systems' product quality and consistency are questioned by customers, and its sales are limited to a small volume of aftermarket sales.

20. The United States HSI market is extremely concentrated as measured by the Herfindahl-Hirschmann Index ("HHI"), and the acquisition would result in a near-monopoly. In 1994, Saint-Gobain

accounted for the large majority of sales of HSIs and Carborundum accounted for virtually all the remainder. Saint-Gobain's acquisition of Carborundum would increase the HHI to over 9800.

21. Even if one defined a market comprised of all ignition sources for the gas appliances in which HSIs are predominantly used, and included HSIs, pilot ignition and spark ignition, the combined share of Saint-Gobain and Carborundum would be close to 80% of total sales.

22. Saint-Gobain has a dangerous probability of obtaining unilateral market power in the United States market for HSIs.

C. Conditions of Entry

23. There is a history of failed entry into the HSI market, and new entry would not be timely, likely or sufficient to deter or offset reductions in competition resulting from the acquisition. Designing and manufacturing HSIs would require several years for process development, plant construction, and product testing. Entry would require significant sunk investment with uncertain ultimate success. Efficient production would require entry at a scale that would be relatively large compared to the total sales available in the HSI market, making entry more risky and unlikely.

D. Effects of the Acquisition

24. The acquisition of Carborundum by Saint-Gobain may substantially lessen competition and tend to create a monopoly in the HSI market in the United States because, among other things:

a. It will increase concentration substantially in a highly concentrated market;

b. It will eliminate substantial head-to-head competition between Saint-Gobain and Carborundum, who are each other's closest competitors in the research and development, manufacture, and sale of HSIs;

c. It will allow Saint-Gobain unilaterally to exercise market power;

d. It will likely result in increased prices for HSIs; and

e. It will likely result in diminished product innovation in HSIs.

V. SILICON CARBIDE REFRACTORY BRICKS

A. Relevant Line of Commerce

25. A third line of commerce within which to analyze the effects of the acquisition is the United States market for silicon carbide refractory bricks. Silicon carbide refractory bricks are fired ceramic bricks made from silicon carbide grain. These products are used to line the interior sidewalls of aluminum reduction cells, steel blast furnaces, and copper shaft furnaces.

26. Aluminum, steel and copper manufacturers would not substitute for silicon carbide bricks in response to even a significant price increase. The choice of a refractory material is sensitive primarily to the performance requirements as established by the design of the manufacturing facility in which the material will be used. Silicon carbide's excellent heat and oxidation resistance makes it a superior product for certain types of aluminum reduction cells, steel blast furnaces and copper shaft furnaces.

27. Imports of silicon carbide refractory bricks are minimal. Overseas production costs are generally higher than production costs in the United States, and imports would be constrained by added shipping and handling costs, and by duties, and would not constrain increased prices in the United States.

28. Total sales of silicon carbide refractory bricks in the United States are approximately $15 million.

B. Market Concentration

29. The United States silicon carbide refractory brick market is extremely concentrated as measured by the Herfindahl-Hirschmann Index (HHI), and the acquisition would result in a near-monopoly. In 1994, Carborundum accounted for the majority of sales of silicon carbide refractory bricks in the United States, and Saint-Gobain virtually all of the rest. Saint-Gobain's, acquisition of Carborundum would increase the HHI to over 9000.

30. Saint-Gobain has a dangerous probability of obtaining unilateral market power in the United States market for silicon carbide refractory bricks.

C. Conditions of Entry

31. Entry into the silicon carbide refractory brick market would not be timely, likely or sufficient to deter or offset reductions in competition resulting from the proposed acquisition. Designing and manufacturing silicon carbide refractory bricks would require product and process development, plant construction, and product testing, all of which could require several years of effort. In addition, entry would require significant sunk investment with uncertain ultimate success.

D. Effects of the Acquisition

32. The acquisition of Carborundum by Saint-Gobain may substantially lessen competition and tend to create a monopoly in the silicon carbide refractory bricks in the United States because, among other things:

a. It will increase concentration substantially in a highly concentrated market;

b. It will eliminate substantial head-to-head competition between Saint-Gobain and Carborundum, who are each other's closest competitors in the research and development, manufacture, and sale of silicon carbide refractory bricks;

c. It will allow Saint-Gobain unilaterally to exercise market power; and

d. It will likely result in increased prices for silicon carbide refractory bricks.

VI. VIOLATIONS CHARGED

33. The acquisition agreement between Saint-Gobain and BP described in paragraph three violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

34. The proposed acquisition of Carborundum by Saint-Gobain 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.

35. The proposed acquisition of Carborundum by Saint-Gobain, if consummated, would allow Saint-Gobain to monopolize the United

States markets for fused cast refractories, HSIs and silicon carbide refractory bricks, in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission ("the Commission"), having initiated an investigation of the proposed acquisition by Compagnie de Saint-Gobain of certain of the subsidiaries of British Petroleum which together comprise The Carborundum Company ("Carborundum"), in which Saint-Gobain/Norton Industrial Ceramics Corporation ("Saint-Gobain") will acquire substantially all of the Carborundum assets in the United States, which acquisition is more fully described at paragraph I. (F) below, and Saint-Gobain having been furnished with a copy of a draft complaint that the Bureau of Competition has presented to the Commission for its consideration and which, if issued by the Commission, would charge Saint-Gobain with violations of the Clayton Act and Federal Trade Commission Act; and

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

The Commission, having 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 filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, makes the following jurisdictional findings and enters the following order:

1. Respondent Saint-Gobain/Norton Industrial Ceramics 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 One New Bond Street, Worcester, Massachusetts.

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

ORDER

I.

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

A. *"Respondent"* or *"Saint-Gobain"* means Saint-Gobain/Norton Industrial Ceramics Corporation, its directors, officers, employees, agents and representatives, its predecessors, successors, and assigns; subsidiaries, divisions, and groups and affiliates controlled by Saint-Gobain, and the respective directors, officers, employees, agents, representatives, successors and assigns of each; its domestic and foreign parents, including Compagnie de Saint-Gobain, and the subsidiaries, divisions, and groups and affiliates controlled by Compagnie de Saint-Gobain or any other domestic or foreign parent, and the respective directors, officers, employees, agents, representatives, successors and assigns of each.

B. *"Carborundum"* means the companies and assets comprising The Carborundum Company that Saint Gobain proposes to acquire from BP pursuant to the Acquisition.

C. *"BP"* means The British Petroleum Company p.l.c.

D. *"Toshiba Monofrax"* means the joint venture between Carborundum and Toshiba Ceramics Company, Limited, pursuant to the Joint Venture Agreement dated December 20, 1965.

E. *"Commission"* means the Federal Trade Commission.

F. *"Acquisition"* means the acquisition described in the Stock Purchase Agreement entered into on May 26, 1995 by which Saint-Gobain has agreed to acquire and BP has agreed to convey certain rights and interests in, and title to, Carborundum.

G. *"Fused cast refractories"* means all grades or types of refractory products which are produced using a fused cast process, *i.e.*, melting components in electric furnaces and casting the molten

product into shaped products, including, but not limited to, fused cast AZS (alumina-zirconia-silica) and fused cast alumina.

H. *"Hot surface igniters"* means all silicon carbide hot surface igniters used in the ignition system of gas appliances.

I. *"Silicon carbide performance refractories"* means all refractory products composed of bonded silicon carbide grains.

J. *"Silicon carbide refractory bricks"* means all refractory products composed of bonded silicon carbide grains which are formed by hydraulic, mechanical or vibratory pressing, and are marketed for use in the manufacture of primary metals, including aluminum reduction cells, steel blast furnaces, and copper shaft furnaces.

K. *"Carborundum silicon carbide refractory brick technology"* means all patents, trade secrets, technology and know-how of Carborundum for producing any silicon carbide refractory brick product sold by Carborundum on or before the date of the Acquisition, all such information being sufficiently detailed for the commercial production and sale of such products, including, but not limited to, all technical information, data, specifications, drawings, design and equipment specifications, manuals, engineering reports, manufacturing designs and reports, operating manuals, and formulations, laboratory research, and quality control data.

L. *"Assets and Businesses"* means assets, properties, businesses, and goodwill, tangible and intangible, including, without limitation, the following:

1. All plant facilities, machinery, fixtures, equipment, vehicles, transportation and storage facilities, furniture, tools, supplies, stores, spare parts, and other tangible personal property;

2. All customer lists, vendor lists, catalogs, sales promotion literature, advertising materials, research materials, technical information, dedicated management information systems, information contained in management information systems, rights to software, trademarks, patents and patent rights, inventions, trade secrets, technology, know-how, ongoing research and development, specifications, designs, drawings, processes and quality control data;

3. Raw material and finished product inventories and goods in process;

4. All right, title and interest in and to real property, together with appurtenances, licenses, and permits;

5. All right, title, and interest in and to the contracts entered into in the ordinary course of business with customers (together with associated bids), 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 separately maintained, as well as relevant portions of not separately maintained books, records and files; and

8. All items of prepaid expense.

M. *"Carborundum fused cast refractories properties to be divested"* means the Carborundum Monofrax Group, Carborundum's manufacturing facility in Falconer, New York, and any other Carborundum Assets and Businesses utilized in connection with the research, development, manufacture, distribution or sale of fused cast refractories (including any assets located at or research or development work ongoing or completed at the Carborundum Technology Center); provided, however, that the "Carborundum fused cast refractories properties to be divested" does not include the name "Carborundum" nor any interest of Carborundum in, or contractual relationship with, Toshiba Monofrax.

N. *"Carborundum igniters properties to be divested"* means Carborundum's hot surface igniter manufacturing facility in Mayaguez, Puerto Rico, and any other Carborundum Assets and Businesses utilized in connection with the research, development, manufacture, distribution or sale of hot surface igniters (including any assets located or research and development work done at the Carborundum Technology Center, and any rights of Carborundum in which any person has agreed not to compete with Carborundum in the manufacture or marketing of hot surface igniters); provided, however, that "Carborundum igniters properties to be divested" does not include the name "Carborundum."

O. *"Carborundum silicon carbide properties to be divested"* means Carborundum's Keasbey, New Jersey silicon carbide performance refractories manufacturing facility, and any other Carborundum Assets and Businesses utilized in connection with the research, development, manufacture, distribution or sale of all products, including silicon carbide refractory bricks and products, other than silicon carbide refractory bricks, manufactured at that plant (including such assets located, or research and development work

done, at the Carborundum Technology Center); provided, however, that "silicon carbide properties to be divested" does not include the name "Carborundum" or any Carborundum silicon carbide refractory manufacturing facilities other than the Keasbey, New Jersey plant, or any trade names used by Carborundum.

P. *"Carborundum properties to be divested"* means the Carborundum fused cast refractories properties to be divested, the Carborundum igniters properties to be divested, and the Carborundum silicon carbide properties to be divested.

Q. *"Carborundum Technology Center"* means Carborundum's research and development facility located in Niagara Falls, New York.

R. *"Saint-Gobain fused cast refractories properties to be divested"* means (i) Saint-Gobain's manufacturing facility in Louisville, Kentucky, and any other Saint-Gobain Assets and Businesses located in North America that are utilized in the research, development, manufacture, sale or distribution of fused cast refractories and (ii) any product or processing technology utilized in connection with the research, development, manufacture, distribution or sale of fused cast refractories (including any ongoing or completed research or development work within Saint-Gobain that is related to fused cast AZS refractories, fused cast alumina refractories, or to any other fused cast products produced or sold by Saint-Gobain in North America; provided, however, that such research shall not include research or development work that relates solely to process technology used by Societe Europeenne des Produits Refractaires in Europe).

S. *"Licensee"* means the person to whom the Carborundum silicon carbide refractory brick technology is licensed pursuant to paragraph II of this order.

T. *"License date"* means the date on which the Carborundum silicon carbide refractory brick technology is licensed following Commission approval pursuant to paragraph II of this order.

U. *"Remaining properties to be divested"* means the following:

1. The Carborundum fused cast refractories properties to be divested if the Carborundum fused cast refractories properties to be divested have not been divested, or divestiture of the Saint-Gobain fused cast refractories properties to be divested has not been

approved by the Commission and divested, by the time that a trustee is appointed in accordance with paragraph III of this order, and

2. The Carborundum igniters properties to be divested if the Carborundum igniter properties to be divested have not been divested by the time that a trustee is appointed in accordance with paragraph III of this order, and

3. The Carborundum silicon carbide properties to be divested if the Carborundum silicon carbide properties to be divested have not been divested, or a license to the Carborundum silicon carbide refractory brick technology has not been approved by the Commission and granted, by the time that a trustee is appointed in accordance with paragraph III of this order.

V. *"Viability and competitiveness"* of the properties to be divested means that such respective properties are capable of functioning independently and competitively in the fused cast refractories, hot surface igniters, and silicon carbide performance refractories businesses.

II.

It is further ordered, That:

A. Respondent shall divest, absolutely and in good faith, at no minimum price, by the earlier of February 28, 1997, or one year from the date the Acquisition is consummated, the Carborundum fused cast refractories properties to be divested as an ongoing business, and shall also divest such additional ancillary Carborundum Assets and Businesses and effect such arrangements as are necessary to assure the viability and competitiveness of the Carborundum fused cast refractories properties to be divested.

B. Respondent may propose, and the Commission may in its sole discretion accept, in lieu of divestiture of the Carborundum fused cast refractories properties to be divested, divestiture of the Saint-Gobain fused cast refractories properties to be divested, to a person that receives the prior approval of the Commission, and in a manner that receives the prior approval of the Commission. Divestiture of the Saint-Gobain fused cast refractories properties to be divested shall, in order to obtain Commission approval, satisfy the purposes of this order and remedy the lessening of competition resulting from the

Acquisition as alleged in the Commission's complaint. Respondent's request that the Commission approve a divestiture of the Saint-Gobain fused cast refractories properties to be divested shall not toll the time in which it is required to divest the Carborundum fused cast refractories properties to be divested, except that if the Commission has not approved or disapproved such request within ninety (90) days of the date on which it was submitted, then, in the event of Commission disapproval of the request, the period shall be extended by the length of time in excess of ninety days before Commission disapproval. Respondent's request that the Commission approve divestiture of the Saint-Gobain fused cast refractories properties to be divested shall not eliminate the requirement that it divest the Carborundum fused cast refractories properties to be divested, unless such substitute divestiture is approved by the Commission and consummated in a timely fashion consistent with the requirements of this order.

C. Respondent shall divest, absolutely and in good faith, at no minimum price, by the earlier of February 28, 1997, or one year from the date the Acquisition is consummated, the Carborundum igniters properties to be divested as an ongoing business, and shall also divest such additional ancillary Carborundum Assets and Businesses and effect such arrangements as are necessary to assure the viability and competitiveness of the Carborundum igniters properties to be divested.

D. Respondent shall divest, absolutely and in good faith, at no minimum price, by the earlier of February 28, 1997, or one year from the date the Acquisition is consummated, the Carborundum silicon carbide properties to be divested, and shall also divest such additional ancillary Carborundum Assets and Businesses and effect such arrangements as are necessary to assure the viability and competitiveness of the Carborundum silicon carbide properties to be divested.

E. Respondent may propose, prior to the earlier of August 30, 1996, or six months from the date the Acquisition is consummated, and the Commission may in its sole discretion accept, in lieu of divestiture of the Carborundum silicon carbide properties to be divested, to grant, with no continuing royalties, a perpetual license to the Carborundum silicon carbide refractory brick technology to a person that obtains the prior approval of the Commission, in a manner that receives the prior approval of the Commission.

Licensing of the Carborundum silicon carbide refractory brick technology shall, in order to obtain Commission approval, satisfy the purposes of this order and remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's complaint. In no event shall any licensing agreement pursuant to this paragraph contain any limitation on the products the licensee is permitted to produce, or the geographic area in which the licensee may produce such products. Respondent's request that the Commission approve a licensee shall not toll the time in which it is required to divest the Carborundum silicon carbide properties to be divested, except that if the Commission has not approved or disapproved such request within ninety (90) days of the date on which it was submitted, then, in the event of Commission disapproval of the request, the period shall be extended by the length of time in excess of ninety days before Commission disapproval. Respondent's request that the Commission approve a licensee shall not eliminate the requirement that it divest the Carborundum silicon carbide properties to be divested, unless such licensing is approved by the Commission and consummated in a timely fashion consistent with the requirements of this order.

F. If respondent licenses the Carborundum silicon carbide refractory brick technology pursuant to paragraph II.E. of this order, then for a period of six (6) months after the license date, upon reasonable notice and request from the licensee, respondent shall provide to the licensee information, technical assistance, and advice sufficient to effect the transfer to the licensee of the silicon carbide refractory brick technology and to enable the licensee to manufacture silicon carbide refractory bricks. Upon reasonable notice and request from the licensee, respondent shall also provide to the licensee consultation and training with knowledgeable employees of respondent, including a qualified engineer, at the licensee's facility for a period of time, not to exceed three (3) months, sufficient to satisfy the licensee's management that its personnel are adequately trained in the manufacture of silicon carbide refractory bricks. Respondent may require reimbursement from the licensee for all of its direct out-of-pocket expenses, including a reasonable labor loss fee for on-site assistance incurred in providing the services required by this paragraph II.F. of this order.

G. If respondent licenses the Carborundum silicon carbide refractory brick technology pursuant to paragraph II.E. of this order,

then respondent shall provide the licensee with all promotional, advertising, and marketing materials regarding silicon carbide refractory bricks prepared by Carborundum at any time during the period commencing twelve (12) months prior to the date this order becomes final, a list of all customers of Carborundum's silicon carbide refractory bricks during the period commencing twenty-four (24) months prior to the date this order becomes final, and a list of Carborundum's suppliers of silicon carbide, other raw materials, and production components used to produce Carborundum's silicon carbide refractory bricks.

H. Respondent shall comply with all terms of the Agreement to Hold Separate attached to this order and made a part hereof as Appendix I. Said Agreement shall continue in effect with respect to the Carborundum fused cast refractories properties to be divested until such time as respondent has divested the Carborundum fused cast refractories properties to be divested, with respect to the Carborundum igniters properties to be divested until such time as respondent has divested the Carborundum igniters properties to be divested, and with respect to the Carborundum silicon carbide properties to be divested until such time as respondent has divested the Carborundum silicon carbide properties to be divested, or until such other time as stated in said Agreement, provided that said Agreement to Hold Separate shall not continue in effect with respect to the Carborundum fused cast refractories properties to be divested if respondent divests, with Commission approval, the Saint-Gobain fused cast refractories properties to be divested, and shall not continue in effect with respect to the Carborundum silicon carbide properties to be divested if respondent licenses, with Commission approval, the Carborundum silicon carbide refractory brick technology.

I. Respondent shall divest each of the Carborundum properties to be divested only to an acquirer or acquirers that receive the prior approval of the Commission and only in a manner that receives the prior approval of the Commission. The purpose of the divestitures of the Carborundum properties to be divested is to ensure the continuation of the Carborundum properties to be divested as ongoing, viable businesses engaged in the manufacture and sale of fused cast refractories, hot surface igniters, and silicon carbide performance refractories, respectively, and to remedy any lessening

of competition resulting from the Acquisition as alleged in the Commission's complaint.

III.

It is further ordered, That:

A. If respondent has not divested, absolutely and in good faith and with the Commission's approval, each of the Carborundum properties to be divested, or, pursuant to paragraph II.B. of this order, the Saint-Gobain fused cast refractories properties to be divested, or has not licensed, with the Commission's approval, pursuant to paragraph II.E. of this order, the Carborundum silicon carbide refractory brick technology, the Commission may appoint one or more trustees to divest the remaining properties to be divested, along with any reasonable ancillary Carborundum assets and other reasonable arrangements that are necessary to assure the viability and competitiveness of such remaining properties to be divested.

B. In the event the Commission or the Attorney General brings an action pursuant to Section 5(l) of the Federal Trade Commission Act, 15 U.S.C. 45(l), or any other statute enforced by the Commission, respondent shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to Section 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by respondent to comply with this order.

C. 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 powers, authorities, duties and responsibilities of the trustee:

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

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 remaining properties to be divested, along with any reasonable ancillary Carborundum assets and other reasonable arrangements that are necessary to assure the viability and competitiveness of such remaining properties to be divested.

3. The trustee shall have twelve (12) months from the date of appointment to accomplish the divestiture or divestitures. If, however, at the end of the twelve-month period the trustee has submitted a plan of divestiture or believes that divestiture can be accomplished within a reasonable time, the divestiture period may be extended by the Commission; provided, however, the Commission may only extend the divestiture period or divestiture periods, as applicable, two (2) times, but not more than one (1) year in the aggregate for each divestiture.

4. The trustee shall have full and complete access to the personnel, books, records and facilities related to the remaining properties to be divested, or any other relevant information, as the trustee may reasonably request. Respondent shall develop such financial or other information as such trustee may reasonably request and shall cooperate with any reasonable request of the trustee. Respondent shall take no action to interfere with or impede any trustee's accomplishment of the divestiture or divestitures. 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 the court for a court-appointed trustee.

5. Subject to respondent's absolute and unconditional obligation to divest at no minimum price, the trustee shall use his or her best efforts to negotiate the most favorable price and terms available for the divestiture of the remaining properties to be divested. If the trustee receives *bona fide* offers for the remaining properties to be divested from more than one acquiring entity or entities, 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.

6. The trustee shall serve, without bond or other security, at the cost and expense of respondent, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have authority to employ, at the cost and expense of respondent, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are reasonably necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the 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 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 remaining properties to be divested.

7. Respondent shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, or liabilities arising out of, or in connection with, the performance of the trustee's duties under this order, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of any claim, whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.

8. Within ten (10) days after appointment of the trustee, and subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, respondent shall execute a trust agreement that transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestitures required by this order.

9. If a 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 appropriate trustee, issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this order.

11. The trustee shall have no obligation or authority to operate or maintain the remaining properties to be divested.

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

IV.

It is further ordered, That within thirty (30) days after the date this order becomes final and every sixty (60) days thereafter until respondent has fully complied with paragraphs II and III of this order, respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying and has complied with those provisions, including the Agreement to Hold Separate. Respondent shall include in its compliance reports, among other things that are required from time to time, a full description of substantive contacts or negotiations for the divestitures of the Carborundum fused cast refractories properties to be divested, Carborundum igniter properties to be divested, Carborundum silicon carbide properties to be divested, and divestiture of the Saint-Gobain fused cast refractories properties to be divested or licensing of the Carborundum silicon carbide refractory brick technology, as specified in paragraph II of this order, including the identity of all parties contacted. Respondent also shall include in compliance reports, among other things, copies of all written communications to and from such parties, all internal memoranda, reports and recommendations concerning the divestitures.

V.

It is further ordered, That for the purposes of determining or securing compliance with this order, and subject to any legally recognized privilege, upon written request and on reasonable notice to respondent made to counsel for respondent, Saint-Gobain 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 ten (10) 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.

VI.

It is further ordered, That until the obligations set forth in paragraphs II and III of this order are met, respondent 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, dissolution or sale of subsidiaries, or any other change that may affect compliance obligations arising out of the order.

APPENDIX I

AGREEMENT TO HOLD SEPARATE

This Agreement to Hold Separate (the "Hold Separate") is by and between Saint-Gobain/Norton Industrial Ceramics Corporation ("Saint-Gobain"), a corporation organized, existing, and doing business under and by virtue of the laws of Delaware, with its principal office and place of business at One New Bond Street, Worcester, Massachusetts, and the Federal Trade Commission (the "Commission"), an independent agency of the United States Government, established under the Federal Trade Commission Act of 1914, 15 U.S.C. 41, *et seq.* (collectively, the "Parties").

PREMISES

Whereas, on May 26, 1995, Compagnie de Saint-Gobain, the parent company of Saint-Gobain/Norton Industrial Ceramics Corporation, entered into, through its wholly-owned subsidiary Societe Europeenne Des Produits Refractaires ("SEPR"), a Stock Purchase Agreement with The Standard Oil Company, BP International Limited, and BP Exploration (Alaska), Inc., subsidiaries of British Petroleum Company, p.l.c. ("BP") providing for the acquisition (the "Acquisition") of the voting securities of the

companies that together comprise The Carborundum Company ("Carborundum"); and

Whereas, Carborundum, with its principal office and place of business at 1625 Buffalo Avenue, Niagara Falls, New York, manufactures and sells a range of products, including fused cast refractories, hot surface igniters, and silicon carbide performance refractories; 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") , the Commission will place it on the public record for a period of at least sixty (60) days and may subsequently withdraw such acceptance pursuant to the provisions of Section 2.34 of the Commission's Rules; and

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

Whereas, the Commission is concerned that if the Acquisition is consummated, it will be necessary to preserve the Commission's ability to require the divestiture of Carborundum and the Commission's right to have Carborundum or the Carborundum properties to be divested continue as viable competitors independent of Saint-Gobain; and

Whereas, even if the Commission determines to finally accept the consent order, it is necessary to hold separate the Carborundum properties to be divested to protect interim competition pending divestiture or other relief; and

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

(i) Preserve Carborundum as a viable and competitive business, independent of Saint-Gobain, and engaged in the research and development, manufacture and sale of fused cast refractories, hot surface igniters and silicon carbide performance refractories pending final acceptance or withdrawal of acceptance of the consent order by

the Commission pursuant to the provisions of Section 2.34 of the Commission's Rules;

(ii) Preserve the Carborundum properties to be divested as viable and competitive businesses, independent of Saint-Gobain, and engaged in the research and development, manufacture and sale of fused cast refractories, hot surface igniters and silicon carbide performance refractories pending divestiture or other relief pursuant to paragraph II or paragraph III of the consent order;

(iii) Preserve Carborundum as a viable and competitive business, independent of Saint-Gobain, and engaged in the research and development, manufacture and sale of fused cast refractories, hot surface igniters and silicon carbide performance refractories and prevent any interim harm to consumers as a result of the Acquisition;

(iv) Remedy the anticompetitive effects of the Acquisition as alleged in the Commission's complaint; and

Whereas, entering into this Hold Separate shall in no way be construed as an admission by Saint-Gobain that the Acquisition is illegal or would have any anticompetitive effects; and

Whereas, Saint-Gobain 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 at the time it accepts the consent order for public comment that, unless the Commission determines to reject the consent order, the Commission will not seek a temporary restraining order, preliminary injunction, or permanent injunction to prevent consummation of the Acquisition, and will grant early termination of the Hart-Scott-Rodino waiting period, as follows:

1. Saint-Gobain agrees to execute and be bound by the attached consent order.

2. The terms "fused cast refractories," "hot surface igniters," "silicon carbide performance refractories," "carborundum fused cast refractories properties to be divested," "Carborundum igniters properties to be divested," "Carborundum silicon carbide properties

to be divested," "Carborundum properties to be divested," and "Acquisition" have the same definitions as in the consent order;

3. Saint-Gobain agrees that from the date this Hold Separate is accepted until the earliest of the dates listed in subparagraphs 3.a. or 3.b., it will comply with the provisions of paragraph 5 of this Hold Separate with respect to Carborundum:

a. Five (5) business days after the Commission withdraws its acceptance of the consent order pursuant to the provisions of Section 2.34 of the Commission's Rules;

b. The day after the Commission accepts as final the consent order pursuant to the provisions of Section 2.34 of the Commission's Rules.

Provided, however, that Saint-Gobain is not required to hold separate pursuant to this Hold Separate any of the following business groups or businesses of Carborundum: ceramic fiber; microelectronics; structural ceramics; boron nitride; ekonol polyester resin; Carborundum specialty products; irrigation; or Carborundum's silicon carbide refractory manufacturing plants in Germany, The United Kingdom or Australia.

4. Saint-Gobain agrees that from the date this Hold Separate is accepted until the earliest of the dates listed in subparagraphs 4.a., or 4.b., it will comply with the provisions of paragraph 5 of this Hold Separate with respect to each of the Carborundum properties to be divested:

a. Five (5) business days after the Commission withdraws its acceptance of the consent order pursuant to the provisions of Section 2.34 of the Commission's Rules;

b. The day after the respective divestiture required by the consent order is completed, or, as applicable with regard to the Carborundum silicon carbide properties to be divested, an approved license granted.

5. Saint-Gobain shall hold Carborundum or the Carborundum properties to be divested, as applicable pursuant to paragraphs 3 and 4 (the "Held-Separate Businesses"), as they are constituted on the date the Acquisition is consummated, separate and apart on the following terms and conditions:

a. The Held-Separate Businesses shall be held separate and apart and shall be operated independently of Saint-Gobain (meaning here and hereinafter, Saint-Gobain excluding the Held-Separate Businesses and excluding all personnel connected with the Held-Separate Businesses as of the date this Hold Separate is signed) except to the extent that Saint-Gobain must exercise direction and control over the Held-Separate Businesses to assure compliance with this Hold Separate or with the consent order.

b. Saint-Gobain shall not exercise direction or control over, or influence directly or indirectly, the Held-Separate Businesses, the New Board or Management Committee (as defined in subparagraph 5.d. any of its operations or businesses; provided, however, that Saint-Gobain may exercise only such direction and control over the Held-Separate Businesses as is necessary to assure compliance with this Hold Separate or with the consent order.

c. Saint-Gobain shall maintain the marketability, viability and competitiveness of the Held-Separate Businesses, and shall not take such action that will cause or permit the destruction, removal, wasting, deterioration or impairment of the Held-Separate Businesses, except in the ordinary course of business and except for ordinary wear and tear, and shall not sell, transfer, encumber (other than in the normal course of business), or otherwise impair the marketability, viability or competitiveness of the Held-Separate Businesses.

d. Upon consummation of the Acquisition, Saint-Gobain shall elect a three-person Board of Directors for the Held-Separate Businesses (the "New Board"), or a three-person Management Committee. After the order is made final pursuant to Section 2.34 of the Commission's rules, Saint-Gobain may elect a separate New Board or Management Committee for each of the Held-Separate Businesses. Each New Board or Management Committee for each Held-Separate Business shall consist of at least two Carborundum officers knowledgeable about the Held-Separate Business, one of whom shall be named Chairman of the New Board or Management Committee, and who shall remain independent of Saint-Gobain and competent to assure the continued viability and competitiveness of the Held-Separate Business, and one New Board or Management Committee Member who may also be an officer, agent or employee of Saint-Gobain (the "Saint-Gobain New Board or Management Committee Member"). The Saint-Gobain New Board or Management

Committee Member for each New Board or Management Committee for each Held-Separate Business shall not have any direct responsibility relating to any Saint-Gobain business that manufactures, markets or uses the products, or products that compete with, products manufactured or marketed by such Held-Separate Business. Except for the Saint-Gobain New Board or Management Committee Member, Saint-Gobain shall not permit any director, officer, employee or agent of Saint-Gobain also to be a director, officer, employee or agent of Carborundum. Each New Board or Management Committee member shall enter into a confidentiality agreement agreeing to be bound by the terms and conditions of this Hold Separate.

e. Except as required by law and except to the extent that necessary information is exchanged in the course of complying with this Hold Separate or the consent order, or in the course of defending investigations or litigation or obtaining legal advice, or providing risk management services, Saint-Gobain shall not receive or have access to, or the use of, any Material Confidential Information of the Held-Separate Businesses, not in the public domain, except as such information would be available to Saint-Gobain in the ordinary course of business if the Acquisition had not taken place. Saint-Gobain may receive on a regular basis from the Held-Separate Businesses aggregate financial information necessary and essential to allow Saint-Gobain to file financial reports, tax returns and personnel reports, and such other information, other than information relating specifically to the Carborundum properties to be divested, necessary in the course of evaluating and consummating the Acquisition. Any such information that is obtained pursuant to this subparagraph shall only be used for the purposes set out in this subparagraph. ("Material Confidential Information," as used in this Hold Separate, means competitively sensitive or proprietary information not independently known to Saint-Gobain from sources other than the Held-Separate Businesses or the New Board or Management Committee, as applicable, and includes but is not limited to customer lists, customers, price lists, prices, individual transactions, marketing methods, patents, technologies, processes, or other trade secrets.) In no event shall Saint-Gobain receive Material Confidential Information relating to any specific customer of Carborundum.

f. Saint-Gobain may retain an independent auditor to monitor the operation of the Held-Separate Businesses. Said auditor may report in writing to Saint-Gobain on all aspects of the operation of the Held-Separate Businesses other than information on customer lists, customers, price lists, prices, individual transactions, marketing methods, patents, technologies, processes, or other trade secrets.

g. Except as permitted by this Hold Separate, the New Board or Management Committee member appointed by Saint-Gobain who is also an officer, agent, or employee of Saint-Gobain shall not receive any Material Confidential Information of the Held-Separate Businesses or Material Confidential Information of any person other than Saint-Gobain and shall not disclose any such information obtained through his or her involvement with the Held-Separate Businesses to Saint-Gobain or use it to obtain any advantage for Saint-Gobain. The Saint-Gobain New Board or Management Committee Member shall participate in matters that come before the New Board or Management Committee only for the limited purpose of considering any capital investment of over $250,000 for the Carborundum fused cast refractories properties to be divested, any capital investment over $150,000 for the Carborundum igniters properties to be divested, any capital investment over $150,000 for the Carborundum silicon carbide properties to be divested, approving any proposed budget and operating plans, authorizing dividends and repayment of loans consistent with the provisions hereof, reviewing any material transactions described in paragraph 5.g., and carrying out Saint-Gobain's responsibilities under the Hold Separate and the consent order. Except as permitted by the Hold Separate, the Saint-Gobain New Board or Management Committee Member shall not participate in any other matter.

h. All material transactions, out of the ordinary course of business and not precluded by paragraph 5 hereof, shall be subject to a majority vote of the New Board or Management Committee (as defined in paragraph 5.d. hereof).

i. Saint-Gobain shall not change the composition of the New Board or Management Committee unless the Chairman of the New Board or Management Committee consents, or unless it is necessary to do so in order to assure compliance with this Hold Separate or with the consent order. The Chairman of the New Board or Management Committee shall have the power to remove members of the New Board or Management Committee for cause and to require Saint-

Gobain to appoint replacement members of the New Board or Management Committee. Saint-Gobain shall not change the composition of the management of the Held-Separate Businesses except that the New Board or Management Committee shall have the power to remove management employees for any legal reason. If the Chairman ceases to act or fails to act diligently, a substitute Chairman shall be appointed in the same manner as provided in paragraph 5.d. Saint-Gobain shall circulate to the management employees of Carborundum and appropriately display a notice of the Hold Separate and the Consent Agreement at a conspicuous place at all offices and facilities of the Held-Separate Businesses.

j. All earnings and profits of the Held-Separate Businesses shall be retained separately by Carborundum or the Carborundum properties to be divested, as applicable. If necessary, Saint-Gobain shall provide the Held-Separate Businesses with sufficient working capital to operate at current rates of operation, upon commercially reasonable terms.

k. Should the Federal Trade Commission seek in any proceeding to compel Saint-Gobain to divest itself of Carborundum or to compel Saint-Gobain to divest any assets or businesses of Carborundum that it may hold, or to seek any other injunctive or equitable relief, Saint-Gobain 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. Saint-Gobain also waives all rights to contest the validity of this Hold Separate.

6. For the purpose of determining or securing compliance with this Hold Separate, subject to any legally recognized privilege, and upon written request and ten days, notice to Saint-Gobain, Saint-Gobain shall permit any duly authorized representative(s) of the Commission:

a. Access during the office hours of Saint-Gobain 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 Saint-Gobain or Carborundum relating to compliance with this Hold Separate;

b. Without restraint or interference from Saint-Gobain, to interview Saint-Gobain's or Carborundum's officers, directors or

employees, who may have counsel present, regarding any such matters.

7. This agreement shall be binding upon acceptance by Saint-Gobain and the Commission.

IN THE MATTER OF

BUDGET RENT A CAR SYSTEMS, INC.

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

Docket C-3674. Complaint, June 17, 1996--Decision, June 17, 1996

This consent order prohibits, among other things, an Illinois-based corporation from failing to disclose, clearly and prominently, any representation relating to the renter's liability for loss of or damage to a rental vehicle, and from failing to post at each Budget rental location a sign, clearly and prominently, containing the disclosure statement. In addition, the consent order prohibits the respondent from misrepresenting: the obligation of the renter to make any payment as a result of loss of or damage to a rental vehicle; and the value of a vehicle that has been lost or damaged.

Appearances

For the Commission: *Randall Brook, Charles Harwood* and *Robert Schroeder.*

For the respondent: *Robert Aprati,* in-house counsel, Lisle, IL. and *Lisa Jose Fales, Collier, Shannon, Rill & Scott*, Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that Budget Rent A Car Systems, 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 Budget Rent a Car Systems, Inc., is a Delaware corporation with its principal office and place of business located at 4225 Naperville Road, Lisle, Illinois.

PAR. 2. Respondent has advertised, offered for rent, and rented, directly and through franchisees, vehicles 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. In connection with the renting of vehicles, respondent has disseminated or caused to be disseminated promotional and informational material through advertisements, an 800-number that contains recorded messages, respondent's own telephone reservation system, third-party computerized reservation systems operated by airline and travel agency employees, and point of sale disclosures.

PAR. 5. Some of respondent's promotional and informational material including, but not limited to, the vehicle rental contract, brochure, and telephone script attached as Exhibits A - C, describe the renter's liability for loss of or damage to vehicles under various circumstances.

PAR. 6. In connection with the renting of vehicles, respondent has offered renters in most states a choice of either accepting or declining an option called the loss damage waiver ("LDW"). If a renter accepted LDW, respondent would add an additional fee to the total rental charge. In 1993 respondent typically charged renters approximately $13 per day for LDW. LDW is not insurance but instead waives respondent's claim against the renters for damages in the event the vehicle is damaged or stolen during the pendency of the rental agreement.

PAR. 7. The renter's own vehicle insurance company or credit card issuer will often pay for loss of or damage to rental vehicles when a renter declines to purchase LDW. Respondent's informational materials, referred to in paragraph five, and numerous public sources of information, have made this fact known to potential renters.

PAR. 8. In numerous instances respondent has sought and obtained from renters who declined LDW and who have been involved in accidents as much as $4,500 more than the vehicle's repair cost or market value. This charge is called "loss of turnback". "Turnback" is a sales incentive some manufacturers offer Budget. It occurs when the manufacturer, using a pre-negotiated formula, agrees to repurchase a used vehicle from Budget. The formula's repurchase price can be much higher than the car's market value. Respondent did not inform the renter about this potential extra charge for loss of turnback until respondent made a claim against the renter for loss or damage. Insurance companies and credit card issuers usually refuse to pay respondent's claim for loss of turnback because it exceeds the vehicle's cost of repairs or its fair market value.

PAR. 9. In the informational materials referred to in paragraph five, respondent has represented that renters were liable for loss of or

damage to the rental vehicle if they did not purchase LDW. Respondent failed to disclose that it might include, in a damage or loss claim against renters who decline LDW, as much as $4,500 for loss of turnback. This fact would have been material to consumers' decisions to rent a vehicle from respondent and to purchase LDW. The failure to disclose this material fact, in light of the representations made, was, and is, a deceptive act or practice.

PAR. 10. In the informational materials referred to in paragraph five, respondent has represented that only two charges related to damages, a loss of use fee and the insurance policy deductible, might not be covered by the renter's vehicle insurance. Respondent failed to disclose that the renter's vehicle insurance would likely not cover a loss of turnback charge. This fact would have been material to consumers' decisions to rent a vehicle from respondent and to purchase LDW. The failure to disclose this material fact, in light of the representations made, was, and is, a deceptive act or practice.

PAR. 11. In numerous instances where vehicles were damaged, respondent has sent, or caused to be sent, written communications to renters who declined LDW demanding that they reimburse respondent for "loss of turnback."

PAR. 12. By demanding reimbursement for loss of turnback, respondent has represented, directly or by implication, that the signed rental contract entitled it to collect this charge.

PAR. 13. In truth and in fact, the signed rental contract did not entitle respondent to collect loss of turnback. Therefore, the representation set forth in paragraph twelve was, and is, false and misleading.

PAR. 14. In numerous instances where vehicles were stolen or declared "totaled," respondent has charged renters who declined LDW for loss based on "Budget book value" or "net vehicle cost."

PAR. 15. In charging a renter for loss based on the "Budget book value" or "net vehicle cost" when a vehicle was stolen or declared a total loss, respondent has represented, directly or by implication, that it was charging the fair market value of the vehicle.

PAR. 16. In truth and in fact, respondent was not charging the fair market value of the vehicle. Instead, it was charging the value that included loss of turnback. Therefore, the representation set forth in paragraph fifteen was, and is, false and misleading.

PAR. 17. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

EXHIBIT A

Budget

Exhibit A

CREDIT IDENTIFICATION OR BILLING INSTRUCTIONS

CREDIT CARD/DIRECT BILL NO./I.D. NO/EXP. DATE

RENTER

RESIDENCE

CITY STATE ZIP

HOME PHONE D.O.B. RESERVATION NO.

LICENSE NO. EXP. DATE STATE

COMPANY

COMPANY PHONE NO. CORPORATE RATE NO.

LOCAL CONTACT/PHONE NO.

ADDITIONAL DRIVER/I.D. D.B.

LICENSE NO. EXP. DATE/STATE

REMARKS

DUE BACK AUTHORIZED RETURN RENTER'S INITIAL

X

LOSS DAMAGE WAIVER (LDW)— Renter advises Budget to accept or declines the optional LDW as the rate charges for each day or location thereof. If Renter declines LDW, Renter will be responsible for the FULL VALUE of other amount within limited of any loss of or damage to the Vehicle, including loss of use and related expenses, regardless of fault, except as provided in Paragraph 7 on the reverse side. If Renter accepts LDW, Renter will not be responsible for each loss or damage, EXCEPT AS PROVIDED IN PARAGRAPH 7(B) ON THE REVERSE SIDE. LDW IS NOT INSURANCE. ACCEPTANCE OR REJECTION OF LDW DOES NOT CHANGE YOUR LIABILITY INSURANCE. RENTER SHOULD CHECK WITH THE INSURANCE YOU MAINTAIN THE EXTENT OF COVERAGE PROVIDED FOR PERSONAL INJURY AND LOSS OF OR DAMAGE TO THE VEHICLE DUE TO THEFT, VANDALISM OR COLLISION DAMAGE.

X

INITIALS

RENTAL AGREEMENT NO.

BILL NO./PREAMOUNT

LESS DEPOSIT

NET DUE RENTER

ATTENTION

- DAILY RATE IS BASED ON 24 HOUR DAY MINIMUM CHARGE
- DISCOUNT RATES ONLY FOR SPECIFIED PERIOD
- RATES DO NOT INCLUDE REFUEL, NO SERVICE CHARGE

RENTER AGREES TO FUEL PURCHASE OPTION (SEE PARA. 11 B ON REVERSE SIDE)

RETURN LOCATION CHARGE

INITIAL MILEAGE

DISCOUNT TOTAL

SUB TOTAL

CHARGES SUBJECT

EXHIBIT A

The Renter agrees to all Terms on both sides of this Agreement [illegible]

1. VEHICLE. [illegible] THERE IS NO WARRANTY OF ANY KIND, EXPRESS OR IMPLIED, AS TO THE MERCHANTABILITY OR FITNESS FOR ANY PARTICULAR PURPOSE OF ANY VEHICLE COVERED BY THIS AGREEMENT.

2. VEHICLE RETURN. [illegible]

3. REPOSSESSION OF VEHICLE. [illegible]

4. AUTHORIZED DRIVERS. [illegible]

5. USE RESTRICTIONS: Renter and Authorized Drivers agree that the Vehicle will not be used or operated by anyone:
A. Who is an unauthorized driver; or
B. In a willful or wanton manner; or
C. While intoxicated or under the influence of drugs or other substances which would impair driving ability; or
D. For any felony act including transportation of drugs or contraband; or
E. To tow or push anything, to carry persons or property for hire, or to engage in a speed contest; or
F. If obtained by fraud or misrepresentation; or
G. Outside the continental United States; or
H. Off regularly maintained roadways; or
I. To carry hazardous or explosive substances; or
J. To transport weight in excess of Vehicle's maximum payload capacity; or
K. Where insufficient clearance of height or width exists; or
L. Who does not know how to operate a stick shift driven vehicle; or
M. Improper loading; or
N. Who leaves the Vehicle and fails to remove the keys or close and lock all doors, windows and the trunk and the Vehicle is stolen.

6. LIABILITY INSURANCE. [illegible]

7. ACCIDENTAL FIRE, ACTS OF NATURE. [illegible]

8. RESPONSIBILITY FOR LOSS OF OR DAMAGE TO THE VEHICLE: If Renter declines optional LOSS DAMAGE WAIVER (LDW), Renter is responsible for the FULL VALUE (or lesser amount indicated on reverse side) of any loss of or damage, including loss or damage due to collision, vandalism and theft, and loss of use and expenses, to the Vehicle, regardless of fault, except as [illegible] in Paragraph 7.
If Renter or any Authorized Driver purchases LDW [illegible] use restriction in Paragraph 5, Renter will be respon[illegible] the FULL VALUE (or lesser amount indicated on rever[illegible]) of such loss of or damage (except as provided in Par[illegible]) including actual and consequential damages, costs and [illegible] fees, and LDW will be void.

9. DAMAGED VEHICLE. [illegible]

10. [illegible]

11. PAYMENT. [illegible]

12. REFUELING SERVICE CHARGE. [illegible]

13. RENTER RESPONSIBILITY FOR PROPERTY. [illegible]

14. FAILURE TO RETURN VEHICLE. [illegible] the Vehicle.

15. VEHICLE REPAIRS. Renter will not permit any repair to or replacement of any part [illegible] vehicle without the prior consent of the renting location and Renter agrees [illegible] such unauthorized repairs and parts.

16. MISCELLANEOUS.
A. Renter will pay all costs including reasonable attorneys fees and court costs [illegible] by the renting location, Budget and Sears, and will defend and indemnify [illegible] from all claims, demands and lawsuits resulting from [illegible] the issuance of a warrant for the arrest of Renter [illegible]

[illegible]

FORM # [illegible]

Complaint

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EXHIBIT B

Exhibit B

Budget

LOSS DAMAGE
WAIVER (LDW)

EXHIBIT B

QUESTIONS FREQUENTLY ASKED CONCERNING THE LOSS DAMAGE WAIVER OPTION

WHAT EXACTLY IS LDW?

Simply stated, it's an easy way to make it possible that you may never have to pay a cent out of your own pocket if the vehicle you rent is stolen, vandalized or damaged in an accident.

WHY DOES BUDGET OFFER LDW?

It's another way we make sure your experience with Budget is a totally enjoyable one. LDW is another service that lets us do that. Although it's optional, we think the security LDW provides makes it well worthwhile. It's up to you to return your vehicle in the same condition it was in at the start of the rental, except for normal wear and tear and damage caused by accidental fire or acts of nature. Unfortunately, events do occur. And the last thing you need to worry about when you rent a vehicle is paying for its loss or damage. With LDW, you don't have to give it a second thought. You're relieved of all financial responsibility for loss or damage to the vehicle so long as you have not violated the terms of the Rental Agreement you signed.

HOW MUCH DOES LDW COST?

The daily charge for LDW is stated on the front of the Rental Agreement. If you accept LDW, this charge will be added to your rental for each rental day during the rental period.

WON'T MY OWN INSURANCE COVER ME?

Maybe. It all depends on where you live and what kind of policy you have. Some policies exclude rental vehicles. Or cover rental vehicles only when your vehicle is out of service and the rental is used as a replacement. Other policies charge an additional premium for coverage of rental vehicles. Only your insurance agent can tell you for sure what kind of coverage you have. But remember, even if you're covered and something happens to the rental vehicle, you're responsible for any amount your insurance company doesn't pay.

WHAT HAPPENS IF I DECLINE LDW?

In the event of an accident or loss, you may end up paying a lot more than you bargained for. Even if your insurance covers you, you may have to pay your deductible. You may be faced with an increased premium because you filed a claim. And of course, if your insurance doesn't cover you, you're responsible for the full value of any loss or damage to the vehicle, plus additional costs.

WHAT DO I GET IF I ACCEPT LDW?

You'll get the peace of mind of knowing that we'll pay for the full value of any loss or damage, so long as you do not violate the terms of the Rental Agreement you signed. Again, the choice is entirely yours. But when you consider the frustration and money LDW may save you, we're sure you'll agree that accepting is a wise choice, indeed.

Under the terms of the Rental Agreement, in the event of loss or damage to the vehicle, you're responsible for the full value of such loss or damage, plus costs. The only exceptions are accidental fire or acts of nature, however, you must not breach any provision of the rental agreement. When you accept the optional LDW from Budget, you may be fully relieved of this responsibility.

EXHIBIT C

INTRODUCTION

Thank you for calling 1-800-RENT SMART. If you are calling for brochures please write to: Budget Rent Smart
8700 W. Bradley Rd.
Milwaukee, WI 53224
This toll-free service has been developed by Budget Rent a Car to help you make smart rental decisions, save money, and add value to your vacation or business trip. If you are calling from a touch-tone phone, please press "1" now. If you are calling from a rotary phone, please wait and Budget service representative will be happy to take your call.

1-800 RENT SMART

INTRODUCTION:

Thank you for calling 1 - 800 - RENT SMART. This toll-free service has been developed by Budget Rent a Car to help you make smart rental decisions, save money, and add value to your vacation or business trip.
If you are calling from a touch-tone phone, please press "1" now. If you are calling from a rotary phone, please wait and a Budget service representative will be happy to take your call.

MENU:

- For information on LOSS DAMAGE WAIVER, press "1"
- For information on PERSONAL ACCIDENT INSURANCE or PERSONAL EFFECTS COVERAGE, press "2".
- For information on SUPPLEMENTAL LIABILITY INSURANCE, press "3".
- For information on REFUELING SERVICE OPTIONS, press "4".
- For information on RETURN POLICIES, press "5".
- For information on METHODS OF PAYMENT, press "6".
- For information on CAR RENTAL PRICING, press "7".
- For information on AGE RESTRICTIONS, press "8".
- For information on the BUDGET GUARANTEE, press "9".
- For more information or to make a reservation, consult your travel agent or press "0" now.

LOSS DAMAGE WAIVER

The optional Loss Damage Waiver (LDW) offered by car rental companies is not insurance. It's an option car rental companies offer renters to waive their financial responsibility in the event the car is damaged or stolen while on rent. Budget recommends that you decide whether or not you need LDW before you pick up your car and, if you don't need it, don't buy it. Here's some basic information you need to know in order to make the smart choice.

If you're renting for business, you probably don't need LDW. Check with your corporate travel arranger and follow their guidelines and recommendations.
If you're renting for personal reasons, check your own automobile insurance policy. Many policies do cover rental cars, but - if you decline - the LDW and rely on your own insurance, you would probably still be responsible for paying your usual deductible. Also, "loss of use" fees are not normally covered by personal auto insurance policies. Loss of use means reimbursing the car rental company for the revenue it's lost by having the car out of service while repairs are being made.
Some credit cards offer protection if you use their card to pay for your rental. If your credit card offers coverage, check to see if it offers primary coverage, which initially pays for loss or damage up to set limits, or secondary coverage, which pays only after the primary coverage - such as your auto policy - pays.
At most Budget locations, the cost of LDW is $12.99 a day. If you accept the LDW, $12.99 will be added to your total rental cost for each rental day.
To continue to hear more about LDW, press "1" now.
If you accept LDW, and comply with the terms of the rental agreement, you're relieved of all financial responsibility for loss or damage to the car, including collision, theft and vandalism during the rental.
If you decline LDW, you may be responsible for up to the full value of the car if it is damaged, vandalized or stolen during the rental. You may also be responsible for paying "loss of use" charges.
LDW is not available in all states and certain restrictions may apply in some states. Specific information on availability of the optional LDW can be obtained when making a reservation.
Remember to check out your options in advance, and - if you don't need LDW - don't buy it.
For more information or to make a reservation, consult your travel agent or press "0" now.

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 Seattle 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 general counsel, 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 Budget Rent A Car Systems, Inc., is a Delaware corporation with its principal office and place of business located at 4225 Naperville Road, Lisle, Illinois.

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

ORDER

DEFINITIONS

For purposes of this order:

A. *"Turnback"* means any preset price, premium, bonus, or formula that could result in respondent receiving more than the vehicle's fair market value upon repurchase by the vehicle's original vendor, financer, or their designee.

B. *"Fair market value"* means the vehicle's price as listed in an industry-wide and generally accepted publication or directory of used car values, or the resale price received in a commercially reasonable sale.

C. *"LDW"* means any option that respondent offers that limits or eliminates a renter's liability to respondent for loss of or damage to the respondent's vehicle during the pendency of the rental agreement.

D. *"Insurance"* means the renter's own standard vehicle insurance, and any alternative, supplemental, or secondary coverage the renter possesses that provides coverage for rented vehicles including, but not limited to, the coverage currently furnished by many credit card companies.

I.

It is ordered, That respondent, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any partnership, corporation, subsidiary, division, or other device, in connection with the promoting, offering for rental, or rental of any vehicle, in or for any rental location where it seeks loss of turnback or turnback value in any form for vehicles rented in that location, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, does forthwith cease and desist from:

A. Failing to disclose, clearly and prominently, in connection with any representation relating to the renter's liability for loss of or damage to a rental vehicle, including any representation about LDW, that in the event of loss of or damage to a vehicle for which LDW was declined, respondent may charge the renter between $x and $y [specify range of dollar amounts Budget may seek] more than the cost of repairs or the fair market value of the vehicle, that many insurance companies will not pay this charge, and that the renter will have to pay it. This paragraph applies specifically to, but is not limited to, Budget's rental contracts and to any representation relating to the price or terms of LDW made through respondent's inputs in the "company-specific location" part of third-party, computerized

reservation systems, such as "Apollo," "PARS," "Sabre," or "System One."

Provided, however, that if respondent uses a "short-form" rental contract or other document or electronic form of agreement that makes it impractical to place the required disclosure within the document or form, respondent shall devise other means to ensure that each renter receives the substance of the disclosure before entering into the rental agreement. The other means could include, but are not limited to, a separate disclosure document to be signed or initialed by the renter.

B. Failing to post at each Budget rental location a sign or placard clearly and prominently containing the following language:

> If you decline LDW and the rental car is damaged or stolen, we may charge you between $x and $y [specify range of dollar amounts Budget may seek] more than the cost of repairs or the fair market value of the vehicle. Many insurance companies will not pay this. If yours doesn't, you will have to pay it.

The sign or placard shall be of a size, and posted in a manner, reasonably calculated to elicit prospective renters' attention.

C. Failing to disclose, in a clear and prominent manner in any communication seeking payment of any charge for loss of or damage to a rental vehicle, any part of the charge that is attributable to loss of turnback including, but not limited to, instances where the vehicle is totaled or stolen and respondent is seeking compensation based in whole or part on any turnback amount. This disclosure shall include an explanation of what loss of turnback means and how it was calculated.

II.

It is further ordered, That respondent, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any partnership, corporation, subsidiary, division, or other device, in connection with the promoting, offering for rental, or rental of any vehicle, in or for any rental location where it seeks loss of turnback or turnback value in any form for vehicles rented in that location, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, does forthwith cease and desist from misrepresenting, in any manner, directly or by implication:

(1) The obligation of the renter to make any payment as the result of the loss of or damage to a rental vehicle; and

(2) The value of a vehicle that has been lost or damaged.

III.

It is further ordered, That no provision of this order is intended to preempt any state law, regulation, or administrative interpretation that may limit or prevent respondent from collecting loss of turnback from a renter.

IV.

It is further ordered, That respondent shall pay into an interest-bearing escrow account designated by the Commission, under the control of the Commission's designated agent, the sum of $75,000 on or before five days from the date of service of this order. This shall fully satisfy all monetary claims asserted by the Commission in the complaint filed herein against this respondent and shall be used to provide redress to consumers who made a payment to respondent and to pay any attendant expenses of administration. If the Commission determines, in its sole discretion, that redress to consumers is wholly or partially impracticable, any funds not so used shall be deposited into the United States Treasury. No portion of respondent's payment shall be deemed a payment of any fine, penalty, or punitive assessment. Respondent shall be notified as to how funds are disbursed but shall have no right to contest the manner of distribution chosen by the Commission.

V.

It is further ordered, That respondent shall, for three years from the date of service upon it of this order, distribute, or cause to be distributed, a copy of this order to all present and future division, regional, branch, and subrogation managers who have management responsibilities relating to the collection of collision or theft damages from renters.

VI.

It is further ordered, That respondent shall, for three years from the date of service of this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying all documents relating to compliance with this order.

VII.

It is further ordered, That respondent shall, for 10 years from the date of service of this order, notify the FTC in writing at least 30 days prior to the effective date of any proposed change in its corporate structure, such as dissolution, assignment, or sale resulting in the emergence of successor corporations, the creation or dissolution of subsidiaries, or any other changes in the corporation that may affect compliance obligations arising out of this order.

VIII.

It is further ordered, That respondent shall, within 60 days from 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.

IX.

It is further ordered, That this order will terminate on June 17, 2016, 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; and

B. This order if the complaint is filed after the order has terminated pursuant to this paragraph.

Provided further, that if the 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 the complaint is filed and the later of the deadline for appealing the dismissal or ruling and the date the dismissal or ruling is upheld on appeal.

IN THE MATTER OF

NORDICTRACK, INC.

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

Docket C-3675. Complaint, June 17, 1996--Decision, June 17, 1996

This consent order prohibits, among other things, a Minnesota-based manufacturer of exercise equipment from misrepresenting the benefits, efficacy, or performance of such products in promoting weight loss or weight maintenance, and requires the respondent to possess reliable evidence to substantiate such claims in the future.

Appearances

For the Commission: *Kerry O'Brien, Linda Badger* and *Jeffrey Klurfeld.*

For the respondent: *Pamela Deese, Robins, Kaplan, Miller & Ciresi*, Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that NordicTrack, 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 NordicTrack, Inc. is a Minnesota corporation, with its principal office or place of business at 104 Peavey Road, Chaska, Minnesota.

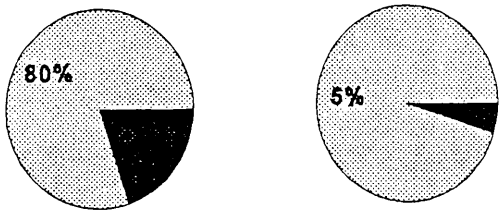
PAR. 2. Respondent has manufactured, advertised, labelled, offered for sale, sold, and distributed various exercise equipment to consumers, including its cross-country ski exercisers.

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 its cross-country ski exerciser,

including but not necessarily limited to the attached Exhibits A-E. These advertisements contain the following statements and depictions:

A. NordicTrack simply gives you a better work-out in less time and that makes losing weight easy. Here's proof. In a recent survey, people who purchased their NordicTrack to lose weight, said they lost an average of 17 pounds,
{depicting a woman exercising on a NordicTrack losing weight as she continues to use the machine}
{on screen: Lost an Average of 17 lbs. Individual results vary.}
and what's more, 80% said they kept it off for at least one year. Now that is true success especially when you compare that to diets where only 5% keep the weight off after a year.
{on screen: Weight off for one year



NordicTrack Dieting}

But even more impressive is how easy it is to attain those benefits for yourself. . . .
. . . .
A lot of people use NordicTrack to lose weight. If that's your fitness goal, then be sure and stay with us because when we come back you'll learn about NordicTrack's incredible, proven weight loss program ...
. . . .
. . . you will get results. That's something you really can't get from diet centers or ordinary exercise machines. But you can with NordicTrack. Just look at these statistics. Seven of every 10 people who bought NordicTrack to lose weight, lost an average of 17 pounds.
{on screen: 7 in 10 lost 17 lbs! Individual results vary.}
. . . And if you're really concerned about losing weight, this statistic is really impressive. 80% of those who lost weight using NordicTrack kept it off for one year or more.
{on screen: 80% kept the weight off for over one year. Study of owners who purchased NordicTrack to lose weight}
You too can lose weight because NordicTrack is a proven formula for taking weight off and keeping it off. (Exhibit A: infomercial)

B. In fact, research shows that of those who bought a NordicTrack to lose weight, 7 in 10 lost an average of 17 pounds. And 80% of them kept it off for over a year. (Exhibit B: print ad) (emphasis in original)

C. Diets alone don't work.

Diets don't keep the weight off. But studies reveal that 8 in 10 people who bought a NordicTrack for weight control lost an average of 17 pounds. And after a year, they still kept it off!
Our calorie-blazing workout is the best way to lose and keep off the weight (and waist).
The easy way to melt pounds away.
NordicTrack's *patented flywheel and one-way clutch system* provides a smooth workout that takes as little as 20 to 30 minutes, 3 times a week.
(Exhibit C: print ad)

D. NordicTrack: Fastest way to melt your winter fat. ... And it takes as few as 20 minutes, three times a week. Lose weight fast with "The World's Best Aerobic Exerciser®." . . . That's why NordicTrack users recently lost an average of 18 lbs. - in just 12 weeks. (Exhibit D: print ad) (emphasis in original)

E. HOW 20 MINUTES CAN CHANGE YOUR LIFE.
NordicTrack gives you more of a workout in less time than any other in-home exerciser. It's the best way to get the exercise you need to enjoy a long, healthy life. It's the only way to get the total-body workout that has changed the way America exercises. And all it takes is 20 minutes, three times a week.
. . . .
When you begin your regular NordicTrack workouts, you'll be proud of how fast you achieve your goals.
- If weight loss is your goal, research shows that on average, people can lose 18 pounds in just 12 weeks with NordicTrack.

(Exhibit E: print ad)

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

A. Seventy or eighty percent of those who purchased a NordicTrack cross-country ski exerciser to lose weight lost an average of seventeen pounds;
B. Eighty percent of those who purchased a NordicTrack cross-country ski exerciser to lose weight and lost weight using it maintained all of their weight loss for at least a year;
C. Eighty percent of those who purchased a NordicTrack cross-country ski exerciser to lose weight maintained all of their weight loss for at least a year;
D. Consumers who use NordicTrack cross-country ski exercisers for twenty minutes a day, three times per week, lose an average of eighteen pounds in twelve weeks.

PAR. 6. Through the use of the statements and depictions contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits A-E, respondent has represented, directly or by implication, that at the time it made the representations set forth in paragraph five, respondent possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 7. In truth and in fact, at the time it made the representations set forth in paragraph five, respondent did not possess and rely upon a reasonable basis that substantiated such representations. Respondent based its success rate claims on studies which suffered from various methodological flaws. The results of the studies reflect the experiences of only a highly selected population of purchasers who were able to integrate the NordicTrack cross-country ski exerciser into their regular, weekly, exercise regime. One such study involved putting thirty-eight participants through a rigorous twelve-week exercise program. Respondent based weight-loss claims on the average weight loss experienced by the twenty participants (53%) able to complete the program. The studies also failed to take into account changes in the dietary habits of purchasers. Furthermore, the studies were based on self-reported body weights, unadjusted for bias, which may yield inaccurate results. As a result of these methodological flaws, respondent's studies did not constitute a reasonable basis that substantiated the representations set forth in paragraph five. Therefore, the representation set forth in paragraph six was, and is, false and misleading.

PAR. 8. Through the use of the statements and depictions contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits A-E, respondent has represented, directly or by implication, that competent and reliable research or studies prove the representations set forth in paragraph five.

PAR. 9. In truth and in fact, competent and reliable research or studies do not prove the representations set forth in paragraph five. Therefore, the representation set forth in paragraph eight was, and is, false and misleading.

PAR. 10. Through the use of the statements and depictions contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisement attached as Exhibit A, respondent has represented, directly or by implication, that

only five percent of those who lose weight on diets keep the weight off after a year.

PAR. 11. Through the use of the statements and depictions contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisement attached as Exhibit A, respondent has represented, directly or by implication, that at the time it made the representation set forth in paragraph ten, respondent possessed and relied upon a reasonable basis that substantiated such representation.

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

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

EXHIBIT A

NordicTrack Infomercial
"Change Your Life With NordicTrack" 28:30

ANNOUNCER: The following is a paid advertisement, presented by NordicTrack, Incorporated.

KAY TAYLOR, Nordictrack owner: I feel healthy. I feel full of energy. I feel like everybody should have one. (laughs)

JACKIE CASHION, Nordictrack owner: After the workout you can feel your arms, your upper back, your lower back, your hips, legs, abdomen, everything. It's really a whole body workout, and you just can't get that with any other kind of machine.

MIKE HORSFALL, Nordictrack owner: NordicTrack has helped me stick with a fitness program. And if I can do it, you can do it.

ANNOUNCER: What do all these, and 3 million people like them have in common? What makes them healthier and happier than they've ever been? The answer is NordicTrack, the world's best aerobic exercise machine. All across America, people have discovered that NordicTrack is the key to taking control of their lives. Today, you'll learn how you can dramatically improve your life, and how you can benefit from finding the NordicTrack body inside you. You'll discover how NordicTrack is the best way to lose weight, shape your body, condition your heart, and increase your energy so you'll look and feel your best. NordicTrack -- America's leading fitness company, with the machine that's been featured in Shape, Men's Health, Fitness, USA Today Magazine, and featured in

leading publications everywhere. The superior choice recommended by Consumer's Digest, the Made in America Foundation, and the American Fitness Association. And used by people like you everywhere, who have changed their lives for the better.

BOB SEAGREN: Hi I'm Bob Seagren. And today, NordicTrack and I would like to invite you to learn more about the world's best aerobic exerciser, why it's so effective, and how it can change your life too.

You know, a few years ago, around 26 to be exact, I didn't have much trouble staying in shape. A couple of decades and a few pounds later, staying fit wasn't quite so easy. So I began looking for the best aerobic exercise anywhere. And a couple of years ago, I found it. In fact, I like it so much, I went on television to talk about it: "Once I tried NordicTrack, I was hooked. Its total body motion relaxed my muscles and helped me release pent up tension. And mentally, I felt better." {scenes from "Inside Track to Fitness"} That was two years ago. At the time, almost a million people had already discovered that NordicTrack could change their lives. Since then, nearly 2 million more have gotten on track, and changed their lives with the benefits of NordicTrack. Benefits like proven weight loss, and faster cardiovascular conditioning. Because the NordicTrack workout actually burns more calories with less effort. That's why NordicTrack users get better results with a machine they also love to use. But you don't have to be a cross-country skier or even an athlete to enjoy the benefits of NordicTrack. You just need a desire to change your life.

For eighteen years now, people just like you have been using NordicTrack because it works. And today, we'll talk with some of these people about the changes they've made in their lives when they took that first step onto a NordicTrack. We'll also visit with the father of aerobic exercise, Dr. Kenneth Cooper. When we come back, they'll explain why NordicTrack is the world's best aerobic exercise machine, and how easy it can be for you to improve the way you look and feel, and get your life on the right track.

DRAMATIZATION: When Brian first joined the company, I thought, "He's cute. Kinda chunky, but cute."

Gwen was the first person I met when I started my new job. And she had a nice personality, but she didn't really look like my type.

Then I began to notice a difference in Brian. He was looking -- great. I could tell he was losing weight, but it was more than that.

Yeah, I had dropped some pounds. But so had Gwen. And she looked TERRIFIC. He was just so full of life. It's like he found his secret. Um -- I wanted to know more about it. And more about him, too.

So I finally asked her what she had been doing, because whatever it was, it was working.

It was NordicTrack. (both laugh.)

I lost 15 pounds in just two months.

Now I'm a size 8, and I'm loving my new life.

Our new life.

Our new life.

BOB SEAGREN: NordicTrack; not only can it change your shape it can change your life.

You know, NordicTrack works far more effectively than other exercise equipment, because only NordicTrack accurately simulates the best aerobic exercise in the world -- cross-country skiing. On a NordicTrack, you can burn up to 1,100 calories an hour because it works on all your muscle groups, both lower and upper body, unlike ordinary exercisers. In fact, four separate studies have proven that NordicTrack burns more calories, up to 51% more than stationary bicycles. Up to 39% more than shuffle-type skiers, up to 61% more than stairsteppers. And, at normal exercise levels, up to 32% more calories than ordinary treadmills.
NordicTrack simply gives you a better work-out in less time and that makes losing weight easy. Here's proof. In a recent survey, people who purchased their NordicTrack to lose weight, said they lost an average of 17 pounds,
{depicting a woman exercising on a NordicTrack losing weight as she continues to use the machine}
{on screen: Lost an Average of 17 lbs. Individual results vary.}
and what's more, 80% said they kept it off for at least one year. Now that is true success especially when you compare that to diets where only 5% keep the weight off after a year.
{on screen: Weight off for one year

NordicTrack Dieting}

But even more impressive is how easy it is to attain those benefits for yourself. That's why I'm talking with NordicTrack owners who perhaps just like you are looking for a better way to get in shape and stay that way for life. People like Diane Hall. Hi Diane.
DIANE HALL, NordicTrack owner: Hi Bob.
BOB SEAGREN: Diane, how did you become a NordicTrack owner?
DIANE HALL: My husband and I knew we needed to get into some sort of fitness program. We saw the show on TV, so we called for the free tape, and watched that, and we were sold.
BOB SEAGREN: What do you like most about NordicTrack?
DIANE HALL: I think the biggest surprise was that I lost 20 pounds without any dieting at all. I think that's a wonderful benefit.
BOB SEAGREN: And now let's hear what some other people have to say about the world's best aerobic exercisers.
KAY TAYLOR: It's actually fun. I mean it doesn't get boring to me, and I can just work at it, and I know what it's doing, because I can feel it.
MIKE HORSFALL: Having the NordicTrack there, and because its fun to use, it has kept me on some sort of exercise regime which is even more important the older you get.
CHAR STUART, Nordictrack owner: Its making me a healthier person. And I truly believe it is. It's just very easy to use.

BOB SEAGREN: You know the NordicTrack really is easy to use. You just step on the wooden skis. Your feet fit comfortably into the toe cuffs, and you'll begin walking. It's a nice, natural gliding motion, as you shift your weight from side to side. Your hips rest comfortably against a contoured pad. And when you're ready, just add your arms. They'll swing in a smooth, natural unrestricted arc -- it's really as easy as that. The NordicTrack is not jarring like some machines. It's all low impact. So it won't damage your ligaments or joints. And like Diane and millions of other users have discovered, NordicTrack makes a regular exercise routine easy, because in as little as 20 minutes three times/week, you can get the world's best total body workout right in the comfort of home. No wonder 7 out 10 owners still use their NordicTracks regularly, 5 years after buying them. That's right, 7 out of 10, and here's why.

JACKIE CASHION: NordicTrack is the machine that you can use for the rest of your life. Um, it's low impact, and it gives you a really good workout. You don't have to worry about hurting yourself.

MIKE HORSFALL: I tend to not be motivated by things that aren't very much fun, and NordicTrack is fun.

CHAR STUART: It's so convenient, it makes you not mind exercising.

BOB SEAGREN: It's obvious by now that NordicTrack is incredibly effective. Study after study rates it as the best aerobic exercise machine in the world, That's because research has proven that cross-country skiing is the world's most effective exercise, and NordicTrack simulates it best. And while there are other exercise machines on the market only NordicTrack's legendary flywheel design, and its patented upper arm exerciser, give you the smooth, total body motion of cross-country skiing. That's what makes NordicTrack a NordicTrack.

You won't get it with a stairstepper; you won't get it with a bike, or a treadmill. You only get it with NordicTrack.

You know, getting fit isn't just about changing the way you look, its also about changing the way you feel. You can feel healthier. You can feel more energetic. All it takes is a few minutes, three times a week. And, one simple phone call.

BARBARA at Nordictrack: Hi, here at NordicTrack, we get thousands of calls everyday from people wanting to feel better, look better, and take control of their lives. And everyday we give them the help it takes to achieve those goals. Because when you buy a NordicTrack, you're not only getting the world's best aerobic exercise machine, you're also getting the help and support of a company that's been a recognized leader in aerobic conditioning for more than 18 years. So if you're not sure how to use your equipment, need help planning a fitness program, or have other questions for our fitness counselors, just call our toll-free support line. We're there to help you succeed. It takes as little as 20 minutes/day, 3 times/week. And you'll be on your way to success. And your NordicTrack body.

ANNOUNCER: Call our toll-free number on your screen now, and we'll send you absolutely free, this 30 minute video, plus this 16 page brochure with information on how to achieve your individual fitness goals with any one of our 7 NordicTrack models. Every NordicTrack is backed by our two year limited warranty, and lifetime assurance program. Call now, and learn how easy it is to own a NordicTrack with our new easy-pay plan.

BARBARA AT NORDICTRACK: You can take control, and improve your life. It's as easy as picking up the phone, and calling the number on your screen now. Get on the right track; the track to better health, because you can change your life.
BOB SEAGREN: Cross-country skiing -- fluid, natural, and because it uses all the body's major muscle groups, the best aerobic exercise in the world.
Hi, I'm Bob Seagren. Aerobic exercise has been popular for years, because it's recognized everywhere as the best way to lose fat, get your heart in shape, and control your weight. But not all aerobic exercise is created equal. That's why we spoke with Dr. Ken Cooper, of the Cooper Aerobics Institute in Dallas, Texas. Dr. Cooper's pioneering research, and promotion of aerobic conditioning, has earned him the recognition as the founder of the modern aerobics movement. Let's hear what the man who literally wrote the book on aerobics has to say about the best aerobic exerciser in the world.
DR. KENNETH COOPER: Why is cross-country skiing so good? Any exercise that involves the arms and legs gives you synergistic effect. What does that mean? One plus one equals three. Any time you can combine the arms and legs into the activity, you get more benefit in a shorter period of time. So I'm safe in saying that the best aerobic activity, bar none, is cross-country skiing. Alright, if that is true, how does it relate to something like the NordicTrack? Well, the answer is that we can't all go out and cross-country ski; it's not readily available, but these new devices like the NordicTrack so simulate cross-country skiing that the results are almost the same. I've been promoting NordicTrack for years and years. And always complimentary because it's a good device.
BOB SEAGREN: As you can see, aerobic exercise is an important way to improve your life. But as we've just discovered, not all aerobic exercise is created equal. And the same holds true for aerobic exercise equipment. You see, stationary bicycles mainly work the thigh and hamstrings. Treadmills work the upper and lower leg area, but neglect the upper body. And stairsteppers miss this important area, too.
Only NordicTrack includes all the muscle groups used in cross-country skiing. Ankles, and achilles tendons. Calf muscles. Hamstrings. Thighs. And the gluteus muscles. But unlike others, NordicTrack also works and tones the muscles of the back, abdomen, shoulders, biceps, triceps, and pectorals. By working the muscles above your waist, NordicTrack increases your body's oxygen consumption dramatically. That's why you'll burn more calories on a NordicTrack than with ordinary equipment. Up to 51% more than stationary bicycles, 32% more than ordinary treadmills at normal exercise levels. And up to 61% more than stairsteppers.
With ordinary exercise equipment, you'll have to work longer, harder, or both just to achieve the same aerobic benefits as 20 minutes on a NordicTrack. This total body approach has another positive benefit to keeping your workout on track. NordicTrack feels less stressful because your workout is spread across more muscles. In three separate head-to-head tests, NordicTrack was consistently rated as feeling more comfortable to use and less stressful than other exercisers.
And quite honestly, if you're like me, that means you're more likely to stick with it. So if you're going to invest money, invest in the machine that gives you proven results, NordicTrack.

TIFFANY WAGGONER, NordicTrack owner: I know absolutely that I'm stronger than I've been in a very long time.
KAY TAYLOR: I lost 10 pounds since I started with my NordicTrack.
JACKIE CASHION: You have not a lot of time, and you want to get a good workout. NordicTrack's the best.
BOB SEAGREN: Here's another reason NordicTrack is superior to ordinary exercise equipment. It's a low impact, non-jarring workout, that's easy on your joints and ligaments. Unlike the strain your knees take on a stairstepper, or the pounding your back and hips take on a treadmill. All of which explains why the NordicTrack is preferred 6 to 1 over ordinary equipment. And, why people like Clem Birch have gotten on track to a better life. Hi Clem.
CLEM BIRCH, NordicTrack owner: Hi Bob, how are ya?
BOB SEAGREN: Good. Clem, what made you buy a NordicTrack?
CLEM BIRCH: Well, actually, my doctor recommended that I buy it. After my second heart attack, he said, get a NordicTrack.
BOB SEAGREN: Why did your doctor recommended NordicTrack?
CLEM BIRCH: Well, first thing he told me was that he himself used one, three times/week. And he told me it was the most efficient way for me to exercise that would be easiest on my bones and body structure.
BOB SEAGREN: Clem, what would you say to someone considering buying a NordicTrack?
CLEM BIRCH: I'd say the same thing my doctor said, go get a NordicTrack, it is really the best exercise machine on the street.
BOB SEAGREN: Has using the NordicTrack changed your life?
CLEM BIRCH: Yeah, it's changed my life. It lets me live it everyday.
BOB SEAGREN: Clem, thank you very much. You know it's a story we hear time and time again. That's because NordicTrack is the better way to get your heart in shape.
Recent University and clinical research concluded that NordicTrack conditions your cardiovascular system 24% more efficiently than exercise bikes, 32% better than treadmills, and over 35% more than stairsteppers.
Research shows that in 12 weeks, NordicTrack users were able to decrease their blood pressure 12%. With results like this, isn't it time you decided to change your life -- with NordicTrack.
A lot of people use NordicTrack to lose weight. If that's your fitness goal, then be sure and stay with us because when we come back you'll learn about NordicTrack's incredible, proven weight loss program with the satisfaction guarantee. Stay tuned.
DRAMATIZATION: I turned 40 today. 40. I used to dread the thought of it. I used to think whoever said life begins at 40 was nuts. And then about a year ago, I went in for a physical. The doctor said I had problems. High cholesterol. High blood pressure. Weight. Stress. You get the idea. Said I was a walking time bomb -- that had better do something now about getting into shape.
Hey, it wasn't like I hadn't tried. You know, the health club, jogging, but there was always an excuse, and nothing seemed to work, and I never had the time. Then I discovered NordicTrack. Just 20 minutes, 3 times a week at home. Easy. And right at home. And my blood pressure - down. Cholesterol - down. And you know what? I've kept my weight off. And more importantly, I feel just great. So that person who said life begins at 40, well, they were right. Thanks, NordicTrack.

BARBARA at Nordictrack: Satisfied owners write us all the time, telling us about how much they love their NordicTrack. Some of them have been in use for as long as 15 years. The fact that a NordicTrack will last so long shouldn't be a surprise. You see, each NordicTrack is built by hand, right here in the United States, by people who take pride in making your machine solid and durable, as well as beautiful. This level of craftsmanship is unsurpassed in the fitness equipment industry. It's what sets NordicTrack apart from the rest. So when you buy one of our machines, you get not only the world's best aerobic exerciser, you also get the commitment and support of a company that's been helping people achieve better health for years. That's why now more than 3 million people use a NordicTrack. It's built to last, by the company that invented the aerobic cross-country ski exerciser.

ANNOUNCER: Call our toll-free number on our screen now. And we'll send you absolutely free this 30 minute video, plus this 16 page brochure with information on how to achieve your individual fitness goals with any one of our seven NordicTrack models. Every NordicTrack is backed by our 2-year limited warranty, and lifetime assurance program. Call now, and let our affordable new easy pay plan put you on track, so call now.

BARBARA at Nordictrack: Just 20 minutes a day, 3 times a week, and you'll be on your way to discovering the NordicTrack body inside you. Start by calling the number on your screen now. We'll send you your free NordicTrack brochure and video, and help you get on the right track, the track to better health and a better life. Call now.

BOB SEAGREN: Inside everybody is a better body, a NordicTrack body. Millions of people have discovered it, they've experienced how good it feels to be toned, and alert, instead of overweight and sluggish. And you can discover, too, just how easy it is to attain your NordicTrack body, thanks to the world's best aerobic exerciser. When I was in training for the Olympics back in the late 60's, keeping weight off wasn't a concern. But losing weight is something just about all of us face at one point in our lives. And while diet plays an important role, research proves over and over that a consistent aerobic exercise program is the key to success.

As we've learned, there is absolutely no better aerobic exercise than cross-country skiing. We've also learned that only NordicTrack, with its legendary flywheel design, realistically simulates the fluid motion of cross-country skiing, giving you a total body toning and conditioning workout. That's why the makers of NordicTrack can confidently offer you this: it's called the proven weight loss program, and your satisfaction is guaranteed. Here's how it works:

Call to order a NordicTrack. Use it for 30 minutes, 4-5 times a week, and you can say good bye to 10 pounds in 60 days. That's right, 10 pounds in 60 days. If you're not completely satisfied, return your machine, and NordicTrack will refund the purchase price in full. Your satisfaction is guaranteed. And you will get results. That's something you really can't get from diet centers or ordinary exercise machines. But you can with NordicTrack. Just look at these statistics. Seven of every 10 people who bought NordicTrack to lose weight, lost an average of 17 pounds.

{on screen: 7 in 10 lost 17 lbs! Individual results vary.}.

That's because NordicTrack uses all the body's major muscle groups, burning more fat and calories with less effort. This also makes for faster cardiovascular

conditioning. And if you're really concerned about losing weight, this statistic is really impressive. 80% of those who lost weight using NordicTrack kept it off for one year or more.

{on screen: 80% kept the weight off for over one year. Study of owners who purchased NordicTrack to lose weight}

You too can lose weight because NordicTrack is a proven formula for taking weight off and keeping it off.

Looking better, feeling better, that's what NordicTrack is all about. It's a way to take control of your life and become a happier, healthier person.

Better health is something everybody's talking about these days. There are lots of programs and equipment that claim to help. But why do more than 11,000 doctors recommend NordicTrack to their patients? Well, to answer that question, we interviewed Dr. Ken Cooper, of the Cooper Aerobics Institute in Dallas, Texas.

DR. KENNETH COOPER: For years I asked people what motivates them to continue exercising. Nearly all the people come back with the same answer: it makes me feel good. They are less depressed, they are less (?). They have an improved self image, a much more positive attitude towards life, and fewer somatic complaints. You're different psychologically when you're fit. And time is a big factor as far as exercise is concerned, people tell me they don't have the time, they don't have the place, they don't have the energy, they don't have the equipment, they don't have the money, whatever it may be, so if we could make sometime efficient, and you get more benefit in a short period of time, the Americans want to hear that. And that's the advantages of the equipment such as a NordicTrack that incorporates the arms and legs of the activity. You get more benefit in a shorter period of time.

BOB SEAGREN: Two years ago when I discovered this remarkable exerciser, I went on TV to talk about it. At that time, over a million people were using NordicTrack, with its legendary flywheel, patented upper arm exerciser, hand built durability, and beauty. The only machine that accurately simulates cross-country skiing, the world's best aerobic exercise. Since that show two years ago, nearly 2 million more have gotten on track. Today we have somebody who has changed his life for the better, John Kirk. Hi John.

JOHN KIRK, NordicTrack owner: Hello, Bob.

BOB SEAGREN: Please sit down. John, what motivated you to buy a NordicTrack?

JOHN KIRK: The fact that I had gotten obese. I went to a company physical, and my doctor told me those very same words.

BOB SEAGREN: Have you lost weight with the NordicTrack?

JOHN KIRK: Yes, I have. I was able to take off 57 pounds, and I've managed to keep it off for two years now.

BOB SEAGREN: What would you say to someone considering buying a NordicTrack?

JOHN KIRK: Well, I would say don't compromise with anything but a NordicTrack.

BOB SEAGREN: John, thanks for being with us.

JOHN KIRK: You're welcome, Bob.

DRAMATIZATION: Dear NordicTrack: 11 years ago, my husband and I realized we had to do something about the way we looked and felt. Frank had high blood pressure. I needed to lose some weight. Our doctor recommended we buy

NordicTrack, and we did. I can't imagine living these past 11 years without it. Frank's blood pressure is down, and both of us lost weight. The real miracle is how we feel. All the things that we love to do that we never even considered before NordicTrack. And now that we're grandparents, we need our extra energy more than ever. It's also a real pleasure to realize that someone still makes a product that lasts. Frank always talks about how solid and smooth it still is. I just like how the wood looks, so beautiful. So, even though I had wanted to write and thank you for a long time, the real reason for this letter is that I wish to order a NordicTrack for my daughter. She wants to lose a few pounds, and feel like her old active self again. You see, she just gave us a beautiful new grandson. Take it from me, nobody's going to need that extra energy more than her.

BOB SEAGREN: NordicTrack truly is the world's best aerobic exerciser. It works muscles that bikes, stairsteppers, and treadmills miss entirely. It burns more calories, up to 1100 per hour. Burns fat faster. Conditions your heart faster. Yet it's low impact, and feels more comfortable to use. And because it's easy to get results, you'll stick with it. Remember, after 5 years, 7 in 10 NordicTrack owners still use their machines regularly. They changed their lives, you can too.

With NordicTrack, you'll get the legendary flywheel, adjustable resistance for both legs and arms, to tailor your workout. And, unlike most other fitness equipment made of plastic and aluminum, the NordicTrack is constructed of wood and steel for strength and durability. You also get optional features such as: independently calibrated upper and lower body resistance; adjustable elevation to vary the intensity of your workout. Computerized electronics to monitor your progress. Carved ski tips with brass accents. And authentic ski grips, for a more realistic simulation of cross-country skiing. Wheels, for portability. Folding for easy storage. The beautiful craftsmanship of a quality product handmade in America. And a 3 point lifetime assurance program that includes your in-home trail, a two-year limited warranty, and a toll free customer hotline. Prices are very affordable, starting at just $339.95, less than what you'd pay for a year at a typical health club, and half the price of most treadmills. Only NordicTrack offers proven results.

If you want to lose weight, reduce stress, increase your energy and stamina, or simply feel better, give us a call, and see how easy it is to get on track for live.

BARBARA at Nordictrack: Hi I'm Barbara, here at NordicTrack. For the best aerobic workout, for convenience and affordability, you just can't do better than NordicTrack. But don't take my word for it, every year we get thousands of letters from happy NordicTrack owners. Here's what some of the them say:

ROBERT PENZA, NordicTrack owner: Dear NordicTrack. I have used bikes and rowers, and they did not compare to the total body workout I get from my NordicTrack.

DIANE BURKE, NordicTrack owner: My husband and I are very big fans of our NordicTrack. It has changed our lives. It's great for relieving stress, and the NordicTracks keep me from feeling old.

GERALD P. MCKENNA, NordicTrack owner: I'm 72 years young, and have been "tracking" since 1980.

BARBARA at Nordictrack: At NordicTrack, we don't just make machines, we make a difference in people's lives, and we'd like to make a difference in yours.

ANNOUNCER: Call our toll-free number on your screen now, and we'll send you absolutely free this 30-minute video, plus this 16-page brochure with information

on how to achieve your individual fitness goals with any one of our seven NordicTrack models. And of course, every NordicTrack is backed by our two-year limited warranty, and lifetime assurance program.

BARBARA at Nordictrack: Haven't you put off owning a NordicTrack long enough? Call now.

ANNOUNCER: There's a NordicTrack model to fit every fitness goal and budget. Our new easy pay plan is the affordable way to own a genuine NordicTrack for as little as $19.95/month.

MICHELLE ANDERSON, NordicTrack owner: What would I tell people about NordicTrack? I'd tell them that it's the best there is. The best exercise, the best investment, for the best you.

JOHN KIKTA, NordicTrack owner: I changed my life with NordicTrack. Now I can play harder, work harder, and just enjoy life more.

ANN PRICE, NordicTrack owner: I changed my life in just 20 minutes a day, three times a week, with NordicTrack.

DONALD BLACK, M.D., NordicTrack owner: I changed my life thanks to NordicTrack. And you can change your life, too.

ANNOUNCER: NordicTrack would like to thank Olympic gold medalist Bob Seagren, Dr. Kenneth Cooper, these fine publications, and our valued NordicTrack owners.

The preceding program was a paid advertisement by NordicTrack Incorporated.

EXHIBIT B

Home Magazine

EXHIBIT B

EXHIBIT C

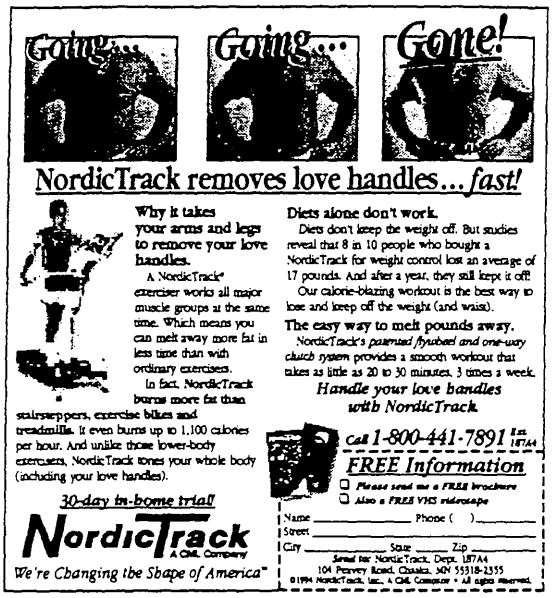

Going...
Going...
Gone!
NordicTrack removes love handles... fast!
Why it takes your arms and legs to remove your love handles.
A NordicTrack® exerciser works all major muscle groups at the same time. Which means you can melt away more fat in less time than with ordinary exercisers.
In fact, NordicTrack burns more fat than stairsteppers, exercise bikes and treadmills. It even burns up to 1,100 calories per hour. And unlike those lower-body exercisers, NordicTrack tones your whole body (including your love handles).
Diets alone don't work.
Diets don't keep the weight off. But studies reveal that 8 in 10 people who bought a NordicTrack for weight control lost an average of 17 pounds. And after a year, they still kept it off!
Our calorie-blazing workout is the best way to lose and keep off the weight (and waist).
The easy way to melt pounds away.
NordicTrack's patented flywheel and one-way clutch system provides a smooth workout that takes as little as 20 to 30 minutes, 3 times a week.
Handle your love handles with NordicTrack.
30-day in-home trial!
NordicTrack
A CML Company
We're Changing the Shape of America™
Call 1-800-441-7891 Ext. 187A4
FREE Information
Please send me a FREE brochure
Also a FREE VHS videotape
Name _____ Phone ( ) _____
Street _____
City _____ State _____ Zip _____
Send to: NordicTrack, Dept. 187A4
104 Peavey Road, Chaska, MN 55318-2355
©1994 NordicTrack, Inc., A CML Company • All rights reserved.

EXHIBIT D


NordicTrack: Fastest way to melt your winter fat.
You'll burn more fat in less time than with stairsteppers, exercise bikes or treadmills.
During winter, fat builds up and pounds add up. And those ordinary exercises that work just your lower body don't use enough of your muscles to efficiently burn the fat. But the NordicTrack® exercise works every major muscle group in your body. That's why research shows you'll burn more than 1½ times more fat than with any ordinary exercise. NordicTrack trims your body faster.
Hard on fat, easy on your body.
Our patented flywheel and one way clutch system offer a non-jarring motion that's easy on your joints. Research also shows that NordicTrack feels easier to use than stairsteppers and exercise bikes. Our total body workout spreads the effort across your entire body, so no muscle gets strained. And it takes as few as 20 minutes, three times a week.
NordicTrack Burns More Calories Than Exercise Bikes Or Steppers
Steppers Up to 61% LESS
Exercise Bikes Up to 51% LESS
NordicTrack
Lose weight fast with "The World's Best Aerobic Exerciser®."
NordicTrack has simulates cross country skiing, which fitness experts agree is the best aerobic workout, bar none. That's why NordicTrack users typically lose an average of 14 lbs. — in just 13 weeks. Why settle for an inferior workout? Get on Track® with NordicTrack!
Call 1-800-441-7891
Ext. 377C4
FREE Video and Brochure
Please send me a FREE video.
Also a FREE 1995 catalogue.
Name
Street
City
Phone ( )
State
Zip
NordicTrack A CML Company
This Year Get In Shape For Good!
30-day in-home trial!

EXHIBIT E-1

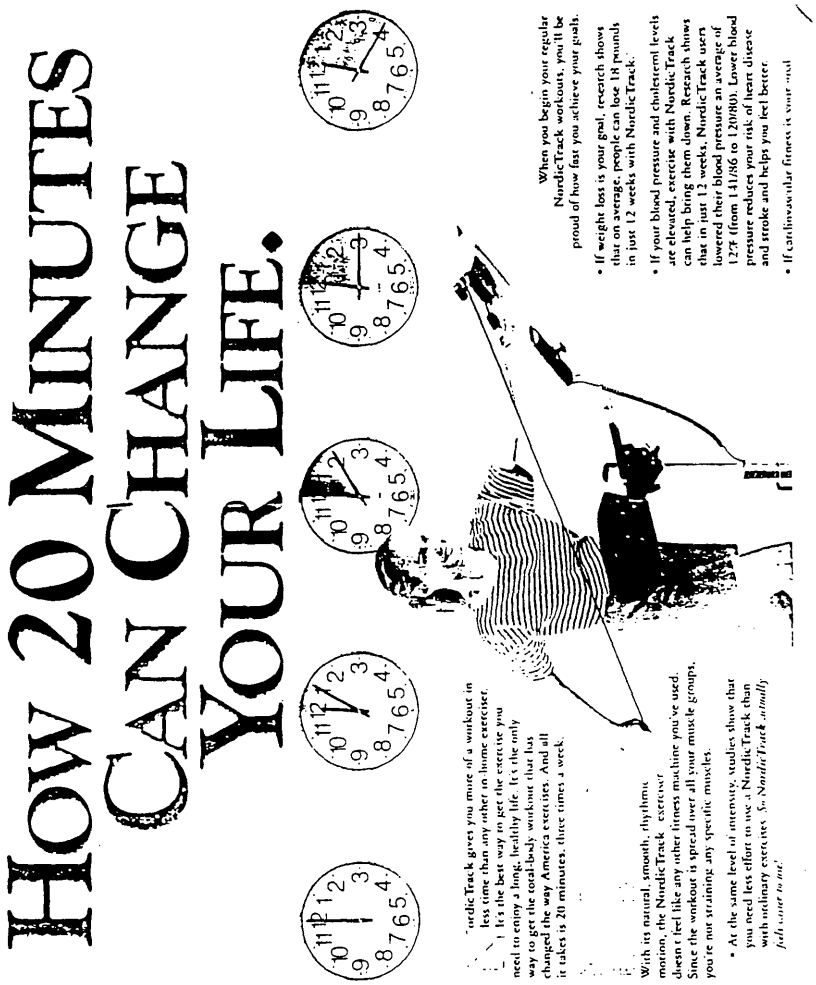


EXHIBIT E-1

EXHIBIT E-2

NordicTrack
A CML Company
THE ORIGINAL IN-HOME SKI MACHINE IS STILL YOUR BEST CHOICE.
SINCE 1976, OVER 3 MILLION PEOPLE ACROSS AMERICA HAVE CHANGED THEIR LIVES WITH NORDICTRACK.
1-800-441-7891
FOR AS LITTLE AS $19.95* A MONTH...FEEL LIKE 3 MILLION.

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, 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 NordicTrack, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Minnesota, with its office and principal place of business located at 104 Peavey Road, in the City of Chaska, State of Minnesota.

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 NordicTrack, 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, labelling, advertising, promotion, offering for sale, sale, or distribution of any exercise equipment 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 percentage of its customers who have successfully lost weight;

B. The percentage of its customers who have successfully maintained weight loss;

C. The number of pounds lost by its customers;

D. The percentage of weight loss maintained by its customers;

E. The rate or speed at which its customers have experienced weight loss;

F. The length of time its customers must use such product to achieve weight loss;

G. The comparative efficacy of any other weight loss method or methods; or

H. The benefits, efficacy, or performance of such product in promoting weight loss or weight loss maintenance;

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 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.

II.

It is further ordered, That respondent NordicTrack, 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, labelling, advertising, promotion, offering for sale, sale, or distribution of any exercise equipment 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 relating to weight loss, weight loss maintenance or comparisons with the efficacy of other weight loss methods.

III.

It is further ordered, That for three (3) years after the last date of dissemination of any representation covered by this order, respondent, or its successors and assigns, shall maintain and upon request make available to the Federal Trade Commission for inspection and copying:

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

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

IV.

It is further ordered, That respondent shall 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 corporation which may affect compliance obligations arising out of this order.

V.

It is further ordered, That respondent shall, within ten (10) days from the date of service of this order upon it, distribute a copy of this order to each of its officers, agents, representatives, independent contractors, and employees involved in the preparation and placement of advertisements or promotional materials, 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 five (5) years, from the date of issuance of this order, distribute a copy of this order to all of respondent's future such officers, agents, representatives, independent contractors, and employees.

VI.

It is further ordered, That this order will terminate on June 17, 2016, 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.

IN THE MATTER OF

IVAX CORPORATION

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-3565. Consent Order, March 27, 1995--Modifying Order, June 17, 1996

This order reopens a 1995 consent order -- that permitted the Florida-based corporation to acquire Zenith Laboratories and required the respondent, for ten years, to obtain Commission approval before acquiring stock -- and this order modifies the consent order by terminating the provision requiring Ivax to obtain prior Commission approval before acquiring any interest in any entity that manufactures, or is an exclusive distributor for another manufacturer of, extended release generic verapamil in the United States.

ORDER REOPENING AND MODIFYING ORDER

On February 14, 1996, IVAX Corporation ("IVAX" or "respondent"), the respondent named in the consent order issued by the Commission on March 27, 1995, in Docket No. C-3565 ("order"), filed its Request To Reopen and Modify Consent Order ("Request") in this matter. IVAX asks that the Commission reopen and modify the order 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 on June 21, 1995 ("Prior Approval Policy Statement" or "Statement").[1] IVAX's Request asks that the Commission "reopen the order issued on March 27, 1995, in this proceeding and modify the order by deleting paragraph III." Request at 1. The thirty-day public comment period on IVAX's Request ended on March 25, 1996. No comments were received. For the reasons discussed below, the Commission has determined to grant IVAX's Request.

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. 39745-47 (Aug. 3, 1995); 4 Trade Reg. Rep. (CCH) ¶ 13,241.

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.*

The Commission stated that it will continue to fashion remedies as needed in the public interest, including ordering narrow prior approval or prior notification requirements in certain limited 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. 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 also announced, in its Prior Approval Policy Statement, 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 complaint in this case charged that IVAX's proposed acquisition of all of the voting securities of Zenith Laboratories, Inc. ("Zenith"), if consummated, would constitute a violation of Section

5 of the FTC Act and Section 7 of the Clayton Act by substantially lessening competition and tending to create a monopoly in the relevant market. Complaint paragraphs 16, 18-19. The complaint alleged the sale of generic verapamil as the relevant product market and alleged the United States as the relevant geographic market. Complaint paragraphs 11-12.

The complaint alleged that the acquisition would eliminate direct and actual competition between IVAX and Zenith; increase the likelihood that IVAX will unilaterally exercise market power; and increase the likelihood that generic verapamil customers will be forced to pay higher prices and/or endure having reduced amounts of generic verapamil available for purchase. Complaint paragraph 16.

The presumption is that setting aside the general prior approval requirement in this order is in the public interest. No facts have been presented that overcome this presumption, and nothing in the record suggests that IVAX would engage in the same acquisition as alleged in the complaint. Accordingly, the Commission has determined to reopen the proceedings and modify the order by deleting paragraph III which contains the prior approval provision.

Accordingly, *It is ordered,* That this matter be, and it hereby is, reopened; and that the Commission's order issued on March 27, 1995, be, and it hereby is, modified by deleting paragraph III, as of the effective date of this order.

IN THE MATTER OF

ALLEGHANY CORPORATION

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-3218. Consent Order, Sept. 9, 1987--Modifying Order, June 27, 1996

This order reopens a 1987 consent order -- that permitted the New York-based title insurance company to acquire Safeco Title Insurance Co., and required the respondent, for ten years, to obtain Commission approval before acquiring certain title-insurance related assets -- and this order modifies the consent order by terminating the provision requiring notification of acquisitions of copies of title records, but will retain the requirement for acquisitions of original title records.

ORDER REOPENING AND MODIFYING ORDER

On November 15, 1995, Alleghany Corporation ("Alleghany" or "respondent"), the respondent named in the consent order issued by the Commission on September 8, 1987, in Docket No. C-3218 ("1987 order") and in the consent order issued by the Commission on July 11, 1991, in Docket No. C-3335 ("1991 order"), filed its Petition To Reopen and Modify Orders ("Petition") in these matters. Alleghany asks that the Commission reopen and modify the 1987 and 1991 orders 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 on June 21, 1995 ("Prior Approval Policy Statement" or "Statement").[1] Alleghany's Petition requests that the Commission reopen and modify the orders to remove paragraph V of the 1987 and 1991 orders, which currently requires Alleghany to seek the prior approval of the Commission for certain acquisitions. In addition, Alleghany requests that the Commission set aside or modify the prior notice provisions of paragraph VI of the 1987 and 1991 orders. Alleghany's Petition was placed on the public record for thirty days. No comments were

[1] 60 Fed. Reg. 39745-47 (Aug. 3, 1995); 4 Trade Reg. Rep. (CCH) ¶ 13,241.

received. For the reasons discussed below, the Commission has determined to grant Alleghany's Petition in part.

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.*

The Commission stated that it will continue to fashion remedies as needed in the public interest, including ordering narrow prior approval or prior notification requirements in certain limited 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. As explained in the 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 also announced, in its Statement, 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.* However, the Commission also stated that "[n]o presumption will apply to existing prior notice requirements, which have been adopted on a case-by-case basis and will continue to be considered on a case-by-case basis under the policy announced in this statement."

The complaint in Docket No. C-3218 alleged that Alleghany's acquisition of Safeco Corporation would violate Section 7 of the Clayton Act and Section 5 of the FTC Act by substantially lessening competition in the production and/or sale of title plant information in Cook County, Illinois, and in Los Angeles County, California.

Paragraph V of the 1987 order requires Alleghany, for ten years, to obtain Commission approval before acquiring any interest in entities with interests in a title plant that serves Cook County, Illinois, or Los Angeles County, California. Paragraph VI of the 1987 order requires Alleghany, for ten years, to give the Commission notice and observe a waiting period before acquiring certain interests relating to title plants servicing any geographic area for which Alleghany also has an ownership interest in a title plant.

The Commission's complaint in Docket No. C-3335 alleged that Alleghany's acquisition of title insurance-related assets of Westwood Equities Corporation would violate Section 7 of the Clayton Act and Section 5 of the FTC Act by substantially lessening competition in the production and/or sale of title plant and back plant information in nine relevant markets. Paragraph V of the 1991 order requires Alleghany, for ten years, to obtain Commission approval before acquiring any interest in certain entities having interests in title plants serving the relevant markets.

Paragraph VI of the 1991 order requires Alleghany, for ten years, to give the Commission notice and observe a waiting period before acquiring certain interests relating to a title plant or back plant serving any geographic area for which Alleghany has an ownership interest in a title plant or back plant.

Under the Commission's Prior Approval Policy Statement, the presumption is that setting aside the prior approval requirement in these orders is in the public interest. Alleghany has shown that these matters do not present the limited circumstances in which narrow prior approval provisions may be appropriate. Accordingly, the Commission has determined to reopen the proceedings and modify the orders to delete paragraph V.

The Policy Statement does not adopt a presumption in favor of reopening existing prior notice provisions.[2] Accordingly, Alleghany must show that reopening is required by changed conditions of law or fact or warranted in the public interest.[3] As developed below, Alleghany has not demonstrated that changed conditions or the public interest require reopening and modifying the orders to set aside completely the existing prior notice provisions.

Alleghany has demonstrated, however, that the public interest requires exempting from the prior notice provisions acquisitions of copies of title records where the seller retains the originals. In contrast to the acquisition of sole rights to title records, such as buying a title plant or back plant, which may be anticompetitive depending on market conditions, the acquisition of copies of records, where the seller retains the original, can be pro-competitive where the transaction otherwise places no restraints on competition between the parties. Acquisitions of copies of records enable the acquirer to compete more effectively by increasing the depth of coverage of its existing records. In addition, acquisitions of copies enable the seller to compete more effectively by lowering its costs yet not removing any records from its control. By inhibiting the potential benefits of such transactions, the costs and delays associated with requiring prior notice of these acquisitions are thus harmful to competition and an unnecessary burden on Alleghany. Accordingly, Alleghany has demonstrated a sufficient affirmative need to have the 1987 and 1991 orders modified in this limited manner. In addition, the balance favors modifying the orders, because there are no reasons to retain the provisions as written, and the proviso is narrowly-tailored to the benefit identified.[4]

Accordingly, *It is ordered*, That these matters be, and they hereby are, reopened; and

It is further ordered, That paragraph V of the orders be, and it hereby is, deleted in its entirety; and

It is further ordered, That paragraph VI of the orders be, and it hereby is, modified, as of the effective date of this order, to add the following to the end of the paragraph:

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[2] Policy Statement at 4-5.

[3] *See* Damon Corp., Docket No. C-2916, Letter to Joel E. Hoffman, Esq. (March 29, 1983), at 2 ("Damon Letter"), reprinted in [1979-1983 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 22,027. Alleghany does not allege changed conditions as a basis for reopening in its Petition.

[4] Although the proviso language differs slightly from the language proposed by Alleghany, the Petition requests "or language to similar effect." Petition at 13, n.4.

Notification is not required to be made pursuant to this paragraph with respect to any acquisition by Alleghany of a copy of title records or other information from a person or entity which thereafter retains the original records or information in its ownership and control, and where competition in the ordinary course between the parties is not otherwise restrained.

Commissioner Azcuenaga dissenting insofar as the Commission modifies the prior notice requirement in paragraph VI, and Commissioner Starek concurring in the result only.

STATEMENT OF COMMISSIONER ROSCOE B. STAREK, III
CONCURRING IN THE RESULT

In its September 14, 1995, petition, Alleghany Corporation requested reopening and modification of two orders based on the Commission's Prior Approval Policy Statement.[1] On November 15, 1995, Alleghany refiled an identical petition, accompanied by declarations from two executives of Alleghany subsidiaries. The refiled petition maintained its original argument -- that, under the authority of the Policy Statement, the orders' prior approval requirements should be deleted and their prior notice provisions also deleted (or at least modified). Although the two executives' declarations alluded in general terms to the "costs," "burdens," "difficulties," and "delays" occasioned by the orders, nowhere in its petition did Alleghany purport to rely on -- or even refer to -- either the "changed conditions" or the "public interest" standard set forth in Section 5(b) of the Federal Trade Commission Act[2] and Rule 2.51 of the Commission's Rules of Practice.[3]

Nevertheless, in today's order the Commission invokes both the Policy Statement and the "public interest" element of Rule 2.51 to address Alleghany's request. The Commission determines that public interest considerations warrant the addition of a proviso to paragraph VI of each order that would generally dispense with the prior notice requirement when the respondent proposes to acquire copies of title records from a seller that retains the original records.

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[1] Statement of Federal Trade Commission Policy Concerning Prior Approval and Prior Notice Provisions, 4 Trade Reg. Rep. (CCH) ¶ 13,241 ("Policy Statement").

[2] 15 U.S.C. 45(b).

[3] 16 CFR 2.51.

Although I concur in the result reached by my colleagues -- deletion of the prior approval provision and elimination of the prior notice requirement as it pertains to respondent's acquisition of copies -- I do not believe that it was necessary to rely on the public interest element of Rule 2.51. Rather, the Policy Statement by itself furnishes sufficient grounds on which to decide Alleghany's petition. The Commission declared in the Policy Statement that prior notice requirements in existing orders "will continue to be considered on a case-by-case basis *under the policy announced in this* [*i.e.*, the Prior Approval Policy] *Statement*"[4] -- an assertion that on its face signifies that existing prior notice provisions will be evaluated under the "credible risk" standard applicable to new prior notice provisions.[5] The Commission said nothing in the Policy Statement about judging existing prior notice provisions under the more general standards of Rule 2.51.[6] If a respondent can show that the factors enunciated in the Policy Statement support modification or deletion of a prior notice requirement, the respondent need not additionally demonstrate that the changed conditions/public interest factors of Rule 2.51 are satisfied. Because the Policy Statement criteria are entirely adequate for the treatment of Alleghany's petition, the reference in today's order to public interest factors is surplusage, likely to create confusion.

If today's order indicates that the Commission perceives a need to search outside the text of the Policy Statement for principles to guide its disposition of prior notice requirements, then it might be appropriate to amend the Policy Statement to apprise the public of that view. Contrary to the message sent by today's action, nothing in the wording of the Policy Statement gives any hint that the Commission considers its announced standard for evaluating prior notice provisions as less than self-sufficient.

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[4] Policy Statement, 4 Trade Reg. Rep. (CCH) ¶ 13,241 at 20,992 (italics added).

[5] The standard for whether a newly-issued order should include a prior notice requirement is whether "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.*

[6] The Policy Statement's sole (and fleeting) reference to Section 5(b) of the Federal Trade Commission Act and Rule 2.51, *Id.*, seems clearly intended to indicate the *procedural* path that a respondent should follow in seeking reopening and modification of a prior approval or prior notice order. Nowhere in the Policy Statement, however, did the Commission signal an intent to supplant (or even supplement) the Policy Statement's very specific substantive criteria with the more general standards of Section 5(b) and Rule 2.51.

The attached alternate version of a Commission order illustrates what I would have considered an appropriate disposition of Alleghany's petition under the Policy Statement's criteria. It treats the various aspects of Alleghany's request, and it requires reliance on nothing more than the Policy Statement's "credible risk" test to conclude that a prior notice requirement should be retained except as to acquisitions of copies.

ATTACHMENT TO STATEMENT OF
COMMISSIONER ROSCOE B. STAREK, III:
ALTERNATE VERSION OF COMMISSION ORDER

ORDER REOPENING AND MODIFYING ORDER

On November 15, 1995, Alleghany Corporation ("Alleghany"), the respondent named in the consent order issued by the Commission on September 8, 1987, in Docket No. C-3218 ("1987 order") and in the consent order issued by the Commission on July 11, 1991, in Docket No. C-3335 ("1991 order"), filed its Petition To Re-Open and Modify Consent Orders ("Petition") in these matters. Alleghany asks that the Commission reopen and modify the 1987 and 1991 orders 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 on June 21, 1995 ("Prior Approval Policy Statement" or "Statement").[1] Alleghany's Petition requests that the Commission reopen and modify each order to delete paragraph V, which currently requires Alleghany to seek the prior approval of the Commission to acquire any interest in or assets of certain named competitors or in a title plant or back plant in certain parts of the country. Alleghany also requests that the Commission either set aside the prior notice provisions of paragraph VI of each order or limit the prior notice provisions to the geographic markets alleged in the complaints. Finally, Alleghany requests that the Commission add a proviso to the prior notice provisions so as to exempt from coverage acquisitions of copies of title records when the seller retains the original records. Alleghany's Petition was placed on the public record for thirty days. No comments were received. For

[1] 60 Fed. Reg. 39745-47 (Aug. 3, 1995); 4 Trade Reg. Rep. (CCH) ¶ 13,241.

the reasons discussed below, the Commission has determined to grant Alleghany's Petition in part.

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.*

The Commission stated that it will continue to fashion remedies as needed in the public interest, including ordering narrow prior approval or prior notification requirements in certain limited 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. As explained in the 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 also announced in its Statement 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.* However, the Commission also stated that "[n]o presumption will apply to existing prior notice requirements, which have been adopted on a case-by-case basis and will continue to be considered on a case-by-case basis under the policy announced in this statement."

The Commission's complaint in Docket No. C-3218 alleged that Alleghany's acquisition of Safeco Corporation would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission ("FTC") Act by substantially lessening competition in the production and/or sale of title plant information in Cook County, Illinois, and in Los Angeles County, California. The 1987 order required a divestiture in each market. In addition, paragraph V of the 1987 order requires Alleghany, for ten years, to obtain Commission approval before acquiring any stock, share capital, or equity interest in any concern that in turn has any direct or indirect ownership interest in a title plant that services either Cook County, Illinois, or Los Angeles County, California, or acquiring from any concern any assets (other than in the ordinary course of business) of, or ownership interest in, an existing title plant that services either Cook County, Illinois, or Los Angeles County, California. Paragraph VI of the 1987 order requires Alleghany, for ten years, to give the Commission notice, and observe a waiting period, before acquiring any stock, share capital, or equity interest in any concern that in turn has any direct or indirect ownership interest in a title plant servicing any geographic area where Alleghany also has any ownership interest in a title plant servicing that area, or acquiring from any concern any assets of, or ownership interest in, any existing title plant servicing any geographic area where Alleghany also has any ownership interest in a title plant servicing that area.

The Commission's complaint in Docket No. C-3335 alleged that Alleghany's acquisition of most of the title-insurance-related assets of Westwood Equities Corporation, including Ticor Title Insurance Company of California ("Ticor"), would violate Section 7 of the Clayton Act and Section 5 of the FTC Act by substantially lessening competition in the production and/or sale of title plant information in nine markets and back plant information in nine markets. The 1991 order required Alleghany to divest, within twelve months, either its own or Ticor's back plant in nine specified counties, and either its own or Ticor's title plant in nine specified counties, to an acquirer or

acquirers approved by the Commission. Paragraph V of the 1991 order requires Alleghany, for ten years, to obtain Commission approval before acquiring any stock, share capital, or equity interest in First American Title Insurance Company, Lawyers Title Insurance Corporation, Stewart Title Guaranty Company, Commonwealth Land Title Insurance Company, Title Insurance Company of Minnesota, or TRW, Inc., or in any concern that in turn has any direct or indirect ownership interest in a title plant that services any county listed in paragraph IIA or in a back plant that services any county listed in paragraph IIB, or acquiring from any concern any assets (other than in the ordinary course of business) of, or ownership interest in, a title plant that services any county listed in paragraph IIA or a back plant that services any county listed in paragraph IIB. Paragraph VI of the 1991 order requires Alleghany, for ten years, to give the Commission notice and observe a waiting period before acquiring any stock, share capital, or equity interest in any concern that in turn has any direct or indirect ownership interest in a title plant or back plant servicing any geographic area where Alleghany also has any ownership interest in a title plant or back plant servicing that area, or acquiring from any concern any assets (other than in the ordinary course of business) of, or ownership interest in, any existing title plant or back plant servicing any geographic area where Alleghany also has any ownership interest in a title plant or back plant servicing that area.

Consistent with the Commission's Prior Approval Policy Statement, the presumption is that setting aside the prior approval requirement in these orders is in the public interest. Alleghany has shown that these matters do not present the limited circumstances that the Statement identifies as appropriate for retaining narrow prior approval provisions because it has already consummated the transactions that led to the 1987 and 1991 orders and could not attempt them again.

Moreover, although the records in these matters evidence a credible risk that Alleghany could engage in future unreportable, anticompetitive acquisitions now covered by prior approval, there is no need to substitute prior notice for prior approval in paragraph V of the orders. Paragraph VI of each order already requires prior notice for any transaction for which there is a geographic overlap anywhere in the nation, including but not limited to the respective complaint markets covered by the prior approval requirements of paragraph V of each order. Accordingly, the Commission has

determined to reopen the proceedings and modify the orders to delete paragraph V.

The presumption under the Prior Approval Policy Statement does not apply to existing prior notice provisions,[2] and application of the factors set forth in the Statement has led the Commission to determine that, with one exception described below, the prior notice requirements of paragraph VI should be retained. The markets alleged in the complaints are small local areas, each of which must be analyzed separately. There is a credible risk that Alleghany could make an anticompetitive acquisition of a title plant or a back plant without being required to file under HSR. None of the divestitures that Alleghany made in satisfaction of the 1987 and 1991 orders was valued above the $15 million HSR threshold. Moreover, Alleghany has not demonstrated that an acquisition of a title plant or a back plant outside the markets alleged in the complaints would raise no antitrust concerns.

The Commission is satisfied, however, that there is no credible risk of an unreportable, anticompetitive acquisition when the transaction merely involves the acquisition of copies of title records while the seller retains the originals. In contrast to the acquisition of sole rights to title records (such as buying a title plant or back plant), which may be anticompetitive depending on market conditions, the acquisition of copies of records -- *i.e.*, where the seller retains the original -- is likely to be procompetitive (or at worst competitively neutral) because the transaction places no restraints on post-acquisition competition between the parties. Acquisitions of copies of records enable the acquirer to compete more effectively by increasing the depth of coverage of its existing records and enable the seller to compete more effectively by lowering its costs while not removing records from its control. Accordingly, the Commission considers prior notice of such transactions unnecessary and has added to paragraph VI of each order a proviso exempting the acquisition of copies.[3]

Accordingly, *It is ordered*, That these matters be, and they hereby are, reopened; and

It is further ordered, That paragraph V of each order be, and it hereby is, deleted in its entirety; and

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[2] Prior Approval Policy Statement at 4-5.

[3] Although the proviso language differs slightly from the language proposed by Alleghany, the Petition requests as an alternative "language to similar effect." Petition at 13 n.4.

It is further ordered, That paragraph VI of each order be, and it hereby is, modified, as of the effective date of this order, to add the following to the end of the paragraph:

> Notification is not required to be made pursuant to this paragraph with respect to any acquisition by Alleghany of a copy of title records or other information from a person or entity that thereafter retains the original records or information in its ownership and control, and where competition in the ordinary course between the parties is not otherwise restrained.

IN THE MATTER OF

ALLEGHANY CORPORATION

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-3335. Consent Order, July 11, 1991--Modifying Order, June 27, 1996

This order reopens a 1991 consent order -- that required the New York-based title insurance company to divest certain rights and interests to a Commission-approved acquirer, and, for ten years, to obtain Commission approval before acquiring certain title-insurance related assets -- and this order modifies the consent order by terminating the provision requiring notification of acquisitions of copies of title records, but will retain the requirement for acquisitions of original title records.

ORDER REOPENING AND MODIFYING ORDER

On November 15, 1995, Alleghany Corporation ("Alleghany" or "respondent"), the respondent named in the consent order issued by the Commission on September 8, 1987, in Docket No. C-3218 ("1987 order") and in the consent order issued by the Commission on July 11, 1991, in Docket No. C-3335 ("1991 order"), filed its Petition To Reopen and Modify Orders ("Petition") in these matters. Alleghany asks that the Commission reopen and modify the 1987 and 1991 orders 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 on June 21, 1995 ("Prior Approval Policy Statement" or "Statement").[1] Alleghany's Petition requests that the Commission reopen and modify the orders to remove paragraph V of the 1987 and 1991 orders, which currently requires Alleghany to seek the prior approval of the Commission for certain acquisitions. In addition, Alleghany requests that the Commission set aside or modify the prior notice provisions of paragraph VI of the 1987 and 1991 orders. Alleghany's Petition was placed on the public record for thirty days. No comments were

[1] 60 Fed. Reg. 39745-47 (Aug. 3, 1995); 4 Trade Reg. Rep. (CCH) ¶ 13,241.

received. For the reasons discussed below, the Commission has determined to grant Alleghany's Petition in part.

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.*

The Commission stated that it will continue to fashion remedies as needed in the public interest, including ordering narrow prior approval or prior notification requirements in certain limited 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. As explained in the 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 also announced, in its Statement, 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.* However, the Commission also stated that "[n]o presumption will apply to existing prior notice requirements, which have been adopted on a case-by-case basis and will continue to be considered on a case-by-case basis under the policy announced in this statement."

The complaint in Docket No. C-3218 alleged that Alleghany's acquisition of Safeco Corporation would violate Section 7 of the Clayton Act and Section 5 of the FTC Act by substantially lessening competition in the production and/or sale of title plant information in Cook County, Illinois, and in Los Angeles County, California.

Paragraph V of the 1987 order requires Alleghany, for ten years, to obtain Commission approval before acquiring any interest in entities with interests in a title plant that serves Cook County, Illinois, or Los Angeles County, California. Paragraph VI of the 1987 order requires Alleghany, for ten years, to give the Commission notice and observe a waiting period before acquiring certain interests relating to title plants servicing any geographic area for which Alleghany also has an ownership interest in a title plant.

The Commission's complaint in Docket No. C-3335 alleged that Alleghany's acquisition of title insurance-related assets of Westwood Equities Corporation would violate Section 7 of the Clayton Act and Section 5 of the FTC Act by substantially lessening competition in the production and/or sale of title plant and back plant information in nine relevant markets. Paragraph V of the 1991 order requires Alleghany, for ten years, to obtain Commission approval before acquiring any interest in certain entities having interests in title plants serving the relevant markets.

Paragraph VI of the 1991 order requires Alleghany, for ten years, to give the Commission notice and observe a waiting period before acquiring certain interests relating to a title plant or back plant serving any geographic area for which Alleghany has an ownership interest in a title plant or back plant.

Under the Commission's Prior Approval Policy Statement, the presumption is that setting aside the prior approval requirement in these orders is in the public interest. Alleghany has shown that these matters do not present the limited circumstances in which narrow prior approval provisions may be appropriate. Accordingly, the Commission has determined to reopen the proceedings and modify the orders to delete paragraph V.

The Policy Statement does not adopt a presumption in favor of reopening existing prior notice provisions.[2] Accordingly, Alleghany must show that reopening is required by changed conditions of law or fact or warranted in the public interest.[3] As developed below, Alleghany has not demonstrated that changed conditions or the public interest require reopening and modifying the orders to set aside completely the existing prior notice provisions.

Alleghany has demonstrated, however, that the public interest requires exempting from the prior notice provisions acquisitions of copies of title records where the seller retains the originals. In contrast to the acquisition of sole rights to title records, such as buying a title plant or back plant, which may be anticompetitive depending on market conditions, the acquisition of copies of records, where the seller retains the original, can be pro-competitive where the transaction otherwise places no restraints on competition between the parties. Acquisitions of copies of records enable the acquirer to compete more effectively by increasing the depth of coverage of its existing records. In addition, acquisitions of copies enable the seller to compete more effectively by lowering its costs yet not removing any records from its control. By inhibiting the potential benefits of such transactions, the costs and delays associated with requiring prior notice of these acquisitions are thus harmful to competition and an unnecessary burden on Alleghany. Accordingly, Alleghany has demonstrated a sufficient affirmative need to have the 1987 and 1991 orders modified in this limited manner. In addition, the balance favors modifying the orders, because there are no reasons to retain the provisions as written, and the proviso is narrowly-tailored to the benefit identified.[4]

Accordingly, *It is ordered*, That these matters be, and they hereby are, reopened; and

It is further ordered, That paragraph V of the orders be, and it hereby is, deleted in its entirety; and

It is further ordered, That paragraph VI of the orders be, and it hereby is, modified, as of the effective date of this order, to add the following to the end of the paragraph:

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[2] Policy Statement at 4-5.

[3] *See* Damon Corp., Docket No. C-2916, Letter to Joel E. Hoffman, Esq. (March 29, 1983), at 2 ("Damon Letter"), reprinted in [1979-1983 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 22,027. Alleghany does not allege changed conditions as a basis for reopening in its Petition.

[4] Although the proviso language differs slightly from the language proposed by Alleghany, the Petition requests "or language to similar effect." Petition at 13, n.4.

Notification is not required to be made pursuant to this paragraph with respect to any acquisition by Alleghany of a copy of title records or other information from a person or entity which thereafter retains the original records or information in its ownership and control, and where competition in the ordinary course between the parties is not otherwise restrained.

Commissioner Azcuenaga dissenting insofar as the Commission modifies the prior notice requirement in paragraph VI, and Commissioner Starek concurring in the result only.

STATEMENT OF COMMISSIONER ROSCOE B. STAREK, III
CONCURRING IN THE RESULT

In its September 14, 1995, petition, Alleghany Corporation requested reopening and modification of two orders based on the Commission's Prior Approval Policy Statement.[1] On November 15, 1995, Alleghany refiled an identical petition, accompanied by declarations from two executives of Alleghany subsidiaries. The refiled petition maintained its original argument -- that, under the authority of the Policy Statement, the orders' prior approval requirements should be deleted and their prior notice provisions also deleted (or at least modified). Although the two executives' declarations alluded in general terms to the "costs," "burdens," "difficulties," and "delays" occasioned by the orders, nowhere in its petition did Alleghany purport to rely on -- or even refer to -- either the "changed conditions" or the "public interest" standard set forth in Section 5(b) of the Federal Trade Commission Act[2] and Rule 2.51 of the Commission's Rules of Practice.[3]

Nevertheless, in today's order the Commission invokes both the Policy Statement and the "public interest" element of Rule 2.51 to address Alleghany's request. The Commission determines that public interest considerations warrant the addition of a proviso to paragraph VI of each order that would generally dispense with the prior notice requirement when the respondent proposes to acquire copies of title records from a seller that retains the original records.

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[1] Statement of Federal Trade Commission Policy Concerning Prior Approval and Prior Notice Provisions, 4 Trade Reg. Rep. (CCH) ¶ 13,241 ("Policy Statement").

[2] 15 U.S.C. 45(b).

[3] 16 CFR 2.51.

Although I concur in the result reached by my colleagues -- deletion of the prior approval provision and elimination of the prior notice requirement as it pertains to respondent's acquisition of copies -- I do not believe that it was necessary to rely on the public interest element of Rule 2.51. Rather, the Policy Statement by itself furnishes sufficient grounds on which to decide Alleghany's petition. The Commission declared in the Policy Statement that prior notice requirements in existing orders "will continue to be considered on a case-by-case basis *under the policy announced in this* [*i.e.*, the Prior Approval Policy] *Statement*"[4] -- an assertion that on its face signifies that existing prior notice provisions will be evaluated under the "credible risk" standard applicable to new prior notice provisions.[5] The Commission said nothing in the Policy Statement about judging existing prior notice provisions under the more general standards of Rule 2.51.[6] If a respondent can show that the factors enunciated in the Policy Statement support modification or deletion of a prior notice requirement, the respondent need not additionally demonstrate that the changed conditions/public interest factors of Rule 2.51 are satisfied. Because the Policy Statement criteria are entirely adequate for the treatment of Alleghany's petition, the reference in today's order to public interest factors is surplusage, likely to create confusion.

If today's order indicates that the Commission perceives a need to search outside the text of the Policy Statement for principles to guide its disposition of prior notice requirements, then it might be appropriate to amend the Policy Statement to apprise the public of that view. Contrary to the message sent by today's action, nothing in the wording of the Policy Statement gives any hint that the Commission considers its announced standard for evaluating prior notice provisions as less than self-sufficient.

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[4] Policy Statement, 4 Trade Reg. Rep. (CCH) ¶ 13,241 at 20,992 (italics added).

[5] The standard for whether a newly-issued order should include a prior notice requirement is whether "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.*

[6] The Policy Statement's sole (and fleeting) reference to Section 5(b) of the Federal Trade Commission Act and Rule 2.51, *Id.*, seems clearly intended to indicate the *procedural* path that a respondent should follow in seeking reopening and modification of a prior approval or prior notice order. Nowhere in the Policy Statement, however, did the Commission signal an intent to supplant (or even supplement) the Policy Statement's very specific substantive criteria with the more general standards of Section 5(b) and Rule 2.51.

The attached alternate version of a Commission order illustrates what I would have considered an appropriate disposition of Alleghany's petition under the Policy Statement's criteria. It treats the various aspects of Alleghany's request, and it requires reliance on nothing more than the Policy Statement's "credible risk" test to conclude that a prior notice requirement should be retained except as to acquisitions of copies.

ATTACHMENT TO STATEMENT OF
COMMISSIONER ROSCOE B. STAREK, III:
ALTERNATE VERSION OF COMMISSION ORDER

ORDER REOPENING AND MODIFYING ORDER

On November 15, 1995, Alleghany Corporation ("Alleghany"), the respondent named in the consent order issued by the Commission on September 8, 1987, in Docket No. C-3218 ("1987 order") and in the consent order issued by the Commission on July 11, 1991, in Docket No. C-3335 ("1991 order"), filed its Petition To Re-Open and Modify Consent Orders ("Petition") in these matters. Alleghany asks that the Commission reopen and modify the 1987 and 1991 orders 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 on June 21, 1995 ("Prior Approval Policy Statement" or "Statement").[1] Alleghany's Petition requests that the Commission reopen and modify each order to delete paragraph V, which currently requires Alleghany to seek the prior approval of the Commission to acquire any interest in or assets of certain named competitors or in a title plant or back plant in certain parts of the country. Alleghany also requests that the Commission either set aside the prior notice provisions of paragraph VI of each order or limit the prior notice provisions to the geographic markets alleged in the complaints. Finally, Alleghany requests that the Commission add a proviso to the prior notice provisions so as to exempt from coverage acquisitions of copies of title records when the seller retains the original records. Alleghany's Petition was placed on the public record for thirty days. No comments were received. For

[1] 60 Fed. Reg. 39745-47 (Aug. 3, 1995); 4 Trade Reg. Rep. (CCH) ¶ 13,241.

the reasons discussed below, the Commission has determined to grant Alleghany's Petition in part.

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.*

The Commission stated that it will continue to fashion remedies as needed in the public interest, including ordering narrow prior approval or prior notification requirements in certain limited 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. As explained in the 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 also announced in its Statement 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

determined to reopen the proceedings and modify the orders to delete paragraph V.

The presumption under the Prior Approval Policy Statement does not apply to existing prior notice provisions,[2] and application of the factors set forth in the Statement has led the Commission to determine that, with one exception described below, the prior notice requirements of paragraph VI should be retained. The markets alleged in the complaints are small local areas, each of which must be analyzed separately. There is a credible risk that Alleghany could make an anticompetitive acquisition of a title plant or a back plant without being required to file under HSR. None of the divestitures that Alleghany made in satisfaction of the 1987 and 1991 orders was valued above the $15 million HSR threshold. Moreover, Alleghany has not demonstrated that an acquisition of a title plant or a back plant outside the markets alleged in the complaints would raise no antitrust concerns.

The Commission is satisfied, however, that there is no credible risk of an unreportable, anticompetitive acquisition when the transaction merely involves the acquisition of copies of title records while the seller retains the originals. In contrast to the acquisition of sole rights to title records (such as buying a title plant or back plant), which may be anticompetitive depending on market conditions, the acquisition of copies of records -- *i.e.*, where the seller retains the original -- is likely to be procompetitive (or at worst competitively neutral) because the transaction places no restraints on post-acquisition competition between the parties. Acquisitions of copies of records enable the acquirer to compete more effectively by increasing the depth of coverage of its existing records and enable the seller to compete more effectively by lowering its costs while not removing records from its control. Accordingly, the Commission considers prior notice of such transactions unnecessary and has added to paragraph VI of each order a proviso exempting the acquisition of copies.[3]

Accordingly, *It is ordered*, That these matters be, and they hereby are, reopened; and

It is further ordered, That paragraph V of each order be, and it hereby is, deleted in its entirety; and

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[2] Prior Approval Policy Statement at 4-5.

[3] Although the proviso language differs slightly from the language proposed by Alleghany, the Petition requests as an alternative "language to similar effect." Petition at 13 n.4.

It is further ordered, That paragraph VI of each order be, and it hereby is, modified, as of the effective date of this order, to add the following to the end of the paragraph:

> Notification is not required to be made pursuant to this paragraph with respect to any acquisition by Alleghany of a copy of title records or other information from a person or entity that thereafter retains the original records or information in its ownership and control, and where competition in the ordinary course between the parties is not otherwise restrained.

RE: The Coca-Cola Company
Docket No. 9207

January 26, 1996

Dear Mr. Lipsky and Mr. Coffman:

On October 2, 1995, The Coca-Cola Company ("Coca-Cola") filed a Petition to Reopen and Modify Consent Order ("Petition") entered in Docket 9207.[1] Coca-Cola filed the 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 FTC Policy Statement Concerning Prior Approval and Prior Notice Provisions, issued on June 21, 1995, and published at 60 Fed. Reg. 39,745-47 (August 3, 1995) ("Policy Statement"). In its Petition, Coca-Cola requests that the proceeding be reopened and the order modified so as to delete the prior approval clause that requires Coca-Cola to obtain the approval of the Commission prior to acquiring an interest in the Dr Pepper brand of carbonated soft drink concentrate. The Petition was placed on the public record for comment, and no comments were received. For the reasons discussed below, the Commission has determined to deny Coca-Cola's Petition.

The order that Coca-Cola seeks to modify resulted from Coca-Cola's 1986 attempt to acquire DP Holdings, Inc., which at the time controlled the Dr Pepper brand of carbonated soft drink concentrate. On July 31, 1986, the Commission obtained a preliminary injunction of the 1986 proposed acquisition.[2] On August 5, 1986, DP Holdings terminated its agreement with Coca-Cola.

On July 15, 1986, the Commission filed its administrative complaint with respect to the proposed acquisition by Coca-Cola. Because Coca-Cola had not acquired the Dr Pepper brand, no divestiture was necessary, and the principal relief sought by complaint counsel in the administrative proceeding, and ultimately ordered by the Commission, was an order with a prior approval requirement. The Commission's final order, issued on June 13, 1994,

[1] Although Coca-Cola's petition characterizes the Commission's order in Docket 9207 as a "consent order," in fact, the order is a litigated order that was modified by the Commission pursuant to a settlement that was reached while a petition for review was pending in the court of appeals.

[2] *FTC v. Coca-Cola Co.*, 641 F. Supp. 1128 (D.D.C. 1986), dismissed as moot *per curiam* 829 F.2d 191 (D.C. Cir. 1987).

imposed both a prior approval requirement and a prior notice requirement on Coca-Cola with respect to certain acquisitions of carbonated soft drink concentrate companies and brands. Coca-Cola appealed the Commission's decision.

Pending that appeal, in the spring of 1995, Coca-Cola and the Commission's General Counsel's Office negotiated a settlement, resulting in an order with a narrower prior approval clause and a narrower prior notice clause than were included in the Commission's 1994 order. As part of the settlement, Coca-Cola agreed to the dismissal of its petitions for appellate review. The negotiated order, which is now the final order, requires Coca-Cola to seek the Commission's approval prior to acquiring any interest in the Dr Pepper brand of carbonated soft drink concentrate, rather than any brand of carbonated soft drink concentrate as the June, 1994, order had required. It also requires Coca-Cola to give the Commission prior notice of an acquisition of an interest in any carbonated soft drink concentrate company that sells over 10 million cases of soft drinks a year and to which the requirements of the Hart-Scott-Rodino Act do not apply. Coca-Cola has petitioned the Commission to delete only the prior approval clause in the negotiated order.

At the time of the Coca-Cola litigation, the Commission's policy was to require a prior approval requirement in all merger consent orders. *See* O.M. 5.4.4.2., Staff Bulletin 88-01. Early in 1995, the Commission began a re-examination of that policy, ultimately concluding that "a general policy of requiring prior approval is no longer needed," and that the Commission would rely instead principally on the premerger notification and waiting period requirements of the Hart-Scott-Rodino Act. Policy Statement at 2.

The Commission recognized, however, that narrow prior approval or prior notification provisions may be necessary to protect the public interest in some circumstances. As to the former, the Commission concluded 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." Policy Statement at 2.

The Policy Statement also addressed the question of existing orders, such as the one in this case, that contained prior approval requirements. The Commission 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." Policy Statement at 4. The Commission determined that, "when a petition is filed to reopen and modify an order pursuant to . . . [the 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 Policy Statement. *Id.* at 4. Thus, the Policy Statement contemplates that an existing prior approval requirement may be retained where there is a "credible risk" that the respondent may attempt to revive the same or a similar anticompetitive merger.

In this proceeding, the Commission has already found that Coca-Cola's proposed acquisition of Dr Pepper would have been anticompetitive if consummated.[3] The Coca-Cola Company, slip op. at 63. Therefore, Coca-Cola's petition to reopen and modify presents the question whether there exists a "credible risk" that Coca-Cola will revive its efforts to acquire Dr Pepper.

While it is settled law that a law violator may not escape a remedial order by merely promising, without more, that it will not repeat the violation (*see SCM Corp. v. FTC,* 565 F.2d 807, 812 (2d Cir. 1977)), Coca-Cola has to this day never disavowed an interest in acquiring Dr Pepper in the future. When counsel for Coca-Cola was asked at the oral argument before the Commission about Coca-Cola's intentions with respect to the acquisition of Dr Pepper, counsel refused to state on the record what those intentions were.[4] Although Coca-Cola's equivocation on this issue was expressly noted by the Commission in its decision of June 13, 1994 (The Coca-Cola Company, slip op. at 18-19 & n.33), Coca-Cola's petition to reopen and modify maintains Coca-Cola's steadfast refusal to give the Commission any assurance in this regard. In any event, the Dr Pepper brand still exists, Coca-Cola continues in the concentrate business, and Coca-Cola has both the ability and the incentive to

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[3] Coca-Cola's Petition does not assert that the facts underlying the Commission's original conclusions have changed, or otherwise assert that changed conditions of fact or law require the order to be reopened.

[4] "When asked at oral argument whether Coca-Cola had made a commitment not to acquire Dr Pepper, the answer was non-responsive and certainly not a clear negative." The Coca-Cola Company, slip op. at 18. (*See, also, id.* at 18, n. 33, for the exchange between then-Chairman Steiger and counsel for Coca-Cola, including a discussion of counsel's subsequent attempt to correct the transcript of the oral argument by changing not his answer to the Chairman's question, but the question itself.)

acquire Dr Pepper if it became available.[5] There continues to be, therefore, a credible risk that Coca-Cola may revive its efforts to acquire Dr Pepper.

The limited prior approval requirement in the negotiated order simply restricts Coca-Cola's ability to revive an anticompetitive acquisition, and is limited to the assets at issue in the challenged transaction. It is, thus, consistent with the Policy Statement, which anticipates that such prior approval provisions will "typically be limited to the proposed merger or other combination of essentially the same relevant assets that were involved in the challenged transaction." Policy Statement at 3.[6] Coca-Cola has not made any other argument showing that the order should be further modified.

Because there remains a credible risk that Coca-Cola will attempt to revive an anticompetitive acquisition, it is appropriate in this case to retain the limited prior approval clause described in the Commission's Policy Statement. Therefore, the Commission has denied the Petition of The Coca-Cola Company to reopen and modify the order in Docket No. 9207.

By direction of the Commission, Commissioner Azcuenaga and Commissioner Starek recused.

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[5] The Petition's acknowledgment that the Dr Pepper brand has been bought twice since Coca-Cola's attempt was thwarted shows, contrary to the Petition's inference, that this brand can be readily bought and sold.

[6] The Commission also notes that, at the time it developed and issued its new policy, Senator Strom Thurmond raised a number of questions with respect to the application of the policy to the order against Coca-Cola. The Commission's June 21, 1995, letter to Senator Strom Thurmond, responding to those questions, stated: "In response to your question whether the settlement with The Coca-Cola Company, Dkt No. 9207 (Commissioner Azcuenaga and Commissioner Starek, recused), reflects a change in policy, we believe it is consistent with the Commission's new policy, although it predates the adoption of that policy." June 21, 1995, letter to Strom Thurmond, by the direction of the Commission, at 2, n.3. Thus, the Commission has previously considered whether the settlement in The Coca-Cola Company is consistent with its new prior approval policy and has concluded that it is.

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